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The New Minimal Cities

ABSTRACT. Between 2007 and 2013, twenty-eight urban municipalities declared bankruptcy or entered a state receivership to manage fiscal insolvency. To cut costs and divert revenues to debt payments, these cities have taken dramatic austerity measures—an unwitting experiment with a shrinking public sector in cities hollowed by household poverty and physical deterioration. Eventually, these cuts raise a question that looms as large for insolvency law as it does on city streets: Is there a point where the city should no longer cut public services and sell public assets, even in the face of unmet obligations to creditors? If so, what is that point?

This Article looks closely at our insolvent cities—their residents, their physical and social conditions, their debts, their governments. It explores, as a descriptive matter, local adaptations to fiscal crisis. It surfaces, as a legal matter, the latent question that mayors, governors, state and local legislatures, bankruptcy judges, and state-appointed receivers must decide: What share of city revenues can a city preserve for its current residents? Unlike creditors, who have contracts and legal judgments to quantify a city's obligations to them, residents have no monetized claim to draw on city revenues. Insolvency law itself provides no guidance on this challenging issue—it simply assumes some level of ongoing spending to preserve “health and welfare,” a concept that raises more questions than it answers. This Article explores residents' interests, mapping out heuristics for decisionmakers and the public to use in thinking about essential public spending in the context of cities at risk of default on debt.

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INTRODUCTION

Unable to meet obligations to creditors while also keeping government services in operation, the City of Detroit entered a state receivership on March 14, 2013 and filed for bankruptcy on July 18. That makes Detroit the twenty-eighth city to declare municipal bankruptcy or to enter a receivership for fiscal crisis since late 2008, a window of time that has seen five of the six largest municipal bankruptcies in American history.¹ In a long-term transformation of local finance that has accelerated in the recent recession, these cities and others are engaging in slash-and-burn budgeting to address falling revenues, rising expenses, and mounting debt. In San Bernardino, the third California city to declare bankruptcy in the recent recession,² the City Attorney followed another round of deep cuts to the police department with solemn advice to residents: “Lock your doors and load your guns.”³ Such an announcement would be unsurprising to the residents of Cleveland and East Cleveland in Ohio, Flint and Inkster in Michigan, and other cities beset by rising crime and police layoffs, where 911 can rarely dispatch an officer for a call reporting a non-violent crime, such as car theft, drug dealing, or prostitution. Camden, New Jersey had over 2,100 incidents of homicide, forcible rape, robbery, or aggravated assault in 2011 – an average of roughly one violent crime every four hours in a city of approximately 77,000 people, only slightly larger than suburban Palo Alto, California.⁴ Yet in January 2011, Camden cut its police

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1. The full list, ranked by amount of debt, includes Detroit, Michigan (filed in 2013); Jefferson County, Alabama (2011); Orange County, California (1994); Stockton, California (2012); San Bernardino, California (2012); and Vallejo, California (2008). See *Detroit's Bankruptcy Is the Nation's Largest*, N.Y. TIMES, July 18, 2013, <http://www.nytimes.com/interactive/2013/07/18/us/detroit-bankruptcy-is-the-largest-in-nation.html>; see also *infra* Table 1 (providing demographic and financial information for other insolvent cities).
 2. The resort town of Mammoth Lakes, California also filed for bankruptcy in this period, but its population falls below the 15,000 population threshold used to define “urban municipalities” in this Article. See *infra* text accompanying notes 24–25.
 3. Ian Lovett, *A Poorer San Bernardino, and a More Dangerous One, Too*, N.Y. TIMES, Jan. 14, 2013, <http://www.nytimes.com/2013/01/15/us/crime-rises-in-san-bernardino-after-bankruptcy.html>. The Milwaukee County Sheriff made a similar announcement. See Matt Pearce, *Milwaukee County Sheriff: Don't Wait for the Police; Arm Yourselves*, L.A. TIMES, Jan. 28, 2013, <http://articles.latimes.com/2013/jan/28/nation/la-na-nn-milwaukee-county-sheriff-guns-20130128>.
 4. See *Crime in the United States 2011: Table 8*, U.S. FED. BUREAU INVESTIGATION, <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2011/crime-in-the-u.s.-2011/offenses-known-to-law-enforcement/standard-links/city-agency>.

force in half and eliminated its homicide and narcotics units.⁵

Where police departments are understaffed, other public services are unstaffed. Cities in California, Pennsylvania, New York, Michigan, Ohio, and elsewhere have terminated thirty to fifty percent of their employees. Following Vallejo, California's bankruptcy, the city's 2011-2012 budget explained that in addition to cutting forty-five percent of all public safety staff, "[a]ll funding for youth, library, arts, elderly, needy, education, and recreation programs, projects and positions previously provided by the General Fund were completely eliminated."⁶ Decisions to scale government back in this way are distinct from contracting out for services; these cities are not purchasing private substitutes for public services. This is privatization in its purest form—government service shedding, on the unfunded hope that private or charitable alternatives will arise. Yet such cuts amplify the longstanding trend of outsourcing service provision to other public agencies (like counties) and private contractors, because the city government itself has fewer responsibilities, less authority, and a smaller staff.

Cities undertaking austerity measures also shed their property—public assets like parks, pools, and government office buildings. In Benton Harbor, Michigan, a city commission and a state receiver transferred possession of twenty-two acres of the city's pristine lakeshore and dunes to a private golf course in exchange for critically needed annual income, even though the scattered, inland replacement parcels given to the city as substitute open space required industrial decontamination and the installation of exposure barriers prior to public use.⁷ In Newark, New Jersey, Mayor Cory Booker sold sixteen

5. Alisa Chang, *Crime-Ridden Camden to Dump City Police Force*, NPR (Dec. 6, 2012), <http://www.npr.org/2012/12/06/166658788/crime-ridden-camden-to-dump-city-police-force>.
6. *Adopted Budget, Fiscal Year 2011-2012*, CITY OF VALLEJO, at ix (June 14, 2011), <http://www.ci.vallejo.ca.us/common/pages/DisplayFile.aspx?itemId=29293>.
7. The contested lakeshore preserve was dedicated to the public in 1917 in the name of the donors' deceased daughter, with the following message:

Perhaps some of you do not own a foot of ground, remember then, that this is your park, it belongs to you. Perhaps some of you have no piano or phonograph, the roll of the water murmuring in calm, roaring in storm, is your music, your piano and music box. . . . The beach is yours, the drive is yours, the dunes are yours, all yours. It is not so much a gift from my wife and myself, it's a gift from a little child. See to it, that the park is the children's.

Klock Family's Legacy and Gifts to the Community, SAVE JEAN KLOCK PARK, <http://savejeanklockpark.org/KlockLegacy.html> (last visited Dec. 9, 2013) (ellipses in original). For a window into the storm of controversy surrounding the conversion of twenty-two acres of the park into the golf course, see Jonathan Mahler, *Now that the Factories Are Closed, It's Tee*

city buildings in active public use, including the city's historic police and fire headquarters and Newark Symphony Hall, in a deal that plugged most of an \$80 million deficit in the 2010 budget but will ultimately cost the city \$125 million to lease back the buildings over the next twenty years.⁸

Local government is shrinking in these and other struggling cities. Years, if not decades, of budget cuts and asset sales have left little beyond a stripped-down version of core service functions like irregular police and fire protection, rudimentary sanitation, and water supply. School districts continue to manage education (albeit with budget woes of their own), but the city government itself is no longer pursuing a vision beyond public safety in true emergencies. How low can these cuts go? While laws provide an entitlement to a public education, and we have long struggled to interpret what constitutes a legally adequate education, there is little to nothing to indicate what other services the local public sector must provide. Beyond education, is there some minimum level of public services and public space needed to achieve neighborhood safety and habitability?

This is a humanitarian question, but it is also a doctrinal challenge. A system of state and federal laws governs cities that cannot pay their bills, and decisionmakers in this system (including mayors, governors, federal bankruptcy judges, and creditors) must determine whether a city's finances require outside intervention, such as a state receivership or federal bankruptcy protection, and if so, how to budget for the city going forward. Decisionmakers must evaluate, in essence, whether a city could cut still more deeply into spending on current residents to pay off creditors, or whether it is creditors, rather than residents, who have to bear the next round of cuts.

Standards for local public services must necessarily inform this balancing of interests between creditors and current residents. Creditors such as bondholders, retired public employees, contractors, and tort plaintiffs have contracts and legal judgments that quantify a city's obligations to them. Residents, by contrast, have no such legal instruments with which to monetize their share of a city's revenues. They have no concrete legal entitlements to

Time in Benton Harbor, Mich., N.Y. TIMES, Dec. 15, 2011, <http://www.nytimes.com/2011/12/18/magazine/benton-harbor.html>; Robert McClure, *Heart of Michigan Park Sacrificed for Private Golf Course*, INVESTIGATE WEST (June 11, 2012), <http://www.invw.org/article/benton-harbor-michigan-1280>; and Mich. Env'tl. Council, *Jean Klock Park's Dunes Closer to Conversion from Public Ownership to Private Golf Course*, MICH. ENVTL. REP. (Summer 2008), <http://www.environmentalcouncil.org/priorities/article.php?x=16>.

8. Michelle Conlin, Associated Press, *The Great Government Fire Sale Is On*, NPR (May 13, 2011), <http://www.npr.org/templates/story/story.php?storyId=136268652>.

police and fire protection, no regulations governing emergency response times, no enforceable right to water and water infrastructure, and no mandate for sanitary services like solid waste or wastewater disposal. Municipal bankruptcy and receivership laws articulate a duty to protect “basic public safety” and minimum services “consistent with public health and safety,” but these laws lack guidance as to what those broad concepts mean as a practical matter. How long should a caller to 911 wait for a fire truck or an ambulance? Is there some point when a city’s violent crime rate tells us that the city needs more police officers, if not gang prevention efforts, afterschool programs for juveniles, and victim support programs? Is there a specific density at which neighborhoods are “entitled” to access a public water system? Where to set the floor under public service cuts is a critical legal issue in public insolvencies, but we are asking decisionmakers to reason through it alone, and we have failed to pay attention to their answers.

In this fog of opaque, discretionary reasoning, a curious political reality is nonetheless visible. In the context of municipal insolvency, everyone (liberal, conservative, and libertarian alike) assumes that residents have some claim to share in a city’s present and future revenues. When it comes to public fiscal crisis, everyone seems to agree that it is in the best interests of both creditors and society for a city to continue to provide for the “basic health and safety” of its residents – if not because they are simply people, then simply because they are the city’s taxpayers, the ones who can make creditors whole over the long run without a bailout. Everyone seems to agree, that is, with no public deliberation (let alone agreement) as to what those minimum levels of public services should be. This Article frames and advises that early stage deliberation.

My goal is not to assert that residents’ interests are the only ones urgently at stake in a bankruptcy. “Creditors” is a monolithic word that stands in for thousands of individuals as well as institutions. Among them are retirees who worked for decades in insolvent cities plagued by poverty, crime, and, in some cases, demoralizing working conditions. From the point of view of individual retirees, most pension commitments are not extravagant: the average annual police pension in Detroit, for example, is \$30,000 a year, and general city workers (like librarians or sanitation workers) receive about \$18,000 a year.⁹ If these payments fall through, there may be nothing except poverty programs to fall back on, because many of these retirees, including most former fire and law

9. Melanie Hicken, *Just How Generous Are Detroit’s Pensions?*, CNN MONEY (July 23, 2013), <http://money.cnn.com/2013/07/23/retirement/detroit-pensions>.

enforcement employees, are excluded by law from Social Security.¹⁰ The 10.8 million people (amounting to 64% of full-time civilian public employees nationwide) who work full-time for a local government are stricken with dread as they watch these insolvencies.¹¹ What they see of the fate of public pensions, which are a form of deferred compensation, will affect the competitiveness of public sector jobs and thus the quality of local public services.

The word “creditor” also stands for investors who lent these cities money in good faith, believing loans to municipalities to be one of the most stable, predictable assets available in American financial markets. When a city defaults on its obligations to bondholders, it creates risk in municipal bond markets that may drive up borrowing costs for other cities in the future. Like it or not, the national economy is exposed to these risks. The American municipal bond market includes one million outstanding municipal bonds with a total aggregate principal of more than \$3.7 trillion.¹² A cascade of municipalities (beyond the twenty-eight cities to date) that paid less than the contracted price for debt would reverberate in the national economy. Individual investors’ exposure to any given municipal insolvency is likely to be proportionately minor as compared to that city’s retirees’ exposure, but default on municipal bonds nonetheless distributes individualized losses to investors, both large and small, most of whom had expressed little taste for (and perhaps tolerance of) risk.

I thus stand on the foundation that creditor perspectives on municipal insolvency are compelling from both a humanistic perspective and a policy one. I leave the full articulation of those perspectives, however, to other work where they are being widely and ably explored. Instead, I focus here on residents’ position in the struggle toward the “least bad” compromise that is the nature of insolvency.

This story of residents’ interests must surely begin with a look at who lives in insolvent cities. Part I provides a comprehensive list of all twenty-eight cities with at least 15,000 residents that have declared bankruptcy or entered a formal state receivership for municipal insolvency during the five years following

10. Many states exclude public employees from the Social Security Act. See Lauren Damme, *Amid State Pension Funding Crises, Joining Social Security Becomes an Option*, NEW AM. FOUND. (Aug. 4, 2010), http://www.newamerica.net/publications/policy/amid_state_pension_funding_crises_joining_social_security_becomes_an_option.

11. See *Government Employment & Payroll*, U.S. CENSUS BUREAU (2011), <http://www.census.gov/govs/apes>.

12. *Report on the Municipal Securities Market*, U.S. SEC. & EXCH. COMM’N, at i (July 31, 2012), <http://www.sec.gov/news/studies/2012/munireport073112.pdf>.

September 2008. Tables of data about these cities lay out their demographics, poverty rates, population change over time, median home values, crime rates, and other metrics.

Two commonalities are noticeable immediately in all these cities: their poverty rates are high and rising, while their populations are shrunken and shrinking. Poverty means less revenue despite growing expenses—more crime and fires, more children unprepared for school, and deeper needs for drug treatment, afterschool care, and homeless shelters. We might assume that population loss would bring down expenses to offset some rising costs (fewer people cost less to service, right?), but in fact, steep population loss is also dramatically bad for budgets. Cities that formerly had large populations consumed more extensive city services in the past, leaving a disproportionate pension and capital debt overhang. Spatially, such cities' service territories are as large as they ever were, but the density of service consumers is down, resulting in costly inefficiencies. And people and businesses rarely clean up their mess¹³ when they exit a city, leaving behind vacant structures likely to be dilapidated or obsolete, if not sullied by contamination and waste. Those structures impose costs much deeper than the aesthetics of dereliction. It has been said that in shrinking cities, demolitions may be the major public works of the twenty-first century.¹⁴ Firemen are kept busy and endangered: When arson becomes entertainment, a city's decay is as desperate as it is ordinary.¹⁵

Whatever the service demands of an impoverished shrinking city might be, in a time of state and federal deficits and redistributive intolerance, local fiscal crisis means that city governments must get smaller. What are these cities doing to shrink their governments? After introducing insolvent cities as well as

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13. This is how one lifelong Detroitier put it to journalist Charlie LeDuff. See CHARLIE LEDUFF, *DETROIT: AN AMERICAN AUTOPSY* 45 (2013).
 14. 2 WILL ALSOP ET AL., *SHRINKING CITIES: INTERVENTIONS* 80 (2006) (quoting Paul Virilio, *The Overexposed City*, in *ZONE* 1|2, at 14, 24 (Michel Feher & Sanford Kwinter eds., Astrid Hustvedt trans., 1987)) (“[D]uring a crisis period, will the demolition of cities replace the major public works of traditional politics? If so, it would no longer be possible to distinguish between the nature of recessions (economic, industrial) and the nature of war.”).
 15. In 2011, there were more than 287 fires caused by arson in Flint, Michigan, compared with just 8 in Cambridge, Massachusetts and 7 in Green Bay, Wisconsin—two healthier cities with comparable (even slightly larger) populations. Detroit saw 957 fires by arson compared with 161 in San Francisco and 143 in Fort Worth, comparably sized cities in terms of population. Youngstown, Ohio saw 237 fires caused by arson compared with 12 in Palo Alto, California. See *Crime in the United States 2011: Table 8*, *supra* note 4. Comprehensive crime data are not yet available for 2012.

insolvency law in Part I, including an overview of the main legal systems that apply to cities at risk of insolvency, Part II looks at the changes underway in insolvent cities. I consider these adaptations according to a three-part framework that describes the main purposes of local government spending, namely: to provide services (including economic development), to maintain land and equipment for public use, and to regulate for public safety. Because there is very little that insolvent cities can do to increase revenues, cities are cutting services, selling assets, and reconsidering their land-use regulations. This Part explores the nature of the transformative changes underway along each of these dimensions.

The result of these budget contractions is, as discussed in Part III, a generation of urban, high-poverty governments focused on little more than the control of fire and violent crime. These are our new minimal cities. I call them “new” because we have seen minimal local government before. Wealthy suburbs have experimented with a thin local public sector focused primarily on land-use and public safety, including police, fire, sanitation, and land-use control, often via contracts with counties and private contractors. The term “minimal cities” was coined by political scientist Gary Miller in 1981 to describe such places, where local government borders and land-use policies are organized to keep property taxes low and minimize the range of local public services.¹⁶ Beyond the fact that government spending is limited, however, the new minimal cities identified in this Article look nothing like Miller’s original minimal cities. Indeed, minimal government in wealthy areas is predicated on excluding the heterogeneous service needs associated with the residents and uses that inhabit our new minimal cities. This reflects an implicit bargain, or at least assumption, that residents who require more public services will live elsewhere. A councilmember of the prosperous, suburban city of Costa Mesa, California revealed candidly that the best way to keep service costs low and revenues high is to filter out residents who might commit crimes—for instance, by catering only to residents with a college degree.¹⁷ In a state where only 30%

16. See GARY J. MILLER, *CITIES BY CONTRACT: THE POLITICS OF MUNICIPAL INCORPORATION* 85–86 (1981).

17. See Tad Friend, *Contract City: When a Town’s Budget Fight Turned Deadly*, *NEW YORKER*, Sept. 5, 2011, http://www.newyorker.com/reporting/2011/09/05/110905fa_fact_friend (“[Councilmember Jim] Rigeheimer countered that Costa Mesa could reduce crime by expelling its undesirables and attracting better residents, not by overpaying its cops. Irvine was famously safe, he said, because ‘eighty-five per cent of the people there have college degrees.’”).

of people over twenty-five years old meet that criterion,¹⁸ where would the non-college-educated persons of the state live? The bankrupt city of San Bernardino (about an hour's drive from Costa Mesa) might be one option, because the new minimal cities are not exclusive—cheaper land provides homes for people with weak buying power, including low-wage workers.

I take up the major normative questions for public law that emerge from the transformation of poor cities into minimal cities, including the question of essential minimum services. Joining the officials who are now struggling to figure out how to maintain basic health and safety, this Part works through the question of minimum standards for basic services by mapping out heuristics for bankruptcy judges, state receivers, state legislators, and the public to use in thinking about the shape of minimum standards. I draw ideas from social contract theory, economic efficiency, human rights and humanitarian exigency, property rights, anti-poverty policy, and land-use planning to assemble a set of normative approaches and sources of law that help reason through residents' claims to city revenues.

Part IV, in conclusion, asks what it means for local governments to get smaller and do so responsibly. I try to look holistically and pragmatically at how to restructure local government finance and power in light of fiscal stress and concentrated poverty. If we must shrink the local public sector, that change should be intentionally created and internally consistent, not simply government weakness borne of disorganized decay. Like the land-use strategies of the “shrinking cities movement,” which work to restructure the way land is organized and used in post-industrial cities coping with substantial population losses, the concept of shrinking governance that I develop here recognizes that some cities are not on an inevitable, upward growth trajectory. Shrinking governance shifts focus from the context of land use and spatial organization to the broader governance context.

This Article explores what happens when inclusive and exclusive cities are both minimal cities, when a government model from suburban life ends up in populous cities with concentrated poverty. I grieve the conditions in our high-poverty shrinking cities. Yet this Article is neither an obituary nor a lament. It is forward-facing and functionalist. Local governments need ways to build, shrink, and, if desired, rebuild government responsibly and flexibly across economic cycles. They need tools to manage decline that go beyond the

18. 2008-2012 American Community Survey 5-Year Estimates: Educational Attainment, U.S. CENSUS BUREAU, http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=%20=ACS_11_5YR_S1501&prodType=table (last visited Dec. 3, 2013).

passive, injurious strategies of atrophy and attrition. Instead of extending long-running research and debate about why cities reach the point when they can't pay their bills—a “whodunit” of urban fiscal crisis¹⁹—cities need work on what to do about it.

The fact that the broader American economy is thawing does not spell an end to the difficult questions the recession has surfaced. Every city identified in this study has been struggling with deindustrialization for decades, and their pre-recession fiscal prospects were dim. Widening inequality among individuals has imprinted itself in space, and these cities lie within the lowest strata of cities ranked by property values, crime rates, and educational outcomes. In addition, the housing market crash that began in 2006 means that this particular recession will continue to impact local budgets for years. For reasons explained herein, cities' property tax revenues will lag any recovery of the local housing market by years, if not decades. This is ominous news for local budgets, because property taxes remain the single largest source of local revenues.

For purposes of this current piece, I stand in the current moment—along with the residents and local leaders who live in these cities—to think through the contraction of the local public sector. When cities face the compound threat of poverty, population loss, and fiscal crisis, what should they do? The imperative for research on these questions was captured by author and journalist Charlie LeDuff: “You better look at Detroit, because that’s what happens when you run out of money.”²⁰ Needless to say, running out of money is a phenomenon not limited to cities. It is becoming business as usual for many higher-level governments, from sequestration in Washington, D.C. to serious deliberation about state bankruptcy. So too is it the current state of affairs for many school districts today, which lost 300,000 teachers between 2008 and 2011, resulting in changes like this one: in Texas in 2011, no less than 7,000 schools received waivers from the state’s maximum class size limits for grades K-4.²¹ A minimal state may thus come to describe the trajectory of the public sector, beyond city hall.

19. I owe the word choice in this disclaimer to MARK BINELLI, *DETROIT CITY IS THE PLACE TO BE: THE AFTERLIFE OF AN AMERICAN METROPOLIS* 13 (2012).

20. *The Colbert Report* (Comedy Central television broadcast Apr. 9, 2013).

21. *Teacher Jobs at Risk*, EXEC. OFFICE OF THE PRESIDENT 1 (Oct. 2011), http://www.whitehouse.gov/sites/default/files/uploads/teacher_jobs_at_risk_report.pdf; Claudio Sanchez, *Texas Schools Grapple with Big Budget Cuts*, NPR (Dec. 22, 2011), <http://www.npr.org/2011/12/22/144079041/texas-schools-grapple-with-big-budget-cuts>. Texas cut another four billion dollars in state aid for education for fiscal years 2012 and 2013. *Outlook for U.S. Local*

This Article explores, as a descriptive matter, the austerity experiment underway in American cities that have gone broke. It surfaces, as a legal matter, the latent question of minimum standards in the system of laws governing cities in crisis. And it investigates, as a normative project, sources of guidance to help fiscal overseers determine the point beyond which it should be legally, or at least politically, unacceptable to cut local public services and sell assets. In so doing, it is wrestling with two challenging issues for legal theory. First is the question of habitability for neighborhoods: Is habitability a scalable concept that ascends past individual dwellings and out into the collective space of neighborhoods and cities? How low can shared services go before we should consider a neighborhood uninhabitable? And second: What does urban life require of public life? What are the essential collective services that we will guarantee regardless of consumer buying power or access to private charity? Posing this question in terms of cities offers a smaller setting in which to explore the age-old debate about what we want from the public sector—what taxpayers expect for themselves, and what they are willing to guarantee for others.

I. CITIES IN DISTRESS

“Distress” in a city takes many forms: the percentage of households that live below the federal threshold for poverty, the number of residents who suffer a crime of violence each year, the local unemployment rate, the per capita GDP for the local area, and so forth. Aspects of our federal and state legal systems, such as eligibility for certain grants and loans, hinge on these measures. Insolvency law does not. When a city can no longer pay its bills or is perilously close to that point, some states have shaped a special domain of law designed to prevent or manage the risk of default. These systems rely on signals of distress found in local budget numbers, such as the value and costs of a city’s assets, a city’s cash on hand, and payments due for city debt and contracts. In order to offer research of value to these special legal systems, I have defined “cities in distress” as the finite pool of cities governed by municipal insolvency programs and bankruptcy law.

Where are these insolvent cities, and who lives there? Section I.A introduces these places, their residents, and the causes of their fiscal stress. Section I.B describes the basic structure of the law of municipal insolvency, a

Governments Remains Negative in 2012, MOODY’S INVESTORS SERVICE (MOODY’S) 5 (Feb. 1, 2012) [hereinafter *Outlook Remains Negative* (Feb. 2012)].

legal regime that manages cities in distress as they try to “do more with less,” or simply do less, in their perilous fiscal straits.

A. In Fact

Twenty-eight “urban municipalities” in ten states entered or remained in a state or federal program for fiscal distress during the period extending from September 1, 2008, through September 30, 2013, a window of time that, in my view, effectively benchmarks the worst effects of the Great Recession in terms of local government finances.²² I have defined “urban municipalities” broadly to include all cities with more than 15,000 residents that during the 2008-2013 period: (1) declared municipal bankruptcy, whether or not that bankruptcy

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22. The first tremors in the U.S. housing market appeared in late 2006, see *This American Life: The Giant Pool of Money*, CHI. PUB. MEDIA (May 9, 2008), <http://www.thisamericanlife.org/radio-archives/episode/355/transcript> (quoting Morgan Stanley residential mortgage trader Mike Francis’s recollection that “somewhere around Halloween of 2006,” “[w]e started seeing our securities . . . perform very, very poorly”), and were shaking markets in earnest by February 2007, when Freddie Mac announced that it would no longer buy subprime mortgages and mortgage-backed securities, see *The Financial Crisis: A Timeline of Events and Policy Actions, 2007-2011*, FED. RESERVE BANK ST. LOUIS, <http://timeline.stlouisfed.org/index.cfm?p=timeline> (last visited Dec. 9, 2013), and HSBC Holdings wrote down its holdings of subprime-related mortgage-backed securities by \$10.5 billion. See Reuters, *HSBC Reports Rise in Troubled Loans*, N.Y. TIMES, Feb. 8, 2007, <http://www.nytimes.com/2007/02/08/business/worldbusiness/08bank.html>; Mauro F. Guillen, *The Global Economic & Financial Crisis: A Timeline*, LAUDER INST. (2011), http://lauder.wharton.upenn.edu/pages/pdf/class_info/Chronology_Economic_Financial_Crisis.pdf. According to the National Bureau of Economic Research, the U.S. entered the Great Recession in December 2007 as national median home sales prices began to slow and then descend steeply in 2008. Hundreds of mortgage companies and banks collapsed between 2007 and 2008, culminating in the collapse of Lehman Brothers in September of 2008. See Guillen, *supra*; *US Business Cycle Expansions and Contractions*, NAT’L BUREAU ECON. RES. (Apr. 23, 2012), http://www.nber.org/cycles/US_Business_Cycle_Expansions_and_Contractions_20120423.pdf. While these events benchmark the Great Recession as a national matter, local government property tax revenues (the single most important revenue source in most cities) lag housing market losses often by a year or more. See *The Local Squeeze: Falling Revenues and Growing Demand for Services Challenge Cities, Counties, and School Districts*, PEW CHARITABLE TRUSTS (PEW) 9 (June 1, 2012), http://www.pewstates.org/uploadedFiles/PCS_Assets/2012/Pew_Cities_Local%20Squeeze_report.pdf [hereinafter *The Local Squeeze*]. This lag, in addition to the federal and state revenue losses that reduced aid to local governments after the bank failures of 2008, makes the collapse of Lehman Brothers a logical starting point for a five-year window on the recession. This period begins with the largest Chapter 11 bankruptcy filing in history, tracks an ailing housing market, and ends just months after the largest Chapter 9 bankruptcy filing in history, Detroit.

petition was accepted by the bankruptcy court; or (2) were officially covered by a formal state receivership to prevent or manage municipal insolvency. The first of these categories is the most straightforward—cities that have formally declared bankruptcy under Chapter 9 of the federal bankruptcy code, including five cities in California, Michigan, and Alabama. The second category captures cities that have formally declared a fiscal emergency under state law, or otherwise have been placed under the jurisdiction of a formal state receivership in which the state is not merely monitoring a vulnerable city’s finances, but has actually stepped in to manage or co-manage its finances. Notably, these two categories include all those debt-rated cities that I have been able to identify that have missed a contractually obligated payment on debt, whether interest or principal, or entered a “distressed exchange” in which the issuer restructures its debt to avoid imminent default or bankruptcy.²³ There may well be additional cities in the country that faced insolvency without access to federal bankruptcy protection or a state receivership, leaving their creditors to take the city to court for contract violations. Such cities proved difficult to identify on a comprehensive basis, however, and thus this third method of managing fiscal distress is functionally excluded from analysis here.

The present analysis focuses on cities with at least 15,000 people—a population threshold that tries to capture governments responsible for urban or suburban territory.²⁴ That cut excluded small cities from this analysis that lay in Arkansas, California, Illinois, Michigan, Minnesota, Missouri, New Jersey, Oklahoma, Pennsylvania, and Washington. It also excluded from analysis all counties and special districts. Prominent county insolvencies like Jefferson County, Alabama (which entered bankruptcy in 2011); Boise County,

23. See *U.S. Municipal Bond Defaults and Recoveries, 1970-2009*, MOODY’S 2-3 (Feb. 2010) (defining “default” for the purposes of Moody’s municipal bond ratings). Cities in such a position are tracked through Moody’s Investor Service, which watches and catalogues all cases of municipal default. See *id.* at apps. A-B.

24. The 2010 U.S. Census defined rural places as having under 2,500 people; “urban clusters” as having between 2,500 and 50,000; and “urbanized areas” as having more than 50,000. See *2010 Census Urban and Rural Classification and Urban Area Criteria*, U.S. CENSUS BUREAU (July 22, 2013), <http://www.census.gov/geo/reference/ua/urban-rural-2010.html>. While it would better track these designations to apply a threshold of 2,500 people to the present research, as a practical matter it added more than two dozen very small towns and villages (many of them the depopulated steel towns of the Ohio and Pennsylvania Rustbelt) to this analysis that made comprehensive research impracticable. In addition, a 15,000 population mark arguably differentiates high-poverty rural towns from urban cities and suburbs, which are more likely to host governments that provide (or at least, provided) a more heterogeneous and diverse array of services and assets.

Idaho (which filed for bankruptcy in 2011, but was rejected by the court as ineligible); and Nassau County, New York (which was placed in a state receivership in 2011) warrant separate treatment, given the important distinctions between cities' and counties' institutional structures, authority, and political and fiscal autonomy.²⁵ Comparative analysis of cities and counties with respect to fiscal conditions is therefore less productive, if not problematic. I have excluded special districts (including school districts) from analysis for similar reasons. These districts vary substantially from one another in terms of revenue sources, service obligations, and financial conditions; and in any event, they are different from general-purpose municipal governments.

Other than those limitations, the list of twenty-eight cities here includes every city to have declared bankruptcy or entered a receivership program. It is important to note, however, that these cities are not necessarily the only cities in comparably bad fiscal shape. As will be clearer after reading Section I.B below, a city cannot declare bankruptcy unless state law has authorized it to do so. Similarly, a city cannot enter a receivership program unless its state has such a program and the state has selected that city for participation. Other cities may be in comparably dire fiscal straits as the ones evaluated here, but for various reasons, they have not been permitted by their state to enter a special insolvency regime. States may choose to bail out their largest cities through grants and loans rather than let them reach or publicly admit insolvency.²⁶

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25. I have addressed these distinctions at length in previous work. See Michelle Wilde Anderson, *Cities Inside Out: Race, Poverty, and Exclusion at the Urban Fringe*, 55 UCLA L. REV. 1095 (2008) [hereinafter Anderson, *Cities Inside Out*] (distinguishing between city and county government); Michelle Wilde Anderson, *Mapped Out of Local Democracy*, 62 STAN. L. REV. 931 (2010) [hereinafter Anderson, *Mapped Out of Local Democracy*] (arguing for legislative reforms to empower county government). For a thoughtful analysis of Jefferson County's bankruptcy, see Howard Walthall, *The Jefferson County, Alabama Bankruptcy: A Cautionary Tale of County Government* (2013) (unpublished manuscript) (on file with author).
26. For instance, Pennsylvania has a well-developed fiscal intervention program for distressed municipalities known as Act 47, but the state withdrew the city of Philadelphia from eligibility for this program, opting instead to manage that city's fiscal trouble separately because of its impact on statewide interests. See 53 PA. CONS. STAT. ANN. §§ 12720.101-12720.709 (West 2013); see also *id.* § 12720.102(a) ("The inability of a city of the first class [Philadelphia] to provide essential services to its citizens as a result of a fiscal emergency is hereby determined to affect adversely the health, safety and welfare not only of the citizens of that municipality but also of other citizens in this Commonwealth."); PENNSYLVANIA LEGISLATOR'S MUNICIPAL DESKBOOK: MUNICIPAL FISCAL DISTRESS AND RECOVERY 186 (3d ed. 2006), http://www.lgc.state.pa.us/deskbook06/Issues_Taxation_and_Finance_11_Municipal_Fiscal_Distress.pdf (explaining Philadelphia's exclusion from Act 47).

Even within states with insolvency laws, the choice of which cities to select for state intervention may reflect local or state politics in addition to objective criteria of fiscal crisis. And finally, some small-government states may stay out of the way when a city faces a major shortfall, simply allowing creditors to take that city to court and wrestle things out one debt at a time. In sum, the pool of cities here is not infected with my own selection bias, but it may well reflect elements of selection bias by the state itself, because state laws and decisionmaking determine which cities, if any, are governed by insolvency law.

The research cities, which are listed in full in the tables included in the Appendix, lie in the following ten states: Alabama, California, Illinois, Indiana, Massachusetts, Michigan, New Jersey, Ohio, Pennsylvania, and Rhode Island. All of these cities, including the ones in California, fall in one of two general categories. Each city was either a historic center of manufacturing or a historic suburb (generally associated with a manufacturing city) with an outmoded, deteriorating housing stock.

The first category of places, which have been recently dubbed “legacy cities” or “forgotten cities,”²⁷ includes well-known industrial capitals like Detroit (approximately 714,000 people) and Pittsburgh (more than 300,000 people), as well as an array of smaller mill and manufacturing cities across the Northeast and Midwest: Gary, Indiana (80,000); Springfield, Massachusetts (153,000); Flint (102,000) and Hamtramck (22,000), Michigan; Camden, New Jersey (77,000); Reading (88,000 people), Scranton (76,000), Harrisburg (50,000), Altoona (46,000), New Castle (23,000), and Johnstown (21,000), Pennsylvania; Mansfield, Ohio (48,000); and Central Falls, Rhode Island (19,000).²⁸

These post-industrial legacy cities share similar histories. They were leaders of American industry in the 1920s to 1940s, with “smokestacks reachin’ like the arms of God into a beautiful sky of soot and clay.”²⁹ They weakened as the century wore on. Automation meant fewer manufacturing jobs, and corporate flight away from the union strongholds of older cities to the anti-labor South

27. See *Reinventing America’s Legacy Cities*, AM. ASSEMBLY COLUM. UNIV. (2011), http://americanassembly.org/sites/americanassembly.org/files/Reinventing_Americas_Legacy_Cities_o.pdf; Lorraine Hoyt & André Leroux, *Voices from Forgotten Cities: Innovative Revitalization Coalitions in America’s Older Small Cities*, MIT SCH. ARCHITECTURE & PLAN. (2007), http://sap.mit.edu/resources/portfolio/forgotten_cities.

28. Figures given here and throughout this Section are approximated; precise numbers are stated in the tables included herein.

29. BRUCE SPRINGSTEEN, *Youngstown, on THE GHOST OF TOM JOAD* (Columbia Records 1995).

meant fewer jobs.³⁰ Federal infrastructure investments moved south and west, laying new road and highway systems that facilitated urban ecosystems somewhere else.³¹ Each lost job took local disposable income and consumption with it.³² As residents and businesses closed up and moved on, they left behind their physical structures: thousands of working-class homes in “neighborhoods stacked like boxes”;³³ shells for shops, restaurants, bars, and theaters; hulking, multistory factory buildings and warehouses. As manufacturing and other well-paid blue-collar jobs dried up, median household income fell for those who remained in these cities, reflecting unemployment and the lower wages of sectors like services and retail.³⁴ Among the legacy cities facing insolvency, listed above, all except Pittsburgh and Scranton, Pennsylvania have higher rates of unemployment than the national average. In ten of these cities, at least one in five persons is unemployed. Whereas the median household income for the nation as a whole in 2010 was \$53,046, the median household income in these manufacturing legacy cities is \$29,268³⁵—i.e., a citywide median income just above the poverty line for a household of four.³⁶

Post-industrial economic restructuring and deindustrialization did not exclusively impact the Rustbelt. Those changes hit older cities across the country, including the military-industrial cities of the West that served not only as major commercial ports, but also as western capitals of military operations. Interestingly, three of the four California cities listed in Table 1 are post-industrial cities, and like many Rustbelt cities, all are the city equivalents of military veterans—they were capitals of World War II or other wartime operations. From 1941 to 1994, San Bernardino, for instance, was home to

30. See THOMAS J. SUGRUE, *THE ORIGINS OF THE URBAN CRISIS: RACE AND INEQUALITY IN POSTWAR DETROIT* 6, 125-41 (1996).

31. See *id.* at 6.

32. See *id.* at 125-27 (describing the phenomenon of capital mobility).

33. These homes helped build the dream of northern migration to industrial jobs: the belief that a good family living was possible for working people. See Christopher Gilbert, *Time with Stevie Wonder in It*, in *THE RINGING EAR: BLACK POETS LEAN SOUTH* 6 (Nikky Finney ed., 2007) (“The tribal families driven north to neighborhoods stacked like boxes—to work the auto plants was progress, to pour steel would buy a car to drive hope further on down the road.”).

34. See Robert Forrant, *Grinding Decline in Springfield: Is the Finance Control Board the Answer?*, *NEW ENG. J. PUB. POL’Y* 67, 74-77 (2005) (describing the gap between manufacturing and services wages).

35. See *infra* Table 1.

36. See *infra* note 49 and accompanying text.

Norton Air Force Base, which was a major logistics center and freight transport facility for military aircraft, supplies, and equipment.³⁷ The city also provided the main residential neighborhoods for workers at Kaiser Steel, one of the largest steel mills in the country between World War II and its closure in 1984.³⁸ Stockton, which historically had one of California's most important ports and shipping channels, housed a Naval Reserve Center on Rough and Ready Island, a strategic position in the Cold War. The installation was decommissioned in 1996.³⁹ The city of Vallejo developed primarily around the Mare Island Naval base, which was founded in 1854 as the first Naval base on the Pacific coast and employed nearly 50,000 workers at its peak in World War II.⁴⁰ Like the others, Mare Island closed in 1996, leaving behind a bedroom community for an employer that had closed shop.⁴¹ In all three of these cities, unemployment and poverty rates exceed national rates, and the numbers are staggering: nearly one-third of residents live below the poverty line in San Bernardino, and about one in six adults are unemployed in Stockton and Vallejo.⁴²

Several other listed cities are distressed older suburbs, some of which have historic roots as independent cities but merged with metropolitan areas anchored in a larger central city. These places include Pritchard, Alabama (a suburb of Mobile); East St. Louis, Illinois (a historic city and suburb of St. Louis); Allen Park and Inkster, Michigan (suburbs of Detroit); Pontiac, Michigan (a smaller city nestled in Metro Detroit and its automotive economy); East Cleveland and Garfield Heights, Ohio (suburbs of Cleveland); Chester, Pennsylvania (a historic city between Philadelphia and Wilmington); and East Providence, Rhode Island (a historic city but functional suburb of

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37. See *History*, NORTON AIR FORCE BASE MUSEUM, <http://www.nafbmuseum.org/history> (last visited Dec. 2, 2013).
38. See JOHN CHARLES ANICIC, JR., KAISER STEEL, FONTANA (2006); David Weinberg, *San Bernardino Struggles After Bankruptcy*, MARKETPLACE (Sept. 27, 2012), <http://www.marketplace.org/topics/economy/local-budgets/san-bernardino-struggles-after-bankruptcy>.
39. SAN JOAQUIN CNTY. HISTORICAL SOC'Y & MUSEUM, A CENTURY OF SERVICE: THE STOCKTON CHAMBER OF COMMERCE 6 (2002).
40. JAMES E. KERN, VALLEJO NAVAL & HISTORICAL MUSEUM, IMAGES OF AMERICA: VALLEJO 108 (2004).
41. See Demian Bulwa & Carolyn Jones, *A Closer Look at Vallejo's Woes*, S.F. CHRON., Mar. 10, 2008, <http://www.sfgate.com/news/article/A-closer-look-at-Vallejo-s-woes-3224578.php>.
42. See *infra* Table 1.

Providence). All except Pritchard and East Providence have lost substantial portions of their populations since 1960, and many struggle with aging, substandard, and substantially blighted housing stock that dates back to the cities' role as residential bedroom communities for inner city manufacturing jobs.⁴³ With rising crime, blight, and unemployment, these places have "small-town budgets and big-city problems," as novelist Philipp Meyer put it.⁴⁴ Like the legacy cities discussed above, these suburbs are part of a larger pattern. In a national study of 4,066 American suburban governments, the authors classified 168 as "distressed," as indicated by high rates of poverty, unemployment, and foreclosure.⁴⁵ These household measures translated into signs of citywide economic distress: Among this pool of 168 distressed suburbs, a full 162 of them had slower economic growth and/or slower population growth (or absolute population loss) than median rates.⁴⁶

Whether a legacy city or a distressed suburb, cities in insolvency programs exhibit striking commonalities. Table 1 presents variables about each city's demographics and housing markets, and offers a picture of population change over time. One commonality stands out immediately: all but two of the cities that have crossed the line into insolvency are dogged by individual poverty.⁴⁷ Our national poverty rates are already quite high: 15% of all people, and more than one in five children, live below the poverty line. Yet the median poverty rate for these twenty-eight cities is more than double that: 31% of all people, and 44% of children. In ten cities, more than half of all children live below the poverty line.⁴⁸ The statistical definition of poverty helps to highlight the concentrated poverty captured in this data: In 2010, the federal poverty line was \$11,139 for a one-person household, and \$22,113 for a four-person household with two children.⁴⁹ In California, with its unusually high cost of living, the poverty rate in the listed cities indicates an even worse standard of

43. See Kathryn W. Hexter et al., *Revitalizing Distressed Older Suburbs*, WHAT WORKS COLLABORATIVE / CLEV. ST. UNIV. 2 (Nov. 2011), <http://www.urban.org/UploadedPDF/412461-Revitalizing-Distressed-Suburbs.pdf>.

44. PHILIPP MEYER, *AMERICAN RUST* 120 (2009). Meyer was describing the towns along Pennsylvania's Monongahela River.

45. Hexter et al., *supra* note 43, at 6.

46. *Id.* at 7.

47. The exceptions are Garfield Heights, Ohio, and East Providence, Rhode Island.

48. See *infra* Table 1.

49. *Poverty Thresholds*, U.S. CENSUS BUREAU (2010), <http://www.census.gov/hhes/www/poverty/data/threshld>.

living. Yet the median poverty rate among the four California cities still places more than 25% of all people, and 35% of children, in poverty.⁵⁰

A relationship between poverty and insolvency is not inevitable, because city insolvency is defined by city budgets, not household variables like unemployment rates and per capita incomes. In theory, city and household variables might diverge—cities in fiscal crisis with falling rates of per capita spending might not be poor cities, as defined by the economic status of individual residents. Corruption or mismanagement (such as the junk bond investments that led wealthy Orange County, California into bankruptcy in 1994) can explain a tight fiscal belt. Yet it is more often the case that insolvent cities are populated by insolvent households, because the faltering fortunes of a city’s residents immediately impact the public budget. Climbing rates of local unemployment, for instance, trigger property tax delinquency and home foreclosures, which in turn cause property values, and thus property tax revenues, to fall.⁵¹ A weak local business environment leads not only to employee layoffs, but also to falling sales tax revenue. A recession’s impact on income and corporate taxes collected by the state causes state funding for local governments to fall. Public hardship is thus likely to reflect household hardship. For this reason, it makes sense that most cities aggressively shrinking their governments face high rates of unemployment and concentrated poverty.

Cities in insolvency span a wide range of population sizes—from 15,000 (which I set as the population floor for this project) to about 714,000, with a median of about 47,000.⁵² Yet if they lack commonality in absolute population size, their population trajectory is similar. Most of these cities are facing either recent or sustained population loss. Many would be classified as “shrinking cities” by land-use planners, i.e., as older cities that have lost at least 25% of their population over the past fifty years (1960-2010) and have high levels of vacant or abandoned structures.⁵³ At least half of the cities on the list have a current population that is less than 75% of what it was in 1960. Some of these losses are hard to conceive: Detroit lost nearly one million residents, dropping

50. See *infra* Table 1.

51. See *Special Comment: U.S. Municipal Rating Revisions Through the Great Recession*, MOODY’S 3 (Aug. 31, 2011) (noting that falling credit ratings were driven by sharp declines in core revenues, which in turn are driven by rising unemployment and falling real estate values).

52. See *infra* Table 1.

53. See Joseph Schilling & Jonathan Logan, *Greening the Rust Belt: A Green Infrastructure Model for Right Sizing America’s Shrinking Cities*, 74 J. AM. PLAN. ASS’N 451, 452 (2008) (using a similar definition for “shrinking cities”).

from more than 1.6 million to 714,000; Gary's population fell from 178,000 to 80,000; East St. Louis fell from 82,000 to 27,000.⁵⁴ In cities in the Sunbelt, population change over that same time period was positive, but the recent period since 2006 has seen very steep losses.⁵⁵ In San Bernardino, California, for instance, 876 units became unoccupied in just three years (2006-2009), and many of those vacancies were spatially concentrated in particular neighborhoods.⁵⁶

When people move their homes and businesses out of a city, they do not take their buildings with them. They rarely clear them away either: demolishing obsolete or dilapidated structures to clear lots for future reuse is not worth the costs in a weak real estate market. Indeed, if the market is extremely weak, landowners often choose to write off their losses, simply abandoning their lots or selling them for a song to speculators. Especially in heavy winter climates like those across the Rustbelt, abandoned buildings fare poorly; one urban planner for Detroit estimated that after a home is abandoned in the city, it lasts only about six months before it is uninhabitable from the combined effects of squatters, scavengers who strip it for building materials, and snow load.⁵⁷ Each exiting resident or business in a weak real estate market thus passes a private bill for demolition to the public, which must handle both the public safety problems caused by blighted buildings and the eventual costs of demolition. When a city cannot keep up with necessary demolition, population losses show up as the rate of vacant housing units on the census. Thirteen cities on the list have vacancy rates above fifteen percent. In East Cleveland, one-third of the housing supply is vacant. Detroit has 78,000 abandoned and blighted structures which will carry an average demolition cost of \$8,500 per structure, as well as 66,000 blighted vacant lots.⁵⁸

A weak market that causes an oversupply of housing is a self-perpetuating cycle, because vacancies create further drag on land markets, which in turn drag down property tax revenues that could be used to maintain public safety and keep up with demolition costs. Median home sales prices in the listed cities

54. See *infra* Table 1.

55. See JUSTIN B. HOLLANDER, *SUNBURNT CITIES: THE GREAT RECESSION, DEPOPULATION, AND URBAN PLANNING IN THE AMERICAN SUNBELT* 51 tbl.6.2 (2011).

56. *Id.*

57. Toni Griffin, Address at the UC Berkeley College of Environmental Design: Detroit Future City (Apr. 1, 2013).

58. *In re City of Detroit*, No. 13-53846, 2013 WL 6331931, at *26 (Bankr. E.D. Mich. Dec. 5, 2013).

in 2013 are all below the national figure of \$174,000. Only the cities in California, Massachusetts, and Rhode Island even break \$100,000 for median sales prices. In thirteen of the listed cities, the median home sales price is below \$50,000; in eight of those cities, it is at or below \$30,000.⁵⁹ Falling home values dramatically undermine household economic security and creditworthiness, which, alongside a weak employment market, can drag families into poverty.

Poverty and population loss also reinforce fiscal insolvency. Both poverty and population loss hit government revenues directly, as declining wealth and a declining number of city taxpayers produce lower revenues to fund current services and keep up with past debt. Service quality, public safety, and local quality of life deteriorate while rates of taxation and stigmatization rise, creating a population drain that leaves the city with those residents who are the poorest and least mobile, thus least able to afford private substitutes for public services like afterschool care, elder care, personal security, or transportation. A sliding population means that there are fewer taxpayers to fund debt incurred by past populations, including pension costs. For instance, the ailing city of Hamtramck (a small carve-out within Detroit's borders) has lost 60% of its population since 1930; its current expenditures cover only 90 public employees compared to 252 retirees.⁶⁰

A city's carrying costs for basic public safety services also rise alongside intensifying poverty and blight. Table 2 captures crime rates in the listed cities, and an unfortunate pattern emerges: most of the listed cities have rates of violent crime, property crime, and arson that are higher than national averages. For many listed cities, this excess is by orders of magnitude. Violent crime rates exceed five times the national average in six cities; arson rates exceed five times the national average in five cities. Dilapidated and vacant housing also increase the prevalence of accidental fires, as occupants and squatters improvise wiring fixes and winter heat sources. Given that reporting rates for common crimes, including burglary and robbery, may fall as crime becomes more ubiquitous and police investigative efforts seem increasingly frail or futile, these rates may actually understate the gravity of rising crime.⁶¹

59. See *infra* Table 1.

60. Roger Lowenstein, *Broke Town, U.S.A.*, N.Y. TIMES MAG., Mar. 3, 2011, <http://www.nytimes.com/2011/03/06/magazine/06Muni-t.html>.

61. See generally Steven D. Levitt, *The Relationship Between Crime Reporting and Police: Implications for the Use of Uniform Crime Reports*, 14 J. QUANTITATIVE CRIMINOLOGY 61 (1998) (confirming a positive relationship between increases in the size of a local police force and

Like poverty and population loss, racial segregation is both a characteristic of many cities facing insolvency and a cause for it. While six of the listed cities are more than 75% non-Hispanic white, a much larger share of them (16 of the 28) are majority-minority cities, including eleven cities that are hypersegregated minority cities with non-Hispanic white population at or under 25%. Some of the majority-minority cities on the list, like Chester, East Cleveland, East St. Louis, Inkster, Prichard, and Vallejo, have proud histories as suburban enclaves where middle-class black and Latino families settled in order to purchase affordable, desirable homes in safe areas. These cities, just like the central cities on the list, suffered from long-term white flight as white households self-segregated into suburbs with fewer minority families, and public and private investments in new suburbs continued to grow. Suburbanization and white flight left behind segregated enclaves of diminished economic and social capital, where aging housing and schools further depressed housing values.⁶² Most recently, these cities were hit extremely hard by subprime lending. Empirical evidence has shown that such high-cost, high-risk loans were concentrated in minority neighborhoods for reasons beyond class and creditworthiness. In high-income, predominantly African-American communities, only about 71% of home refinancing for African-American borrowers earning at least 120% of area median income was done with prime loans, compared to about 83% of refinance loans for lower-income white borrowers living in predominantly white and lower-income neighborhoods.⁶³ Among low-income households of all races living in low-income communities, 10% of home purchase loans were subprime, compared to 18% of loans for

the fraction of victimizations that are reported to police, due to heightened expectations that crime will be solved); Rodrigo R. Soares, *Crime Reporting as a Measure of Institutional Development*, 52 ECON. DEV. & CULTURAL CHANGE 851, 851 (2004) (finding that “variation of rates of crime reporting across countries is strongly related to measures of institutional stability, to police presence, and, most important, to a subjective index of corruption”).

62. See SUGRUE, *supra* note 30; Hoyt & Leroux, *supra* note 27. For a study of white discomfort with black political leadership in majority-minority cities, a form of bias that accentuates white flight and racial tipping point dynamics, see ZOLTAN L. HAJNAL, *CHANGING WHITE ATTITUDES TOWARD BLACK POLITICAL LEADERSHIP* (2007).
63. See William Apgar & Allegra Calder, *The Dual Mortgage Market: The Persistence of Discrimination in Mortgage Lending*, in *THE GEOGRAPHY OF OPPORTUNITY: RACE AND HOUSING CHOICE IN METROPOLITAN AMERICA* 101, 102-03 (Xavier de Souza Briggs ed., 2005). The U.S. Department of Housing and Urban Development has conducted more than a decade of research into income and racial disparities in subprime lending, including paired testing methodology designed to differentiate lender discrimination based on credit risk from lender discrimination based on race. *Id.*

equivalent African-American households in low-income neighborhoods.⁶⁴ These contrasts were even more stark for refinance loans: 27% of refinance loans to low-income borrowers in low-income neighborhoods nationwide were subprime, but 42% of the loans sold to low-income African-American borrowers living in low-income neighborhoods were subprime.⁶⁵ Long histories of racial discrimination—from racially restrictive covenants to white flight to a persistent discriminatory mortgage lending—are important causes of urban decline in many majority-minority cities, including the intensification of concentrated poverty and population loss.⁶⁶

Poverty, population loss, and racial segregation account for only some of the fiscal pressures on the twenty-eight insolvent cities. All of these cities face something of a perfect storm—extreme exposure to these factors plus an array of additional pressure. Researchers at Moody’s Investors Service, who closely monitor local finances, have classified the outlook for local governments as negative for five consecutive years; they cite slow economic recovery, sagging property tax and state aid revenues, and elevated pension and healthcare costs as primary causes.⁶⁷ Below, I go through these explanations, as well as some additional issues, to understand the roots of local fiscal crisis in general and for these cities in particular. Necessarily, these are generalizations and themes based on analysis across cities, rather than individualized accounts of each of the twenty-eight research cities’ fiscal histories. Each one has its own history, and some of these histories have been told elsewhere with tremendous depth and care.

Fiscal crisis in the dataset cities is both cumulative and episodic: It reflects the acute shock of the recent recession delivered to places that, as discussed, were weakened by systemic decline over several decades. The economic downturn (2007–2012) hit cities with a double blow of reductions in state aid as

64. *Id.* at 108; see also Michelle Wilde Anderson & Victoria C. Plaut, *Property Law: Implicit Bias and the Resilience of Spatial Colorlines*, in *IMPLICIT RACIAL BIAS ACROSS THE LAW* 25, 29–33 & nn.20–35 (Justin D. Levinson & Robert J. Smith eds., 2012) (citing these and additional empirical analyses of racial discrimination in mortgage lending).

65. Apgar & Calder, *supra* note 63, at 108.

66. See DAVID M.P. FREUND, *COLORED PROPERTY: STATE POLICY AND WHITE RACIAL POLITICS IN SUBURBAN AMERICA* (2007).

67. *Sector Comment: Outlook for US Local Governments Remains Negative in 2013*, MOODY’S 1 (Feb. 21, 2013); *Sector Comment: Outlook for U.S. Local Governments Remains Negative*, MOODY’S 1 (Oct. 5, 2012) [hereinafter *Outlook Remains Negative* (Oct. 2012)]. In December 2013, Moody’s revised its outlook for local governments to “stable.” See *2014 Outlook—US Local Governments*, MOODY’S 1 (Dec. 4, 2013).

well as property taxes, their two largest revenue sources. Fiscal year 2010 was the first time since 1980 that local governments faced cuts to both revenue sources.⁶⁸ These sources of revenue account for about 65% of local government income, and they are expected to remain down through at least 2014.⁶⁹ State tax revenues plunged during the recession, and states passed that pain on to local governments with \$12.6 billion in reduced state aid in 2010.⁷⁰ Some cuts have been especially severe; in Rhode Island, for instance, 2013 state aid to non-education local governmental entities was only 23% of the 2007 amount.⁷¹ State aid to local governments is vulnerable to falling levels of federal aid to states; for that reason, reductions in federal spending that improve the federal credit rating are “credit negative” for local governments’ credit ratings.⁷² Sequestration, fiscal cliffs, and any other drawdowns of federal spending mean local fiscal losses.

Meanwhile, the plummeting housing market meant that property tax revenues to cities decreased by \$11.9 billion from 2009 to 2010, and by another \$14.6 billion from 2010 to 2011.⁷³ Between 2007 and 2011, home prices across the country fell by nearly 20%, and 1.5 million homes went into default or foreclosure.⁷⁴ Foreclosures in 2012 remained “stubbornly high.”⁷⁵ The bottom of the housing market in this recession will show itself for a long time to come in city revenues, because property tax assessment schedules mean that tax revenues lag changes in property valuation by one to three years. Just as assessments were slow to reflect the nadir of the market, so too will they lag the gradual recovery in housing prices.⁷⁶ In all states, the infrequency of assessments means that property tax revenues will lag recovery by two to three

68. *The Local Squeeze*, *supra* note 22, at 4.

69. *Outlook Remains Negative* (Oct. 2012), *supra* note 67, at 2.

70. *The Local Squeeze*, *supra* note 22, at 6 (citing 2010 as the most recent available figure). In specific states, the consequences were drastic, including the elimination of all state aid to local governments in Nebraska, and sixty percent cuts in state aid to counties and cities in Maryland. *Id.* at 7.

71. *Outlook Remains Negative* (Oct. 2012), *supra* note 67, at 4.

72. *Special Comment: The Impact of US Federal Fiscal and Economic Strain on Municipal Credits*, MOODY’S 9 (Nov. 14, 2011).

73. *The Local Squeeze*, *supra* note 22, at 4.

74. *See id.* at 9.

75. *Outlook Remains Negative* (Oct. 2012), *supra* note 67, at 3.

76. *See The Local Squeeze*, *supra* note 22, at 9; *Outlook Remains Negative* (Oct. 2012), *supra* note 67, at 2-3.

years. In addition, many states (including California and Michigan) have anti-tax laws that control the appreciation rate of land for property tax assessment purposes. This means that, for assessment purposes, the unusually high number of properties that were sold or foreclosed at the bottom of the housing market will retain their depressed valuation until the time of next transfer. The housing market crashed particularly hard in poor cities, because subprime lending disproportionately affected poor neighborhoods and middle-class neighborhoods of color. Spatially-concentrated lending patterns triggered spatially-concentrated foreclosures, which in turn caused rising numbers of vacant and neglected homes as well as downward pressure on remaining residents' housing values.

In the research cities, housing market losses during the recession were even more dramatic than the national average. The Sunbelt post-industrial cities of Vallejo, San Bernardino, and Stockton revived temporarily from long-term challenges during the sharp ascent of housing values in the 2000s, which turned out to be more of a bubble than a recovery. Due to their long-term structural challenges and high rates of poverty, these cities depended too heavily on property tax revenues and housing industry employment, and their neighborhoods were devastated by concentrated subprime and predatory lending. Stockton, for instance, held the ignominious title for the second highest foreclosure rate in the country in 2011.⁷⁷ Median home prices there slid from \$380,000 to \$133,000 between January of 2006 and January of 2013, and had only climbed back up to \$155,000 by September 2013.⁷⁸ The city “teeter[ed] on the verge of bankruptcy” in 2010 and 2011 as property tax revenues sagged, and sales tax and use tax revenues plummeted 30% from 2006 levels.⁷⁹ The California cities, however, were not the only ones that suffered from subprime lending, foreclosures, and falling home values. During the same period, median home sales prices in Detroit also fell more than 60%, from about \$76,000 to \$25,500, and had risen back to only \$26,900 by September 2013.⁸⁰

77. See *The Local Squeeze*, *supra* note 22, at 3.

78. Home price calculations are based on “Local Info” figures available at Zillow. *Stockton Home Prices and Home Values*, ZILLOW, http://www.zillow.com/local-info/CA-Stockton-home-value/r_7266/ (last visited Dec. 3, 2013).

79. *The Local Squeeze*, *supra* note 22, at 3. Other Sunbelt cities saw similar drops in state aid—in New Mexico it fell by 10%, and in Arizona and Nevada it fell by 5%. *Id.* at 6.

80. See *Detroit Home Prices and Home Values*, ZILLOW, http://www.zillow.com/local-info/MI-Detroit-home-value/r_17762/ (last visited Dec. 3, 2013) (based on median home prices from January of 2006 to December of 2012).

In the midst of falling revenues, service needs have also risen due to faltering household income and employment.⁸¹ The country saw a fourteen percent increase in the number of persons living below the poverty line between 2007 and 2010, driving up demand for public services.⁸² Approximately two-thirds of the finance officers in the country reported that public safety costs went up during the recent recession.⁸³ While county governments in most states provide and administer most health and safety net assistance—like food stamps, indigent health care, child protective services, and so forth⁸⁴—cities bear some of the costs of poverty through public safety resources, demand for public goods, and unpaid liability for taxes and user fees.

Whereas some local fiscal woes reflect the acute fiscal impact and particulars of the present recession, many are related to long-term structural constraints on older cities. Loose rules about the formation of new municipalities facilitated the incorporation of new suburbs, which competed for residents and private investment and drew tax dollars into new public service territories and school districts.⁸⁵ Springfield, Massachusetts, for instance, became unable to rely on its own tax base, because so much wealth had moved out of the city.⁸⁶ The cities that were left behind increasingly functioned as “reservations for the impoverished, with expanding slums and a diminishing middle class.”⁸⁷ In some sense, all twenty-eight cities have that problem—population losses, rising levels of local poverty, and an inability to pay the bills based on locally generated revenues. But the metaphor also captures the particular dynamic evident in the older manufacturing cities in the group like Springfield, Detroit, Flint, Pittsburgh, Reading, Johnstown, and

81. *The Local Squeeze*, *supra* note 22, at 1.

82. *Id.* at 14.

83. *Id.* at 16.

84. See Michelle Wilde Anderson, *Regional Localism: American County Government* (2014) (unpublished manuscript) (on file with author) (arguing that in most states, it is more likely to be counties, rather than cities, that provide the front line governments for the American poor, both rural and urban).

85. See, e.g., Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 73-77 (1990).

86. See Forrant, *supra* note 34, at 78; Adam Gorlick, Associated Press, *From Strong Economy to Financial Ruin, Springfield Needs Help to Stay Afloat*, SAN DIEGO UNION TRIB., June 4, 2004, <http://legacy.utsandiego.com/news/nation/20040604-2352-springfieldfinances.html>.

87. JON C. TEAFORD, *CITIES OF THE HEARTLAND: THE RISE AND FALL OF THE INDUSTRIAL MIDWEST* 211 (1993).

Altoona.⁸⁸ Each of these cities is losing population in absolute numbers within a metropolitan area that is still growing economically and that is stable or growing in terms of population. These cities contain a decreasing share of their metropolitan population—the city of Detroit is home to just 17% of the population of Metro Detroit, and just 6% of its combined city-suburban tax base.⁸⁹ Pittsburgh, which has about half the population it did in 1960, lies in a metropolitan area with a stable or growing population, such that the city’s share of its metro population has fallen from about 22% in 1960 to 11.5% in 2010.⁹⁰ Cities that have been losing residents for so long thus have faced the dual blows of weakening property values and tax revenues along with the drain of mobile capital, as well as dramatic class polarization between the oldest cities and their suburbs.

The presence of assets and incomes capable of contributing to public services through taxes is the most fundamental limitation on revenue generation. Much less significant determinants of municipal revenues, but nonetheless important, are legal constraints on the available methods of local finance. Tax reforms that constitutionalized strict limits in most states on how local governments raise revenues have been squeezing the public sector for two decades.⁹¹ Cities have limited flexibility in generating alternative sources of revenue; state law largely controls eligible sources of revenue and withholds self-governance.⁹² For cities with a healthy tax base, those constraints do not matter as much—a low rate of taxation is adequate if the asset taxed is valuable and spending needs are low. For asset-poor cities, however, these constraints allow local governments limited flexibility to raise revenues in creative ways, such as using payroll or commuter taxes to claim revenues from persons who

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88. This list excludes cities like Gary, Camden, Pontiac, and others that evolved into main cities in their own right, but throughout their history have functioned as suburbs or ancillary small cities for a larger central city.
89. JOHN GALLAGHER, *REVOLUTION DETROIT: STRATEGIES FOR URBAN REINVENTION* 8-9 (2013) (according to the 2010 U.S. Census).
90. Calculations by author based on 1960 and 2010 U.S. Census data for the City of Pittsburgh and the Pittsburgh Metropolitan Statistical Area (1960) and Pittsburgh Combined Statistical Area (2010).
91. See Richard Briffault, *Foreword: The Disfavored Constitution: State Fiscal Limits and State Constitutional Law*, 34 RUTGERS L.J. 907, 928-39 (2003).
92. See GERALD E. FRUG & DAVID J. BARRON, *CITY BOUND: HOW STATES STIFLE URBAN INNOVATION* 60-75 (2008); Clayton P. Gillette, *Fiscal Home Rule* (N.Y. Univ. Sch. of Law, Pub. Law & Legal Theory Research Paper Series, Working Paper No. 09-23, 2009), <http://ssrn.com/abstract=1374979>.

use the city (and thus, its services) during their working hours.⁹³ Few states have permitted any degree of involuntary tax-sharing agreements among newer suburbs and older cities, thus blocking regional distribution efforts. Such constraints create asynchronous private and public economic costs and benefits. That is, a metropolitan area's private economic spheres may be highly interdependent (for instance, with high numbers of suburban residents who commute to central city employment), but the metropolitan area's public economic life may still be independent, because only the suburb can draw tax revenues other than sales taxes directly from these residents.

If suburbanization is a historic cause for decline, pensions are a new one. Pension debt overhang has been built across recent decades, but it was aggravated and illuminated by the recent recession. Even with the recovery of pension assets on the stock market and the passage of legal reforms that require more cautious pension fund valuation going forward, a worrisome number of local budgets are dragged down by unfunded liabilities for pensions and other post-employment benefits. In a study of 61 large cities across the country (including the most populous city in each state along with all other cities with more than 500,000 people), the Pew Charitable Trust found that the cities collectively faced more than a \$217 billion gap between funded and unfunded liabilities for retiree pensions and health care.⁹⁴ The pensions gap was unevenly distributed: 24 of the cities were at least 80% funded, while others were funded at lower levels, including four cities funded at or under 50%.⁹⁵ Funding for retiree health care was nearly universally dismal; only Los Angeles and Denver had funded at least 50% of their health care liabilities (with Washington, D.C. nearly there at 49%).⁹⁶ While the recession led to drops in funding levels of about five percentage points, unfunded liabilities could not be traced to the recession alone.⁹⁷ The extent of the pension liabilities faced by some of these cities raises concerns that those cities will become tomorrow's insolvencies. Detroit was the only city included in the Pew analysis that is currently

93. See FRUG & BARRON, *supra* note 92, at 64-73.

94. See *A Widening Gap in Cities: Shortfalls in Funding for Pensions and Retiree Health Care*, PEW 2 (Jan. 2013), http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Retirement_security/Pew_city_pensions_report.pdf [hereinafter *A Widening Gap*] (finding that, expressed as a percentage of total liability, these 61 cities collectively had funded 74% of their pension liabilities, but only 6% of their retiree health care obligations).

95. *Id.* at 4 exhibit 2. The four cities funded at or under 50% were Charleston, West Virginia; Omaha, Nebraska; Portland, Oregon; and Providence, Rhode Island. *Id.*

96. *Id.* at 5 exhibit 3.

97. *Id.* at 6-7.

insolvent, but the lowest performers in the Pew study belong on “watch lists” of cities in fiscal distress.

The pension problem boils down to several specific causes of unfunded pension and retiree liabilities: (1) the rising costs of retiree health care, due to both increased longevity post-retirement and rising health care costs; (2) unaffordable contracts and promises;⁹⁸ (3) imprecise and excessively optimistic accounting methods;⁹⁹ and (4) management failures, including underfunding. A fifth critical factor applies to the research cities: a shrinking population necessarily causes a pension debt overhang created by having fewer taxpayers to sustain retirement commitments made by a larger past population for a larger past workforce. This issue is taken up in more depth in Part IV. Apportioning blame among these factors is beyond the scope of the current discussion, but suffice it to say that cumulatively, pension woes are a relatively minor cause for fiscal stress in many financially troubled cities, as compared to overall financial management problems (including the pension bond deals described below) and weak local economies.¹⁰⁰

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98. While this second issue has been widely emphasized using anecdotal evidence of single extravagant contracts, it has distorted the basic reality that, like their private sector counterparts, most public sector workers end up with post-retirement income that will fall below their pre-retirement living standards. Even public sector workers who spend more than half of their career with a public employer have a median replacement income below the eighty percent level needed to maintain pre-retirement living standards, and workers who spend shorter periods of time in the public workforce enjoy considerably lower replacement rates. See Alicia H. Munnell et al., *How Prepared Are State and Local Workers for Retirement?*, CENTER FOR RETIREMENT RES. BOS. C. 1-2 (Oct. 2011), http://crr.bc.edu/wp-content/uploads/2011/10/slp_22_508.pdf.
99. For instance, until a rule change phased in starting in 2006, public pension funds did not have to report the full costs of their post-retirement health care funding commitments. John Sanchez, *The Vesting, Modification, and Financing of Public Retiree Health Benefits in Light of New Accounting Rules*, 41 J. MARSHALL L. REV. 1147 (2008) (providing an overview of the law surrounding public employee health benefit plans, using several examples from local governments). These accounting methods were corrected in a federal pension management rule change that caused funds to reduce their reported funding levels. See *id.* at 1147.
100. See Alicia H. Munnell et al., *Are City Fiscal Woes Widespread? Are Pensions the Cause?*, CENTER FOR RETIREMENT RES. BOS. C. (Dec. 2013), http://crr.bc.edu/wp-content/uploads/2013/12/slp_36.pdf (based on a sample of financially troubled cities that overlaps substantially with the listed cities in the present research, measuring the relative fiscal impacts of fiscal management issues like carrying over a deficit from one year to another, economic factors such as the local foreclosure rate, and pension variables such as pension costs as a portion of revenues, and concluding that pensions are not the major factor in cities' economic problems).

There may be an important and understudied sixth cause of pension-related fiscal stress as well: the desperate restructuring of pension obligations through derivatives and other “creative” financial instruments designed by investment banks and sold to cities. In Detroit’s case in particular, the city’s pension problems were made significantly worse by a debt deal that sought to restructure the city’s pension liabilities in 2005. In that deal, Merrill Lynch, UBS, and other banks sold Detroit swaps and other complex financial instruments to fund the city’s pension liability—debts that turned out to be closer to high-risk, high-cost subprime second mortgages than to the sensible “refinance” the banks described the deals to be. Such deals included trigger clauses that, upon the happening of a stated adverse event (such as the downgrading of the city’s debt), required immediate, sizable payments or the surrender of collateral to swap holders. In the court opinion deeming Detroit eligible for Chapter 9 bankruptcy, the judge described the impact of a 2008 drop in interest rates: “[T]he City lost on the swaps bet. Actually, it lost catastrophically on the swaps bet.”¹⁰¹ Cooked up in 2005, the city now owes as much as \$2.8 billion on that deal, more than a fifth of the city’s debt.¹⁰²

Cities vary in their degree of exposure to these different pension funding challenges, but all such cities face a similar problem from residents’ point of view. San Bernardino’s bankruptcy filing captured this problem. The city had cut more than 250 staff positions between 2009 and 2012, and its service needs were rising due to population growth during the housing boom, rising poverty and unemployment, and gang-related crime.¹⁰³ Yet the city’s costs per retiree continued to increase—costs that the city had failed to fund as they accrued. “This unfortunate fact,” the city wrote, “has forced the City to reduce staff and services in an effort to balance budgets without receiving any corresponding reduction in its personnel costs.”¹⁰⁴ Higher costs, less labor: From residents’ perspective, that statement sums up the pension crisis for all the research cities and many others. And yet its truth offers no easy answers, given that the

101. *In re City of Detroit*, No. 13-53846, 2013 WL 6331931, at *8 (Bankr. E.D. Mich. Dec. 5, 2013); see also *id.* at *7-9 (explaining the swap deals and outstanding liabilities).

102. Nathan Bomey & John Gallagher, *How Detroit Went Broke: The Answers May Surprise You—and Don’t Blame Coleman Young*, DETROIT FREE PRESS, Sept. 15, 2013, <http://www.freep.com/interactive/article/20130915/NEWS01/130801004/Detroit-Bankruptcy-history-1950-debt-pension-revenue>.

103. City of San Bernardino’s Memorandum of Facts and Law in Support of the Statement of Qualifications Under Section 109(c) of the Bankruptcy Code at 12-13, 28-29, *In re City of San Bernardino*, No. 6:12-bk-28006-MJ (Bankr. C.D. Cal. Aug. 31, 2012).

104. *Id.* at 13.

average pension in California is only \$29,000 per year—and a contract promising such payments “can be made cheaper only by breaking it.”¹⁰⁵

Beyond poor planning and unrealistic performance models for pension liabilities, the research cities have faced other management problems. These include failure to plan for downturns, staffing challenges, and, in a few cases, self-dealing and corruption. An intensive, qualitative study of four of the high-poverty, majority-minority postindustrial suburbs that have entered insolvency (East Cleveland, Chester, Inkster, and Pritchard) found that management and governance challenges included, among other concerns, “high turnover among city professional staff due to poor working environments and low wages.”¹⁰⁶ For cities that have weathered corruption scandals, these problems surely worsen. Camden¹⁰⁷ and Detroit, for instance, are more famous for their bad mayors and other exploitative officials than their good ones. Detroit’s infamous Kwame Kilpatrick was a catastrophic mayor for reasons ranging from personal bad behavior to bribery. But from a fiscal point of view, the most expensive mistake Kilpatrick made was the pension bond deal described earlier in this Section—a deal for which he was awarded a regional “Deal of the Year Award” for 2005 by the *Bond Buyer*, the main news source for municipal bond investors.¹⁰⁸ This bad deal and Kilpatrick’s political corruption, however, should not eclipse the city’s other mayors who struggled to do right by their struggling city. Detroit’s first African-American mayor, Coleman Young, for instance, who governed the city for twenty years, was fiscally conservative (even “neoliberal” according to some accounts) and brought the city to its lowest level of debt since at least 1950.¹⁰⁹ Young’s administration was memorably symbolic—the first major American city to have a black mayor,

105. *Retirement Benefits: Who Pays the Bill?*, ECONOMIST (July 27, 2013), <http://www.economist.com/news/united-states/21582282-pensioners-are-pushing-many-cities-and-states-towards-financial-crisis-who-pays-bill>.

106. Hexter et al., *supra* note 43, at 18.

107. See, e.g., Chris Hedges, *City of Ruins: Camden, New Jersey, Stands as a Warning of What Huge Pockets of America Could Turn into*, NATION, Nov. 4, 2010, <http://www.thenation.com/article/155801/city-ruins#>; Iver Peterson, *In Camden, Another Mayor Is Indicted on Corruption Charges*, N.Y. TIMES, Mar. 31, 2000, <http://www.nytimes.com/2000/03/31/nyregion/in-camden-another-mayor-is-indicted-on-corruption-charges.html>.

108. Bomey & Gallagher, *supra* note 102; see also Joseph E. Stiglitz, *The Wrong Lesson from Detroit’s Bankruptcy*, N.Y. TIMES: OPINIONATOR (Aug. 11, 2013, 11:44 PM), <http://opinionator.blogs.nytimes.com/2013/08/11/the-wrong-lesson-from-detroit-bankruptcy> (discussing the swap derivatives implicated in Detroit’s financial misfortunes).

109. See JASON HACKWORTH, *THE NEOLIBERAL CITY: GOVERNANCE, IDEOLOGY, AND DEVELOPMENT IN AMERICAN URBANISM* 37-38 (2007); Bomey & Gallagher, *supra* note 102.

arriving at a time of intense racial discord over the nearly all-white police force's aggressive treatment of black residents and intensifying white flight—and Young had a rhetorical style that did not mince words about racial tensions in the city. In that context, the public habit of blaming the city's fiscal problems on its first black mayor may say more about white skepticism of black capacity for self-governance than it does about his administration or governance of the city generally.¹¹⁰

Last but not least, a few cities on the list are also facing fiscal distress caused by problematic development projects, including the construction of public facilities by private contractors.¹¹¹ Harrisburg, Pennsylvania's descent into insolvency over a private contract to build a trash incinerator is now a cautionary tale describing \$282 million dollars of opportunity costs. The city built a trash-to-electricity incinerator in 1972 that began to break down and violate air pollution regulations until the EPA ordered it closed in 2003.¹¹² The city decided to refurbish the facility instead of closing it, and contracted with a private company to do the work—a bad bet, given that the unusually low bid was too good to be true and the company proved to be incompetent and inexperienced.¹¹³ Instead of making the facility profitable and providing Harrisburg with a revenue stream, the incinerator burned little more than \$125 million of city funding. In 2010 alone, Harrisburg owed \$68 million in debt service for the incinerator—more than the city's typical annual general fund budget of \$55-65 million in the 2002-2011 period.¹¹⁴ Pittsburgh, or at least its

110. See Bomey & Gallagher, *supra* note 102 (titling the article “How Detroit went broke . . . and don't blame Coleman Young”).

111. *Recent Local Government Defaults and Bankruptcies May Indicate a Shift in Willingness to Pay Debt*, MOODY'S 17-18 (July 19, 2012) (identifying “[d]rivers behind erosion of willingness to pay debt,” which include (1) guaranteed debts for large projects expected to be self-supporting that now rely on municipal funding, (2) debt structures that are vulnerable to the issuer's willingness to pay, (3) use of debt to finance less essential economic development projects, (4) political impasse, and (5) long-term spending in excess of revenues).

112. In the 1990s and 2000s, Harrisburg made nine separate requests for debt financing related to the incinerator. See Melissa Daniels, *PA: Harrisburg's Debt Reveals Weaknesses in How State OKs Borrowing*, WATCHDOG.ORG (Oct. 5, 2012), <http://watchdog.org/58197/pa-state-paper-shuffling-subject-to-change-after-harrisburg-debt-saga>; see also John Buntin, *Harrisburg's Failed Infrastructure Project*, GOVERNING, Nov. 2010, <http://www.governing.com/topics/transportation-infrastructure/Harrisburgs-failed-infrastructure-project.html> (discussing the incinerator's closure).

113. See Buntin, *supra* note 112.

114. See Michael Cooper, *An Incinerator Becomes Harrisburg's Money Pit*, N.Y. TIMES, May 20, 2010, <http://www.nytimes.com/2010/05/21/us/21harrisburg.html>.

county, is at risk of following in Harrisburg’s footsteps. The Allegheny County sewer system is under a consent order with the EPA to repair its aging and overwhelmed sewer system, which dumps untreated sewage from the city and its suburbs into the region’s three major rivers every time there is “even modest rainfall.”¹¹⁵ The EPA order requires the regional authority to solve the problem by 2026; the public works project necessary to do so will cost about \$2.8 billion.¹¹⁶

The foregoing give some sense of our cities in distress. Even as cities’ fortunes may rise and fall together on the tide of the general economy, the American system of cities has always had strong and weak places, growing and shrinking regions.¹¹⁷ Today’s Silicon Valley and its Information Age kin, like Austin and Boston, are roaring despite the drag of the recent recession. Their growth is reminiscent of Detroit and its family of industrial cities in the 1920s and 1940s, when they fueled the nation with innovation, jobs, and culture— from jazz to Motown, from the first high-rise architecture to our finest urban parks. Growth, those cities learned, is not always a ratchet; yesterday’s urban titans have been “sinking down”¹¹⁸ for decades. Faced with sustained fiscal shortfalls and pressing needs, some cities must turn to legal machinery to manage urban decline.

B. In Law

When a city cannot pay its bills or meet its obligations to creditors, one of three legal systems kicks in, depending on state law: municipal bankruptcy, a state insolvency program, or traditional common law remedies.¹¹⁹ This Section provides an overview of these legal approaches to municipal insolvency.

115. See 2013: *Pittsburgh Today & Tomorrow*, PITTSBURGH TODAY 14 (2013), http://www.pittsburghtoday.org/specialreports/Pittsburgh_Today_And_Tomorrow_2013.pdf.

116. *Id.*

117. See Robert A. Beauregard, *Urban Population Loss in Historical Perspective: United States, 1820-2000*, 41 ENV’T & PLAN. 514, 514-15 (2009).

118. “My sweet Jenny I’m sinkin’ down, here darlin’ in Youngstown.” SPRINGSTEEN, *supra* note 29.

119. For a more detailed overview of each of these approaches as well as an analysis of their costs and benefits, see Heather M. Forrest, *State Court Receivership Alternative to Chapter 9*, 29 AM. BANKR. INST. J. 12 (2010); Clayton P. Gillette, *Bondholders and Financially Stressed Municipalities*, 39 FORDHAM URB. L.J. 639 (2012); and Omer Kimhi, *Reviving Cities: Legal Remedies to Municipal Financial Crises*, 88 B.U. L. REV. 633, 647-55 (2008).

The first track for dealing with municipal fiscal distress is bankruptcy, offered under Chapter 9 of the U.S. Bankruptcy Code.¹²⁰ For Tenth Amendment reasons, this option is available only where the state has “specifically authorized” the municipality, or all municipalities in the state, to so file.¹²¹ Twenty-seven states permit their municipalities to petition for bankruptcy in some circumstances, but most of these states set very narrow pre-conditions and approval requirements.¹²² The substance of Chapter 9 is very much in flux. The current wave of Chapter 9 filings from California, Michigan, and Alabama is raising new and difficult legal questions regarding (1) the meaning of fiscal insolvency, an eligibility requirement for Chapter 9;¹²³ (2) the nature of a city’s obligation to negotiate “in good faith with creditors” if such negotiations are practicable and it has not obtained plan approval from a majority of claims;¹²⁴ (3) the meaning of California’s 2012 statute establishing new pre-conditions for filing Chapter 9;¹²⁵ and (4) most controversially and consequentially, the status of collective bargaining agreements under Chapter

120. For an introduction to municipal bankruptcy and the legal theory questions it raises, see generally Clayton P. Gillette, *Fiscal Federalism, Political Will, and Strategic Use of Municipal Bankruptcy*, 79 U. CHI. L. REV. 281 (2012); Michael W. McConnell & Randal C. Picker, *When Cities Go Broke: A Conceptual Introduction to Municipal Bankruptcy*, 60 U. CHI. L. REV. 425 (1993); and David A. Skeel, Jr., *Is Bankruptcy the Answer for Troubled Cities and States?*, 50 HOUS. L. REV. 1063, 1080-84 (2013).

121. See U.S. CONST. amend. X; 11 U.S.C. § 109(c)(2) (2012).

122. Original research on file with author. The states that expressly bar or withhold authorization for a general purpose municipality to file for Chapter 9 bankruptcy are: Alaska, Delaware, Georgia, Hawaii, Indiana, Kansas, Maine, Maryland, Massachusetts, Mississippi, New Hampshire, New Mexico, Nevada, North Dakota, Oregon, South Dakota, Tennessee, Utah, Vermont, Virginia, West Virginia, Wisconsin, and Wyoming (as well as the District of Columbia). Iowa has been omitted from this list, but it only permits its municipalities to file for bankruptcy to resolve “involuntary” insolvency, presumably meaning an insolvency caused by debts like a legal judgment against the city. See IOWA CODE ANN. § 76.16A (West 2013).

123. See *infra* text accompanying notes 288-300.

124. 11 U.S.C. § 109(c)(5); see *In re City of Detroit*, No. 13-53846, 2013 WL 6331931, at *66, *68-72 (Bankr. E.D. Mich. Dec. 5, 2013) (finding that Detroit’s proposal to creditors followed by a short discussion period did not satisfy the good faith negotiation requirement, but nonetheless finding that the city had satisfied § 109(c)(5) because negotiations with creditors were impracticable).

125. See *In re City of Stockton, Cal.*, 493 B.R. 772 (Bankr. E.D. Cal. 2013) (ruling on bondholders’ allegations that Stockton failed to negotiate in good faith through a neutral evaluation process prior to filing its bankruptcy petition, as required under state law).

9.¹²⁶ Detroit's bankruptcy filing, which is orders of magnitude bigger than any in history, has the potential to remake the legal and political landscape of these issues.

More broadly, Detroit and the other current bankruptcies will give cities and creditors a better sense of the consequences of municipal bankruptcy. Cities already have a pretty good sense of how painful it is to try to forestall bankruptcy. As explored here in Part II, avoidance means austerity measures such as slashing cuts to services and widespread employee layoffs; emergency asset sales that, because they are so rushed, may yield lower dollar amounts than the full value of the property; and high-cost, high-risk credit deals with investment banks. Cities also know some of the punishing downsides of bankruptcy that have made Chapter 9 so rarely used: a bankrupt city loses the ability to borrow; it may hurt other municipalities' ability to borrow in its state or region; the filing is stigmatizing for the city, making it harder to retain and attract businesses and residents; it is terribly expensive in legal and administrative fees; and it is politically damaging, if not disastrous, for sitting officials.

Cities do not, however, have as good a sense of what lies on the other side of bankruptcy: whether they will be able to restore an acceptable level of services, whether they will be able to attract competent employees, what it will take to recover their creditworthiness, and so forth. That means that creditors are still learning too: they have to adjust their expectations on whether states and federal governments will bail out insolvent cities; unions and public employees have to learn how much to trust deferred forms of compensation like pensions and retirement health care; and bond markets have to adjust how they think about the credit risks of lending to municipalities.

126. See *In re City of Vallejo*, 432 B.R. 262 (Bankr. E.D. Cal. 2010) (holding that a municipal debtor was permitted to reject or modify collective bargaining agreements in Chapter 9 bankruptcy, without limitation by state law); *In re City of Vallejo*, 403 B.R. 72 (Bankr. E.D. Cal. 2009) (holding that federal bankruptcy law, not state labor law, controlled status of Vallejo's collective bargaining agreements and permitting the rejection of those agreements in Chapter 9 bankruptcy); see also *In re City of Vallejo*, No. 08-26813-A-9, 2009 WL 9085533 (Bankr. E.D. Cal. Mar. 2, 2009) (seeking to enforce a collective bargaining agreement's minimum staffing levels for city fire trucks outside of the bankruptcy proceedings). In an earlier bankruptcy proceeding in Orange County, the court reached a different conclusion. See *In re Cnty. of Orange*, 179 B.R. 177 (Bankr. C.D. Cal. 1995). For scholarship on this issue, see Jeffrey B. Ellman & Daniel J. Merrett, *Pensions and Chapter 9: Can Municipalities Use Bankruptcy to Solve Their Pension Woes?*, 27 EMORY BANKR. DEV. J. 365 (2011); Richard W. Trotter, *Running on Empty: Municipal Insolvency and Rejection of Collective Bargaining Agreements in Chapter 9 Bankruptcy*, 36 S. ILL. U. L.J. 45 (2011).

State municipal insolvency laws and programs, which at least twenty-three states have formally put in place, provide an alternative to municipal bankruptcy, and thus a reassurance to creditors that the state will avoid rewriting municipal debt agreements under Chapter 9.¹²⁷ State insolvency laws, which can be generally applicable or ad hoc legislation, call for intervention by the state in local fiscal affairs (commonly called a receivership) during a period of distress or emergency.¹²⁸ State supervision varies widely in terms of the state's proactive monitoring and auditing of local finances, the procedures and management of the state intervention, and the terms and circumstances of the state's withdrawal.¹²⁹ Typically, municipal insolvency legislation identifies economic criteria or other triggering conditions for intervention. Upon satisfaction of those pre-conditions, a state financial board or state-appointed receiver is authorized to gather information about the city's financial condition, to manage its debt or guarantee the city's loans, and to manage the city's finances through a recovery plan.¹³⁰ State programs vary widely in the amount of control wielded by the state; from "oversight" programs with weak authority to intervene in cases of fiscal distress to "control" programs with strong intervention authority.¹³¹ In stronger systems, the receiver may be

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127. The states with municipal insolvency laws and/or a formal intervention program for municipal fiscal distress are Arizona, California, Connecticut, Florida, Illinois, Indiana, Iowa, Maine, Massachusetts, Michigan, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, Tennessee, and Texas. *The State Role in Local Government Financial Distress*, PEW 9-10 tbl.1 (July 2013), http://www.pewstates.org/uploadedFiles/PCS_Assets/2013/Pew_State_Role_in_Local_Government_Financial_Distress.pdf.
128. See David R. Berman, *Takeovers of Local Governments: An Overview and Evaluation of State Policies*, 25 PUBLIUS 55, 57 (1995); Kimhi, *supra* note 119, at 674-75; see also Charles K. Coe, *Preventing Local Government Fiscal Crises: Emerging Best Practices*, 68 PUB. ADMIN. REV. 759, 759 (2008) (citing 2003 research); Omer Kimhi, *A Tale of Four Cities—Models of State Intervention in Distressed Localities Fiscal Affairs*, 80 U. CIN. L. REV. 881, 897-901 (2012) (providing case studies of cities under state supervision).
129. See Berman, *supra* note 128, at 68; Coe, *supra* note 128, at 760. See generally Michelle Wilde Anderson, *Democratic Dissolution: Radical Experimentation in State Takeovers of Local Governments*, 39 FORDHAM URB. L.J. 577, 584 (2012) (describing different models of state intervention, ranging "from 'oversight' systems with weak intervention authority to 'control' systems with strong intervention authority"); Kimhi, *supra* note 119 (discussing the range of legal remedies in cases of municipal bankruptcy); Brenda Ojendyk, *Does State Oversight Help Struggling Municipalities?*, NUVEEN INVESTMENTS (Apr. 2013), <http://www.nuveen.com/Home/Documents/Default.aspx?fileId=59084> (describing the benefits of state oversight of financially insolvent municipalities).
130. See Anderson, *supra* note 129, at 584; Kimhi, *supra* note 119, at 654-55.
131. See Berman, *supra* note 128, at 61 (distinguishing "oversight" programs that preserve local

empowered to raise taxes and user fees, cut or contract out services, liquidate assets, and approve or negotiate collective bargaining agreements.¹³² While receiverships were traditionally coupled with state funds to help fund services and stabilize credit through grants, loans, or loan guarantees, state budget stress and weakened political will to “bail out” municipalities have meant that some states are providing less fiscal relief.¹³³

The final category of law that has evolved to address municipal fiscal meltdown is the default position of “traditional creditors’ remedies” where bankruptcy or a receivership program is not in place.¹³⁴ If a city cannot pay a creditor, that creditor can simply take the city to court, bringing a state mandamus action to compel the city to pay its debts. Creditors’ remedies, which can be organized and enforced through a judicial receivership, can include the sale of city property not in public use (i.e., property owned in a proprietary capacity rather than active public use) or the compulsory levy of new taxes.¹³⁵ Judicial receivers do not have the power to impair the city’s contractual obligations, but they can stay proceedings against a municipality while it comes up with a plan for paying its debts.¹³⁶

It would be sensible if the choice among Chapter 9, a state insolvency program, and a judicial receivership depended on the nature of the city’s fiscal distress. That is not the case, however, because states rarely offer more than one of the three systems to manage insolvency. The choice among them reflects a range of issues related to politics, history, and ideology. For instance, this choice implicates both local autonomy (how much independence and discretion will local governments have?) and state governance (is the state willing to fund staffing and administrative costs to monitor local finances?). It

discretion in city operations and “control” programs in which the state “dictate[s] specific policy steps”); Coe, *supra* note 128, at 760, 763-64 (distinguishing state programs in terms of the state’s degree of “intervention authority,” from strong to weak to no such power).

132. See Anderson, *supra* note 129, at 584; Coe, *supra* note 128, at 763.

133. See Anderson, *supra* note 129, at 585; Berman, *supra* note 128.

134. See Kimhi, *supra* note 119, at 647-50; McConnell & Picker, *supra* note 120, at 429.

135. For instance, Central Falls, Rhode Island petitioned a state court for a judicial receivership in 2010 because the state, at that time, did not authorize municipal bankruptcy. See Pfeiffer v. Moreau, C.A. No. PB 10-5615 (R.I. Super. Ct. 2010) (discussing the original filing). Such a receivership did not come to pass, however, due to intervening litigation and legislation, and ultimately, the city’s filing for Chapter 9. See Mun. Assets in Distress (MAD) Task Force, *Options for Dealing with Municipal Assets in Distress*, ALSTON + BIRD LLP 3-4 (Aug. 2011), <http://www.alston.com/files/docs/MAD-TaskForce.pdf>.

136. See U.S. CONST. art. I, § 10; MAD Task Force, *supra* note 135, at 4.

reflects state lawmakers' views on contagion effect theories positing that any write-down on municipal bond debt will drive up the costs of borrowing for all other municipalities in the state. Choices among insolvency regimes also reflect different views about why cities in a particular state have floundered, diverging roughly into mismanagement explanations (including corruption), political theories (including excessive rent seeking by special interests), and socioeconomic decline theories (emphasizing urban poverty and suburbanization).¹³⁷ Historically and ideologically driven views about the predominant cause of insolvency in a particular state inform whether decisionmakers seek to make insolvency a punishment, a quarantine, or a safety net.

The cities covered in this study have all crossed the legal line into one of these systems of law. Three of the four California cities on the list filed for bankruptcy as permitted under state law, after each city followed the prescribed procedure of pre-bankruptcy negotiations and findings. The fourth city, Atwater, declared a fiscal emergency as required by these procedures, and started down the road to a Chapter 9 filing. Pritchard, Alabama also filed for Chapter 9 protection. Michigan and Rhode Island have formal state receivership programs in which all of the listed cities are participants; and in each state, one city (Detroit and Central Falls, respectively) went past a receivership and into bankruptcy.¹³⁸ Illinois, Indiana, Massachusetts, New Jersey, Ohio, and Pennsylvania have formal intervention programs for municipal bankruptcy, but none of their struggling municipalities have entered bankruptcy.¹³⁹ The City of Harrisburg did file for Chapter 9, but the state acted to block the filing and the judge determined that the city was thus ineligible for Chapter 9—a sequence that reiterates the state gatekeeping function in accessing Chapter 9, regardless of municipal will or depth of deficits.¹⁴⁰

When cities are scrambling to avoid these programs and managing affairs once inside them, how do local governments and governance change?

137. See Kimhi, *supra* note 119, at 637-47.

138. For an extensive introduction and analysis of these states' programs, see Anderson, *supra* note 129; and *Fiscal Stress and Municipal Bankruptcy: History and Implications for Rhode Island*, R.I. PUB. EXPENDITURE COUNCIL (Apr. 2012), <http://www.ripec.org/pdfs/2012-Chapter-9.pdf>.

139. See *The State Role in Local Government Financial Distress*, *supra* note 127, at 9-10 tbl.1, 20 tbl.2. The receivership program in Massachusetts is organized as an ad hoc intervention tailored around the needs of the specific cities, including, most recently, Springfield. *Id.* at 18, 22.

140. See Juliet M. Moringiello, *Specific Authorization to File Under Chapter 9: Lessons from Harrisburg*, 32 CAL. BANKR. J. 237 (2012).

Understanding these adaptations is a first step to thinking about how cities can manage fiscal distress strategically and responsibly.

II. SHRINKING GOVERNMENT

Referring to former workers in the auto industry, the head of a Michigan-based career center recounted:

The hardest thing for many auto workers who've been doing the same job for 25 years or so to accept is that instantly, permanently, their standard of living has been ratcheted down 80 percent . . . You may have been making \$25 an hour making widgets for years, but now your skill set means you're worth \$8 an hour.¹⁴¹

That fall—experienced by individual households across the country—is also evocative of the depopulation, revenue losses, business closures, and physical ossification that industrial cities have been experiencing since the 1950s. Cities that once symbolized American prosperity now symbolize decline.

What does it look like to go from prosperity to poverty for a city government? Long-term decline and acute recession mean less money in city coffers, and lower revenues necessarily mean less purchasing power for a city government or a growing overhang of debt, or both. One way or another, sooner or later, the government will have to get smaller. How they do so is a critical issue.

For one thing, as legal scholar David Skeel has argued, the public response to severe fiscal crisis can look a great deal like an inefficient liquidation. Even though public entities, unlike corporations, are not technically at risk of involuntary liquidation during a period of distress (because receivers and bankruptcy courts have no power to dissolve the city), the desperation to cut costs can lead to the inefficient sale or seizure of assets that will compromise long-term viability for the entity, ultimately making creditors as a whole worse off.¹⁴² Skeel tells the story of states' dramatic downsizing in the recession:

141. Nick Carey, *Special Report: America's Route to Recovery*, REUTERS, Dec. 29, 2009, <http://www.reuters.com/article/2009/12/29/us-usa-economy-recovery-idUSTRE5BS2I620091229> (quoting Douglas Stites, Chief Executive of Capital Area Michigan Works in Lansing, Michigan).

142. See David A. Skeel Jr., *States of Bankruptcy*, 79 U. CHI. L. REV. 677, 686 (2012).

California was poised to sell \$1.3 billion of its public properties until Governor Jerry Brown called the sales off. Many states have cut back sharply on public libraries and social programs. These cuts may destroy synergies—such as the networks developed in connection with an antipoverty or prison-release program—in ways that echo, at least loosely, the inefficient liquidation of a business.¹⁴³

The hasty sale of cities' physical property assets (like land and buildings) can generate less value than those assets are worth. Deep cuts to key services like schools and public safety can push residents and businesses to exit the city. And in the local context, "synergies" may be far-reaching, such as the interdependence of preschool programs and parental employment, or of youth summer programs and policing. Inefficient sales and cuts may leave less money to pay creditors and fund future services, thus making everyone, including creditors, worse off. Public downsizing may cause human harms as well, especially in a city with rising poverty rates. Residents may abruptly lack access to youth afterschool care or supervised recreation. Public employees can lose their jobs. Falling law enforcement and rising crime creates victims of crime—from home burglaries to assaults to homicide.

With these economic and humanitarian concerns in mind, this Part describes the way that cities navigating insolvency are downsizing. In order to sort through these changes, I offer a framework for categorizing cities' activities. In my view, which reflects a distillation of ideas that are common across law and theory, local governments are empowered with revenues and coercive authority to fulfill three main purposes: (1) to provide or facilitate services; (2) to hold land and property in the public interest; and (3) to regulate for public health, safety, and welfare. Local governments are also important in fostering democratic participation, but this broad mandate is least malleable during a fiscal crisis and is best left for a distinct exploration of

143. *Id.* (footnote omitted). Skeel is referring to a proposed sale of what grew to become twenty-four governmental properties worth \$2.3 billion (including the San Francisco Civic Center—where the California Supreme Court is located—the state's Department of Education and Attorney General's office, and others). After paying off construction debt on the buildings, the deal would have brought in only \$1.2 billion, but ultimately (according to the nonpartisan Legislative Analyst's Office) cost the state \$5.2 billion in rent over twenty years. The deal thus amounted to a ten percent loan, which the state controller and treasurer opposed. See *Brown Drops Plan to Sell State Buildings*, CBS SF BAY AREA (Feb. 9, 2011), <http://sanfrancisco.cbslocal.com/2011/02/09/brown-drops-plan-to-sell-california-government-buildings>.

participation and public accountability in the context of rising household poverty.¹⁴⁴

The first of these purposes encapsulates the provision of local services to residents, businesses, visitors, and people who work in the city, including services that are “vital to the preservation of life (police, fire, sanitation, public health), liberty (police, courts, prosecutors), property (zoning, planning, taxing), and public enlightenment (schools, libraries).”¹⁴⁵ For many cities, politicians and public employees also take on some degree of responsibility for local economic development and job creation. To provide (or at least contract for, as discussed further below) some number of public services is uncontroversial, even as reasonable minds might disagree about which goods are vulnerable to the kind of market failure that necessitates some degree of public involvement.¹⁴⁶ The second purpose of the local public sector is to dedicate land, equipment, and other assets for public use and purposes, including infrastructure systems and public spaces. The third purpose underlies the local police powers, the home base of local authority, to pursue public health, safety, and welfare through regulation. In particular, local governments actively regulate for public safety, the composition of the built environment, and the protection of local property values.¹⁴⁷

Thus framed, we turn to the central question of this Part: How do cities adapt their services, proprietary functions, and regulations to long-term declines in revenues and the acute shock of a recession? Like a middle-class family adjusting to life near the minimum wage, cities’ adaptations must surely be dramatic.

144. I take up these other issues of governance in a forthcoming companion piece. See Michelle Wilde Anderson, *Ensuring Local Public Solvency in an Age of Distraction and Deregulation* (2014) (unpublished manuscript) (on file with author).

145. ROBERT L. LINEBERRY, *EQUALITY AND URBAN POLICY: THE DISTRIBUTION OF MUNICIPAL PUBLIC SERVICES* 10 (1977).

146. See MILLER, *supra* note 16, at 5-6; McConnell & Picker, *supra* note 120, at 488-91 (describing one purpose of cities as creating a more efficient way to provide public and club goods).

147. On the local regulation of crime, disorder, and individual conduct, see, for example, NICOLE STELLE GARNETT, *ORDERING THE CITY: LAND USE, POLICING, AND THE RESTORATION OF URBAN AMERICA* (2010); Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public-Space Zoning*, 105 *YALE L.J.* 1165 (1996); Wayne A. Logan, *The Shadow Criminal Law of Municipal Governance*, 62 *OHIO ST. L.J.* 1409 (2001); and Tracey L. Meares & Dan M. Kahan, *Law and (Norms of) Order in the Inner City*, 32 *L. & SOC’Y REV.* 805, 830-31 (1998).

A. Cutting

Analysis of how local governments facing fiscal crisis are cutting back begins from a surprising baseline: nearly all city spending is related to basic services and management, not to redistribution. In a smart and comprehensive empirical analysis of city spending over a fifteen-year period (based on a dataset of nearly every city with more than 2,500 people), political scientists Zoltan Hajnal and Jessica Trounstine found that nationwide, redistribution is a comparatively small portion of cities' budgets.¹⁴⁸ Only 9.6% of local spending goes towards redistribution—even though that category included all expenditures related to education.¹⁴⁹ When education is excluded, it leaves *less than 3% of city expenditures for redistributive programs*, including public health, welfare, and housing.¹⁵⁰ The big city spending is instead on allocational costs (31% of city budgets), which includes basic city services like police, fire, parks, sewerage, waste, etc.; “other” expenses (48%) that include interest on debt, insurance, judicial functions, and other administrative expenses; and developmental spending (13%), which focuses on economic growth (including streets, transportation, and airports).¹⁵¹

What is even more counterintuitive is that poor cities, where redistributive spending would be both more popular and more needed, spend even less on redistribution to ameliorate the impacts of poverty. After analyzing the economic, political, institutional, and demographic factors that could be determining spending rates, Hajnal and Trounstine found that when cities had lower total revenue per capita, they increased developmental spending and reduced redistributive spending.¹⁵² Indeed, fiscal constraints or surpluses were much more correlated with spending on redistribution than were standard indicators of need for redistributive programs (e.g., poverty and unemployment rates).¹⁵³ Redistribution is also correlated with race, but in a way that is directly contrary to stereotypes about majority black cities as

148. Zoltan L. Hajnal & Jessica Trounstine, *Who or What Governs?: The Effects of Economics, Politics, Institutions, and Needs on Local Spending*, 38 AM. POL. RES. 1130, 1140, 1144 (2010).

149. *Id.* at 1144.

150. *Id.* (finding that cities spend less than 0.5% on public welfare, 1.7% on public housing, and 0.7% public health).

151. ZOLTAN L. HAJNAL, AMERICA'S UNEVEN DEMOCRACY: RACE, TURNOUT, AND REPRESENTATION IN CITY POLITICS 102 & n.1 (2010).

152. Hajnal & Trounstine, *supra* note 148, at 1148 tbl.2.

153. *Id.* at 1152.

welfarist governments: When a city is at least 50% African-American, it spends approximately half as much on redistribution as when a city is only 5% black.¹⁵⁴ Higher levels of redistributive spending, it turns out, are a luxury enjoyed by cities with an economic surplus.¹⁵⁵

So if cities have little left to cut on the redistribution side, is it possible that they spend too much on basic services? There is no empirical work on this question across services, but a national analysis of law enforcement—by far the biggest single line item for personnel in most city budgets—suggests that the answer for poor cities is no. In a recent study comparing per capita spending on policing with crime rates and victimization costs, economists Aaron Chalfin and Justin McCrary list the thirty “most underpoliced cities” in the nation.¹⁵⁶ This list includes *nearly every city* listed in my own Tables 1 and 2 with a population large enough (over 50,000 people) to be included in the Chalfin-McCrary study.¹⁵⁷ The most underpoliced city in the country is the high-poverty, insolvent city of Gary, Indiana, which has 266 officers per 100,000 population, nearly the same staffing ratio as the 261 officers per 100,000 population in Cambridge, Massachusetts.¹⁵⁸ Yet the annual cost of crime per capita—a measure that estimates the private costs of crime, such as injury, lost income, and stolen property—is more than 15 times higher in Gary than it is in Cambridge.¹⁵⁹ Because of this high cost of crime, the benefits of public spending on law enforcement in Gary are dramatically higher than they are in

154. *Id.*

155. While the data in the Zoltan and Trounstein study did not extend into the recent recession, its fifteen-year span (1986-2001) covered other major economic downturns, and it is consistent with other studies finding that when local governments focus on shrinking budgets, reducing taxes, and increasing efficiency, they move spending towards public safety and away from social services. See Lynne A. Weikart, *Allocation Patterns Among the New Public Management Mayors*, 27 PUB. PERFORMANCE & MGMT. REV. 37 (2003) (finding in a study of spending in Indianapolis, New York City, and Los Angeles that the 1990s-era focus on reducing taxes, privatizing services, shrinking government, and increasing efficiency had unintended consequences, including a shift in spending to public safety instead of social services); see also Rebecca J. Campbell, *Leviathan and Fiscal Illusion in Local Government Overlapping Jurisdictions*, 120 PUB. CHOICE 301 (2004) (discussing spending behaviors related to police and public safety).

156. Aaron Chalfin & Justin McCrary, *The Effect of Police on Crime: New Evidence from U.S. Cities, 1960-2010*, at tbl.10 (NBER Working Paper No. 18815, 2013), <http://www.nber.org/papers/w18815>.

157. *See id.*

158. *See id.*

159. *See id.*

Cambridge. Every additional dollar spent on policing in Gary would yield \$14 in benefits of reduced crime, whereas every new dollar spent on policing in Cambridge would yield only 30 cents in such benefits.¹⁶⁰

Not only are these cities underpoliced in terms of the cost/benefit ratio of investment in law enforcement, but they also pay their officers significantly less than overpoliced cities do,¹⁶¹ despite the increased risk of policing in high-crime cities. For instance, four cities in the Greater Los Angeles Area¹⁶² (Fullerton, Torrance, Alhambra, and Burbank, California) on Chalfin and McCrary's list of most overpoliced cities spend more than \$205,000 per officer annually, compared to the high-crime, bankrupt City of San Bernardino on the most underpoliced list, which spends about \$157,000 per officer.¹⁶³ The counties of the Detroit metropolitan area¹⁶⁴ also show variation in pay that is inversely related to crime rates and benefit-cost ratios: Ann Arbor spends about \$151,000 per officer, compared to the underpoliced cities of Detroit (\$96,000) and Flint (\$108,000).¹⁶⁵ These costs per officer included all wages, benefits, and employer pension contributions.¹⁶⁶

"Underpoliced" though they may be, insolvent cities make sizable cuts to their law enforcement budgets during insolvency. Layoffs in specific cities listed in Table 1 have been drastic, despite very high crime rates. Between 2006 and 2012, Vallejo shrunk the city's police force from 155 to 93.¹⁶⁷ Flint has laid off two-thirds of its police force over the last three years,¹⁶⁸ even though the

160. *See id.*

161. *See id.*

162. Formally, this area is labeled by the U.S. Census as the Los Angeles-Long Beach-Anaheim, CA Combined Statistical Area. *Principal Cities of Metropolitan and Micropolitan Statistical Areas*, U.S. CENSUS BUREAU (Feb. 2013), <http://www.census.gov/population/metro/data/def.html> [hereinafter *Principal Cities*].

163. Chalfin & McCrary, *supra* note 156, at tbl.10.

164. The Census defines this region as the Detroit-Warren-Dearborn, MI Combined Statistical Area. *Principal Cities*, *supra* note 162.

165. Chalfin & McCrary, *supra* note 156, at tbl.10.

166. *Id.* at 40.

167. Carolyn Jones, *Vallejo Begins to Recover from Bankruptcy*, S.F. GATE, Mar. 4, 2012, <http://www.sfgate.com/bayarea/article/Vallejo-begins-to-recover-from-bankruptcy-3380143.php>; *see also* Bobby White, *In Vallejo, Bankruptcy Scars Still Visible*, WALL ST. J., Jan. 19, 2012, <http://online.wsj.com/news/articles/SB10001424052970204555904577167013455352608> (reporting the rise in volunteer street watches to combat a surge in prostitution rates following bankruptcy). The firefighting personnel decreased from 121 to 77 in the same period. Jones, *supra*.

168. U.S. DEP'T OF JUSTICE, *THE IMPACT OF THE ECONOMIC DOWNTURN ON AMERICAN POLICE*

city has been plagued by crime for years; in 2011, the city had the highest absolute number of violent crimes and homicides for all US cities with between 100,000-250,000 people—despite the fact that the city is at the lowest end of this population range.¹⁶⁹ In Stockton, the city has 22% fewer police officers than it did four years ago, even though “[v]iolent crime, murders, gang activity, and drug trafficking are on the rise.”¹⁷⁰ Camden cut its police force in half and replaced older officers with young recruits, leaving the department with the lowest number of officers since 1949, and inexperienced ones as well.¹⁷¹ Yet policing there is more dangerous, and more important, than ever. One officer said it this way: “Camden is not a joke. Some parts of this place are a war zone. . . . We risk our lives every day.”¹⁷²

Indeed, cuts to police departments in some cities have been so dramatic that they necessarily accompany a major policy shift: the concentration of resources on emergency response alone. Reflecting budgets that look more like triage than primary care, cities have cut most deeply into non-emergency response, crime prevention, and community policing strategies aimed at improving local quality of life. A national study found that in the recession, twenty-six percent of police departments reduced investigations and follow-ups of “property crimes, fugitive tracking, non-felony domestic assaults, financial crimes, computer crimes, narcotics, and traffic cases.”¹⁷³ Nationwide, funding for law enforcement declined throughout the 2007-10 period, with 2010 marking the largest downturn in revenues in the twenty-five year history of the survey.¹⁷⁴

AGENCIES 13 (2011) [hereinafter THE IMPACT OF THE ECONOMIC DOWNTURN].

169. See *Crime in the United States 2011: Table 8*, *supra* note 4 (reporting that Flint’s population is 102,357 and that the city had 52 homicides and 2,392 total violent crimes in 2011).
170. City of Stockton’s Memorandum of Fact and Law in Support of Its Statement of Qualifications Under Section 109(c) of the United States Bankruptcy Code at 1, *In re City of Stockton*, Cal., 493 B.R. 772 (Bankr. E.D. Cal. 2013) (No. 2012-32118) [hereinafter City of Stockton’s Memorandum].
171. See THE IMPACT OF THE ECONOMIC DOWNTURN, *supra* note 168, at 13; Chang, *supra* note 5.
172. John Rudolf, *Chris Christie Pushes Camden Police Force to Disband, Despite Questions over New Plan’s Finances*, HUFFINGTON POST (Nov. 19, 2012, 9:56 AM), http://www.huffingtonpost.com/2012/11/19/chris-christie-camden-police_n_2025372.html.
173. THE IMPACT OF THE ECONOMIC DOWNTURN, *supra* note 168, at 4, 20; see also Matthew J. Parlow, *The Great Recession and Its Implications for Community Policing*, 28 GA. ST. U. L. REV. 1193 (2012) (providing a comprehensive look at budget cuts, police restructuring, policy changes, and staffing policies in U.S. police forces during the recent recession).
174. THE IMPACT OF THE ECONOMIC DOWNTURN, *supra* note 168, at 10.

If cuts to law enforcement are dramatic, they pale compared to other cuts in the cities of Table 1. Between 2009 and 2012, the City of Stockton eliminated about a quarter of its police officers, but also cut one-third of the fire department and 40% of all other employees.¹⁷⁵ Detroit cut its public workforce by 36% between 2002 and 2009.¹⁷⁶ Similar cuts in San Bernardino (over 250 positions cut) meant that by the time the City filed for bankruptcy, it did little else other than provide emergency services to contain crime and fight fire: in 2011-12, 72% of the city's General Fund was spent on police and fire services, and another 4% was allocated to other departments specifically for public safety uses.¹⁷⁷ Other cities in distress have made similarly dramatic cuts in staffing as they work to avoid insolvency. In Cleveland, the city cut 466 positions (including more than 170 police officers and firefighters), which caused delays in waste collection; cuts to the operating days of pools and recreational facilities; reduced street sweeping, park maintenance, and lighting repairs; and closure of five of the city's fire companies.¹⁷⁸ The Philadelphia library lost 19% of its government funding between 2008 and 2010, which resulted in reducing hours by 12%, staffing (full-time equivalent) by 14%, and acquisition of materials by 44%.¹⁷⁹ This coping strategy was chosen after an alternative plan to close 11 of the city's 49 libraries provoked public outrage.¹⁸⁰

These cuts have negative feedback effects even in purely economic terms. According to Moody's Investor Service, local governments have made "job

175. Regan Morris, *Californian City of Stockton Files for Bankruptcy*, BBC NEWS (June 27, 2012, 2:53 PM), <http://www.bbc.co.uk/news/world-us-canada-18605326>.

176. See *Tough Decisions and Limited Options: How Philadelphia and Other Cities are Balancing Budgets in a Time of Recession*, PEW 5 fig.3 (2009), http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Philadelphia-area_grantmaking/FINAL_Budget%20Brief.pdf.

177. See City of San Bernardino's Memorandum of Facts and Law in Support of the Statement of Qualifications Under Section 109(c) of the Bankruptcy Code at 12-13, *In re City of San Bernardino*, 499 B.R. 776 (Bankr. C.D. Cal. 2013) (No. 125).

178. Tracy Carloss, *Cleveland Mayor Says All Departments Affected by City Layoffs*, NEWSNET5.COM (May 16, 2011), http://www.newsnet5.com/dpp/news/local_news/cleveland_metro/cleveland-mayor-says-all-departments-affected-by-city-layoffs#ixzz2OfXP3IrW; see also *The Local Squeeze*, *supra* note 22, at 3 (describing cuts in state aid to Cleveland in fiscal year 2012 that resulted in a loss of seven percent of the city's general fund revenues).

179. *The Library in the City: Changing Demands and a Challenging Future*, PEW 23 fig.10, 25 fig.11, 26 & fig.12 (2012), http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Philadelphia_Research_Initiative/Philadelphia-Library-City.pdf [hereinafter *The Library in the City*].

180. *Id.* at 22.

cuts, wage and benefit freezes, and public service cuts that themselves are delaying more robust recovery.”¹⁸¹ Nationwide, local governments issued 650,000 pink slips or job cuts between 2008 and 2012,¹⁸² constituting a more extreme workforce reduction than in prior downturns.¹⁸³ Municipalities in California made nearly 100,000 of those cuts.¹⁸⁴ All service areas have been affected by budget cuts, which primarily affect personnel spending.¹⁸⁵

Personnel-related cuts include state and local legal reforms to local employees’ pension plan benefits, funding structures, retirement age, and employee contribution levels. At the local level, struggling cities like Providence, Rhode Island have made cuts affecting both current and future retirees, including a cap on pension benefits of 1.5 times the state’s median income and elimination of annual cost of living adjustments.¹⁸⁶ In Detroit, where 93% of pension liability was fully funded in 2009 but the city has left its other post-employment benefits dramatically underfunded, police officers

181. *Outlook Remains Negative* (Feb. 2012), *supra* note 21, at 2 (observing that the deeper these cuts go, the harder the next round becomes, because “[b]udget options are growing more limited and politically difficult for many issuers, forcing choices between deeply unpopular tax increases, multiple rounds of public sector job and service cuts, and depletion of reserves”).
182. Michael A. Pagano et al., *City Fiscal Conditions in 2012*, NAT’L LEAGUE CITIES 7 (Sept. 2012), <http://www.nlc.org/Documents/Find%20City%20Solutions/Research%20Innovation/Finance/city-fiscal-conditions-research-brief-rpt-sep12.pdf> (reporting a 2011 survey by the National League of Cities finding a total reduction of nearly 500,000 city and county jobs between 2010–2012); *see also The Local Squeeze*, *supra* note 22, at 13–14 (reporting 500,000 job losses in the local public sector between 2008 and 2011, or 3.4% of the local government workforce, at a time when demand for services has been rising).
183. *See Outlook Remains Negative* (Oct. 2012), *supra* note 67, at 4; *see also* Pagano et al., *supra* note 182, at 6.
184. *The Local Squeeze*, *supra* note 22, at 13. As a percentage of state employees, seven other states saw deeper layoffs: Nevada, Georgia, South Carolina, Arizona, Michigan, Rhode Island, and North Carolina. *Id.* at 15.
185. In a 2012 national survey of city finance officers, 21% reported decreases in human service spending, 19% reported cuts in education spending, and 25% reported spending cuts in “services other than public safety, human-social services, and education,” including parks, libraries, and public works. Pagano et al., *supra* note 182, at 6 fig.7, 7. Personnel cuts included hiring freezes, salary and wage reductions or freezes, layoffs, early retirements, furloughs, reduced health care benefits, revisions to union contracts, and reductions to pension benefits. *Id.* at 7 fig.8. The second most common way to reduce spending is to delay or cancel capital infrastructure projects. *Id.* at 6–7.
186. *A Widening Gap*, *supra* note 94, at 23–24; *Outlook Remains Negative* (Oct. 2012), *supra* note 67, at 7.

voluntarily conceded pension benefits for current plan members that will save the city \$50-100 million over the next five years.¹⁸⁷

As deep as these various modes of expense cuts have been, they look mild in comparison to the radical proposal in Detroit to withdraw city services from the neighborhoods with the highest rates of vacancy. The goal would be to shift land uses in those areas such that in fifty years, Detroit would have a green heart of “woodlands, orchards, urban farms, ponds and man-made lakes.”¹⁸⁸ This idea was first proposed years ago,¹⁸⁹ but Mayor Bing floated it concretely in 2010. He stated that the city would not force anyone to move, but that those who remain in neighborhoods designated for un-development “need to understand that they’re not going to get the kind of services they require.”¹⁹⁰ He said those residents will be better off in other parts of the city where they will get “water, sewer, lighting, public safety – all of that.”¹⁹¹ Residents would be redirected to neighborhoods that are “relatively stable,” but faltering from foreclosures and vacancies.¹⁹² The strategy was more stick than carrot: Little, if any, economic inducements would be available to help residents relocate, but they would be motivated by the loss of services if they stayed behind. Bing’s announcement provoked a great deal of controversy initially, but it was followed by a less controversial 2012 master plan that calls for one-quarter of Detroit’s land area to be slowly withdrawn from all but the most basic city services.¹⁹³

Cuts into core city services raise challenging normative issues. For instance, what is the status of criminal law (say, a prohibition on drug sales) when a caller to 911 cannot summon police to enforce it because there is no violence in

187. See *A Widening Gap*, *supra* note 94, at 13; *Outlook Remains Negative* (Feb. 2012), *supra* note 21, at 9.

188. JC Reindl, *Detroit Planners Try a Softer Approach to Urban Renewal*, DETROIT FREE PRESS, Feb. 10, 2013, <http://www.freep.com/article/20130210/NEWS01/302100118/Detroit-planners-try-a-softer-approach-to-urban-renewal>.

189. See, e.g., CITY PLANNING COMM’N OF DETROIT, SURVEY AND RECOMMENDATIONS REGARDING VACANT LAND IN THE CITY (1990).

190. Jeff Gerritt, *Dave Bing Says There’ll Be Incentives for Detroiters to Move*, DETROIT FREE PRESS, Dec. 9, 2010, <http://www.freep.com/apps/pbcs.dll/article?AID=/20101209/OPINION02/12090488/Dave-Bing-says-there-ll-be-incentives-for-Detroiters-to-move>.

191. *Id.*

192. *Id.*

193. See Reindl, *supra* note 188; see also *Detroit Future City: Detroit Strategic Framework Plan*, DETROIT WORKS PROJECT (2012), <http://detroitworksproject.com/wp-content/uploads/2013/01/The-DFC-Plan.pdf>.

progress? And when state receivers and federal bankruptcy judges say that their cuts will preserve “basic services,” what do they mean? If a big city has one police officer, does that constitute basic law enforcement? Surely not, but we have no shared rubric for revising that guarantee—one officer per 100,000 people, or 10,000? I explore these issues in Part III.

B. Selling

The best way to avoid cuts to services is to find new revenues. Yet the usual ways of doing that, such as raising taxes or fees, rarely offer a viable solution. They may be politically infeasible, legally impermissible, or economically undesirable, and if the city’s population is poor enough and its land values weak enough, new taxes and fees may yield precious little in new revenues anyway. Thus, local governments sell assets in a fiscal crisis. As one journalist put it: “The Great Government Fire Sale is on.”¹⁹⁴ Cities facing insolvency and others trying to avoid that fate sell what they can, often with an abruptness and desperation that give buyers the upper hand and undermine the long-term collective interests of creditors and residents alike. When made by elected politicians, these sales are controversial enough; when made by state receivers or consented to in bankruptcy court, such sales can be lightning rods for public outrage and feelings of disenfranchisement.

Local governments own and sell two kinds of property: (1) land, equipment, or assets owned in a governmental capacity (i.e., in public use); and (2) land, equipment, or assets owned in a proprietary capacity (i.e., income-generating property, or property held for future public use). Property in both categories can be sold by elected officials or state receivers, but only land in the second category can be auctioned off against a city’s elected officials’ will in a judicial proceeding by creditors against a city debtor.¹⁹⁵

Asset sales in the first category are most troubling in cases where the sale produces short-term revenues while increasing future expenses. As mentioned in the Introduction, then-Mayor Booker of Newark closed an \$80 million budget deficit with savage cuts and a significant property tax increase, followed by the sale of sixteen of the city’s buildings, including the city’s historic police and fire headquarters.¹⁹⁶ The city will take in \$74 million from the sale (\$40

194. Conlin, *supra* note 8.

195. See McConnell & Picker, *supra* note 120, at 429-34 (describing the treatment of governmental versus proprietary property in bankruptcy law).

196. Conlin, *supra* note 8.

million to plug its 2010 deficit, plus capital investments and debt service in the buildings), but it will pay \$125 million to lease back the buildings over the next twenty years.¹⁹⁷ The deal thus functions more like a debt instrument than an asset sale. One commentator remarked: “This is the second worst thing a government can do The worst thing they can do is run out of money.”¹⁹⁸ I take his point—what mayor wants to declare bankruptcy or lay off yet another round of staff? Especially during a global recession, it is reasonable to hope that tomorrow’s revenues surely cannot be worse than today’s. Desperate times, desperate measures. But nonetheless, piling on new high-cost debt during a fiscal crisis may actually be worse than its alternatives. It does not simply defer the tough issues, it makes those issues considerably tougher.

Problematic sales are also exemplified by a 2008 deal in Chicago. In a desperate move to balance the budget over a four-year period, Mayor Richard Daley leased the city’s parking meters to a private investment group for a seventy-five-year contract. That group subsequently raised parking fees dramatically and is projected to receive \$11.6 billion from a deal that paid the city \$1.15 billion for a one-time budget fix.¹⁹⁹ The only winners seemed to be the private investors—including Morgan Stanley, Abu Dhabi Investment Authority, and Allianz Capital Partners.²⁰⁰ Adding insult to injury, the company contracted to manage the city’s parking meters subsequently sent the city nearly \$50 million in bills to reimburse the company for lost revenue caused by disability parking placards and street closings, which mired the city in a contract dispute.²⁰¹ Yet privatization advocates heralded the sale. The Reason Foundation, a libertarian think tank, has lauded the sale of parking assets to corporations as “a hot privatization opportunity for local governments,” and a long list of cities are considering similar deals.²⁰² For

197. *Id.*

198. *Id.*

199. Darrell Preston, *Morgan Stanley Group’s \$11 Billion Makes Chicago Taxpayers Cry*, BLOOMBERG NEWS (Aug. 9, 2010), <http://www.bloomberg.com/news/2010-08-09/morgan-stanley-group-s-11-billion-from-chicago-meters-makes-taxpayers-cry.html>.

200. *Id.* (“The deal illustrates how Wall Street banks, recipients of more than \$300 billion in taxpayer bailouts in the worst credit collapse since the Great Depression, are profiting from helping states and cities close record recession-induced deficits by selling bonds and leasing public properties.”).

201. See David Segal, *A Georgia Town Takes the People’s Business Private*, N.Y. TIMES, June 23, 2012, <http://www.nytimes.com/2012/06/24/business/a-georgia-town-takes-the-peoples-business-private.html>.

202. HARRIS KENNY & ADAM SUMMERS, REASON FOUND., ANNUAL PRIVATIZATION REPORT 2011:

those who prefer inefficiency in parking enforcement, the approach taken in Pontiac, Michigan by the city's emergency manager is more attractive. He made parking free by removing all public parking meters in the city, citing maintenance and operational costs that exceeded revenues.²⁰³

Then there is the question of what the government should own at all. When cities own valuable assets in active public use, are those assets an unaffordable luxury that should be liquidated or privatized? Or is everyone better off, including creditors, if such assets remain in city hands to support the city's retention and attraction of residents and businesses? These questions burst into public debate over creditors' appraisal of the Detroit Institute of Arts ("DIA") collection, raising the specter of liquidation. Good faith bargaining with creditors is an eligibility requirement for Chapter 9 bankruptcy protection and an expectation for state receiverships, and it includes efforts to liquidate valuable city assets.²⁰⁴ In accordance with these rules, Detroit's emergency manager permitted creditors to appraise the value of the DIA collection, which is owned by the city.²⁰⁵ Critics charged that one of the finest jewels of the city would be lost, and with it, some of the city's potential to attract reinvestment and revival.²⁰⁶ Many bemoaned the loss of the DIA collection to the American

LOCAL PRIVATIZATION 5, 7-15 (Leonard Gilroy & Harris Kenny eds., 2012) (describing enacted or pending lease or sale agreements for parking systems in Atlanta, Boston, Harrisburg, Indianapolis, Memphis, New Haven, New York City, Philadelphia, Pittsburgh, Sacramento, Toledo, and many other cities).

203. Bill Laitner, *Pontiac Gets Rid of Parking Meters Downtown*, DETROIT FREE PRESS, Nov. 8, 2011, <http://www.freep.com/article/20111108/NEWS05/111080364>.
204. See 11 U.S.C. §§ 109(c)(5)(B), 921(c) (2012); *In re City of Detroit*, No. 13-53846, 2013 WL 6331931, at *74 (Bankr. E.D. Mich. Dec. 5, 2013) (summarizing creditor arguments that the city acted in bad faith in its bankruptcy filing, including the argument that the city suppressed information about the value of its art collection, but not directly addressing the issue of the art collection in the order); *In re City of San Bernardino*, No. RS 6: 12-bk-28006 MJ, 2013 WL 5645560, at *9 (Bankr. C.D. Cal. Oct. 16, 2013) (noting San Bernardino's cost cutting measures, including "liquidat[ing] what assets it could," as evidence of its need to restructure its debt through Chapter 9); *In re City of Stockton, Cal.*, 493 B.R. 772, 790 (Bankr. E.D. Cal. 2013) (claiming that Stockton did not have "untapped resources that would make a material difference," such as "fixed assets . . . available to be sold or otherwise monetized").
205. Randy Kennedy & Monica Davey, *Detroit's Creditors Eye Its Art Collection*, N.Y. TIMES, July 19, 2013, <http://www.nytimes.com/2013/07/20/arts/design/detroits-creditors-eye-its-art-collection.html>.
206. See *Sunday Dialogue: Sell Masterpieces to Help Save a City?*, N.Y. TIMES, Aug. 11, 2013, <http://www.nytimes.com/2013/08/11/opinion/sunday/sunday-dialogue-sell-masterpieces-to-help-save-a-city.html>.

public, because liquidation would likely mean selling individual works of art to high bidders at auction, allowing most pieces to vanish into private homes around the world.²⁰⁷ For other onlookers, however, it was painful to watch how Michigan and America seemed to care more about losing Detroit's art than about the condition of the city itself—the number of children in miserable schools, the number of people victimized by crime, and the deterioration of the city's parks and buildings.²⁰⁸ One letter to an op-ed page put it this way: "It's 2013, and there are Whistlers, van Goghs and Caravaggios in Detroit. A few of them are hanging in a trophy case called the Detroit Institute of Arts. But many more are sleeping in a kindergarten classroom because they didn't eat breakfast."²⁰⁹ With the city now in bankruptcy, the question of selling the art collection will be left to a state official (the city's emergency manager) who will draft the city's bankruptcy plan, as well as a federal judge who will assess that plan's reconciliation of creditors' claims and the city's future.

As quickly as governments are trying to empty their books of property in both categories, many cities are also accumulating new, low-value land obtained through tax foreclosure. Therein lie two major administrative challenges faced in depopulating cities with plummeting land values. First, very high numbers of properties become delinquent on their property taxes, requiring local administrative capacity to enforce the tax duty through tax liens, and eventually, tax foreclosures. Second is the challenge of what to do with the property that is successfully foreclosed—clear it of blighted structures, redevelop it, hold it, sell it? Any of those options creates administrative costs that may exceed the value of the underlying asset, or that at least require immediate spending outlays geared at long-term returns.

Herein lies a fundamental challenge of public property ownership during insolvency: is it worth spending some extra money on administration to collect new property tax revenues? If insolvencies lead to a shutdown of administrative spending on things like tax assessors, legal services, and data management, cities will save today at the expense of revenues tomorrow. It is

207. See Peter Schjeldahl, *What Should Detroit Do with Its Art?: The Sequel*, NEW YORKER, July 26, 2013, <http://www.newyorker.com/online/blogs/culture/2013/07/what-should-detroit-do-with-its-art-the-sequel.html>.

208. See Kennedy & Davey, *supra* note 205 (quoting the emergency manager's spokesperson as stating, "It's hard to go to a pensioner on a fixed income and say 'We're going to cut 20 percent of your income or 30 percent or whatever the number is, but art is eternal'").

209. Angela Sorby, Letter to the Editor, *Sunday Dialogue: Sell Masterpieces to Help Save a City?*, N.Y. TIMES, Aug. 11, 2013, <http://www.nytimes.com/2013/08/11/opinion/sunday/sunday-dialogue-sell-masterpieces-to-help-save-a-city.html>.

for that reason that Detroit now finds itself in a shocking position: treasury officials in Wayne County were “so overwhelmed by foreclosures” in 2012 that they are now “look[ing] the other way” on about 75,000 properties that should be seized for tax delinquency.²¹⁰ No delinquencies means no consequences or deterrence for the failure to pay property taxes. That fact, plus the depth of poverty in the city, makes it utterly unsurprising that for several years, Detroit has only been collecting about half of the property tax revenues due.²¹¹

Cities bending under the burden of significant acreage in tax-foreclosed properties have taken two approaches to unload excess land: the fire sale and the land bank. With respect to the first, New Orleans, Cleveland, and Detroit, among other cities, have programs to facilitate the sale of tax-foreclosed, vacant or abandoned lots to adjacent neighbors at a nominal price—as little as a few hundred dollars.²¹² This phenomenon, in which landowners acquire adjacent vacant lots for use as a side yard for gardens, play areas, or open space, is known as blotting and the “New Suburbanism,” because it lowers density to suburban or even rural levels.²¹³ Blotting encourages property maintenance, facilitates exclusion of criminal activity from abandoned structures, and places property back on tax rolls. One study of tax-foreclosed vacant property in Detroit found that more than a quarter of it was bought by the next-door neighbor,²¹⁴ and another found that among hundreds of blocks in the city, nearly every one had at least one blot.²¹⁵ From an administrative perspective, however, blotting imposes administrative costs. The city must acquire the land through lien and foreclosure proceedings, then auction it for nominal cash returns in the hopes of recouping funds through future property tax revenues.

210. Christine MacDonald & Mike Wilkinson, *Half of Detroit Property Owners Don't Pay Taxes: News Analysis Finds \$246.5M in Taxes Went Unpaid Last Year*, DETROIT NEWS, Feb. 21, 2013, <http://www.detroitnews.com/article/20130221/METRO01/302210375>.

211. Quinn Klinefelter, *Collecting Taxes Among Detroit's Financial Troubles*, NPR (July 25, 2013, 4:00 AM), <http://www.npr.org/2013/07/25/205373991/collecting-taxes-among-detroits-financial-troubles>.

212. Kate Davidson, *Blotting—Not Squatting—in Detroit Neighborhoods*, NPR (Dec. 5, 2011, 12:00 PM), <http://www.npr.org/2011/12/05/142341520/blotting-not-squatting-in-detroit-neighborhoods>.

213. See HOLLANDER, *supra* note 55, at 13; Tobias Armbrorst et al., Interboro & Damon Rich et al., Ctr. for Urban Pedagogy, *However Unspectacular: The New Suburbanism*, in 2 SHRINKING CITIES 324, 325 (Philipp Oswalt ed., 2005); Tobias Armbrorst et al., *Improve Your Lot!*, in CITIES GROWING SMALLER 46, 47 (Steve Rugare & Terry Schwartz eds., 2008) [hereinafter, Armbrorst et al., *Improve Your Lot*].

214. Margaret Dewar, *Selling Tax-Reverted Land: Lessons from Cleveland and Detroit*, 72 J. AM. PLAN. ASS'N 167, 172 tbl.6 (2006).

215. Armbrorst et al., *Improve Your Lot*, *supra* note 213, at 48.

These administrative tradeoffs help explain why, despite the advantages of blotting, it is extremely hard to do in Detroit, given the chaotic disarray of city data about who owns property in the city and the irregular channels available for buying land from the city.²¹⁶

When cities are too disorganized to sell small parcels of land to small buyers, only larger private interests will be organized enough to purchase city land. A company called Hantz Farms Detroit, for instance, which is owned by one of the wealthiest men remaining in the city, purchased 1,500 lots in Detroit for less than \$350 each—a “bake sale price”²¹⁷ that was criticized as a “land grab,” but embraced by a mayor battling to manage an estimated 60,000 parcels of vacant or blighted property.²¹⁸ The company plans to clear the lots and turn the properties into commercial tree farms—more than 15,000 oaks and maples will be planted—thereby bringing the land back onto the productive tax rolls, improving safety in and around the properties, providing local jobs, and beautifying neighborhoods.²¹⁹ It is a good plan, perhaps even a virtuous one, but nonetheless it is an indicator that if city land is being sold at nominal prices, the procedures to buy it should be transparent and available to small buyers, like local entrepreneurs and neighbors, as much as major landowners.

Land banks provide one device for more thoughtfully managing the transfer of tax-foreclosed land to promote the city and its residents’ interests. Long-term decline in shrinking cities has stimulated a wave of experimentation with stronger local land banks that keep city property in government ownership for a strategic period of transition prior to sale. A land bank is an entity created by a local government to acquire abandoned or delinquent property through tax foreclosure, then clean, hold, and eventually resell or repurpose it.²²⁰ Legal reforms in Ohio, Michigan, and Georgia have enabled

216. See *id.* at 57–59 (chronicling the odyssey that individual buyers must go through, often fruitlessly, to buy individual lots in the city).

217. Sarah Hulett, *An Urban Tree Farm Grows in Detroit*, NPR (Dec. 21, 2012, 1:29 PM), <http://www.npr.org/2012/12/21/167807136/an-urban-tree-farm-grows-in-detroit> (quoting Matthew Greenia at a public hearing).

218. John Gallagher et al., *Council OKs Sale of 1,500 Lots for Urban Farming Project*, DETROIT FREE PRESS, Dec. 11, 2012, <http://www.freep.com/article/20121211/NEWS01/121211061>.

219. Hulett, *supra* note 217.

220. For legal analysis of the use of land banks in cities burdened by excess vacant property, see Catherine J. LaCroix, *Urban Agriculture and Other Green Uses: Remaking the Shrinking City*, 42 URB. LAW. 225 (2010); and Julie A. Tappendorf & Brent O. Denzin, *Turning Vacant Properties into Community Assets Through Land Banking*, 43 URB. LAW. 801 (2011).

counties to create more powerful, active land banks that can acquire tax-foreclosed land without offering it first at a public auction, thus avoiding sale to absentee speculators.²²¹ For their funding, land banks rely on state tax-foreclosure fees, land-sale proceeds, intergovernmental and foundation grants, and revenue from brownfield tax-increment finance bonds for demolition and redevelopment costs.²²² During the period of public ownership, the land bank can rehabilitate, assemble and reorganize, and/or decontaminate that property to serve public goals, such as to provide urban green spaces, abate blight, and provide affordable housing or commercial space.²²³ Because land banking allows a local government to hold and assemble land, it can pursue larger scale land-use planning to improve neighborhood livability, such as converting residential property into a grocery store or park.²²⁴ In older industrial cities like Flint, Cleveland, and Philadelphia, land banking has been used to “green” the cities with bike paths, greenways, parks, natural gardens for storm water and flood control, solar fields, and constructed wetlands.²²⁵ Land banks’ ultimate goal is not to amass and retain public property, but rather to transfer land after improving its public and private value.

Whether the goal is to sell city land to someone—anyone—or to try to capture higher use and market value for city property through a land bank, unloading assets takes administration. Weak, understaffed governments are vulnerable to selling their assets for less than they are worth or failing to sell them at all. It is a familiar lesson: sometimes you need a little money to make a little money.

C. *(De)regulating*

Jay Williams, the young mayor of Youngstown from 2005 to 2011, commented during his tenure: “We have spent the past 20 to 25 years looking in the rearview mirror Letting go of the past has been difficult for many people because the past was so good.”²²⁶ The melancholy in his statement captured the past era of living wage jobs (or any jobs at all) and a sense of

221. See LaCroix, *supra* note 220, at 231-32; Schilling & Logan, *supra* note 53, at 459.

222. See Schilling & Logan, *supra* note 53, at 458-59.

223. See LaCroix, *supra* note 220, at 232-35; Tappendorf & Denzin, *supra* note 220, at 805.

224. Tappendorf & Denzin, *supra* note 220, at 805.

225. See LaCroix, *supra* note 220, at 233-34; Tappendorf & Denzin, *supra* note 220, at 807.

226. Carey, *supra* note 141.

being part of a decidedly American, decidedly rising industrial empire. But he made the remark in the context of the city's anticipated 2010 land-use planning overhaul, and in so doing he captured something else as well: for too long, the city had held on to a growth-centered vision of local regulation. That rearview mirror reflected subdivisions of single-family homes for working class families living a comfortable life. It reflected pickiness about when and how development occurs, strict ideas about how to shape uses in the city to maximize the livability and safety of residential neighborhoods and to cluster similar non-residential uses according to form and use restrictions. But looking ahead, demand in real estate markets had evaporated, and the city was pockmarked with empty lots, blighted structures, and disintegrating homes. The remaining residents needed neighborhood stabilization and jobs. And city planners had learned the hard way that big employers like the large industrial facilities of yesteryear were not coming back.

Looking ahead meant thinking small. Partly, that has meant letting go of the past regulatory environment. Regulation in the domains of land use, building safety, and development; business licensing and operations; and public health and food safety all reflect a city's idea of itself—whether it wants to attract, stall, or simply shape growth. As a city declines, regulations written for the wrong set of assumptions can inhibit organic, small-scale economic development and new uses for land. The fact that these regulations are underenforced—a predictable result of layoffs—is slim comfort, because it shows up as sporadic enforcement. Yet pure deregulation is no easy answer either. It would permit development anywhere in the city, leaving the city with higher carrying costs for services and infrastructure spread over a larger territory.

Walking a line to achieve the right kind of strategic regulatory changes, Youngstown, Detroit, Cleveland, and other Rustbelt cities—as well as Sunbelt cities like Phoenix, Fresno, and Stockton that have experienced dramatic population loss in the last five years—have gone through major planning overhauls in recent years to focus on three objectives: (1) prohibiting new development in areas of high vacancy (a species of new, strict regulation) to transition those areas into green zones “off the grid” of urban services and infrastructure, (2) more flexible and inclusive zoning in residential and commercial areas targeted for growth (deregulation), and (3) reducing barriers to entry for small businesses. Taken together, these trends are more about re-regulation than deregulation—they eliminate constraints on some types of growth, but try to slow or stop growth in certain areas. The first two of these arise within cities' land-use planning authority, and the third within its general power to regulate local businesses to promote health, safety, and welfare. Each is discussed below.

Pulling land off the grid of infrastructure and services, the first of these objectives, is not only about spending decisions and service withdrawals, as discussed in Section II.A. It requires strict regulatory measures to prevent “pockets or islands of new development in areas where the overall physical conditions of the area will continue to trend toward increased vacancy.”²²⁷ This is functionally a no-growth or anti-growth policy—familiar to suburban settings where homeowners seek to create “green belts” that provide environmental and recreational amenities while protecting developed properties from becoming landlocked sprawl.²²⁸ In contrast to those settings, however, pulling neighborhoods off the grid of services in an insolvent city is both a wise and an urgent fiscal measure to reduce costs by reducing city service territory. While creditors might not, at first glance, support administrative investments in re-regulation of city land use, it may well be necessary for their collective best interests.

Selecting neighborhoods for obsolescence versus investment—and everything in between—forces hard political choices. Such decisions are most dramatic in steeply depopulated cities, where city planning processes deploy regulatory tools, such as barring communities from private investment, to facilitate a neighborhood’s decline for the sake of reducing future public service costs. City officials must decide: Where will development efforts be concentrated? Whose infrastructure will be maintained, or even more dramatically, whose infrastructure will be decommissioned?

Targeted zones for non-development have been part of the strategy in Cleveland, a city trying to rebrand itself as a “Green City on a Blue Lake,” as part of its Sustainable Cleveland 2019 campaign.²²⁹ The city has created an “Urban Garden District” zoning designation that reserves a section of the city for urban agriculture, including community gardens for household consumption, “market gardens” for small-scale agricultural enterprises, and on-site sales.²³⁰ Structures, other than small ancillary uses like greenhouses and

227. *Detroit Future City: Detroit Strategic Framework Plan*, *supra* note 193, at 149.

228. See generally Kenneth A. Stahl, *The Artifice of Local Growth Politics: At-Large Elections, Ballot-Box Zoning, and Judicial Review*, 94 MARQ. L. REV. 1, 3 (2010) (discussing anti-growth initiatives supported by suburban homeowners).

229. See CLEVELAND LAND LAB AT THE CLEVELAND URBAN DESIGN COLLABORATIVE, KENT STATE UNIV., RE-IMAGINING A MORE SUSTAINABLE CLEVELAND 2 (2008); see also Nina Mukherji & Alfonso Morales, *Zoning for Urban Agriculture*, ZONING PRAC., Mar. 2010, at 4-5 (describing zoning strategies to promote urban agriculture).

230. See LaCroix, *supra* note 220, at 236-37; Mukherji & Morales, *supra* note 229, at 5.

sheds, are not permitted.²³¹ These policies seek not only the productive reuse and beautification of blighted land but also economic development and access to healthy food by keeping food production jobs and profits in the city.²³² Youngstown's 2010 master plan similarly included a "limited services" overlay zone to steer development away from the most rapidly declining parts of the city, though the city has struggled to adopt such zones for any specific areas of the city, which illustrates the tricky politics of implementation.²³³

The second major change in the regulatory environment in struggling, shrinking cities has been to loosen land-use controls in parts of the city targeted for renewal and recovery. Land-use planning scholar and shrinking cities expert Justin Hollander has been calling for such measures—for instance, establishing "relaxed zoning" overlays that would be activated when a certain threshold is met, such as when at least twenty percent of the homes in an area are vacant for more than ninety days.²³⁴ A relaxed zoning code would no longer restrict buildings to residential use.²³⁵ Part of this flexibility would include permitting some land to lapse into productive but undeveloped uses like wildlife refuges, cemeteries, and truck parking.²³⁶

As a haven for the middle-class aspirations of America's manufacturing working class, around sixty percent of Detroit is strictly zoned for single-family homes.²³⁷ Except in those neighborhoods targeted for service withdrawal, Detroit's strategic plan framework calls for more flexible zoning in residential neighborhoods as well as in its commercial districts. The plan says: "Given the vast quantities of vacant commercially zoned land along corridors, there should be fewer use restrictions placed on land in order to return it to productive use," and it creates a zoning designation that permits "a wide range of commercial,

231. See LaCroix, *supra* note 220, at 237.

232. See *id.* at 236; Marty Sterpka, *Cleveland's For-Profit Urban Gardens Are Growing*, PLAIN DEALER (July 6, 2009), http://blog.cleveland.com/metro/2009/07/clevelands_Forprofit_urban_gar.html.

233. See YOUNGSTOWN, OH., REDEVELOPMENT CODE ch. 1102.03(e) (2013), http://www.cityofyoungstownoh.com/Uploads/20135683912_Youngstown%20Final%20Adopted%20Published%20Version%204-13.pdf (setting the development rules in Limited Services Overlay Districts, where "limited municipal services will be offered and where significant investment and reinvestment is not encouraged"); *Detroit Future City: Detroit Strategic Framework Plan*, *supra* note 193, at 151.

234. See HOLLANDER, *supra* note 55, at 14.

235. See *id.*

236. See *id.* at 94.

237. Griffin, *supra* note 57.

residential, or blue infrastructure uses to redefine the identities of vacant and underutilized commercial corridors.”²³⁸

One might hope that such efforts, if pursued seriously along with a wider array of reforms, would help defuse what surely must be the most surprising proposal for local deregulation of a shrinking city, not to mention asset sales. That proposal, the brainchild of real estate tycoon Rod Lockwood, is to create an enclave of pure deregulation in Detroit. The city would sell and de-annex Belle Isle, a 982-acre public park on an island in the Detroit River, for \$1 billion to a group of investors who would form the Commonwealth of Belle Isle, a “city-state” within the U.S. The state would be built on principles of limited government and minimal taxation in a bid to “riva[l] Singapore,” attract capital to the Detroit region, and offer “a social laboratory for the western world.”²³⁹ In my view, the proposal would be the fastest way to snuff the fledgling recovery now underway in Detroit’s downtown, where capital and investment have begun to return,²⁴⁰ but surely could not survive competition with a brand new, adjacent commercial district. Since it is the entity of the City of Detroit that supports an economically heterogeneous 714,000 people and must pay to dismantle the physical remains of yesterday’s booming free market, it is the City of Detroit that must recover.²⁴¹

An early pioneer in efforts to offer more flexible zoning rules was Youngstown, Ohio, which drafted a master plan called the Youngstown 2010

238. *Detroit Future City: Detroit Strategic Framework Plan*, *supra* note 193, at 149.

239. Rodney Lockwood, BELLE ISLE: DETROIT’S GAME CHANGER, <http://www.commonwealthofbelleisle.com> (last visited Oct. 29, 2013); *see also* Mark Binelli, *Detroit, the Billionaire’s Playground*, N.Y. TIMES, Feb. 7, 2013, <http://www.nytimes.com/2013/02/08/opinion/detroit-sinks-with-belle-isle.html> (discussing Lockwood’s proposal).

240. *See, e.g.*, Monica Davey, *A Private Boom amid Detroit’s Public Blight*, N.Y. TIMES, Mar. 4, 2013, <http://www.nytimes.com/2013/03/05/us/a-private-boom-amid-detroits-public-blight.html>.

241. It is interesting to note how developing Belle Isle would likely leave behind a major bill for the public sector, because Detroit’s old downtown would likely be left to ruin—surely a cumbersome, expensive, and selective way to meet Mr. Lockwood’s dreams of small government. My dim view of the proposal is more in line with TV personality Stephen Colbert’s assessment: “Yes yes, it would greatly help Detroit. Because what that city needs is a pristine private island that they can see from the bars of their postindustrial hellscape.” *The Colbert Report* (Comedy Central television broadcast Feb. 19, 2013). None other than Ayn Rand might predict such an outcome, as *Atlas Shrugged* tells the story of chaos and collapse in the old world when business and industry escape to Galt’s Gulch, an alternative, deregulated universe. AYN RAND, *ATLAS SHRUGGED* (1957). The difference between Rand and myself is that chaos and collapse in the old world is just deserts in her view, a moral concern in mine.

Plan. The premise of the plan was to accept the city's decline, striving to become a "sustainable mid-sized city" with an improved local quality of life for current residents.²⁴² Rather than focus on economic development or broader social issues, the plan focused on improving the physical condition of the city as a means to improve the quality of life and business in the city, thus attracting growth as a secondary by-product of livability.²⁴³ The plan called for aggressive demolition of blighted structures and the repurposing of urban land as various forms of open space. It provided for relaxed zoning in declining neighborhoods. The plan thus let go of the aspiration of a return to its former population (more than double its current size) and its former identity and prominence as a steel mill giant.

A third type of deregulation common in high-poverty shrinking cities is an effort to trim city procedures that encumber new businesses. Advocates for limited government at the local level decry such barriers to entry. Impassioned calls for smaller local government emphasize excessive fees and taxation to fund ravenous spending; long, burdensome, costly, and confusing processes to obtain government permits and licenses; a lack of transparency and accountability; and oppressive regulation.²⁴⁴ Libertarian and free market advocacy groups that focus on local politics (including the Institute for Justice, the Manhattan Institute, and the Cato Institute) view such barriers as a form of economic protectionism that deploys local regulation in the private interest of large businesses, monopolies, and public employees. Such regulations disadvantage "outsiders, latecomers, and [the] resourceless."²⁴⁵

I have been unable to find any grand housekeeping of city rules to separate necessary from unnecessary local regulations. That is no surprise: what city could afford to invest in that kind of long-term improvement when they are

242. Laura Schatz, *Decline-Oriented Urban Governance in Youngstown, Ohio*, in *THE CITY AFTER ABANDONMENT* 87, 91 (Margaret Dewar & June Manning Thomas eds., 2012).

243. See *id.* at 100.

244. See, e.g., CLINT BOLICK, *LEVIATHAN: THE GROWTH OF LOCAL GOVERNMENT AND THE EROSION OF LIBERTY* (2004) (calling local government a form of "grassroots tyranny" captured by big businesses and unions at the expense of small businesses and private contractors, and dismissive of property rights and individual liberties); *THE VOLUNTARY CITY: CHOICE, COMMUNITY, AND CIVIL SOCIETY* 36, 17 (David T. Beito et al. eds., 2006) [hereinafter *THE VOLUNTARY CITY*] (assembling a history of private, voluntary, and community-based systems of social services, infrastructure, and land use in American cities and arguing that such methods provide a cure for "increasingly severe failures in the governmental sector," especially in large metropolitan areas "where the state had failed most conspicuously").

245. BOLICK, *supra* note 244, at 74 (quoting Walter Williams).

desperately laying off staff needed for immediate health and safety? But such overhauls might be in both creditors' and residents' long-term interests in the city's recovery. More modest efforts to streamline city regulation have, in some cases, had good results. Many cities, for instance, have helped to establish non-profit development corporations that work to facilitate economic development by serving as a liaison to government agencies, leading and supervising local permitting processes, and informing businesses about available incentives and financing tools. The Detroit Economic Growth Corporation, for instance, has facilitated "the largest retail development in Detroit in more than 40 years," which includes the first national grocer in the city in more than two decades.²⁴⁶ The Detroit Economic Growth Corporation facilitated brownfield tax credits and a tax-increment financing plan to support the development.²⁴⁷ Effective though it might have been, it seems obvious that the first-best solution would have been to streamline the permitting process directly, making third-party navigators unnecessary.

Taken together, these efforts at modernizing a city's regulation and adapting it to the city's precarious fiscal position raise an important observation for shrinking government: Regulations mean nothing if a city has no staff to enforce them. That goes for criminal law, first and foremost. Are prostitution and hand-to-hand drug trades still a crime in a city if police are not dispatched to disrupt them? But it also applies to land use and business licensing. If a city's license and permitting staff is so slim and overburdened, and its procedures so complicated or antiquated, more and more people will disobey them. In a city with few remaining building inspectors or other enforcement personnel, regulatory ignorance or defiance will have no penalty – whether the regulation pursued a dubious protectionist objective or a critical safety one. In short, codes cannot enforce themselves. Cities should not be encumbered with more regulation and process than what is required for the true public interest, but what they do have on the books should mean something, and it should mean the same thing for each person. For regulation to inflict the least amount of drag on economic development, a city must have enough employees or contractors to make regulatory processes speedy, predictable, and fair.

246. Cathy Nedd, *Detroit Economic Growth Corporation Helps Minority Developers Get Piece of Revitalization Pie*, MICH. CHRON., Mar. 4, 2013, <http://www.michronicleonline.com/index.php/business-original/9876-degc-helps-minority-developers-participate-in-revitalization-of-detroit> (describing the development at Gateway Marketplace).

247. *Id.*

From new zoning plans that will pull neighborhoods off the grid to strategic deregulation of permitting processes, the regulatory changes in cities remind us that sometimes, it may take a bit of city administration, deployed wisely, to revitalize and empower the private sector.

III. THE NEW MINIMAL CITIES

Highland Park, Michigan is an independent city in the middle of Detroit. It has about 12,000 residents—the remnants of the city’s population of 50,000 in the 1930s and 40s.²⁴⁸ Forty-seven percent of the population (62% of children) lives below the poverty line.²⁴⁹ Journalist Mark Binelli described his trip to Highland Park’s only firehouse. It was “an unmarked warehouse building . . . so anonymous and isolated you’d think it housed toxic waste material or a fleet of garbage trucks.”²⁵⁰ The former headquarters had been condemned as an environmental hazard, so the fire department had come to occupy this “temporary location” six years ago.²⁵¹ The crew frequently saw multiple building fires each night, due to astronomically high rates of arson and the “jerry-rigged, easily combustible wiring jobs” across the city.²⁵² As Binelli waited for the first fire call to come in on the night of his visit, he observed the following:

A firefighter named Chaplain sat nearby, occasionally answering a phone and taking notes on a pad. I hadn’t paid much attention to him until I realized he was talking to someone who seemed to be requesting an ambulance. Hollowell [another firefighter] noticed the curious look

248. *American FactFinder, Community Facts*, U.S. CENSUS BUREAU, <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml> (enter “Highland Park, Michigan” in the search box) (last visited Dec. 3, 2013) (listing the city’s exact population as 11,776).

249. *American FactFinder, Table DP03: Selected Economic Characteristics, 2008-2012 American Community Survey 5-Year Estimates*, U.S. CENSUS BUREAU, <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml> (enter “Highland Park, Michigan” in the search box, then follow “Income, Employment, Occupation, Commuting to Work . . .” hyperlink) (last visited Jan. 30, 2014).

250. MARK BINELLI, *DETROIT CITY IS THE PLACE TO BE: THE AFTERLIFE OF AN AMERICAN METROPOLIS* 185 (2012). Highland Park is a legally independent city surrounded by Detroit; it served as a tax haven for factories run by the Ford Motor Company. *Id.* at 181-82.

251. *Id.* at 186.

252. *Id.* at 188, 193; *see also id.* at 189 (describing beleaguered firefighters coming off a week with several major fires, about which a firefighter commented, “Every time gas prices drop, we see an increase in fires”).

on my face and said, “This is our 911.” He meant that Chaplain—a lone guy sitting in a folding chair answering a phone—was the 911 operator for the entire city of Highland Park. When the call was completed, Hollowell said, “Chaplain, who have you got waiting tonight for the EMS?” Chaplain looked at his pad and said, “Two strokes, a heart attack, a guy who fell and cracked his head open.” He said the first call had come at 5:56 p.m. and none had received EMS attention yet. I looked at my watch. It was after eight.

The city of Highland Park did not own an ambulance and had only one EMS truck.²⁵³

The extreme demand, low staffing, and inadequate equipment and facilities in Highland Park are typical of cities experiencing fiscal crisis in the context of concentrated poverty. How low will we let their budgets go? Is there any minimum level of emergency services, or public services more broadly, beneath which law and politics will not or should not allow a public agency to fall? This is, in essence, a question of whether there should be a safety net for public agencies—one that is oriented not toward bondholders and other creditors, but toward residents. This part of the Article defines our “new minimal cities” and the doctrinal quandary of whether and how to put a floor under the downsizing of the public sector.

A. *A Local Nightwatchman State*

In the high-poverty, insolvent cities of the present study, the range and intensity of services have been so far reduced that they seemingly embody the nightwatchman state ideal—in Robert Nozick’s terms, a minimal state “limited to the narrow functions of protection against force, theft, fraud, enforcement of contracts, and so on.”²⁵⁴ That is, these cities might be nightwatchman states except insofar as the nightwatchman is unable to prevent force, theft, and fraud. In violent and underpoliced cities like Camden, Detroit, and Flint,²⁵⁵ to speak of a nightwatchman at all is a cruel irony.

These are our new, high-poverty minimal cities. In that their services are confined to bare bones public safety with little to no redistributive spending,²⁵⁶

253. *Id.* at 191–92.

254. ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA, at ix (1974).

255. See *infra* Table 2 (reporting 2012 violent crime rates).

256. See *supra* notes 148–155 and accompanying text.

they share something with the “minimal cities” described in Gary Miller’s seminal work of urban political science in 1981. The original and new minimal cities, however, are also fundamentally different from one another. Looking at today’s shrinking governments through the lens of Miller’s conception of minimal cities illuminates the interdependent relationship between the original minimal cities and those facing insolvency today.

Miller’s *Cities by Contract* focused on industrial and suburban areas of Los Angeles County that formed their own municipalities in the 1950s, 60s, and 70s. Landowners shaped these cities to keep the range and intensity of urban services as low as possible to avoid property taxes.²⁵⁷ Some such cities were primarily industrial or commercial minimum cities, which kept out residential land uses to avoid costly services like schools, parks, or libraries.²⁵⁸ Other minimal cities had large, high-value residential communities (often gated subdivisions) that relied on private or club provision of many key services, such as private roads, security measures, and open space.²⁵⁹ These minimal cities avoided public services in general, and redistributive public services in particular.²⁶⁰ They could get by with a few employees charged with enforcing strict planning and building codes, along with a contract with the county for basic services like law enforcement, fire protection, and sanitation.²⁶¹ This arrangement, known as the Lakewood Plan, became popular in suburban areas across the country, and one could now identify minimal cities like those in Miller’s study in any metropolitan area.²⁶²

The practice of keeping taxes low by shrinking local government in prosperous areas has only grown since Miller wrote. Radically small government has come to many of the nation’s wealthy municipalities. Sandy Springs, a prosperous suburb of Atlanta, for instance, has fewer than a dozen government employees whose sole focus is to enter contracts with private

257. MILLER, *supra* note 16, at 82.

258. *Id.* at 34-62.

259. *See id.* at 96 (“In their plush surroundings, they find it easy to do without city parks, city health programs, and so forth.”).

260. *Id.* at 83-84.

261. *See id.* at 96.

262. *Id.* at vii. The name comes from the City of Lakewood, which successfully conceived a way to fend off an annexation effort by the City of Long Beach in the early 1950s. The idea was this: if the area contracted with county service providers to continue basic services, it could form its own city (even without a large population and an economy of scale for service provision), thereby blocking annexation to a larger, more heterogeneous city. *Id.* at 20-21.

vendors that provide all other administrative services to the city.²⁶³ These vendors, which employ several hundred people focused on matters in Sandy Springs, are in England, Colorado, Massachusetts, and California.²⁶⁴ Or consider Damascus, Oregon, where a statewide taxpayer advocacy group (hoping to seed a model for other cities) lobbied to pass city charter amendments that forbade the city from adopting new services, including public transportation.²⁶⁵ In 2012, voters enacted a charter amendment that limited the growth rate of total city spending and fixed the starting point to require major budget cuts immediately.²⁶⁶

The experiences in Miller's minimal cities and in places like Sandy Springs translate poorly to the context of a high-poverty city. For one thing, because they were organized at the outset to purchase private substitutes for public services and spaces, Miller's minimal cities do not experience cuts to the public sector to the same extent as the new minimal cities. In other words, once a jurisdiction develops a land-use model that enables low rates of spending and taxation, it is more insulated from falling levels of public revenue, whether due to a recession or local taxation caps and constraints. Miller himself noticed this phenomenon, observing that after the passage of Proposition 13's tax cap in California, minimal cities felt little impact, because their fiscal model was based on low or no property tax revenues and minimal public services.²⁶⁷ The City of Lakewood merely had to cut its library hours following the passage of Proposition 13, in contrast to the older City of Long Beach, which had to make major cuts not only to libraries, but to health, recreation, child safety, and other programs.²⁶⁸ The story was the same across Los Angeles County: While most of the Lakewood Plan cities felt minor effects from the passage of

263. Steve Stanek & Leonard Gilroy, *Sandy Springs Incorporates, Inspires New Wave of 'Private' Cities in Georgia*, REASON FOUND. (Nov. 1, 2006), http://www.reason.org/commentaries/gilroy_20061101b.shtml.

264. See Segal, *supra* note 201.

265. See Michelle Wilde Anderson, *Dissolving Cities*, 121 YALE L.J. 1364, 1406-07 (2012).

266. CLACKAMAS CNTY., OFFICIAL CLACKAMAS COUNTY 2012 GENERAL ELECTION VOTERS' PAMPHLET 3-42 (2012), <http://www.clackamas.us/elections/documents/vp20121106c.pdf>; *Clackamas County, Oregon General Election November 6, 2012 Official Final Cumulative Report*, CLACKAMAS COUNTY, <http://www.clackamas.us/elections/results/Results20121106.html> (last visited Jan. 21, 2014) (reporting that voters in Damascus passed Measure 3-404 by a 64.5 percent to 35.5 percent margin).

267. MILLER, *supra* note 16, at 195-96.

268. *Id.* at 195.

Proposition 13 (i.e., they had no reductions in services, or no new fees or taxes), nearly every one of the older cities in the county faced significant impacts, including increased fees and taxes, reduced services, and employee layoffs.²⁶⁹

For advocates of small government and privatization, the public sector contractions in big cities like Long Beach might be un compelling news— simply a necessary transition in reaching higher efficiencies. Such views, however, assume that the private sector is always available as a substitute for public provision of services. When advocates sought to bar their city from funding public transit in Damascus, they could reliably assume that people would use private cars instead. Persons with discretionary income can pay for private summer camps and afterschool sports leagues when the city lacks parks and recreation programs, or assemble home book collections when libraries are inconvenient. Where law enforcement is inadequate, they can fund private alarms or neighborhood security patrols. Residents with greater buying power can also settle in a planned unit development—the “privatopias” of the gated community revolution—where a homeowners’ association can own and manage a range of club goods such as parks, pools, and community centers.²⁷⁰

In urban economies with high numbers of low-wage jobs and high rates of unemployment, these alternatives are not available. In many of the cities listed in Table 1, with one-third or more of residents living in poverty and median incomes that barely cover basic expenses, low incomes and poverty impede access to private substitutes for public services. Privatized versions of shared amenities are simply unaffordable to most residents. When public revenues in a poor city shrink far enough, the necessary trade-offs are not primarily related to public versus private provision, but rather to provision versus non-provision of a service. Other than some level of public education and some level of police and fire protection, and some level of private charitable efforts by churches and non-profits, low-income households must muddle through without shared means of educating and occupying their children and youth, caring for their elderly, and improving neighborhood conditions. When they do so in a city with underfunded and overwhelmed public schools and unchecked crime, such settings are unable to provide the basic cornerstones of American upward social mobility—personal safety and educational opportunity. As captured by Nozick’s nightwatchman state ideal (not to mention deregulation proposals for

269. *Id.* at 198-99.

270. See generally EVAN MCKENZIE, PRIVATOPIA: HOMEOWNER ASSOCIATIONS AND THE RISE OF RESIDENTIAL PRIVATE GOVERNMENT (1994).

Detroit²⁷¹), even a purist libertarian government includes a public role in preserving freedom by protecting personal safety.

There is another reason that the Lakewood model of small local government is in tension with the cities covered in this article, and herein lies the critique of the status quo that I intend with the use of the term minimal cities. The trick of minimal cities like Sandy Springs has always been that by excluding people and uses that require a greater range or depth of public services, these cities impliedly strike a bargain that other territories would receive excluded people and provide for their service needs. It is not simply a vertical redistribution argument—i.e., that a higher level of government like the state might have to bear some of the costs of services for low-wage workers—but a spatial one. Exclusivity in places like Miller’s minimal cities means that other cities must be non-exclusive—they must house people who cannot afford to create habitable, safe neighborhoods using their wages alone.

This implicit bargain worked like this: In low-density areas with high-value residential properties, landowners incorporated to “gain[] control of the zoning function”²⁷² and to stifle demand for multifamily housing, because affordable housing would bring new service needs and service consumers.²⁷³ In so doing, the metropolitan area spread out spatially, thereby facilitating sprawl, fuel consumption, traffic congestion, and greenhouse gas emissions.²⁷⁴ They also externalized some of the costs of government, services, and land uses, and allowed landowners to avoid property taxation.²⁷⁵ Furthermore, landowners in Lakewood Plan cities externalized some share of the costs of services they

271. See *supra* notes 239-241 and accompanying text.

272. MILLER, *supra* note 16, at 85.

273. See *id.* at 97-98.

274. See *id.*

275. *Id.* at 22-29, 34-62. This story of externalization of the costs of poverty and low-wage workers, and the resulting interdependence of rich and poor municipalities within metropolitan regions, has been a focus of scholarship in urban law and policy for decades. See, e.g., GERALD E. FRUG, *CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS* (1999); Richard Briffault, *The Local Government Boundary Problem in Metropolitan Areas*, 48 STAN. L. REV. 1115 (1996); Sheryll D. Cashin, *Localism, Self-Interest, and the Tyranny of the Favored Quarter: Addressing the Barriers to New Regionalism*, 88 GEO. L.J. 1985 (2000); Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841 (1994); Laurie Reynolds, *Intergovernmental Cooperation, Metropolitan Equity, and the New Regionalism*, 78 WASH. L. REV. 93 (2003); David Dante Troutt, *Ghetoes Made Easy: The Metamarket/Antimarket Dichotomy and the Legal Challenges of Inner-City Economic Development*, 35 HARV. C.R.-C.L. L. REV. 427 (2000).

consumed by the county onto older cities in the region that also relied on county services.²⁷⁶

The prosperous, anti-tax minimal cities of Miller's account thus had the effect of sorting the population of metropolitan areas according to "tax avoiders" and "service seekers," often tracking underlying class differences between the two. It sorted by race as well, due to racially exclusionary behavior combined with the wealth gap among racial groups.²⁷⁷ Spatial sorting by income affects the distribution of crime, with some jurisdictions needing to spend more on law enforcement to guarantee an inferior level of public safety.²⁷⁸ In short, cities with poor people tend to have poorer tax bases, as well as higher service demands.²⁷⁹ When bad things like crime polarize spatially, so too do good things—land uses that generate tax revenue gravitate to low-tax jurisdictions, meaning that minimal cities are more competitive for the kind of growth and development that reinforce low taxes and quality services.²⁸⁰

By contrast, like Long Beach in the 1970s, the new minimal cities have faced extensive cutbacks on basic services during contractions in revenues. They became minimal via deep cuts over time, not by institutional design. Whereas Miller's minimal cities had a model of governance and a residential population that was designed, *ab initio*, to rely on privately provided shared goods, new minimal cities remained accessible to heterogeneous residential populations with lower median incomes. As these cities collapse into the municipal equivalent of "subsistence level," they leave a high-poverty residential population to go without basic collective functions.

276. See MILLER, *supra* note 16, at 22-23 (describing county governments' political incentives to offer subsidized service rates to Lakewood Plan cities, i.e., to keep service prices below cost via subsidization by general revenues collected from across the county's territory, including from older central cities).

277. See *id.* at 132-40; see also Cashin, *supra* note 275, at 1990 ("[T]he balkanization of the metropolitan population into separate jurisdictions, increasingly stratified by income and usually stratified by race, has changed the nature of political discourse . . ."); Ford, *supra* note 275, at 1850 ("[T]he now-color-blind society confronts a situation of almost complete segregation of the races—a segregation that also fairly neatly tracks a class segregation (because blacks earn, on average, far less than whites, in part because of their historical isolation from the resources and job opportunities available in the wealthier and socially privileged white communities)."); Troutt, *supra* note 275, at 507 ("The resilience of discrimination at the intersection of race and class places further calls for the instruments of legal redress.").

278. See MILLER, *supra* note 16, at 140-45.

279. See *id.* at 150-51.

280. See *id.* at 146-62.

None of this comes as any surprise. For decades, it has been widely known that “the benefits of metropolitan fragmentation have not been universally distributed. While the homogeneous upper-income cities have benefited from effective demand articulation mechanisms and from strong resource bases, homogeneous low-income cities have been increasingly unable to meet demands for municipal services adequately.”²⁸¹ As Gary Miller found long ago, “low-income cities have also been low-resource cities,” which has been “detrimental to low-income individuals.”²⁸² Even if this were acceptable in terms of formal efficiency (i.e., some are made better off more than the degree to which some are made worse off), it would warrant correction for these inequities separately, i.e., through external subsidization and redistribution.

That, of course, has been the idea behind several decades of state and federal spending targeting high-poverty cities. Since the passage of the first municipal bankruptcy statute in the Great Depression, and as reinforced profoundly by events along the way like the riots of the 1960s and 1990s, lawmakers and voters alike have been well aware of cities in trouble. Presidents have made the issue a setting for policymaking, from Johnson’s National Advisory Commission on Civil Disorders (the Kerner Commission), to Clinton’s Empowerment Zone Program, to Obama’s White House Office of Urban Affairs. Intergovernmental transfers to poor local governments through grantmaking, tax credits, and bonding authority, however, have been declining in absolute and relative terms since the 1980s. And they are minor in comparison to the countervailing forces and public investments that further the decline of older industrial cities. These forces are more powerful by orders of magnitude—including mass federal subsidization of development in the West and the South, automation, globalization, and the defunding of federal investments in non-highway infrastructure.²⁸³

At the local and regional level, policymakers and scholars concerned about urban decline have spent decades pursuing a redistributive agenda to overcome the racial and socioeconomic polarization among municipalities within single regions. They have sought to improve public services in poor areas using

281. *Id.* at 183.

282. *Id.* at 182.

283. See SUGRUE, *supra* note 30, at 6, 125-41; TEAFORD, *supra* note 87, at 211-58. In addition to proving inadequate, the subsidies for declining cities have been imprecise. In Miller’s terms, every wealthy taxpayer pays into such subsidy pools regardless of whether he already pays local taxes to an economically heterogeneous city (e.g., a resident of the Bel-Air neighborhood in the city of Los Angeles) or avoids that initial layer of local redistribution by residing in a wealthy, independent city (e.g., a resident of the city of Beverly Hills).

mechanisms like municipal services equality litigation, the centralization and redistribution of public revenues, local government consolidation, interlocal voting plans, fair share housing, and other ideas all sitting under a broad banner of “regional equity.”²⁸⁴ Despite some notable successes, there has been a great deal of disappointment, particularly with regard to the regional redistribution of tax revenues.

The diminishing public sector in the new minimal cities thus violates the bargain struck between low-tax-effort, high-asset cities and their high-tax-effort, low-asset neighbors, in an era when state and federal fiscal crises, as well as revenue limits, cut the availability of external sources of subsidization and market correction. Reforms to shrink government in prosperous cities offer important, legitimate laboratories to test a small local public sector, but their residents face questions about which service provider or locational choice is optimal, rather than whether their households can access a shared good under any circumstance. Because the original minimal cities arose in prosperous suburbs, it warrants pause and reflection as their minimal services model shows up in cities with concentrated poverty. The shrinking of local government in high-poverty cities describes a troubling experiment with prosperous people’s government for poor people.

All cities cannot be minimal cities in urban economies with low-wage workers and cycles of rising unemployment, unless we have given up on social mobility for individuals and habitability for communities. That leads to the next question to which I now turn: When states are unable to secure public safety and thus shrink below the level of a “nightwatchman state,” do we have legal commitments to habitability that would put a floor under these shrinking governments?

B. Doctrinal Boundaries of Residents’ Interests

Legal proceedings governing insolvency must reconcile the competing financial claims of two groups of parties: the city (including its residents and current employees) and its creditors (including retirees, current employees with vested benefits, and bondholders). While there is rich and valuable research exploring how bond and labor creditors do fare and should fare in this balancing,²⁸⁵ there is far too little focused on the financial claims of the city.

284. See Anderson, *supra* note 265, at 1428-30 (providing a history of this line of legal and policy scholarship).

285. See, e.g., Jack M. Beer mann, *The Public Pension Crisis*, 70 WASH. & LEE L. REV. 3 (2013)

The task of this Section is to articulate the legal issues that lie on the city's side of the line. I will root this discussion in Chapter 9 bankruptcy law, because receivership programs vary somewhat from state to state, and a recitation of their precise rules would be excessively technical for the present setting. All receivership programs, however, face the same threshold issue of eligibility and the same main-stage issue of recovery planning, and all of them articulate these issues in ways similar to those described below for Chapter 9.

A city's interest in an insolvency intervention boils down to this: What is the starting "contract" liability that cities bring to the bargaining table in a dispute with creditors over the allocation of revenues and assets, and what is the degree to which a bankruptcy plan can reduce that amount? This challenge arises at two stages: (1) the decision regarding whether a court or state receiver should intervene in local finances (an eligibility matter), and (2) if it does intervene, the balancing of creditors' interests against residents' interests in the city's recovery plan. At both junctures, decisionmakers must determine how much more a debtor city could reduce current spending in order to divert more revenues to creditors.

Eligibility proceedings require decisionmakers to determine whether a city requires outside intervention to handle its debts. Not all struggling fiscal entities need a reorganization of debt or a third-party intervention to manage spending. Some can muddle through on their own, cutting deals with creditors on a case-by-case basis to the extent possible, facing creditor lawsuits in courts, and extracting new revenues from residents. This will usually mean surrendering assets or specific streams of revenue to creditors, either because those assets were collateral to the loan (as in some bond instruments) or because a creditor successfully obtains a judgment against the city in court and

(considering state reforms to address pension funding shortfalls and the wisdom of bailouts to avoid the breach of pension contracts); Ellman & Merrett, *supra* note 126 (discussing bankruptcy as a potential solution for municipalities to use to address pension funding shortfalls); Gillette, *supra* note 120, at 304-08 (evaluating empirical evidence of contagion effects on bond markets); Walter W. Miller, Jr., *Municipal Bonds in Chapter 9 Adjustment Proceedings*, WESTLAW J. BANKR., Mar. 14, 2013, at 1 (explaining bondholder rights in a municipal bankruptcy); Dan Seymour & Anne Van Praagh, *Detroit Bankruptcy May Change How Other Distressed Cities Approach Their Pension and Debt Obligations*, MOODY'S (July 26, 2013), http://media.mlive.com/news/detroit_impact/other/Detroit%20Bankruptcy%20May%20Change%20How%20Other%20Cities%20Approach%20Pension%20and%20Debt.pdf (assessing the Detroit bankruptcy's impact on municipalities' fidelity to bond liabilities). For thoughtful engagement with the tradeoffs between residents and bondholders in bankruptcy and their relative strengths as fiscal monitors, see Clayton P. Gillette, *Bondholders and Financially Stressed Municipalities*, 39 *FORDHAM URB. L.J.* 639 (2012).

the asset is attached for payment of that judgment. At some point, muddling through creates a collective action problem: when each creditor individualistically pursues their interest in full repayment, they force inefficient liquidation of city assets and spending cuts that hurt the city's ability to pay other creditors and make creditors as a whole worse off. Intervention is arguably needed at this point in order to create a plan that systematically maximizes the share allocated to each creditor and achieves a fair balance among them. Intervention is also justified in bankruptcy because liquidation of a city is not possible. Just like an individual debtor in a Chapter 7 or 13 personal bankruptcy, "[c]ities cannot go out of business."²⁸⁶ They exist in land and space, and the dissolution of their legal boundaries would simply pass the bill for their debts and spending needs to a county or neighboring city. Chapter 9 therefore is not geared towards dissolution but rather reorganization—"to enable a financially distressed city to 'continue to provide its residents with essential services such as police protection, fire protection, sewage and garbage removal, and schools' . . . while it works out a plan to adjust its debts and obligations."²⁸⁷

It is states that decide whether their cities can appeal to a federal bankruptcy court for intervention.²⁸⁸ Once in court, however, Chapter 9 instructs bankruptcy judges to assess a city's eligibility for relief. This eligibility question turns on whether the city is insolvent, which is defined as the failure or inability to pay bona fide debts as they come due.²⁸⁹ Insolvency is evaluated using a cash-flow analysis specially developed for Chapter 9, which assumes the need to fund current services, just as an individual debtor in a Chapter 7 or 13 bankruptcy must still fund housing, food, and subsistence expenses. Since Chapter 9 thus builds in some degree of protection for ongoing spending on current residents, cities seeking bankruptcy protection justify court intervention in terms of the city's inability to make further cuts to basic services without risking "minimum health and safety." Interestingly, this language reflects cities' authorization to serve "health, safety, and welfare" (i.e., local governments' so-called police powers, delegated by their state governments), but it has reframed that authorization as a duty. Pursuant to their authorization to serve health, safety, and welfare through regulation and the spending of tax

²⁸⁶. *In re City of Bridgeport*, 129 B.R. 332, 336 (Bankr. D. Conn. 1991).

²⁸⁷. *Id.* at 336-37 (quoting H.R. REP. NO. 1011 (1988), reprinted in 1988 U.S.C.C.A.N. 4115, 4116).

²⁸⁸. See *supra* notes 121-122 and accompanying text.

²⁸⁹. See 11 U.S.C. § 101(32)(C) (2012).

revenues, this reasoning goes, local governments are in fact obligated to protect their citizens' health, safety, and welfare – at least to some degree.

Stockton's eligibility arguments are a case in point. Its brief on its qualifications for bankruptcy stated:

During the past four years, in response to the declining economy, Stockton has out of necessity reduced or eliminated funding for almost all General Fund programs and services below levels that the City views as minimally acceptable. Little is left to cut in these areas, and what reductions could be made are not nearly enough to even approach solving the City's financial difficulties. The City is not only already cash-insolvent. It is service-insolvent as well.²⁹⁰

Further cuts, the brief warned, would “endanger the welfare and safety of the city's residents and businesses,” especially given the “state of crisis” of public safety in the city.²⁹¹

Similar arguments are made to the general public as well. Describing the decision to declare bankruptcy, for instance, the City Manager of Stockton explained in a radio interview how after three years of spending cuts and privatizations, the city “got to the point where we couldn't cut anymore while still maintaining the health and safety of our citizens.”²⁹² Michigan's Governor and Detroit's Emergency Manager (a state-appointed receiver for the city) offered equivalent justifications for their petition for municipal bankruptcy. The Governor described the city's inability to “meet its basic obligations to its citizens” and pointed to statistics on the city's unemployment and homicide rates, emergency response times, abandoned structures, and other local conditions.²⁹³ He emphasized that this inability to meet needs affected creditors: “reducing spending on basic services,” he wrote, “would only decrease the population and tax base further” and compound the inability to

290. City of Stockton's Memorandum, *supra* note 170, at 36. The city's eligibility determination emphasized this service insolvency, defining it as a “municipality's inability to pay for all the costs of providing services at the level and quality required for the health, safety, and welfare of the community.” See *In re* City of Stockton, Cal., 493 B.R. 772, 781 (Bankr. E.D. Cal. 2013).

291. City of Stockton's Memorandum, *supra* note 170, at 36.

292. *State of Emergency: Cities in Financial Crisis*, NPR (Mar. 4, 2013), <http://www.npr.org/2013/03/04/173440433/state-of-emergency-cities-in-financial-crisis>.

293. Petition for Relief, Exhibit A, Governor's Written Approval of Recommendation at 2-3, *In re* City of Detroit, Mich., No. 13-53846 (Bankr. E.D. Mich. July 18, 2013).

fulfill promises to creditors.²⁹⁴ Emergency Manager Kevyn Orr similarly explained: “Freeing up the cash flow allows us to focus on the key issue . . . the health, safety, and welfare of 700,000 citizens in the city of Detroit.”²⁹⁵

Seeking to block a city’s reorganization and reduction in debt, creditors of Vallejo, Stockton, San Bernardino, and Detroit all argued that their city debtor could still sell additional assets and reduce spending, and thus did not satisfy Chapter 9’s requirement of fiscal insolvency. Yet bankruptcy courts upheld all four cities’ qualifications for Chapter 9. In Vallejo, for instance, the bankruptcy court and a bankruptcy appellate panel for the Ninth Circuit found that the city could not cut services back any further. The panel held:

Vallejo already cut much of its discretionary budget. Vallejo reduced employee rolls and continuously cut funding to services like the senior center, library and parks. Alarming, most of Vallejo’s vehicles were near the end of their expected lives and many of the vehicles had already been extended past that life. Vallejo could have cut more services, but the court found that it had reduced expenditures to the point that municipal services were underfunded. More importantly, the court found further funding reductions would threaten Vallejo’s ability to provide for the basic health and safety of its citizens.²⁹⁶

Though these constituted legal holdings backed up with factual findings regarding prior funding cuts, aging city equipment, and other bits and pieces, words like “underfunded” or “basic health and safety” were not defined specifically in either opinion (for instance, “underfunded” relative to what?). In the opinion holding Stockton eligible for bankruptcy, the court’s decision referenced a specific policing ratio (Stockton’s number of officers per 1,000 residents compared to the comparable national statistic) and the city’s troubling crime rates, but otherwise similarly relied on broad language about “public safety” and minimum standards.²⁹⁷ The court also emphasized the concept of “service delivery insolvency”—the indication that without

294. *Id.* at 3.

295. Matt Helms, *Detroit Bankruptcy Upside: City Services Will Improve*, DETROIT FREE PRESS, July 28, 2013, <http://www.freep.com/article/20130728/NEWS01/307280080/Orr-bankruptcy-Detroit> (video of press conference).

296. *In re City of Vallejo*, 408 B.R. 280, 294 (B.A.P. 9th Cir. 2009), *aff’d* *In re City of Vallejo*, No. 08-26813-A-9, 2008 WL 4180008 (Bankr. E.D. Cal. Sept. 5, 2008).

297. *In re City of Stockton*, Cal., 493 B.R. 772, 780-81 (Bankr. E.D. Cal. 2013).

intervention, city services would continue to fall below acceptable levels.²⁹⁸ In Detroit, the court found a series of facts about the state of the city's services and its recent budget cuts that are stunning enough to speak for themselves about the city's insolvency, but nonetheless do not reveal any baseline ideas about the extent of services the city *should* enjoy.²⁹⁹

Once decisionmakers deem a city eligible for intervention, an insolvency proceeding comes to the second juncture where minimum standards issues loom large: the prospective recovery plan. In addition to other requirements, a bankruptcy court must be satisfied that a municipality's bankruptcy plan is "feasible."³⁰⁰ Under Chapter 9, this standard includes, and then goes beyond, the Chapter 11 expectation that the debtor will not need another bankruptcy reorganization in the near future, i.e., that the plan "offers a reasonable prospect of success and is workable."³⁰¹ Under Chapter 11, a corporation following a bankruptcy reorganization must be able to comply with all applicable regulations related to safety, the environment, labor, and so forth. In other words, the post-bankruptcy entity must be able to afford prospective regulatory compliance, or the entity cannot be preserved.³⁰² Chapter 9 incorporates this idea of reasonable ongoing costs as well, requiring a Chapter 9 court to "evaluate whether it is probable that the debtor can both pay pre-petition debt and provide future public services at the level necessary to its viability as a municipality."³⁰³ What service levels do cities need to meet that standard?

298. *Id.* at 789-90.

299. *City of Detroit*, 2013 WL 6331931, at *25-27.

300. See 11 U.S.C. § 943(b)(7) (2012).

301. Chapter 11's feasibility requirement is located at 11 U.S.C. § 1129(a)(11) (2012). See Rosemary E. Williams, *Confirmation of Plan of Reorganization by Business Entity Under Section 1129 of the Bankruptcy Code*, 94 AM. JUR. 3D 1 *Proof of Facts* § 38 (2013) (discussing the feasibility requirement); see also ALAN N. RESNICK & HENRY J. SOMMER, *COLLIER ON BANKRUPTCY* ¶ 1129.02 (16th ed. 2009 & Supp. 2011) (discussing the requirements of § 1129).

302. See *In re TCI 2 Holdings, LLC*, 428 B.R. 117, 175-78 (Bankr. D.N.J. 2010); Williams, *supra* note 301.

303. *In re Mount Carbon Metro. Dist.*, 242 B.R. 18, 35 (Bankr. D. Colo. 1999); see also *In re Corcoran Hosp. Dist.*, 233 B.R. 449, 453-54 (Bankr. E.D. Cal. 1999) (providing a cursory discussion of whether a hospital district's Chapter 9 plan was feasible); *In re City of Colorado Springs Spring Creek Gen. Improvement Dist.*, 177 B.R. 684, 695-96 (Bankr. D. Colo. 1995) (holding, after a cursory discussion, that a general improvement district's Chapter 9 plan was not feasible); *In re Sanitary & Improvement Dist.*, 98 B.R. 970, 971-72, 975 (Bankr. D. Neb. 1989) (providing a cursory discussion of whether a sanitation district's

So few general purpose city governments have gone through a Chapter 9 that precedent on this question is limited. Much more research on this issue is needed, because bankruptcy court documents themselves convey little reasoning as to the concrete meaning of general commitments to “basic services,” “health and safety,” and “feasibility.” I find it surprising to report that neither Chapter 9 case law nor state law regulations or guidelines define legally adequate service levels—things like the advisable number of firefighters needed for a given unit of population or a given incident rate. It would seem that city officials, bankruptcy courts, and state receivers are completely on their own in trying to apply these terms. Decisionmakers are stumbling through the issue of minimum service levels guided only by judgment, discretion, and politics. After the current cluster of bankruptcies concludes (Stockton, San Bernardino, and Detroit), further research, including empirical work, is warranted on exactly how cities draft their plans—including the extent of services funded, any concrete metrics used to determine what “basic” staffing levels mean, and cities’ service priorities, as expressed in their inter-service compromises. That research would provide valuable guidance for other cities facing hard times, as well as for the courts and receivers asked to shepherd them through.

Beyond Chapter 9 bankruptcy, these same challenges, similarly unmoored by specific guidelines, arise in receivership programs as well. The express purpose of Michigan’s emergency manager law is “to preserve the capacity of local units of government . . . to provide or cause to be provided necessary services essential to the public health, safety, and welfare.”³⁰⁴ Pennsylvania’s receivership law seeks to “develop recovery plans and to provide emergency grants and loans to restore basic municipal services to minimal levels consistent with public health and safety.”³⁰⁵ By law then, as in bankruptcy, receivers are charged with providing “necessary services.” To help judges and public officials muddle through the question of what those services are, the next Section thinks through some guiding principles.

Chapter 9 plan was feasible); *Key Provisions of Chapter 9 in Plan Confirmation: Feasibility*, ADVANCED CH. ELEVEN BANKR. PRAC. § 15.49 (2013) (explaining Chapter 9’s feasibility standard).

304. 2012 Mich. Pub. Acts 436 pmb1.

305. PA. GOVERNOR’S CTR. FOR LOCAL GOV’T SERVS., MUNICIPAL FINANCIAL RECOVERY ACT 25 (3d ed. 2001).

C. *Minimum Standards for Urban Life*

American law rarely provides positive rights, at least not ones that are constitutionally protected. Battles for a federal right to housing and a right to sustenance or minimum welfare were lost long ago, and few state constitutions go much further to protect positive rights related to housing, welfare, or poverty.³⁰⁶ Unless a landowner can show that they specifically were targeted for exclusion from an existing system (i.e., an equal protection argument), there is no strict legal basis for claiming a “right” or “entitlement” to things like a sewer connection, even if a residential lot is too small to obtain a permit for a private septic system. With that in mind, it is particularly intriguing that when a city enters insolvency, both state and federal law assume that city residents are entitled to some degree of basic services provided by the government. Past cases assume that residents – not as individuals, but as a class – are entitled to have a 911 emergency system that dispatches police officers and firefighters, along with solid waste pick up, wastewater treatment, and other basics. Without resting on either extra-legal natural rights or affirmative, positive rights articulated in constitutional text, Americans do seem to have legally defensible, affirmative rights to basic local services in the context of insolvency law.³⁰⁷ This principle holds even when rights-holders cannot afford to purchase those services at cost, i.e., even when residents are not defined simply as “pay-for-what-you-get” taxpayers.

As irresistibly interesting and morally compelling as I find that “right” to be, what does it mean in practice? While creditors have contracts that monetize the city’s obligations to them, how can courts or receivers monetize what current residents need and what assets they are entitled to hold for their long-term fiscal health? This Section touches on that difficult problem. This inquiry presents an opportunity to put social contract theory into action – a chance to explore and define the terms on which society expects government to provide

306. *But see* EMILY ZACKIN, *LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA’S POSITIVE RIGHTS* (2013) (finding interesting examples of state constitutional positive rights in the context of education, worker’s rights, and the environment).

307. For a thoughtful discussion of positive rights that are neither constitutionally protected nor extra-legal “natural” rights, see Paul A. Diller, *Combating Obesity with a Right to Nutrition*, 101 *GEO. L.J.* 969, 969, 990 (2013) (using a “nontraditional” positive rights framework “to mean any individual or group claim to resources or entitlement to protection that is recognized, even indirectly, by law,” for instance, “as an indirect constitutional right; as a common law concern; through the public-utility paradigm; and as a matter of legislative grace”).

services and protection in exchange for individuals' obedience to the state. Such an inquiry is no small matter, and a complete exploration of it would require more ink, more authors, and more localized political debate than is appropriate here. Instead of attempting to answer this question comprehensively, I offer a set of heuristics for judges, receivers, and citizens to use in developing their own locally appropriate priorities and values.

Efficiency and economic perspectives. At first glance, creditors would seem to have the following preferred formulation to measure resident entitlement to basic services: What is the minimal level of services that can be provided so as not to undermine creditors' collective and long-term interests in city revenues? Up to a certain point, services are in both creditors' and residents' interests, because they can protect (or even increase) the property values used as the basis for property tax assessments that generate revenues for debt service. Indeed, the ongoing provision of basic services is an absolute necessity in retaining residents and businesses who generate any kind of tax and fee revenue. Or put in more technical efficiency terms: courts and receivers could commit to providing services up to the level where the marginal cost of an additional dollar in services is equal to the associated marginal increase in public revenue from property taxes at the maximum rate of taxation permitted under state law or sustainable as a matter of economics.

While it is likely that some courts think about minimal services in this way, it is a deeply flawed measure when it stands alone. For one thing, strictly applied, it would lead to terrible consequences for the distribution of services within the city, because it would call for the cessation of services in any areas of a city that are no longer generating tax revenues in excess of the cost of services, i.e., in very poor areas with depressed property values. Should a bankruptcy court maintain policing, fire, and sanitation services only in those commercial zones and neighborhoods that generate surplus tax revenue? The creditors' efficiency formula would suggest that the city should turn off services to revenue-negative areas, except insofar as needed to contain public safety spillover effects that harm revenue-positive areas. I cannot imagine any credible public decisionmaker of any political orientation saying that public services should cease in the highest poverty neighborhoods of our brokest cities. Indeed, the commitment to preserve health, safety, and welfare during an insolvency is citywide, and would seemingly prohibit a pure application of this efficiency thesis.

However, when neighborhoods are substantially depopulated (e.g., by more than eighty percent, as in large swathes of residential Detroit) rather than simply poor, a creditors' efficiency metric might well favor the decommissioning of underground utilities and some aboveground services to those areas. Though it is more sensible in this setting, it is not a practical

measure for short-term savings. Pulling neighborhoods off the grid of services is a long-term planning matter that requires not only the re-engineering/modification of city utility systems, but also sensitivity to remaining residents' interests—for reasons of Takings Clause liability if not humanitarian concerns.³⁰⁸ Measures to protect residents might include opportunities for resident relocation, or household grants to establish alternate mechanisms for basic household water and sanitation for those who stay. Detroit is trying to achieve these goals, as discussed in Section II.C, through a systemic land-use planning process involving philanthropic investments and extensive community consultation. It would be problematic if an unelected official like a receiver or bankruptcy judge abruptly pulled neighborhoods off the grid of rapid response emergency services and sanitation, for reasons of both public safety and democratic accountability.

A warranty of habitability for neighborhoods. Consistent with their charge to protect health and safety during a fiscal crisis, receivers and courts do and should go beyond a creditors' efficiency metric to consider services as a humanitarian matter—to sustain a commitment to all citizens within a city's borders, regardless of their short-run economic potential as taxpayers. For reasons of safety, and beyond that, human dignity and flourishing, decisionmakers must think of health, safety, and welfare as belonging to all residents. At its heart, citywide spending in pursuit of meaningful health, safety, and welfare amounts to a commitment to habitability. It is a rubric that sounds in human rights, moral duties, social contract theory, and social justice, and it stands for the idea that some urban conditions are intolerable.

Habitability invites reflection about the just city, not simply the solvent one. While the anti-tenement movement of the early twentieth century wrote building codes, and the anti-poverty movement of the 1960s and 70s established a warranty of habitability to protect tenants,³⁰⁹ we have never had a collective public conversation about habitability at larger neighborhood scales. We need such a discourse—consideration of the neighborhood-scale version of the building codes and safety principles³¹⁰ that apply to individual structures

308. See Ben Beckman, Note, *The Wholesale Decommissioning of Vacant Urban Neighborhoods: Smart Decline, Public-Purpose Takings, and the Legality of Shrinking Cities*, 58 CLEV. ST. L. REV. 387 (2010) (exploring the Takings Clause issues that might arise from proposals to pull neighborhoods off the grid of urban services).

309. See David A. Super, *The Rise and Fall of the Implied Warranty of Habitability*, 99 CALIF. L. REV. 389 (2011) (providing a descriptive and normative account of the tenants' rights revolution, which established an implied warranty of habitability in residential leases).

310. Where building codes are unavailable or inadequate to protect health in any given case,

and are enforced by city building inspectors as well as by landlord-tenant law's warranty of habitability or covenant of quiet enjoyment. Instead of focusing on plumbing and wiring and the like (matters of safety and comfort for individual structures), urban-scale habitability is a question of collective conditions, such as crime rates, fire risk, emergency response times, access to clean water, access to wastewater disposal systems, and street lighting. As I describe below, land use laws (for instance, laws governing sanitation and safety in new subdivisions) provide a wide array, albeit a fragmented one, of inputs from which to assemble and reason a broad view of neighborhood scale habitability.

Habitability should go beyond landlord-tenant law and into the domain of local government law, creating a frame for evaluating the providers of public services, whether they are local governments or private contractors.³¹¹ Just as urbanization required a departure from *caveat lessee* principles for buildings (because multifamily housing meant that tenants could not make repairs on critical parts of their buildings without trespassing on other tenants' property), so too does urbanization require collective investments in shared utilities that individual residents do not have the access rights, let alone the funds, to procure, install, or maintain. This is most obviously true of sanitation systems, but it is also the case for policing in neighborhoods that cannot afford private security systems.

Habitability is first and foremost a commitment to the safety and comfort of a neighborhood's residents, rather than the city's *fisc per se*. It is about the people who live in a community, not just the potential of the soil beneath their feet to generate higher public revenues. It should be obvious that local governments must serve their people; they are caretakers of local health and safety on behalf of their region, state, and society. Mobility out of truly

courts assessing the habitability of a dwelling use metrics like a tenant's "safety or health." See, e.g., *Hilder v. St. Peter*, 478 A.2d 202, 208-09 (Vt. 1984).

311. This argument picks up on earlier conversations about equity in the context of public services. See Anderson, *Mapped Out of Local Democracy*, *supra* note 25, at 942-43 (noting the need to move towards a minimum standards framework for public services, but leaving that issue for another day); see also CHARLES M. HAAR & DANIEL WM. FESSLER, *FAIRNESS AND JUSTICE: LAW IN THE SERVICE OF EQUALITY* 173-89 (1987) (arguing that local governments might be liable to provide equal services under common law liability for common carriers); Clayton P. Gillette, *Equality and Variety in the Delivery of Municipal Services*, 100 HARV. L. REV. 946 (1987) (reviewing CHARLES M. HAAR & DANIEL WM. FESSLER, *THE WRONG SIDE OF THE TRACKS: REVOLUTIONARY REDISCOVERY OF THE COMMON LAW TRADITION OF FAIRNESS IN THE STRUGGLE AGAINST EQUALITY* (1986)).

disadvantaged neighborhoods is extremely rare, and residents of a declining city may have no realistic housing choices.³¹²

Governor Snyder's authorization for Detroit's bankruptcy, quoted in the prior Section, expressed a habitability commitment. It articulated residents' interests as separate and distinct from creditors' interests in the stabilization of city revenues. Yet politics and discretion should not be left undisclosed and unexamined to define what kind of commitment that entails. To do so would invite a creditors' efficiency metric to masquerade as a citywide habitability commitment, as politics draws public services toward neighborhoods with more economic influence.³¹³ The paragraphs below suggest objective inputs that could be used to assess neighborhood habitability.

Land use and subdivision laws. Land-use controls on new construction provide a first useful source of minimum standards for the built environment in a neighborhood. A subdivision, i.e., a neighborhood constructed from

312. For only the latest of many empirical inquiries into the limited mobility of the very poor out of high-poverty, racialized inner-city neighborhoods, see ROBERT J. SAMPSON, *GREAT AMERICAN CITY: CHICAGO AND THE ENDURING NEIGHBORHOOD EFFECT* (2012). The immobilizing effects of poverty were perhaps best expressed, however, by an anonymous poet. Years ago, when Chicago Mayor Jane Byrne moved into the public housing development Cabrini-Green in an effort to curb violence there, a resident posted an unsigned poem on the wall of her building that captured this reality. It read:

I live in Cabrini-Green.
I've met some of the finest people I've ever seen
While living in Cabrini-Green.
Most of you are afraid of our neighborhood.
But did you know? So are we.
But we are here, you see,
Not because we want to be.

Douglas E. Kneeland, *Chicago's Mayor Spends "Lovely" Night at Project*, N.Y. TIMES, Apr. 2, 1981, <http://www.nytimes.com/1981/04/02/us/chicago-s-mayor-spends-lovely-night-at-project.html>.

313. That describes the status quo, and it probably explains why officially reported average emergency response times in Detroit are fifty-eight minutes, but reporters covering response times in the highest poverty sections of the city document waits of three hours or more for home burglaries and other crimes. See, e.g., *Go Ahead, Take a Bath. It's the Detroit Police* (Fox 2 News television broadcast Aug. 13, 2012), <http://www.youtube.com/watch?v=n1KmTAY67zA> (running an experiment and conducting street interviews to show the abysmal police wait times in Detroit); see also Monica Davey, *Financial Crisis Just a Symptom of Detroit's Woes*, N.Y. TIMES, July 8, 2013, <http://www.nytimes.com/2013/07/09/us/financial-crisis-just-a-symptom-of-detroits-woes.html> ("Some [Detroit residents] laugh at the odds of an ambulance appearing promptly, if ever. In Detroit, people map out alternative plans instead, enlisting a relative or a friend.").

scratch, is subject to a city's planning and subdivision codes. These are regulatory mechanisms that require landowners to satisfy certain conditions prior to receiving a permit to build. For instance, developers of large-scale subdivisions might be required to install street lighting, construct sewerage infrastructure, build roads, and provide some amount of dedicated open space (like a park) for their residents. Specific standards then detail how to meet each of these requirements. Building, planning, and subdivision codes thus constitute a set of minimum standards that apply to anyone building something new. Such codes cannot be retroactively applied to preexisting development, so they do not apply to old neighborhoods. However, because they constitute the local view of what the private sector should provide as a basis for livable communities, subdivision codes say a great deal about that city's norms for safe, stable, and comfortable neighborhoods.

For instance, if a city requires one streetlight per fifty feet of sidewalk in a new subdivision of single-family homes, that figure can provide a starting point for a city's receiver or bankruptcy counsel to define the street lighting budget in an existing neighborhood funded in the city's bankruptcy plan. In other words, how much money does the city need to get that number of street lights operational again? While a receiver or bankruptcy counsel might choose to cut that commitment down by half or more—demonstrative of tightening the city's belt in a tough fiscal period or the rapid rate of a depopulation in a neighborhood—to ignore its benchmarks entirely leaves politicians, receivers, and judges simply to their instincts about fairness and public safety. A baseline like the subdivision code numbers gives the public and decisionmakers a way to discuss relative investments from one neighborhood to the next.

Building codes. A city's building codes are the backbone of habitability analysis for individual buildings, but so too are they important for neighborhood-scale analysis. Buildings and their blocks are synergistic: blight drags down the property values and quality of life for persons nearby.³¹⁴ Although, as noted, a city cannot retroactively apply its planning and subdivision controls to construction that predated those standards, cities can condemn buildings that create safety hazards. For instance, an abandoned

314. See, e.g., Brian A. Mikelbank, *Spatial Analysis of the Impact of Vacant, Abandoned and Foreclosed Properties*, FED. RES. BANK CLEVELAND (Nov. 2008), http://www.clevelandfed.org/community_development/publications/spatial_analysis_impact_vacant_abandoned_foreclosed_properties.pdf; Stephan Whitaker & Thomas J. Fitzpatrick IV, *The Impact of Vacant, Tax-Delinquent, and Foreclosed Property on Sales Prices of Neighboring Homes* (Fed. Reserve Bank of Cleveland, Working Paper No. 1123R, 2012), <http://www.clevelandfed.org/research/workpaper/2011/wp1123r.pdf>.

building that has been ransacked by “scrappers” seeking saleable materials might be at heightened risk of fire, or a roof collapse under snow accumulation. The city can declare such a structure unfit for occupancy or a safety risk (i.e., by posing an attractive nuisance to children, or harboring criminal activity), and issue a notice (along with fines) to the landowner that the structure constitutes a public safety hazard and the condition must be corrected or the building demolished within a statutorily-defined time period. If the necessary stabilization or demolition is not performed, the city can abate the hazard itself (including through demolition) and attach a lien to the property to assign those costs to landowners.³¹⁵ These procedures require public investments up front (whether they are carried out by public employees or private entities on contract with the city), and those costs may never be recovered in shrinking cities where property owners have abandoned their properties.³¹⁶ Such investments are nonetheless wise both in terms of residential habitability and the city’s long-term property tax revenues.

Environmental regulation. Environmental regulations provide habitability standards applicable to water and sanitation systems. In old neighborhoods, water and sewerage infrastructure may be outdated and inadequate, risking the contamination of soil, waterways, or drinking water. Environmental laws include measurements and standards to assess the longevity and service needs of old systems. Assessing the costs of the city’s compliance with these standards is a critical aspect of an insolvency or bankruptcy, because they help price the costs of the city going forward.³¹⁷ As a fiscal matter, planning for the costs of future regulatory compliance is necessary to make the city financially independent; as a humanitarian one, those investments will be necessary to keep residents healthy. Any version of habitability for Pittsburgh, for instance,

315. There have been some important and thoughtful critiques of code enforcement in poor areas, which can risk displacement of existing occupants unable to bring their dwellings to code. See Eric Damian Kelly, *Fair Housing, Good Housing or Expensive Housing? Are Building Codes Part of the Problem or Part of the Solution?*, 29 J. MARSHALL L. REV. 349, 354 (1996); Jane E. Larson, *Free Markets Deep in the Heart of Texas*, 84 GEO. L.J. 179, 191 (1995); Ezra Rosser, *Rural Housing and Code Enforcement: Navigating Between Values and Housing Types*, 13 GEO. J. ON POVERTY L. & POL’Y 33 (2006). In shrinking cities with high numbers of vacant dwellings, code enforcement inevitably must focus first and foremost on empty parcels, making it less likely to run into these concerns.

316. See *supra* notes 210–216.

317. This arises as part of the “feasibility” analysis described *infra* notes 301–304 and accompanying text.

will require realism about the state of its failing sewer system.³¹⁸ Like building code enforcement against low-income dwellings, this is a story of regulation without funding attached, in which safety standards are applied adversarially against an agent (a landowner in the former case, a public agency in the present one) who will have to locate substantial funds for abatement. Before, during, and after an insolvency, a city must both provide safe and functional infrastructure and comply with environmental regulation, thus making this part of the on-going cost of doing business for a city and one more source of standards for assessing residents' public safety needs.

Collective bargaining agreements. In the context of collective bargaining, unions often advocate for minimum staffing requirements—e.g., the number of firefighters who must be dispatched for a major blaze.³¹⁹ These provisions represent the union's own interests, of course, in keeping members safe and enlarging the workforce covered by the agreement, but they also represent one view of how many people it takes for a local service provider to protect the safety of workers and residents, and do so efficiently. Such clauses are often based on market research about service practices in other cities, as well as a union's technical knowledge of the nature of the work and the local public need. For staffing levels related to all aspects of city services (whether police, fire, public works, or administrative staff), unions are a source of information about norms among other cities.

Regional and statewide average service levels, and other empirical indicators. In addition to benchmarks for staffing levels within any given service, city planners need to determine appropriate service outputs as well as the prioritization among services competing for city funds. Specific metrics might include: average emergency response times across a state or region, per capita police and fire department staffing levels, or the benefits of public spending in terms of reduced private costs.³²⁰ National studies funded by think tanks and government agencies, by state and national local government leagues, and by unions provide extensive information of this kind.³²¹ Whatever the risks or

318. See *supra* notes 115-116 and accompanying text.

319. See, e.g., *In re City of Vallejo*, No. 08-26813-A-9, 2009 WL 9085533, at *1 (Bankr. E.D. Cal. Mar. 2, 2009) (regarding the enforceability of minimum staffing levels for city fire trucks, which were included in a collective bargaining agreement outside of the bankruptcy proceedings).

320. On this last metric of the public and private costs of crime, see, for example, Chalfin & McCrary, *supra* note 156; and *supra* text accompanying notes 156-166.

321. See, e.g., THE IMPACT OF THE ECONOMIC DOWNTURN, *supra* note 168; *The Library in the City*, *supra* note 179; Mark Ouellette, *Assessing Local Afterschool Resources and*

wisdom of relying on this data in the labor bargaining context, in an insolvency, documentation of regional and statewide average service levels provide a useful frame of reference for thinking about how a city's service levels measure up compared to other places.

Best practices in neighborhood stabilization. Habitability should be about more than urban containment and damage control; it should be about urban betterment. Dating back to at least the 1960s, researchers, public officials, policy advisors, think tanks, and others have been considering best practices for cities that house neighborhoods of concentrated poverty.³²² Broad consensus exists across these sources that to combat crime and stabilize communities, cities cannot simply hire more police. From community policing efforts to afterschool programs for teenagers, from job training to economic development efforts, cities have a role in providing, or at least facilitating, long-term investments that improve individuals' economic stability and flourishing. While such strategies promise gains over the long-term that may do little for creditors' short-term exposure to losses, a court thinking seriously about a city's feasibility should tolerate some degree of city investment or collaboration beyond fire control, policing, and sanitation.

Educational adequacy debates. Deliberation about equitable, adequate levels of public investment has long been underway in the context of education, and there is a great deal to be learned from that history. After decades of reform efforts focused on reducing the fiscal inequality among school districts,³²³ education advocates in the late 1980s began turning from equity to adequacy, arguing that the state need not eliminate disparities, but instead should serve

Needs, NAT'L LEAGUE CITIES (2003), <http://www.nlc.org/Documents/Find%20City%20Solutions/IYEF/Afterschool/assessing-afterschool-resources-strategy-gid-2003.pdf>; *NFPA 1720: Standard for the Organization and Deployment of Fire Suppression Operations, Emergency Medical Operations, and Special Operations to the Public by Volunteer Fire Departments*, NAT'L FIRE PROTECTION ASS'N (2010), <http://www.nfpa.org/codes-and-standards/standards-development-process/safer-act-grant/nfpa-1720>.

322. For a very important recent contribution to this research, including a literature review of leading research in this area, see *The Enduring Challenge of Concentrated Poverty in America: Case Studies from Communities Across the U.S.*, COMMUNITY AFF. OFFS., FED. RES. SYS. & METROPOLITAN POL'Y PROGRAM, BROOKINGS INST. (2008), http://www.frbsf.org/community-development/files/cp_fullreport.pdf.
323. Despite some notable achievements, the majority of lawsuits and state legislation left existing funding systems in place, and an educational achievement gap continued to widen between rich and poor districts. See Peter Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, 48 VAND. L. REV. 101, 143-44 (1995). Equity proved very difficult to define, let alone achieve.

as a guarantor of “an acceptable basic level of educational services.”³²⁴ Instead of equalizing the per capita funding for education, they began to argue for substantive minimum standards defined by district characteristics such as class sizes, teacher qualifications, and materials.³²⁵ They emphasized adequacy of inputs as well as performance outputs, but the inputs were substantive (such as guaranteed access to textbooks or maximum class size limits) rather than per capita funding rules. These efforts relied primarily on constitutional and statutory language regarding the right to a public education, but also on a wider moral platform that some levels of investment in education were simply too low to vindicate the values underlying a free public education. By drawing on instincts of compassion rather than inter-group competition and comparison, adequacy arguments proved less threatening.³²⁶

Adequacy theories in education have faced challenges, including thorny disputes about how to measure educational service levels, the correlation between spending and outcomes, and trade-offs among varying features of a public education.³²⁷ Nonetheless, by struggling through that debate, education has pushed past a vague commitment to provide public schools and toward a set of specific regulations subjected to public scrutiny and input.³²⁸

324. *Id.* at 112; see also Michael Heise, *State Constitutions, School Finance Litigation, and the “Third Wave”*: *From Equity to Adequacy*, 68 TEMP. L. REV. 1151, 1163 (1995) (noting that adequacy lawsuits focus on establishing a state constitutional entitlement to an adequate level of educational services).

325. Enrich, *supra* note 323, at 149.

326. *Id.* at 168-69 (“Adequacy arguments . . . concentrate on the appalling condition of the worst off schools and students, and they draw on deep-seated moral currents that measure a society by how well it treats its least fortunate citizens. The focus is not comparative, so concerns about negative impacts on the better off are not as readily aroused.” (footnote omitted)).

327. *Id.* at 150.

328. A similar move to an “adequacy” principle has arisen in other legal settings as well. In the context of prison conditions, the U.S. Supreme Court held that overcrowding in Californian prisons had led to a dramatic deterioration in conditions and services—so much so that mental health and medical services were legally inadequate under the Eighth Amendment and had “failed to meet prisoners’ basic health needs.” *Brown v. Plata*, 131 S. Ct. 1910, 1923 (2011). The decision reiterated prisoners’ entitlement to “basic sustenance, including adequate medical care.” *Id.* at 1928; see also *id.* at 1959 (Alito, J., dissenting) (acknowledging that the Eighth Amendment prohibits prison officials from depriving inmates of “the minimal civilized measure of life’s necessities” (quoting *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981))). Although this decision was specific to prisoners’ inability to provide their own sustenance and their consequent vulnerability, the holding created a legal obligation to define and enforce a prescribed set of minimum standards. *Id.* at 1928 (majority opinion).

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The rapid, sometimes radical deterioration of public services in high-poverty cities and counties challenges us to ask what a minimum standards regime in the context of land-use and housing would look like. What service levels are required to support the habitability of private land, household economic stability, and access to democracy?³²⁹ Municipal insolvency law itself should be an important frontier for the discussion about neighborhood habitability. If not an affirmative right, these concepts should at least find a place in our safety net for cities weathering fiscal crisis.

CONCLUSION: SHRINKING GOVERNANCE RESPONSIBLY

Lessons emerge from the shrinking governance in Detroit and the other postindustrial cities of the Rustbelt and Sunbelt. For a start, these cities teach that there is such a thing as a local government that gets too small, weak, and ineffective to provide basic habitability for a high-poverty population. In 2012, the Mayor of Rochester, New York captured this concern when he warned that “[b]efore we get to the point of financial failure, we will do substantial damage to the cultural and social environment that makes . . . cities an attractive place to live. Cultural and social bankruptcy precedes financial bankruptcy.”³³⁰ As argued in the prior Part, concepts of habitability must grow beyond landlord-tenant relations to include minimum services and neighborhood conditions. This Conclusion provides a normative essay and research agenda about some of the other major issues raised by a shrinking local state and municipal insolvency.

Principle 1: As the local public sector contracts in poor cities, common ways of thinking about “small” and “big” government do not get us far enough.

The current public discourse about government size, in my view, is so oversimplified as to add little of substance, at least where our new minimal cities are concerned. Recent years have seen a rising swell of criticism that local government has gotten too big. In Ohio, for instance, home to fifteen cities in

329. See Anderson, *Cities Inside Out*, *supra* note 25, at 1098 (theorizing these three as the core purposes and virtues of local government).

330. *New York Report*, STATE BUDGET CRISIS TASK FORCE 39 (2012), <http://www.statebudgetcrisis.org/wpcms/wp-content/images/NY-Report.pdf>.

state receiverships (three of which being large enough to study here) and many other high-poverty, postindustrial cities,³³¹ state legislators eliminated the state's estate tax in a bid to improve local government by shrinking it.³³² Eighty percent of the revenues from the estate tax went to local governments,³³³ and estimates put the annual revenue losses to local governments in the range of \$245 to \$275 million.³³⁴ Over one hundred local governments received over \$400,000 a year, and Cincinnati received \$13 million.³³⁵ Tea Party supporter Jay Hottinger of the Ohio House of Representatives celebrated the salutary impact the cuts could have on the functioning of government: "In the days and weeks and short months ahead, how state government and how local government functions, what services are delivered, and how those services are delivered are going to be transformed unlike they have ever been in the history of the state of Ohio."³³⁶

Like Representative Hottinger, think tanks, legislative advocacy groups, and scholars have increasingly viewed local governments as too big. They have

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331. See Alan Mallach & Lavea Brachman, *Ohio's Cities at a Turning Point: Finding the Way Forward*, BROOKINGS INST. (May 2010), http://www.brookings.edu/~media/Research/Files/Papers/2010/5/18%20ohio%20cities%20mallach%20brachman/0518_ohio_cities_mallach_brachman.pdf; *Restoring Prosperity: Transforming Ohio's Communities for the Next Economy*, BROOKINGS INST. (2010), http://www.brookings.edu/~media/Research/Files/Reports/2010/2/22%20ohio%20prosperity/ohio_report.pdf.
332. See Ashlea Ebeling, *Ohio About to Repeal Its Estate Tax*, FORBES (June 10, 2011, 4:55 PM), <http://www.forbes.com/sites/ashleaebeling/2011/06/10/ohio-about-to-repeal-its-estate-tax>; Ashlea Ebeling, *Ohio Repeals Its Estate Tax; Maine and Oregon Tweak Theirs*, FORBES (June 30, 2011, 12:36 PM), <http://www.forbes.com/sites/ashleaebeling/2011/06/30/ohio-estate-tax-repeal-maine-oregon-tweak-tax>.
333. See Emily Campbell, *Reform, Not Repeal, Best Option for Ohio's Estate Tax*, CENTER FOR COMMUNITY SOLUTIONS 2 (Feb. 7, 2011), http://www.communitysolutions.com/assets/docs/Major_Reports/State_Budget_and_tax/reform%20not%20repeal%20best%20option%20for%20ohios%20estate%20tax%200211.pdf; *Repeal of Ohio's Estate Tax Would Benefit Individuals, but Could Hurt Municipalities*, CALFEE, HALTER & GRISWOLD, LLP (Jan. 18, 2011), <http://calfee.com/repeal-of-ohios-estate-tax-would-benefit-individuals-but-could-hurt-municipalities>.
334. See Kevin M. Gilmore, *Don't Repeal Ohio Tax on Estates*, TOLEDO BLADE, Apr. 3, 2011, <http://www.toledoblade.com/Op-Ed-Columns/2011/04/03/Don-t-repeal-Ohio-tax-on-estates.html> (estimating losses at \$276 million).
335. Elizabeth McNichol, *Ohio Digs Its Budget Hole Deeper*, CENTER ON BUDGET & POL'Y PRIORITIES (June 30, 2011, 3:36 PM), <http://www.offthechartsblog.org/ohio-digs-its-budget-hole-deeper>.
336. Joe Guillen, *Estate Tax Repeal Among 18 Bills Ohio House GOP Introduces to Advance Agenda*, PLAIN DEALER, Jan. 11, 2011, http://www.cleveland.com/open/index.ssf/2011/01/estate_tax_repeal_among_18_bil.html.

emphasized excessive public spending, especially on redistribution; excessive regulation, particularly the deployment of eminent domain authority; grossly excessive compensation packages for public employees; high levels of unionization among public employees; and inefficiencies in the provision of services caused by the failure to privatize services and assets.³³⁷ Such criticisms add up to the hypothesis that local budgets are padded with waste and inefficiency, such that revenue losses can be offset by cost-cutting without diminishing the quality or quantity of services. In other words, these criticisms assume a bloated government baseline, from which a leaner, more effective model can be shaped by reducing revenues.

Waste, however, is not always the problem, especially in insolvent cities. Poor populations show a higher level of heterogeneity in their service needs and a weaker ability to purchase private substitutes for public services or facilities. Population loss is a separate but equally important concern, especially in those cities that suffered steep and immediate losses related to the foreclosure crisis. For cities with a debt overhang, such a formula necessarily assumes that it is only mismanagement or government inefficiency that renders its current cost-revenue picture untenable. Taking nothing away from the vigilance needed to control corruption and improve government efficacy—a proposition taken quite seriously by this Article and its future companion works—it nonetheless understates and distorts the effects and costs of poverty and population loss to ascribe all rising expenses to those factors.

So too do assumptions about big local bureaucracies belie consistent empirical evidence that low-income cities pay their employees less for higher risk, more challenging work. Recent economic analysis on the costs of law enforcement in major cities gives concrete evidence of this, as does extensive qualitative research into the management of insolvent cities.³³⁸ Improved competence in the local public sector within high-poverty cities requires

337. See, e.g., BOLICK, *supra* note 244; JAMES M. BUCHANAN & RICHARD A. MUSGRAVE, *PUBLIC FINANCE AND PUBLIC CHOICE: TWO CONTRASTING VISIONS OF THE STATE* (1999); FRED FOLDVARY, *PUBLIC GOODS AND PRIVATE COMMUNITIES: THE MARKET PROVISION OF SOCIAL SERVICES* (1994); THE VOLUNTARY CITY, *supra* note 244; Maria O'Brien Hylton, *Combating Moral Hazard: The Case for Rationalizing Public Employee Benefits*, 45 *IND. L. REV.* 413, 413-16 (2012); Don Bellante et al., *Vallejo Con Dios: Why Public Sector Unionism Is a Bad Deal for Taxpayers and Representative Government*, *CATO INST.* (Sept. 28, 2009), <http://object.cato.org/sites/cato.org/files/pubs/pdf/pa645.pdf>; see also Ellen Dannin, *Privatizing Government Services in the Era of ALEC and the Great Recession*, 43 *U. TOL. L. REV.* 503 (2012) (describing the American Legislative Exchange Council's role in promoting local government reforms).

338. See Hexter et al., *supra* note 43, at 22-23; *supra* text accompanying notes 156-166.

stronger managerial oversight, more competitive pay, and improved working conditions.

It may also require more staffing, or at least contracts with private sector providers that perform city administrative functions. Part II reminds us that inefficiency can be caused by understaffing, not just by poor employee management or performance. Some staffing levels are simply too low to deliver services effectively. This may be obvious with respect to emergency services, but it is true of administrative staff as well. City administrative departments, including building and land use departments, must be staffed at adequate levels to keep permits moving in the city, perform tax collection and tax foreclosures, modernize city data systems and public interfaces, re-regulate and plan the city to suit modern conditions, and facilitate the city's resale of tax-foreclosed property, thus allowing people to invest in land in the city.

Another necessary nuance in our government size debate is this: Public employment, depth of regulation, and government spending relate to each other dynamically. For instance, a government that has laid off large numbers of employees is smaller in its capacity as an employer, but if its laws are unchanged, it is not smaller as a matter of regulation. If a city cuts the staffing of its building and planning departments without changing its land-use and building safety laws, long processing delays will make development more costly while antagonizing permit seekers. Is this "smaller government" (in terms of employees) of greater public importance than efficient government? Or another example: if a city lays off police officers to the point that it can no longer respond to calls for police assistance unless there is a violent confrontation in process, must it change the underlying criminal code to avoid residents' sense that criminal law is empty and unenforceable? Sometimes, smaller is simply not smart. And anyway, is big law without big enforcement a big state, or a small one? Whatever we call it, it is an unpredictable, uneven way to apply public law.

Regulatory processes/stages must therefore modernize along with administrative layoffs and service shedding. Substantial staffing cuts in city administrative departments stoke public frustration and dissatisfaction when such cuts are not accompanied by administrative streamlining of some kind. Such dissatisfaction creates a vicious cycle of voter disappointment, new constraints on revenues, and additional staffing losses. During and before periods of hardship, cities (and the states who sit behind them) need to invest in the adoption of new technologies and regulatory simplification to promote government efficacy. Regulatory suspensions need not and should not cut into matters of basic public safety. But such deregulation should stop at the line of the public interest, avoiding the harm that would come to current residents by suspending environmental law in the name of economic development, for

instance, in cities already plagued by public health concerns relating to environmental conditions and contamination. While the need for economic development is high, so too do residents of post-industrial cities face heightened exposure and vulnerability to environmental harms.³³⁹ Regulation in the public interest is surely required to pursue safety, sanitation, habitability, environmental sustainability, internalization of business costs, transparency, and consumer protection. One can hope that, even in politically polarized times, pragmatic cities might find a moderate, non-partisan political agenda that could pursue deregulation of those laws serving the private interests without sacrificing public interest regulation.

Another tension accentuated in times of fiscal desperation is that between today's public sector and tomorrow's—or, put differently, the taxpayers of today versus those of tomorrow. Choosing smaller government now may mean bigger government later, and vice versa. Any kind of deferred spending or future revenue losses—whether generous post-employment benefits or a privatization contract with an upfront payout followed by lost revenues—necessarily requires more revenues and greater spending (“bigger” government) tomorrow, even as it might appear thrifty today. The reverse is also true. Spending money on a service now, like demolition and removal of blighted structures, may save in costs later, like firefighting followed by demolition and removal. And of course, this says nothing of the private costs that may be incurred by the neglect of necessary measures today. That same blighted structure that is not demolished today will drag down its neighbor's property values and create serious risk of injury or death associated with collapse, fire, or acts of crime and violence. When evaluating a proposal that will make government smaller, we should thus always ask: today, or tomorrow, or both?

Government that gets smaller in the wrong ways—for instance, through the deterioration of public safety and schools—simply fuels the attrition of residents and businesses; and that, in turn, means more individuals taking losses on their investments in a piece of land or an enterprise, further losses to

339. The City of Camden, for instance, houses only 15% of its county's population, but it accounts for more than 80% of the on-site releases and off-site transfers of toxic chemicals in the county. For the city and county population data underlying my calculations, see *American FactFinder*, *supra* note 248 (enter “Camden City, New Jersey” and “Camden County, New Jersey” in the search box) (last visited Dec. 3, 2013). For toxic release inventories, see *2011 Toxic Release Inventory Explorer: Fact Sheets*, U.S. ENVTL. PROTECTION AGENCY, http://iaspub.epa.gov/triexplorer/tri_factsheet_search.searchfactsheet (last visited May 16, 2013) (click on state in map and type in city or county name).

tax revenue, and further cuts to services. Instead, we need a way of sorting the dimensions of local government change and an assessment of the range and depth of a government's activity pursuant to its purposes.

Principle 2: Politicians, planners, scholars, and citizens involved in the shrinking cities land-use planning movement should take on a wider, broader conversation about shrinking governance.

For more than a decade, creative academic and policy work under the banner of the “shrinking cities movement” in the United States, Germany, and other nations has focused on the land-use challenges faced by post-industrial cities that have lost dramatic shares of their population in recent decades.³⁴⁰ As noted in Part I, lost population leaves behind excess structure and infrastructure, from vacant parking garages to empty streets, from oversized utility lines to obsolete industrial buildings. These surpluses drag down quality of life and property values, eventually reaching the point that owners are rational in under-maintaining or abandoning their properties, thus leaving behind structures susceptible to crime, fire, mold, collapse, and vermin. Such vacancies create a downward spiral of local disinvestment and abandonment, as falling quality of life and housing values push the most mobile residents to exit and leave behind an increasingly poor population.

Shrinking cities policies help cities adapt their built environment and land-use regulations to realistic current conditions, rather than aspiring for a return to the past or an ascent in the future.³⁴¹ Shrinking cities land-use planners call for “rightsiz[ing] their physical landscapes to fit declining populations.”³⁴² They advise a set of withdrawals from the desperate competition for large-scale growth and development that has chronically generated a poor return on public subsidies – the packages of tax incentives and infrastructure investments to induce major land uses like automalls and aquariums, cineplexes and science parks, museums and stadiums.³⁴³ Instead of chasing growth, shrinking cities

340. *E.g.*, HOLLANDER, *supra* note 55, at 22 tbl.3.1 (listing the twenty-five cities of the Northeast and Midwest that have lost the most population between 1950 and 2000). Institutional leadership on land use planning in shrinking cities has been provided by, *inter alia*, the Shrinking Cities International Scholars Group at the UC Berkeley Institute of Urban and Regional Development. *See About IURD—History*, BERKELEY INST. URB. & REGIONAL DEV. (2014), <http://www.iurd.berkeley.edu/about/history.shtml>.

341. Schilling & Logan, *supra* note 53, at 453.

342. HOLLANDER, *supra* note 55, at 3.

343. Infamous stories of costly economic development abound. *See, e.g., id.* at 5 (describing a

theories focus on the more modest task of “enhanc[ing] the quality of life of residents without adding jobs, people, or even increasing income levels.”³⁴⁴ The “just city,” imagines Susan Fainstein, is one that focuses on the needs and well-being of current city residents, rather than some population remembered from the past or courted for the future.³⁴⁵ By embracing upsides of population loss (such as decreased density and congestion, and increased open space and recreational opportunities), residents will realize economic gains through the long-term recovery of their property values.³⁴⁶

This Article constitutes an early effort to investigate the analogues of these ideas beyond land use planning, and within local governance itself. Where planners seek “smart decline,” we also need a dialogue about smart insolvency. Instead of focusing on population loss per se, this inquiry emphasizes fiscal losses; instead of focusing on land-use policies alone, the frame of shrinking governance broadens the question of shrinking cities to reach the full apparatus of local government. By necessarily making government smaller, can insolvency bring government down closer to the people, or make it more effective or efficient? What is “rightsizing” from the point of view of government? When does shrinking go too far? And how can the contractions preceding and accompanying insolvency remain accountable to the present constituencies of city governments, including residents, businesses, anchor institutions like universities and hospitals, not-for-profits, and current and retired public employees?

Such questions require local and state politicians, urban policy analysts, scholars, and citizens alike to take on a conversation that reaches beyond the question “what should our city look like?” to reach the question “what should our city’s government look like?”

desperate effort in Orlando, Florida, to stem losses caused by the foreclosure crisis by assembling a relocation incentive package for a medical research center that brought a projected workforce of 303 jobs at a “recruitment cost” – borne by taxpayers – of \$1.2 million *per job*); see also SUSAN S. FAINSTEIN, *THE JUST CITY* (2010) (arguing that large cities have favored economic growth at the expense of wider social benefits).

344. HOLLANDER, *supra* note 55, at 2.

345. FAINSTEIN, *supra* note 343, at 183 (“[A] concern with justice can prevent urban regimes from displacing residents involuntarily, destroying communities, and directing resources at costly megaprojects that offer few general benefits.”).

346. See *id.* at 2-4, 8-9; see also Witold Rybczynski & Peter D. Linneman, *How to Save Our Shrinking Cities*, PUB. INT., Spring 1999, at 30, 35 (arguing that a smaller city may be “more human in scale, more livable, less anonymous, with a more manageable and responsive government”).

Principle 3: We need to focus greater attention on whether a government undertakes to pay for service at all, rather than fixating only on the question of whether public or private workers will actually provide that service.

The current public debate about local government size has been fixated on public versus private modes of service delivery and the role of local governments as employers. From the right, the numbers and unionization rates among local government staffs are subjects of persistent criticism, and falling numbers of public employees is treated as a goal in and of itself.³⁴⁷ From the left, public employment is lauded as an end in itself, because the act of providing stable employment with livable wages and benefits stimulates the local economy and contributes to a stable middle class.

These concerns conflate the first order matter of *whether* a government undertakes to pay for service at all with the second order issue of *who* provides that service if the government indeed funds its provision. Persistent debate about the second issue—essentially, whether a service is provided by a private actor or a public one—distracts us from the extent of service shedding by government. Both are issues of privatization, but they are quite distinct. Take the example of afterschool programming in high-poverty neighborhoods, which city governments sometimes take on as a means of addressing poor educational outcomes, juvenile crime, or youth obesity. A city considering an afterschool program would have at least three choices available to it: (1) run one through the parks and recreation department; (2) contract with or make a grant to a private for-profit or non-profit entity to run activities; or (3) do nothing, and hope that private arrangements meet the need. The luxury to weigh options (1) and (2) will not be available to governments in fiscal crisis as they inevitably slide toward option (3) for most services beyond police, fire, and core administration.

Even on the question of private versus public service delivery where the government remains in the business of meeting a local need, our debate desperately needs to set aside ideological approaches to this question in favor of greater functionalism. While loose claims regarding private service providers' cost savings, efficiency, and quality of services are quite common, extensive empirical research on outcomes from local privatization consistently demonstrates that specific circumstances matter a great deal.³⁴⁸ For instance, a

347. See, e.g., BOLICK, *supra* note 244; Bellante et al., *supra* note 337.

348. See, e.g., Amir Hefetz et al., *Privatization and Inter-Municipal Contracting: US Local Government Experience 1992-2007*, 30 ENV'T & PLANNING C: GOV'T & POL'Y 675 (2012)

service for which there are more than three alternative providers bidding (such as child care) creates a competitive market that can yield public cost-savings, whereas privatized services for which there are few private providers (such as prison health care) can turn costly public monopolies into costly private monopolies. Outsourcing public responsibilities to private sector employees can be more expensive than public provision over the long run, and the bid to unseat public employees from responsibility for all services is sometimes about the partisan affinities of their unions more than cost savings. But so too is it the case that while local governments may employ people to fulfill the purposes of the local public sector, it would be too restrictive a preconception of the “right way” for a government to reach its goals to make public employment itself a freestanding purpose. Employment that provides a living wage is indeed valuable—not only for the sake of individuals, but also for the sake of protecting and growing America’s embattled middle class. Yet nonetheless, public spending must be expected to provide more than a good job and a secure retirement, especially where there is a deep, unmet demand for services and funds are scarce.

For this reason, public employment should be treated as a means, not an end, in insolvent cities. It must deliver something of independent value to the people of the polity first and foremost, before getting to the question of whether that service is best provided by the public or private sector. When thinking about the number of government employees, the relevant orientation has to be not only an employee head count or a price tag, but also the range and quality of services provided or supervised by the city, the need for those services, and the importance of the laws and programs that city staff are charged with implementing. This functionalist perspective is accountable to both economic and non-economic values: For each service or function in each specific locale, city governments must determine what methods of service delivery will be relatively competitive, while also serving public values that rarely yield short-term, monetizable gains, like environmental sustainability and access for low-income persons.³⁴⁹

(analyzing the results of a national survey of more than one thousand local governments over a fifteen year period to assess experiences with intergovernmental contracting and privatization).

349. See, e.g., Mildred E. Warner, *Privatization and Urban Governance: The Continuing Challenges of Efficiency, Voice and Integration*, 29 *CITIES* 38 (2012) (arguing that privatization up to this point has not delivered on its advocates’ promise of “efficiency, voice, and integration”).

Principle 4: Agency specialization and fragmentation are not per se desirable or undesirable.

Another focus of public debate about local government size is the institutional form and internal structure of local governments. Academia has long had a vocal and non-partisan debate about centralization and decentralization, as well as the implications of delegating local functions to special districts.³⁵⁰ Think tanks have taken up a version of this debate, taking fire at local governments for overlapping or duplicative departments within city administrations, or overlapping jurisdictions among cities and a patchwork of special districts and public authorities.³⁵¹ Such grievances rightly emphasize confusion, delays, burdensome fees, and a lack of transparency and accountability. Proposed solutions advocate consolidations and deregulation. Though I do not subscribe to a philosophy of “limited government” for its own sake, I am very sympathetic to specific criticisms of this sort leveled at specific governments. I see institutional design, however, as a means to perform a local function, rather than assuming that matters of agency specialization or fragmentation (for instance, the division of responsibility between cities and special districts) are per se desirable or undesirable. Alterations to government structure should be evaluated in terms of their impacts on service delivery, asset management, and regulation for public safety.

Principle 5: Population loss should be an integral part of the conversation about pension liabilities.

Population loss creates a special kind of problem, fiscally and normatively, when it comes to pension liabilities. Cities that have experienced population loss and depreciating land values face an amplified version of the pension liability problem, because diminished numbers of taxpayers and the falling value of taxable land assets must fund liabilities incurred by a proportionately larger public workforce. The Detroit of today, with a population of about

350. See, e.g., Richard Briffault, *The Local Government Boundary Problem in Metropolitan Areas*, 48 STAN. L. REV. 1115 (1996); Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057 (1980).

351. See, e.g., BOLICK, *supra* note 244, at 3-24; Jason Clemens et al., *No Bang for the Taxpayer's Buck: Why California Must Reform Spending and Trim Government*, PAC. RES. INST. (2010), http://www.pacificresearch.org/docLib/20101013_CAProsp_3_F%284%29.pdf (urging that California state and local governments reduce inefficiencies in part by evaluating what level of government is best able to efficiently deliver the program or service).

714,000, is paying pension liabilities for a city that had more than twice that population in 1970. That has left it with *twice as many retirees as there are current workers*.³⁵² This type of policy problem has been discussed at the level of national governments (e.g., low birth rates in Western Europe mean fewer workers to sustain public retirement commitments for a larger past generation),³⁵³ but the current conversation about the pension overhang on local governments has failed to account for this dynamic. Cities losing population have one more reason—beyond increasing life spans, unrealistic contracts, the spiraling costs of health care, and other factors—that past pension liabilities can swamp a city’s budget. Cities facing a pension overhang related to population loss are carrying the load of a larger spatial territory’s residents, and thus a share of that load should be borne by state taxpayers through state aid programs. Simply put, the argument for state bailouts on pension liabilities is stronger in cities that have lost population to their metropolitan areas or to the rest of the state.

Principle 6: Because employees of police and fire departments account for the vast majority of employees left in insolvent cities, public sector labor reforms that exempt these workers will fail to achieve meaningful cost savings.

Recent years have seen a wave of legislation and voter activity to reform public sector labor laws in the name of state and local cost-cutting. While some of these reforms (such as pension rule changes) have applied to all public employees, the more dramatic reforms to public sector labor law (such as the repeal of public sector bargaining rights) have largely exempted two very significant groups of public employees: police and firefighters.³⁵⁴ The most notable example of this was Wisconsin’s Act 10, enacted by Governor Scott Walker in 2011 in the name of cost-cutting for state and local governments.³⁵⁵

352. Steven Yaccino & Monica Davey, *Detroit’s Emergency Manager Offers Dire Report on City*, N.Y. TIMES, May 12, 2013, <http://www.nytimes.com/2013/05/13/us/detroit-fiscal-problems-are-severe-report-says.html>.

353. See, e.g., Jedediah Purdy, *The New Biopolitics*, DEMOCRACY, Summer 2006, <http://www.democracyjournal.org/1/6471.php>.

354. For an overview of the changes that have been made to public sector labor rights and pension plans, see Kenneth Glenn Dau-Schmidt & Winston Lin, *The Great Recession, the Resulting Budget Shortfalls, the 2010 Elections and the Attack on Public Sector Collective Bargaining in the United States*, 29 HOFSTRA LAB. & EMP. L.J. 407 (2012). See also Ann C. Hodges, *Southern Solutions for Wisconsin Woes*, 43 U. TOL. L. REV. 633, 646 (2012) (noting that firefighters have been spared in all recent reforms to bargaining rights).

355. 2011 Wis. Sess. Laws 23. For a history of the law and some of the dramatic events following

That law effectively abolished collective bargaining for all public employees (both state and local) and established onerous recertification rules for collective bargaining units, but it exempted most fire protection and law enforcement personnel.³⁵⁶ These exemptions were decried as raw politics to punish Democratic-leaning unions.³⁵⁷ Other states, both before and after Wisconsin, similarly repealed collective bargaining rights for all state workers except police and firefighters.³⁵⁸

One of the realities observed in the present Article, however, is that for general purpose local governments weathering fiscal crisis, most of their employees are related to emergency services. At least when it comes to fiscal solvency for struggling city governments (if not also for counties or state governments), attempts to differentiate sectors of public employees from one another may say more about partisan politics than budgetary relief.

Principle 7: Habitability may require outside intervention.

As discussed in Part I, some cities' descent into municipal insolvency involved fiscal mismanagement, if not corruption. But even in these few cities—and certainly in all the others—mismanagement can be a scapegoat explanation for insolvency that distracts from other systemic challenges, including concentrated poverty, the overhang of costs created by population loss, public subsidization of new cities at the expense of old ones, and so forth.

its enactment, see Paul M. Secunda, *The Wisconsin Public-Sector Labor Dispute of 2011*, 27 ABA J. LAB. & EMP. L. 293 (2012).

356. See WIS. STAT. ANN. § 111.70 (1)(fm) (West 2013) (defining the “general employees” excluded from most local and state collective bargaining rights to omit “public safety employees”); *id.* § (1)(mm) (defining “public safety employees”); *id.* §§ 111.70(4)(d)(3b), 111.83(3)(b) (requiring automatic annual recertification elections for unions representing general employees, but not for unions representing public safety employees, in order to retain status as the certified bargaining representative); Martin H. Malin, *The Legislative Upheaval in Public-Sector Labor Law: A Search for Common Elements*, 27 ABA J. LAB. & EMP. L. 149, 156 & n.55 (2012); Secunda, *supra* note 355, at 295-97.
357. See Secunda, *supra* note 355, at 293-94; see also Hodges, *supra* note 354, at 647 (describing the significance of unions' political influence in their exposure to reforms of collective bargaining and other labor rights). Notably, police and fire unions resisted division from other public employees, turning out in large numbers to protest Act 10.
358. See, e.g., TEX. GOV'T CODE ANN. § 617.002 (West 2013); LOC. GOV'T § 174.023 (prohibiting collective bargaining for local government employees except by local option for police and firefighters); Hodges, *supra* note 354, at 634, 641 (describing the longstanding Texas law, as well as Oklahoma's similar decision in 2011 to repeal collective bargaining rights for municipal employees, excluding police and firefighters).

Insolvent cities need a safety net, not punishment. Their creditors may well deserve the same. The voluntary sector – much touted as a viable alternative to building out the public sector³⁵⁹ – has a chance to prove its will and capacity in insolvent cities.

So too do higher level governments bear some responsibility for fostering the legal, political, and economic conditions for decline, and there is no reason to shy away from calling them to the table for in-kind and monetary assistance. Help from the private or public sector need not come in the form of unrestricted cash grants. For instance, as explored in Part II, cities facing insolvency amidst dramatic population loss have extreme backlogs for code enforcement, liens, and demolition. This is an area in which federal and state governments should not leave the math to a zero sum battle between residents and creditors. Blight abatement is a tangible, discrete endeavor for federal or state governments to fund through grants and aid, or even to accomplish directly. The National Guard has poured into Detroit three times in its history – twice for white mob violence against blacks, and once for riots by blacks in 1967 to protest police brutality. The federal government could intervene now as well, by dispatching federally funded employees to remove blighted structures, or funding a local jobs program for Detroit residents to do the same. The private and charitable sector could have a role here as well – imagine a Habitat for Humanity equivalent that, instead of building homes, tore dangerous eyesores out of communities and planted trees, gardens, or children’s playgrounds on lots left behind. However blight abatement is funded and staffed, building codes enacted in the early years of industrialization are a necessary component of habitability. Hazardous, derelict structures have no place in a city. What our markets build, they must either maintain or clear away.

Principle 8: Uninhabitable conditions will not self-correct.

The consequences of a bare bones public sector in high-poverty areas are not a mystery. We have scattered examples of this shrinkage, many of which were chronicled in Part II. But we also have a longer-term window into this issue through rural and exurban local governance. A bare bones version of local government focused simply on protecting people and their property is familiar to both history and the present day. That is where local government started at the Western frontier, as a first step beyond vigilante justice: an area pins a

359. See, e.g., THE VOLUNTARY CITY, *supra* note 244.

badge on a sheriff and fashions a fire brigade. It is also the contemporary model for local government by counties and their subdivisions in high-poverty unincorporated areas. With no public water supplies, no sewerage infrastructure, no streetlights, and no enforcement of building codes, low-income subdivisions and mobile parks on unincorporated land know a great deal about small local government. For unincorporated areas, rural counties may do little more than manage minimal emergency services.³⁶⁰ The wait after a call to 911 might be several minutes longer than it is in a nearby city.³⁶¹ Severe sanitation and public health problems arise from substitutes for shared infrastructure, such as using trucks and outdoor cisterns to haul and store household water, reliance on backyard pits to dispose of household greywater, and septic systems on small lots.³⁶² Any other shared goods beyond minimal public safety must be purchased privately or à la carte from the local government through an assessment district—and sometimes even public safety is only provided for hire. Such arrangements came to infamy in Obion County, Tennessee, where homes burned to the ground in 2010 and 2011 because working-class exurban homeowners did not opt-in to purchase fire protection for a seventy-five-dollar annual fee under a cost-cutting financing policy that was opposed by the firefighters' union for reasons of public safety.³⁶³

These neighborhoods teach us that uninhabitable conditions in a poor community do not correct on their own. For reasons of affordability as well as the administrative challenges of free riders and coordination, some public services, like underground utilities or private security forces, cannot be realistically organized and purchased by low-income persons acting individually. Without intervening public investment in basic infrastructure and public safety, such communities simply deteriorate and depreciate over time.³⁶⁴

360. See Anderson, *Cities Inside Out*, *supra* note 25, at 1108-09.

361. See, e.g., *Comm. Concerning Cmty. Improvement v. City of Modesto*, 583 F.3d 690, 708 (9th Cir. 2009) (reporting significant disparities in dispatch/response times).

362. Anderson, *Cities Inside Out*, *supra* note 25, at 1107; see also Larson, *supra* note 315, at 185-93 (discussing the health risks of improvised private waste disposal); Michelle Wilde Anderson & Juan Carlos Cancino, *Uninhabitability as a Public Policy Objective* (2014) (unpublished manuscript) (on file with author).

363. *Firefighters Let Home Burn Over \$75 Fee—Again*, NBCNEWS.COM (Dec. 7, 2011, 9:58 AM), http://usnews.nbcnews.com/_news/2011/12/07/9272989-firefighters-let-home-burn-over-75-fee-again; *No Pay, No Spray: Firefighters Let Home Burn*, MSNBC.COM (Oct. 6, 2010, 12:48 PM), http://www.msnbc.msn.com/id/39516346/ns/us_news-life/t/no-pay-no-spray-firefighters-let-home-burn.

364. See Anderson & Cancino, *supra* note 362 (detailing the deteriorating conditions and steady land value depreciation over time in one high-poverty unincorporated community just

In rural areas today we thus face the same challenges posed in our new minimal cities and in the industrial urban tenements of the turn of the twentieth century: Will we commit to substantive legal standards for habitability?

Principle 9: State treasurers, or other government accountability departments, must carefully scrutinize local agencies' major financial deals.

State treasurers, or other government accountability departments, must carefully scrutinize “fire sale” disposition of public property. As Section II.B indicated, cities need sophisticated review and valuations of major asset privatization deals. A desperate measure to plug short-term deficits is not in city or state taxpayers’ long-term interests. A state that wishes to cushion its cities’ residents from fiscal pain in the long run would do well to supervise deals made by local officials desperately seeking short-term solutions to navigate a fiscal crisis. State level oversight by inspectors general of major asset sales is one way to handle this. This is not to shift decision-making power to the state, which itself is vulnerable to capture, but rather to create a system of checks and balances between state and local governments when it comes to major asset sales.

This issue applies not only to sales within a receivership, but also before insolvency. It relates to a larger set of issues that I am taking up in a separate article regarding state oversight, approval, and voluntary consultation mechanisms for municipalities approving major interest rate swaps, asset sales, lines of credit, or leasebacks.³⁶⁵ To prevent sophisticated private parties from milking unsophisticated guardians of public funds—as well as to prevent self-dealing, cronyism, and corruption—we need stronger and more regularized audit systems that keep a watchful eye on local finance before a city crosses into insolvency. This is critically important in our current era with falling voter turnout (particularly in poor cities) and a shriveling local investigative press—two trends that undermine accountability in local politics.

Principle 10: Liberate new restructuring options for cities and their service districts, including more modern and flexible mechanisms for dissolution, merger, and consolidation.

outside the city of Tulare in California’s Central Valley).

365. See Anderson, *supra* note 144.

Shrinking governance eventually reaches an existential brink: Once a city has shed many of its responsibilities, what is cityhood good for? We don't have to keep city governments around—not as a matter of law or habit. Dissolution of cities is a legal option that increasing numbers of cities are taking, particularly in response to fiscal distress,³⁶⁶ and merger and consolidation are familiar restructuring options. Several decades after the boom in municipal incorporations, it is worth revisiting basic questions about when and why we need each city government. If an area can only sustain a local nightwatchman state that fights crime and fire, it need not host a municipality. We now have a broad menu of ways to provide law enforcement and fire protection—from counties to special districts to joint powers authorities to volunteer organizations. Even without a city, a county still remains to serve as a land-use authority and provide regional services, and special districts can provide everything from sanitation systems to waste management. If cities have lost their function as portals for citizen access, empowerment, and self-determination—and thus no longer reflect citizen preferences—what is their justification?

In general, we need to liberate more modern and flexible options for cities and their service districts to reorganize through dissolution, merger, and consolidation. A forthcoming article lays out these reforms in greater detail.³⁶⁷ For current purposes, the key reform is that (subject to the confines of the Contracts Clause) all tools that are available to cities in receivership and bankruptcy should be given to democratically elected officials prior to insolvency proceedings. It is fundamentally wrong headed—from any political perspective—to give non-democratic processes like bankruptcy and state receiverships the right to reorganize corporate form or government functions in ways that a municipality cannot do prior to crossing the line into default. It should be easier (or at least no harder) to pursue merger, dissolution, or boundary movement before crossing into insolvency. Such flexibility for restructuring gives elected officials the best chance to avoid insolvency and default while improving the legitimacy of those proceedings where they are absolutely necessary.

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366. Anderson, *supra* note 265.

367. See Michelle Wilde Anderson, *Rewriting the Law of Municipal Dissolution for the Modern Shrinking City* (2014) (unpublished manuscript) (on file with author).

As of December 2013, when Detroit was deemed eligible for bankruptcy, one could say more of its and other insolvent cities' hardships than their recovery. The court opinion deeming Detroit insolvent reported that since 2009, Detroit has closed two-thirds of its parks, and it is slated to continue regular maintenance at only nineteen of those that remain open. It is running a fleet of ambulances—some of which have driven more than 250,000 miles—that so frequently break down that only about one-third of them were in service at any given time during the first quarter of 2013. The city relies on information technology processes that are obsolete, requiring substantial manual data management, including an income tax collection system that the IRS characterized in 2012 as “catastrophic.” Those employees who continue to work for the city watched 2,700 city employees lose their jobs since 2011.³⁶⁸ These are our new minimal cities: governments too small, weak, and ineffective to provide habitable neighborhoods for a high-poverty population. They demand that we ask, as a political and moral matter as much as a legal one, what belongs on our list of expectations for city government? Detroit invites us to think seriously about what services and public spaces we expect from the local public sector.

Maybe a serious deliberation and commitment to habitable communities is a silver lining to our insolvent cities' woes. None other than Chrysler mobilized the hopeful idea that we have something to learn from shrinking cities in the company's “Imported from Detroit” commercial in the 2011 Super Bowl. Against a montage of images depicting Detroit's blighted buildings, working class heritage, and ordinary daily life, the ad asks what we can expect from “a town that's been to hell and back.” A great deal, the ad promises, because “it's the hottest fires that make the hardest steel.”³⁶⁹ One can hope that they're right, that by bearing witness to the burning in many of our legacy cities, we will take responsibility for their future.

368. *In re City of Detroit*, No. 13-53846, 2013 WL 6331931, at *12-15 (Bankr. E.D. Mich. Dec. 5, 2013).

369. See *Imported from Detroit* (Chrysler television broadcast Feb. 6, 2011), http://www.youtube.com/watch?v=SKL254Y_jtc.

APPENDIX: CITIES IN BANKRUPTCY AND RECEIVERSHIPS

The following tables provide information for cities with more than 15,000 residents that have entered bankruptcy or state receivership programs from September 1, 2008 to September 30, 2013. I have compiled this list of cities based on federal municipal bankruptcy filings, official state lists of cities in receiverships, and judicial receiverships for municipal insolvency. See the text accompanying notes 22-26 for more information on compiling the list of cities. In the case of California, I excluded several municipalities with more than 15,000 people that, strictly speaking, qualify for inclusion in this study on the basis of a locally declared fiscal emergency, because in my judgment, these cities' proclamations reflected short-term political strategy more than lasting insolvency. Similarly, I excluded several New Jersey cities included in the state's fiscal intervention program because, again in my judgment, the nature of New Jersey's involvement was closer to state aid than to a receivership.

During the research period, two cities included on the tables below transitioned out of receiverships. The financial control board put in place for Springfield, Massachusetts dissolved on June 30, 2009, returning control to the Springfield elected government. The City of Garfield Heights had its fiscal emergency status terminated by the Ohio Auditor of State on September 19, 2013. The City of Massillon, Ohio (32,149 people) was declared to be in a fiscal emergency on October 8, 2013, just after the cut-off date for cities included in the present study.

All current demographic information cited herein is available at *American Fact Finder*, U.S. CENSUS BUREAU, <http://factfinder2.census.gov/faces/nav/jsf/pages/searchresults.xhtml> (last accessed Jan. 30, 2014). I have included the most recent data for each variable. For 1960 data, see U.S. DEP'T OF COMMERCE, 1 CENSUS OF POPULATION, 1960 (1961).

Median home sale prices are available at *Home Values*, ZILLOW, <http://www.zillow.com/local-info> (last visited Jan. 30, 2014). However, January 2013 median sales price data are not available for all cities. Table 1 reflects the best available data, including:

- Prichard, AL (Median Sales Price, May 2010)
- Atwater, CA (Median Sales Price, March 2013)
- East St. Louis, IL (Median Listing Price, January 2013)
- Flint, MI (Median Sales Price, February 2013)
- Hamtramck, MI (Median Sales Price, November 2013)
- Inkster, MI (Median Listing Price, January 2013)
- Camden, NJ (Median Sales Price, December 2012)
- East Cleveland, OH (Median Listing Price, January 2013)

- Altoona, PA (Median Sales Price, March 2013)
- Chester Township, PA [Chester City not available] (Median Sales Price, April 2013)
- Johnstown, PA (Median Sales Price, November 2012)
- New Castle, PA (Median Sales Price, December 2012)
- Central Falls, RI (Median Listing Price, January 2013)
- East Providence, RI (Median Sales Price, April 2013)

All city-level crime data not mentioned below are available at *Crime in the United States by Agency*, FED. BUREAU INVESTIGATION (2012), http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/tables/8tabledatadecpdf/table_8_offenses_known_to_law_enforcement_by_state_by_city_2012.xls.

The most recent crime data for Pontiac, Michigan, are available at *Crime in the United States by City Agency*, FED. BUREAU INVESTIGATION (2010), <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/tables/table-8/10tbl08mi.xls>.

Total U.S. crime rates are available at *Crime in the United States by Community Type*, FED. BUREAU INVESTIGATION (2012), http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/tables/2tabledatadecoverviewpdf/table_2_crime_in_the_united_states_by_community_type_2012.xls/output.xls.

Total U.S. arson rates are available at *Crime in the United States: Arson*, FED. BUREAU INVESTIGATION (2012), <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/property-crime/arson/arsontopic>.

Table 1.
POPULATION CHANGE, DEMOGRAPHICS, HOUSING & POVERTY

State	AL	CA	CA	CA	CA	IL	IN	MA	MI	MI	MI	MI	MI	MI	MI	NJ
City	Prichard	Atwater	San Bernardino	Stockton	Vallejo	East St. Louis	Gary	Springfield	Allen Park	Detroit	Flint	Hamtramck	Inkster	Pontiac	Camden	
Total Population (2010)	22,659	28,168	209,924	291,707	115,942	27,006	80,294	133,060	28,210	713,777	102,434	22,433	25,369	59,515	77,344	
Total Population (1960)	47,371	N/A	91,922	86,321	60,877	81,712	178,312	174,463	37,494	1,670,144	196,940	34,137	39,097	82,233	117,159	
2010 Population vs. 1960 Population	48%	N/A	228%	338%	190%	33%	45%	88%	75%	43%	52%	66%	65%	72%	66%	
% of Population Under 18 (2010)	26.0	32.0	32.0	29.9	23.2	29.3	28.1	27.0	21.7	26.7	27.3	31.7	27.9	27.2	31.0	
% of Population Over 65 (2010)	13.2	10.4	7.9	10.0	12.1	13.3	14.5	10.9	17.2	11.5	10.7	7.7	11.3	9.3	7.6	
% Black (One Race) (2010)	85.8	4.3	15.0	12.2	22.1	98.0	84.8	22.3	2.1	82.7	56.6	19.3	73.2	52.1	48.1	
% Asian (One Race) (2010)	0.1	5.0	4.0	21.5	24.9	0.1	0.2	2.4	0.8	1.1	0.5	21.5	1.6	2.3	2.1	
% Hispanic/Latino (Any Race) (2010)	0.8	32.6	60.0	40.3	22.6	0.5	38.8	38.8	8.1	6.8	3.9	1.5	2.6	16.5	47.0	
% Non-Hispanic White [White Alone] (2010)	12.4	35.8	26.6	22.9	25.0	0.8	8.9	36.7	87.4	7.8	35.7	53.0	19.5	26.6	4.9	
% Vacant Housing Units (2010)	16.7	9.5	9.4	9.1	8.7	16.1	8.0	20.6	5.1	22.8	21.1	18.8	15.7	18.0	13.7	
% Housing Units Owner-Occupied (2010)	58.3	55.5	50.3	51.6	59.6	45.5	52.7	49.8	85.5	51.1	55.3	49.3	52.4	47.6	39.2	
% Unemployed (2008-2012)	20.8	19.1	16.9	17.1	14.3	18.6	20.1	14.9	13.1	27.5	25.5	20.5	24.9	21.4	23.9	
Median Household Income (Dollars) (2008-2012)	23,726	41,317	39,097	47,246	60,764	19,278	26,956	35,163	56,647	26,955	26,339	24,888	28,095	28,825	26,705	
% of People Below Poverty Level [All People] (2008-2012)	36.3	27.2	30.6	23.3	16.0	43.5	37.4	28.7	8.0	38.1	39.7	44.6	35.7	34.2	38.6	
% of People Below Poverty Level [Under 18 Years] (2008-2012)	49.4	39.5	40.2	31.4	22.5	60.9	59.8	42.4	12.6	52.7	58.5	62.9	54.8	49.5	52.0	
Median Home Sales Price (Dollars) (2013)	36,000	150,000	146,000	133,000	173,000	26,900	24,700	113,000	79,200	25,500	24,300	32,800	21,900	25,900	52,000	

THE NEW MINIMAL CITIES

East Cleveland	OH	17,843	37,991	47%	22.2	18.8	93.2	0.2	1.0	4.5	33.8	33.6	25.8	26,797	39.7	37.3	26,000
Garfield Heights	OH	28,849	38,455	73%	25.0	15.4	35.7	1.3	2.3	59.0	10.9	69.6	11.9	43,443	14.9	21.7	50,100
Mansfield	OH	47,821	47,325	101%	20.2	15.7	22.1	0.7	1.9	72.2	15.1	54.0	14.1	33,004	24.0	37.4	74,000
Altoona	PA	46,320	69,407	67%	22.6	15.6	3.3	0.4	1.3	93.0	8.9	64.5	10.6	35,435	18.3	26.0	70,000
Chester	PA	33,972	63,658	53%	27.2	10.4	74.7	0.6	9.0	15.1	15.2	38.5	17.5	27,546	31.4	45.6	40,000
Harrisburg	PA	49,528	79,697	62%	26.8	9.1	52.4	3.5	18.0	24.8	15.1	38.8	14.8	34,011	31.2	48.4	62,700
Johnstown	PA	20,978	53,949	39%	21.7	18.5	14.6	0.2	3.1	78.4	17.2	48.2	11.7	25,186	34.3	53.5	20,100
New Castle	PA	23,273	44,790	52%	22.6	18.3	12.2	0.4	1.6	82.2	13.6	60.8	12.4	30,070	23.4	37.2	37,500
Pittsburgh	PA	305,704	604,332	51%	16.3	13.8	26.1	4.4	2.3	64.8	12.8	47.6	9.3	38,029	22.5	32.0	96,800
Reading	PA	88,082	98,177	90%	31.0	9.3	13.2	1.2	58.2	28.7	12.4	42.4	20.0	27,206	37.9	52.4	35,000
Scranton	PA	76,089	111,443	68%	20.4	16.4	5.5	3.0	9.9	80.1	11.2	51.3	8.6	37,099	20.7	30.0	67,200
Central Falls	RJ	19,376	19,858	98%	29.1	8.7	10.1	0.6	60.3	25.6	12.7	22.4	10.7	29,268	30.4	41.5	119,000
East Providence	RJ	47,037	41,955	112%	19.5	18.4	5.8	1.5	4.1	82.2	5.8	59.0	9.3	49,545	10.3	17.0	165,000
United States		308,745,538	179,323,175	172%	24.0	13.0	12.6	4.8	16.3	63.7	11.4	65.1	9.3	53,046	14.9	20.8	174,000

Table 2.
CRIME RATES

Arson Rate (Arson Incidents per 1,000 Population)	N/A	0.28	0.22	0.23	0.35	1.37	1.02	0.44	0.04	0.79	2.22	0.72	0.76	0.47	1.40
Property Crime Rate (Property Crimes per 1,000 Population)	63.53	48.46	48.89	51.01	49.56	67.57	55.61	45.46	25.66	57.92	55.54	34.39	40.31	31.37	51.59
Violent Crime Rate (Violent Crimes per 1,000 Population)	23.19	6.23	9.41	15.48	7.45	49.93	9.05	10.39	1.61	21.23	27.29	10.62	15.16	16.99	25.66
Arson	N/A	8	48	68	65	37	82	68	1	562	226	16	19	31	109
Motor Vehicle Theft	193	187	2,710	2,503	1,475	389	775	760	74	11,500	459	188	140	216	704
Larceny-Theft	757	773	4,991	8,339	1,681	569	2,066	3,947	504	15,968	2,207	325	408	765	2,214
Burglary	494	440	2,809	4,416	2,688	869	1,634	2,317	139	13,488	2,979	251	465	1,074	1,089
Total Property Crime	1,444	1,400	10,510	15,258	5,844	1,827	4,475	7,024	717	40,956	5,645	764	1,013	2,055	4,007
Aggravated Assault	365	138	1,116	2,913	440	1,075	360	1,014	23	9,341	1,930	124	255	798	1,097
Robbery	143	32	803	1,556	380	198	275	542	16	4,843	673	105	84	239	755
Forcible Rape	13	8	56	90	44	60	56	39	4	441	108	5	32	67	74
Murder and Non-Negligent Manslaughter	6	2	47	71	14	17	37	11	2	386	63	2	10	9	67
Total Violent Crime	527	180	2,022	4,630	878	1,350	728	1,606	45	15,011	2,774	236	381	1,113	1,993
Total Population	22,728	28,891	214,987	299,105	117,912	27,040	80,472	154,518	27,941	707,096	101,632	22,214	25,129	65,517	77,665
State	AL	CA	CA	CA	CA	IL	IN	MA	MI	MI	MI	MI	MI	MI	NJ
City	Pritchard	Arwater	San Bernardino	Stockton	Vallejo	East St. Louis	Gary	Springfield	Allen Park	Detroit	Flint	Hantramck	Inkster	Pontiac	Camden

THE NEW MINIMAL CITIES

East Cleveland	OH	17,704	88	0	4	0	84	14	1	4	9	0	4-97	0.79	0.00
Garfield Heights	OH	28,623	78	6	9	33	30	1,040	303	666	71	0	2-73	36.33	0.00
Mansfield	OH	47,480	178	1	27	93	57	3,205	1,016	2,104	85	51	3-75	67.50	1.07
Altoona	PA	46,404	163	2	31	32	98	903	226	641	36	18	3-51	19.46	0.39
Chester	PA	34,239	720	22	17	217	464	1,203	465	636	102	26	21-03	35.14	0.76
Harrisburg	PA	49,753	727	11	56	388	272	2,426	613	1,655	158	20	14-61	48.76	0.40
Johnstown	PA	22,360	131	1	6	31	93	822	285	499	38	3	5-86	36.76	0.13
New Castle	PA	23,165	356	3	7	76	270	1,074	392	643	39	8	15-37	46.36	0.35
Pittsburgh	PA	312,112	2,347	41	47	1,134	1,125	10,691	2,537	7,610	544	248	7-52	34.25	0.79
Reading	PA	88,557	828	15	44	382	387	3,612	1,447	1,629	536	17	9-35	40.79	0.19
Scranton	PA	76,118	252	0	23	129	100	2,553	641	1,796	116	27	3-31	33.54	0.35
Central Falls	RI	19,360	142	1	14	47	80	590	133	337	120	5	7-33	30.48	0.26
East Providence	RI	46,994	71	2	13	14	42	834	144	631	59	9	1-51	17.75	0.19
United States		313,914,040	1,214,464	14,827	84,376	354,522	760,739	8,975,438	2,103,787	6,150,598	721,053	52,766	3-87	28.59	0.17