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Reclaiming Fiduciary Law for the City

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Abstract. Modern law sets “public” local government law apart from “private” business entities law. Although intuitive, this distinction ignores legal history and, even more troublingly, the contemporary practices of local governments. Due to distressed finances and a political atmosphere favoring privatization, present-day cities routinely engage in sophisticated market transactions typical of private business entities. Current law fails to adequately address this reality. Because cities are deemed public, courts do not analyze their transactions for compliance with the fiduciary duties private law imposes to ensure sound management. Major city transactions thus evade meaningful review.

This Article addresses this worrisome anomaly by demonstrating that the city’s supposed public nature need not interfere with the application of fiduciary duties to its market transactions. To the contrary, this Article shows that the fiduciary status of city officials is supported—indeed, necessitated—by U.S. law’s history, structure, and normative logic. This Article also devises the appropriate fiduciary duty of care—or sound management—that courts should apply to city officials. It advocates requiring local decisionmakers to abide by certain processes of informed decisionmaking before selling major municipal assets. As primarily a procedural, nonsubstantive test, such a standard would not constrain the political discretion of local officials and could readily be applied by courts.

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Introduction

For a lump-sum payment of $1.157 billion, an entity’s officials decided to transfer, for seventy-five years, all rights to the income derived from one of the entity’s major assets. Almost immediately after the contract was signed, facts emerged demonstrating that the entity’s conduct in negotiating and approving the deal had been flawed. Although the asset was one of the entity’s only marketable properties, the entity’s finance committee dedicated only a single meeting to discussing its sale. The meeting was held the day after an offer was announced, and the offer was forwarded to committee members that same morning, with no details to aid in their deliberations. The finance committee heard only one person testify—the entity’s chief financial officer—who simply asserted that the offered payment accurately reflected the asset’s true value. When asked, he refused to produce figures to substantiate this claim. Nonetheless, the committee approved the deal on the spot. The next day the entity’s full decisionmaking body did the same. A “fairness opinion” was issued by an investment bank, but only a summary was provided. Curiously enough, that opinion did not analyze the price the asset could fetch on the open market, the reasonableness of the seventy-five-year term, or the fact that the sale was being conducted during a major liquidity crisis that had temporarily depressed many assets’ values. A legal opinion on the deal was also requested from the entity’s outside counsel, but it was submitted months after the entity’s decisionmakers had already approved the deal. An independent assessment later found that the asset had been undervalued by 46%, or nearly $1 billion.

Imagine that a person holding an interest in the entity objects to the transaction. Will a court be willing to entertain her challenge and review the decision to sell the asset?

The answer is probably obvious to any lawyer with the most cursory acquaintance with the law of business associations or trusts. The asset sold did not belong to the officials personally; they held and sold it on behalf of those owning an interest in the entity—the asset’s true owners. This separation of control from ownership creates an inherent risk of conflicted or careless decisionmaking: Nonowners—the officials in control of the asset—may not pursue the best deal when selling that asset. They realize little of the gain and

1. See Adolf A. Berle, Jr. & Gardiner C. Means, The Modern Corporation and Private Property 4-5 (1933 prtg.).
2. See Michael C. Jensen & William H. Meckling, Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure, 3 J. Fin. Econ. 305, 308 (1976) (“There is good reason to believe that the agent will not always act in the best interests of the principal.”). For a classic treatment of agency costs (that is, the costs resulting from nonowners, or agents, acting in their own interests rather than the owners’ best interests), see id. at 308-10.
bear little of the loss. The law has long acknowledged this “agency problem” and applies a specialized framework to treat it. Specifically, the law subjects nonowner officials to “fiduciary duties” meant to ensure that their decisions are in the best interests of the property’s real—or “beneficial”—owners.

These fiduciary duties are commonly divided into two categories: duties of loyalty and duties of care. Under the duty of loyalty, the fiduciary must avoid conflicts of interest when dealing with the beneficiary’s assets. Under the duty of care, she must exercise sound management practices. To ensure such sound management, a court will generally assess the quality of the fiduciary’s decisionmaking processes in dealing with the beneficiary’s assets. In the sale described in the opening paragraph, that process appears hasty, uninformed, and well outside the norms of fiduciary behavior for a transaction of such a magnitude.

Yet when a court passed judgment on this deal, it was not asked, nor did it choose, to engage in such fiduciary analysis. In fact, the court explicitly stated that it would not inquire into the decisionmaking process engendering the deal.

3. See id. at 308.

4. The Restatement (Third) of Agency defines “agency” as “the fiduciary relationship that arises when one person (a ‘principal’) manifests assent to another person (an ‘agent’) that the agent shall act on the principal’s behalf and subject to the principal’s control.” See 1 RESTATEMENT (THIRD) OF AGENCY § 1.01 (AM. LAW INST. 2006) (capitalization altered). Agency law holds that agents owe duties to principals, see 2 id. §§ 8.01-.12, and vice versa, see id. §§ 8.13-.15.


6. See 2 RESTATEMENT (THIRD) OF AGENCY §§ 8.02-.06.

7. See id. § 8.08.


9. See 2 RESTATEMENT (THIRD) OF AGENCY § 8.08.

10. See, e.g., infra notes 299-301 and accompanying text.

11. Those facts are strikingly similar to those in Smith v. Van Gorkom, 488 A.2d 858, 864-70 (Del. 1985), overruled in part by Gantler v. Stephens, 965 A.2d 695 (Del. 2009), in which the Supreme Court of Delaware held the agents in breach of their duty of care, see id. at 864, 893. For a full discussion of Van Gorkom, see notes 306-10 and accompanying text below. Note that a substantive analysis of the price for which the assets sold will generally not occur unless the court finds that the decisionmaking process itself was inadequate or conflicted. See infra notes 311-17 and accompanying text.

12. See Indep. Voters of Ill. Indep. Precinct Org. v. Ahmad, 13 N.E.3d 251, 265 (Ill. App. Ct. 2014); Plaintiffs-Appellants’ Opening Brief at 1-2, Indep. Voters of Ill., 13 N.E.3d 251 (No. 12-3629), 2013 WL 9783923 (requesting that the court hold that the deal was an impermissible delegation of powers in violation of the state constitution and enjoin the city from transferring the meters’ revenue to the buyer).
or into the deal’s quality. Instead, the litigants and the court contented themselves solely with arguments over whether the entity had the power to enter a deal to sell the asset. Why? How was an entire body of law—fiduciary law—sidestepped in a case seemingly tailor-made for its application? For just one reason: The entity selling the asset was Chicago, a “public” entity—a city—and not a “private” entity—a corporation or a trust.

This disparate legal treatment of public and private entities is grounded in seemingly important practical distinctions between the entities. Unlike private corporations or trusts, cities are not perceived as the creatures of their members—their residents—set up primarily to efficiently manage those members’ property. Rather, the law views cities as creatures of the state set up primarily to tax, regulate, and provide services. Accordingly, modern courts reckon that the only relevant legal question when a city acts is whether the state empowered it to act. The question, prevalent in private law, whether the entity’s act lived up to any obligations toward members, is irrelevant.

But the practical distinction between the city and the private entity breaks down in the case described above, in which Chicago sold to an investors’ consortium all revenue from its parking meters for seventy-five years. Chicago was not acting as the state’s long arm; it was not regulating its

13. *Indep. Voters of Ill.*, 13 N.E.3d at 264-65 (“We certainly understand the argument . . . that the concession agreement transferring the City’s control of the metered parking system . . . for 75 years should not have been so hastily entered into and that the accompanying Metered Parking System Ordinance should not have been enacted. However, arguments about why the concession was a bad deal for the City do not provide a basis for invalidating the concession agreement and the adopting Ordinance.”).

15. The facts of the case as described in the opening paragraph were derived from OFFICE OF THE INSPECTOR GEN., CITY OF CHI., REPORT OF INSPECTOR GENERAL’S FINDINGS AND RECOMMENDATIONS: AN ANALYSIS OF THE LEASE OF THE CITY’S PARKING METERS 1-3 (2009), https://perma.cc/V3TH-VP93.

16. Cf. 1 RESTATEMENT (THIRD) OF TRS. § 2 (AM. LAW INST. 2003) (defining a trust as “a fiduciary relationship with respect to property”); 18 AM. JUR. 2D Corporations § 1 (West 2017) (describing a corporation as an artificial entity with powers limited to those intended to achieve the goal for which the corporation was created, as defined by the incorporators in the charter).


19. See *infra* notes 88-94 and accompanying text.

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residents’ activities or providing them with services. It was selling an asset to investors. Chicago was transacting rather than governing.\textsuperscript{21}

In thus transacting in the market, Chicago was hardly an outlier. The twenty-first century U.S. city turns to the private market in many ways that would have been unimaginable for its twentieth century predecessor\textsuperscript{22}. The convergence of the outmigration of key industries, stagnant populations, shrinking federal and state grants, and large pension shortfalls has generated structural upheavals in local finances. In response, a wave of outsourcings of services, public-private partnerships, privatizations of city assets, and sophisticated financial dealings is sweeping the nation’s cities.\textsuperscript{24} Cities are investing in securities and buying revenue-producing venues or offering

\textsuperscript{21}. See id. at 265-66 (discussing the plaintiffs’ argument that the agreement violated the state constitution’s home rule provision “by unlawfully conditioning the exercise of the City’s reserved police powers upon compensation” to the investors). The court approved Chicago’s transaction because the deal did not in fact require the city to surrender its powers as government—its “police powers.” See id. at 265-67. The court agreed that the city was not allowed to relinquish those powers to a private party, but it reasoned that in the parking meters deal, the city did not transfer its police powers because even though the city was required to compensate the third-party buyer for losses, it retained “wide discretion in the matter of the location, regulation, and control of the metered parking spaces.” Id. at 266-67.

\textsuperscript{22}. Cf. William A. Marino, Foreword to DAN MCNICHOL, THE UNITED STATES: THE WORLD’S LARGEST EMERGING P3 MARKET; REBUILDING AMERICA’S INFRASTRUCTURE 2 (2013), https://perma.cc/2JHF-B3B2 (“The United States is poised to become the largest public-private partnership (P3) market in the world for infrastructure projects.”).

\textsuperscript{23}. For a comprehensive account of cities in fiscal distress and the reasons leading to that distress, see Michelle Wilde Anderson, The New Minimal Cities, 123 YALE L.J. 1118, 1129-51 (2014). The most notorious victim of these upheavals was Detroit, which was forced to file for bankruptcy protection in 2013. See In re City of Detroit, No. 13-53846, 2013 WL 4761053, at *1 (Bankr. E.D. Mich. July 25, 2013). Chicago’s finances have also been affected; in May 2015, Chicago’s debt was dropped to junk bond status. See Aaron Kuriloff, Moody’s Cuts Chicago’s Debt to Junk, WALL ST. J. (May 12, 2015, 6:49 PM ET), https://perma.cc/JA4L-GQH6.

\textsuperscript{24}. For an overview, see Khalid A. Razaki et al., Privatization of Infrastructure Assets: Financial Structures, Participant Motivations, and Lessee Tax Benefits, J. FIN. & ACCT., Feb. 2013, at 1, 2-3.

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their waterworks,26 airports,27 bridges,28 and other infrastructure for sale or lease.29 This wave should only intensify over the next few years, as the Trump Administration has already firmly endorsed such initiatives.30

The factual gap between the supposedly public city and the private corporation or trust is thus closing fast. Yet the legal gap between “public” local government law and “private” entities law has steadfastly, and uncritically, persisted. Because the city is “public,” its market transactions have avoided the fiduciary scrutiny that private law has developed precisely for such deals, leaving city transactions almost wholly unregulated.

The results have been predictably unfortunate. Like Chicago, many other local governments have been rushing, with little deliberation or expertise, into market deals of highly dubious quality.31 The judge overseeing Detroit’s bankruptcy—the largest municipal bankruptcy in U.S. history32—detailed Detroit’s transactions with investors and found: “[T]he City lost on [its] swaps bet. Actually, it lost catastrophically on the swaps bet. The bet could cost the City hundreds of millions of dollars.”33 In 2002, Orange County, California was


30. See Ivory et al., supra note 26; Patrick Sisson, The Art of the New Deal: Will Donald Trump Stamp His Name on the Project of a Lifetime, a Plan to Upgrade America’s Crumbling Infrastructure?, CURBED (Jan. 19, 2017, 10:00 AM EST), https://perma.cc/U5LQ-D4F3.

31. See Angie Schmitt & Payton Chung, The Indiana Toll Road and the Dark Side of Privately Financed Highways, STREETSBLOG USA (Nov. 18, 2014), https://perma.cc/LD66-N6S9 (noting that many recent deals to privatize roads have resulted in bankruptcy).


33. In re City of Detroit, 504 B.R. 97, 115-16 (Bankr. E.D. Mich. 2013). Almost two decades earlier, Orange County had entered what was then the largest municipal bankruptcy in history because of the disastrous investment strategy employed by the treasurer managing the pool into which the county’s municipalities’ tax receipts were deposited, costing the county $1.8 billion. See Pub. Policy Inst. of Cal., When Government Fails: The Orange County Bankruptcy 1-6 (1998), https://perma.cc/LHP4-36GP. Ignoring professional advice, the treasurer chose to invest based on the assumption that interest rates will always remain low. Id. at 2-4. They did not. See generally Carol J. Loomis, Untangling the Derivatives Mess, FORTUNE, Mar. 20, 1995, at 50.
forced to spend nearly $208 million to buy out the private owner of a highway’s express lanes because the anticompete clause originally incorporated in its contract with the owner precluded the county from making necessary local improvements, such as widening the highway. 34 In 2015, Lawrence, Wisconsin saw its credit rating plunge overnight from the third-highest rating to junk because of a clause in a loan contract city officials had signed with local banks allowing those banks to demand immediate repayment whenever they decided—and for whatever reason—that the city’s finances had deteriorated. 35 The receiver appointed for Harrisburg, Pennsylvania resigned in 2012 after complaining that the distressed city was pressured to sell assets with little consideration and without striving to attain the best prices. 36 Bolingbrook, Illinois leased its ice arena in 2014 to a private operator for a rent observers deemed exceptionally low, based on an appraisal dismissed by one economist as “pretty hilarious reading.” 37 One commentator derided the increasingly popular deals by which local governments sell public buildings to private owners and then rent the space back-deals that plug budget holes but often make very little long-term financial sense—as “tantamount to selling the family china only to have to rent it back in order to eat dinner.” 38 Sales of waterworks have at times resulted in dramatic spikes in rates, rendering water unaffordable to residents; aiming to correct such earlier mistakes, some cities have endeavored to regain control over the systems they sold. 39 In these cases and many others, officials thoughtlessly transacted in city assets, and the tools of public law could offer those cities’ residents—the assets’ true owners—little relief. 40

36. See Eric Veronikis, David Unkovic’s Resignation as Harrisburg Receiver Follows Months of Dealing with Competing Interests, PENNLIVE (Mar. 31, 2012, 6:00 AM), https://perma.cc/9N76-FUYM.
39. See, e.g., Ivory et al., supra note 26.
40. Another example is San Diego County, where the area’s local governments purchased a privately operated toll road originally developed as part of a franchise agreement with a private owner whose bankruptcy imperiled a federal loan made to the private owner.
To solve this costly problem this Article seeks to reclaim the pertinent private law tool—fiduciary law—for the city. Contrary to first appearances, there is nothing particularly radical about this proposed move. Quite the opposite. It finds ample grounding in local government law’s own logic and history. In disparate branches of the law, the supposedly public city is in fact regarded as a private entity. For example, residents in many jurisdictions can bring a derivative lawsuit on their city’s behalf, as if it were a corporation.41 Similarly, when the city restricts trade, antitrust laws regulating private businesses may intervene, although state actions are exempt from such regulation.42 The law thus conceives of the city as an entity of a dual nature: a public entity that can, in certain circumstances, be treated as private.43 Most importantly, a long line of forgotten common law decisions from the nineteenth and early twentieth centuries held that city officials are fiduciaries when transacting in city assets and making contracts on the city’s behalf.44 As the examples of city transactions reported above illustrate, these cases have been ignored by modern lawmakers, commentators, and litigants—but they have never been overruled.45 As those examples also illustrate, the concern animating those early cases—a concern leading early courts to explicitly draw solutions from the laws governing similar agency relationships in trusts and corporations—remains normatively compelling today.46

After thus establishing city officials’ long-dormant status as fiduciaries, this Article explores that status’s ramifications. The role of the fiduciary duty of loyalty in policing city officials’ conflicts of interest has largely been supplanted by statutes setting clear anticorruption and ethics standards.47 The neglected fiduciary duty of care, in sharp contrast, may offer the only legal mechanism available for reviewing the quality of city officials’ actions,


41. See infra Part II.B.1.
42. See infra Part II.B.2.
43. See infra Parts I.B.-C.
44. See infra Parts I.B.-C.
45. See infra Part II.C.
46. See infra Part II.D.
47. See infra notes 240-50 and accompanying text.
incentivizing sound management practices, and preventing the regrettable practices highlighted by the examples provided above. Therefore, the specific contents of city officials’ duty of care must be discerned. We derive the appropriate standard of that duty for the city by exploring the fields of law that have a long experience with it: corporations law and trust law. From this analysis, we conclude that the standard of care most appropriate for the city’s normative circumstances is one that reviews the rationality of decisionmaking processes. Such a standard would require that officials engage in informed decisionmaking before entering major transactions.

This suggested focus on the procedural aspects of cities’ decisionmaking balances several important interests. The threat of such review would restrain the agent’s decisionmaking process and therefore partially address the agency problem inherent in city officials’ relationship with residents. At the same time, because the review would be solely procedural, courts would properly leave substantive judgments to political actors. Thus, under our proposed standard, courts would not be permitted to question the wisdom of a city’s decision to trade—to question, for example, a local decision to sell (or refrain from selling) local parking meters. But courts would be allowed to question the mechanics of the decisionmaking process for picking the meters’ buyer. City officials would preserve their prerogative as legislators to, in words attributed to Justice Thurgood Marshall, “enact[] stupid laws.” But in certain instances, city officials would be required to reach those stupid results through a sufficiently rational process.

This Article proceeds as follows. Part I identifies the source of city officials’ fiduciary duties. It demonstrates that the common law provides precedent for characterizing city officials (a group distinct from other public officials) as fiduciaries. It highlights the corporate law history of the city and demonstrates that even as late nineteenth century and early twentieth century common law courts came to view the city as a creature of public law, they nonetheless maintained corporate law fiduciary precepts in local government law whenever cities transacted in public assets. Part II then evaluates the current

48. The fiduciary duties to be imposed on one type of entity are developed through comparison to the fiduciary duties imposed on other types of entities. See Deborah A. DeMott, Beyond Metaphor: An Analysis of Fiduciary Obligation, 1988 DUKE L.J. 879, 891 (“The evolution of the law of fiduciary obligation illustrates, perhaps more powerfully than most bodies of law, the power of analogy in legal argumentation. Courts considering whether to impose a fiduciary constraint in a novel context rely heavily on comparisons to more conventional contexts in which the constraint does apply. . . . [This pattern’s] pervasiveness and persistence suggest that it is an inevitable aspect of fiduciary analysis.” (footnote omitted)).

49. See infra Parts III.C-.D.

state of the law. It illustrates that the dual treatment of the city—a public entity subject to private law precepts when entering the market—persists today. Yet Part II also finds that meaningful judicial application of fiduciary duties—particularly of the duty of care—to city transactions has dwindled for no apparent or normatively viable reason. Part III proceeds to fill this void by giving substance to the fiduciary duty of care that should be applied to city officials. After exploring the different duties of care used in private entities law, it imports to the city context the duty of care that currently exists under Delaware corporate law, arguing that this duty is the most suitable to the city. From this analysis, a clear conclusion emerges: U.S. law should, and easily can, reclaim fiduciary law for the city.

I. The Source of City Officials’ Fiduciary Duties

This Article contends that city officials are, at times, fiduciaries. The claim is innovative but also deeply rooted in U.S. law. This Part explains that paradox. It shows that while recent scholarly works arguing that all public officials are fiduciaries indeed break novel doctrinal ground, local public officials represent a special case. The common law already regards them as fiduciaries, even if, as Part II will explain, many of the ramifications of this status have been lately forgotten.

To establish this claim, this Part first surveys recent literature in fiduciary law analogizing all public officials to private officials and explains that literature’s limitations. It then turns specifically to local officials, whose unique circumstances the modern literature has not addressed, and highlights the traditional common law’s insistence on the city’s private law attributes and, accordingly, city officials’ legal status as fiduciaries.

A. The Public Law Source of All Public Officials’ Fiduciary Duties: Recent Works and Their Limits

Fiduciary duties are typically associated with private law.51 Those controlling trusts, estates, corporations, partnerships, and so on are the quintessential fiduciaries.52 In a recent spate of highly influential works, however, prominent scholars have put forward the fresh proposition that fiduciary duties are just as relevant to public law. These works are diverse, yet at their core is the

contention that the relationship between public official and citizen mirrors the relationship between a trust’s trustee and beneficiary or a corporation’s director and shareholder; the trustee and corporate director are empowered representatives who govern in accordance with agreed-upon constitutional order—and so is, of course, the public official.53

Scholars have assembled support for the idea that public officials should be treated as fiduciaries by drawing on writings from the era of the Framing and before,54 on the text of the U.S. Constitution,55 and on court decisions old and new.56 Specifically, they have argued that agency administrators,57 judges,58 federal employees,59 and elected officials60 owe fiduciary duties to the public. These officeholders are thus obliged, commentators argue, to divest themselves of certain securities,61 refrain from insider trading,62 abide by strong anticorruption norms,63 and more.64

The contention that public officials are the equivalents of private law’s fiduciaries is thus now a highly developed argument.65 It is not without

55. See, e.g., Tamar Frankel, FIDUCIARY LAW 284 (2011) (discussing constitutional provisions meant to curb conflicts of interest among federal officials (citing U.S. CONST. art. I, § 6, cl. 2; id. art II, § 1, cl. 7; id. art II, § 1, cl. 5; and id. art. I, § 3, cl. 3)).
56. See, e.g., Kim, supra note 53, at 877 & nn.186-87.
59. See, e.g., Kathleen Clark, Do We Have Enough Ethics in Government Yet?: An Answer from Fiduciary Theory, 1996 U. ILL. L. REV. 57, 63.
62. See, e.g., Donna M. Nagy, Insider Trading, Congressional Officials, and Duties of Entrustment, 91 B.U. L. REV. 1105, 1111 (2011) (arguing that enacting a law specifically prohibiting members of Congress from insider trading was unnecessary because it “is already illegal under present law”).
63. See, e.g., Clark, supra note 59, at 74-76.
64. See, e.g., Rave, supra note 60, at 676-77 (arguing that fiduciary duties should be employed to police self-serving redistricting).
65. One important book contends that this notion can serve as the theoretical grounding for states’ authority. See Evan Fox-Decent, Sovereignty’s Promise: The State as
The argument is grounded in an analogy between private associations and public governments, but that analogy is far from perfect. For example, the notion that residence in a nation or state represents a choice analogous to the choice involved in subjecting oneself to a corporate regime by buying the corporation’s stock is somewhat far-fetched. Moreover, the analogy is perhaps not as easily sustained by history and precedent as its proponents contend. Reliance on the Framers’ use of the term “trust” may anachronistically attribute to the Framers the modern concepts of trust law. It may conflate the legal function of the word “trust”—a term imbibed with specific doctrinal meaning—with the word’s function as an abstract term laypeople employ almost daily. Therefore, while the logical and legal analogy...
of the public official to the corporate or trust official is possible, it is contestable.

This Article is distinct from other works in that its focus on local officials sidesteps these controversies surrounding the broader public fiduciary literature. Fiduciary duties can be applied to local officials much more easily than to state and federal officials because this move need not draw on an analogy. Unlike the federal or state governments, the city’s legal roots are in the laws of the private corporation and trust. As will be seen below, while the state was never considered an actual corporation in U.S. law, the city was. Allusions to the term “trust” in the municipal context were, accordingly, not merely abstract pronouncements as in the state context, but rather meaningful statements made by courts that subjected city officials to rules applicable to private trusts and corporations. As a result, fiduciary duties form an inherent part of local government law and need not be imported into it by analogy.

B. The Private Law Source of City Officials’ Fiduciary Duties: The City as a Private Law Subject in Nineteenth Century Law

Stripped to its elemental composition, a city can be thought of as a geographically contained collection of individually owned properties that rely on, and are connected by, common properties supervised by a representative management body. This management body also provides certain services to the individually owned properties and their inhabitants. But the same can be said of a homeowners association or condominium. What then distinguishes the city from the homeowners association or condominium? For many laypeople and lawmakers today, the answer is simple: The former is public, the latter private. But what turns the city public? Why, for legal purposes, is it not private, like the similarly functioning homeowners association or condominium? The answer to that question is vital because the distinct label affixed to the city carries key legal ramifications; among other things, it determines whether the city is subject to the fiduciary duties governing private entities. This Subpart chronicles U.S. law’s ongoing struggles with that question. It first discusses the city’s origins as a private law subject and its nineteenth century transformation into a public law subject. It then explains that even after this transformation, the law still insisted on preserving, in local government law, elements of private law that governed city property ownership. This insistence led late nineteenth century and early twentieth century jurists to apply

72. On homeowners associations and condominiums, see, for example, JOSEPH WILLIAM SINGER ET AL., PROPERTY LAW: RULES, POLICIES, AND PRACTICES 586-87 (6th ed. 2014).
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fiduciary duties from private law to city officials transacting in city-owned properties.

1. The city's origins as a private law subject

The city, the homeowners association or condominium, the corporation, and similar entities are all collective entities—associations. Originally, the common law did not recognize any distinctions among associations; the City of London was not different from the East India Company. Both were "called bodies politic, bodies corporate, . . . or corporations." All such associational bodies shared a common goal: A group of individuals had chosen to combine their resources in order to promote common interests. That goal inevitably demanded the provision of a degree of protection to association members from outsiders. In a legal regime supplying individuals with little protection against government interference, such protection—the protection against the King—was to a great extent the raison d'être of all associations. Consequently, the quo warranto case of 1683, endorsing King Charles II's move to revoke corporate charters—including, prominently, the Charter of the City of London—has been called the "most important case in English History." It contributed to the Stuarts' ouster five years later in the Glorious Revolution that led to the immediate legislative reversal of the decision.

As the uproar over the quo warranto case of 1683 illustrates, the early common law did not see the city as part of government—quite the opposite. The city, like the business enterprise, was a creature of associational, or

74. Blackstone famously grouped together as "lay corporations" towns, the "trading companies of London," and colleges and universities. See 1 WILLIAM BLACKSTONE, COMMENTARIES *470-71.
75. Id. at *467.
76. See Frug, supra note 73, at 1092-93 (discussing the manner in which city charters were the model for other economic corporations and presenting the Hobbesian critique of all these entities as presenting a threat to the Crown).
77. See, e.g., People v. Morris, 13 Wend. 325, 334 (N.Y. Sup. Ct. 1835) ("Many of the English charters incorporating cities and towns . . . are to be viewed . . . in the nature of a bill of rights. . . . They were constitutional charters, which the crown could not encroach upon without violating the freedom of the subject. Most if not all of the leading cases in the books, involving the question of the inviolability of these charters in the English courts, arose between the prerogative of the crown and the corporation.").
80. See 1 BLACKSTONE, supra note 74, at *485.
corporate, law, and its main role—as that of all other associations—was isolating members from government. Cities were founded in the New World against this legal background. After all, few entities better reflect the muddied historical boundaries between business endeavors and local governments than the Virginia Company of London: an association of shareholders formed to establish, for the shareholders' profit, new communities in America. Several major colonial cities were legally established and governed as corporations chartered by the King: New York received such a charter in 1665, and Philadelphia's dates to 1701.

The corporate form separated ownership from management—as it still does today. Like the business corporation owned by many stockholders yet governed by a handful of directors, a chartered English municipality serving many residents was governed by a handful of common councilors (board of directors) and mayor (chief executive). As a legal matter, the city at the time of the Framing was an association like any other, sharing the same governance scheme as a business association.

In the ensuing decades, however, a stark division materialized in U.S. associations law: the private/public divide. The corporation came to be perceived as private, the city as public. The emerging core legal difference between the private association and the public association, most famously elaborated in the Supreme Court's 1819 ruling in *Trustees of Dartmouth College v.*

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84. See Berle & Means, *supra* note 1, at 4-5.


86. Samuel Williston, *History of the Law of Business Corporations Before 1800*, 2 HARV. L. REV. 105, 105 (1888) ("The most striking peculiarity found on first examination of the history of the law of business corporations is the fact that different kinds of corporations are treated without distinction, and, with few exceptions, as if the same rules were applicable to all alike. . . . Municipal and business corporations, so unlike according to modern ideas, are classed together as civil corporations, and treated together along with the rest."). Another conception of the city was not even imaginable. Even Boston, whose residents abhorred the corporate model bestowing control on a select few and thus refused to formally incorporate, was treated as a "quasi-corporation." See *id.* at 60-61. For the definition of a quasi-corporation, see 2 James Kent, *Commentaries on American Law* 274 (New York, William Kent 8th ed. 1854).

87. See People v. Morris, 13 Wend. 325, 337 (N.Y. Sup. Ct. 1835) ("The distinction between public and private corporations is strongly marked, and, as to all essential purposes, they correspond only in name.").
Woodward, had to do with the power of the state over the association. The “private” association, courts explained, was the embodiment of its members, and hence enjoyed the same protections from the state as did the individuals who had created it and were benefiting from it. Conversely, the “public” association was an instrumentality of the state, not a creature of its members. All powers a public association such as the city enjoyed had to be traced to the state and could be limited or taken away by the state. This attitude was given its most enduring expression in the famed 1907 decision in *Hunter v. City of Pittsburgh*, in which the Supreme Court rejected a challenge by residents to a state’s decision to disband their city and annex it to another. The city owed its existence to the state, not to its residents, and hence was ultimately answerable only to the state.

*Hunter* encapsulated the law’s transformation during the nineteenth century. Though as a practical and historical matter the city was a collective entity like any other association, by the late nineteenth century, as a legal matter, residents of a U.S. city, unlike members of other associations, formally no longer “own(ed)” their municipal corporation, except derivatively as members of a state polity.

2. The city retains a private law status as property owner

The preceding statement nicely reflects the conclusion of the post-Independence ideological transformation in attitudes toward the city. As a reflection of the legal reality emerging at the time, however, it is somewhat overblown. Whereas decisions in heavily cited cases, generalized court pronouncements, and scholarly writings forcefully insisted on the separation

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88. See 17 U.S. (4 Wheat.) 518, 668-69 (1819) (opinion of Story, J.) (framing the difference between public and private corporations as whether the associations “are founded by the government for public purposes, where the whole interests belong also to the government”).


90. See United States v. R.R. Co., 84 U.S. (17 Wall.) 322, 329 (1873) (explaining that municipal corporations represent “a portion of [the state’s] governmental power”).

91. See Comm’rs of Laramie Cty. v. Comm’rs of Albany Cty., 92 U.S. 307, 308 (1876) (“Unless the Constitution otherwise provides, the [state] legislature . . . has authority to amend the charter of [a municipal] corporation, enlarge or diminish its powers, extend or limit its boundaries, . . . and even abolish the municipality altogether, in its legislative discretion.”); see also W. Saving Fund Soc’y v. City of Philadelphia, 31 Pa. 175, 182 (1858) (“[A] municipal corporation . . . may be created and destroyed by the state at pleasure . . . .”).


94. HARTOG, supra note 82, at 3-4.
of the city from its roots in private law, in practice the picture was blurred. Several domains remained in which the city was continuously treated as a private entity. The earliest and most prominent was property law.

Even as the city was shedding its private legal status, its standing as a property holder was the one element of its original corporate nature that persistently needled nineteenth century courts and commentators. At least two attributes of city property ownership contributed to the complexity—one normative, the other historical.

First, the subjugation of the city to the state as described above was animated by a democratic desire to curb city power. City power was threatening because the city wielded regulatory powers over individuals—a governmental power that private entities lacked. As a property owner, on the other hand, the city enjoyed no special powers that private entities did not share, and hence the risk of abuse—and the accompanying normative need for separate legal treatment—was somewhat muted.

Second, whenever the issue was the city’s standing as an owner—as opposed to as a regulator—the city’s corporate roots were difficult to ignore. The city owned property because such property was conveyed to the public by residents (for example, through the doctrine of “dedication”) or because the city acquired it using the residents’ contributed funds (paid as taxes or special assessments). While as a government the city’s existence could somehow be imagined as a mere extension of the state government, as a holder of property such a conception was clearly inadequate. Thus, although it now considered

95. For example, residents were still allowed to bring derivative lawsuits on behalf of cities. See infra Part II.B.1.
96. See Murray B. Seasongood, Municipal Corporations: Objections to the Governmental or Proprietary Test, 22 Va. L. Rev. 910, 914, 938 (1936) (critiquing the distinction between municipalities acting in a “governmental or proprietary” capacity and concluding that “no satisfactory basis for solving the problem whether the activity falls into one class or other has been evolved”); id. at 938 (”The rules sought to be established are as logical as those governing French irregular verbs.”).
97. Cf. Frug, supra note 73, at 1106 (suggesting that “nineteenth century thinker[s] could have conceived of state control of cities as a defense of freedom”).
98. See Hartog, supra note 82, at 17.
100. See, e.g., Proprietors of Mt. Hope Cemetery v. City of Boston, 33 N.E. 695, 698 (Mass. 1893) (reasoning that a city may possess property in “its private or proprietary character, as a private corporation might own it”).
102. See Bd. of Comm’rs v. Lucas, 93 U.S. 108, 115 (1876) (“But property, derived by [municipal corporations] from other sources [beyond the state], is often held, by the terms of its grant, for special uses, from which it cannot be diverted by the legislature. footnote continued on next page
the city a public entity, the law did not revoke the city's status as a private entity when its ownership interests in assets were concerned—a key finding for this Article's analysis of the city's obligations as an asset's seller.

Instead, the courts early on acknowledged the duality of the city's nature. They insisted that the city was always subject to state powers in its governmental capacity, but not in its proprietary capacity. That is, when holding that the state could overrule city action, and could even abolish city governments (as in Hunter), courts noted that the same rules would not apply when the city exercised its property rights.

But respecting this proclaimed dual nature of the city proved challenging for courts. The neat dividing line between the city regulating behavior and the city owning property quickly blurred in practice. Control over resources is always a form of exercising power over others, and the city's position as the sole owner of certain local properties means that it forcefully

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104. 2 Kent, supra note 86, at 309 ("Public corporations are such as are created by the government for political purposes, as counties, cities, towns and villages; they are invested with subordinate legislative powers to be exercised for local purposes connected with the public good, and such powers are subject to the control of the legislature of the state. . . . They may also be empowered to take or hold private property for municipal uses, and such property is invested with the security of other private rights.").

105. See supra notes 91-94 and accompanying text.


107. Dillon believed that the distinction was so "difficult to exactly define" that it was effectively "judicial legislation imperceptibly evolved in the process of adjudication." 1 Dillon, supra note 99, § 110.

108. In a related context, the modern Supreme Court has acknowledged the futility of efforts to rely on the distinction between cities as traditional governments and cities as private employers. Shortly after holding that applying a federal minimum wage law to municipal workers interfered with traditional governmental powers (delegated to the locality by the state) and was thus an unconstitutional exercise of Commerce Clause power, see Nat'l League of Cities v. Usery, 426 U.S. 833, 851-52 (1976), the Court overruled itself and rejected the distinction between governmental and proprietary powers, at least as it pertains to federal regulatory authority, see Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 545-47 (1985).

109. See Morris R. Cohen, Property and Sovereignty, 13 Cornell L.Q. 8, 12 (1927) (describing how private property rights amount to power over others).
polices behavior by regulating how those properties are used. When the city defines allowable activities in a public park (for example, permitting or prohibiting alcohol consumption, or closing the park on Sundays), is it acting as a regulator of individual behavior or as an owner setting the contours of its property's uses? What about when the city sets construction criteria for buildings that will be allowed to connect to its sewage system?

These questions defy categorical answers, and thus statements that cities were immune from state intervention when acting as property owners remained mostly dicta. When put to the test, courts did not block states from interfering with local activities—often irrespective of those local activities' seemingly proprietary nature. For example, courts allowed states to seize a city's ferry franchise and to rewrite a contract between a city and a railroad servicing its streets. Private individuals' or entities' property could not so easily be removed from their ownership. The city's private status

110. See Hartog, supra note 82, at 18-22, 66-68 (explaining that New York City's early charter blurred the line between the city's rights over its property and its governmental powers and that the city often exercised governmental power through its control over its property); see also, e.g., Nicole Stelle Garnett, Relocating Disorder, 91 VA. L. REV. 1075, 1077-78 (2005) (describing a rise in local government policies where officials use "property regulation," rather than "policing," in attempt to control "urban disorder").


113. See Hugh D. Spitzer, Realigning the Governmental/Proprietary Distinction in Municipal Law, 40 Seattle U. L. Rev. 173, 175 (2016) (“The classification of local government powers into ‘governmental’ and ‘proprietary’ categories causes more confusion than perhaps any other distinction in municipal law.”).

114. Indeed, some states never recognized the distinction. See, e.g., Carter v. City of Greenville, 178 S.E. 508, 510 (S.C. 1935) (reproducing the county circuit judge’s order in the case).

115. Confronted with a city’s challenge to a state law that abrogated provisions of the city’s contract with a local railroad—in a manner benefiting the latter—the Supreme Court could name only two cases applying the doctrine under which proprietary acts were immune from state interference. See City of Worcester v. Worcester Consol. St. Ry. Co., 196 U.S. 539, 539-42, 551 (1905) (citing Bd. of Comm’rs v. Lucas, 93 U.S. 108 (1876); and Proprietors of Mt. Hope Cemetery v. City of Boston, 33 N.E. 695 (Mass. 1893)). Even between those two cases, only one actually did so. See Mt. Hope Cemetery, 33 N.E. at 698.


118. See U.S. Const. amend. V (“[N]or shall private property be taken for public use, without just compensation.”). Like the U.S. Constitution, many state constitutions require that the state pay the owner just compensation for taking her property. E.g., Ky. Const. § 13; Mont. Const. art. II, § 29; Vt. Const. ch. I, art. 2; Wis. Const. art. I, § 13.
when owning property did not, apparently, generate a private law-type relationship between the city and the state.119

3. The city’s duties as property owner: the public trust doctrine and fiduciary obligations

The city’s private status when owning property did, however, generate a private law-type relationship between the city and its residents. Acting as a government, the city was not obliged to assure residents the enjoyment of specific services or regulations.120 But when acting as a property owner, it could be required to assure residents the enjoyment of certain assets because the law conceived of the city as holding those assets as the residents’ trustee.121 The “public trust” doctrine generated duties that the city owed to its members rather than to the state.

The doctrine originated in the common law’s rule that certain resources—navigable waters and the lands submerged under them, and later also highways and streets122—were held by the King rather than the owners of adjacent lands.123 But the powers of the government (the King’s successor) over these assets depended on the level of government; nineteenth century U.S. courts drew a clear distinction between state and city governments. The state as holder of public trust properties had full power to convey them, like any other

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119. The Supreme Court reasoned that the distinction’s sole relevance was with regard to the city’s immunity from negligence claims challenging acts of its agents and that the distinction was thus irrelevant to the city’s relationship with the state. See City of Trenton v. New Jersey, 262 U.S. 182, 191-92 (1923).

120. See 18 EUGENE MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 53:2 (3d ed. West 2017) (“As a government [the city] is obligated to serve the local inhabitants, to supply them with municipal needs and conveniences . . . . [T]he only remedy for failure, like the remedy for failure on the part of the nation or state, is public protest at the ballot box . . . .”). Naturally, because the city is a creature of the state, state laws may place specific service-provision obligations on the city. See supra notes 87-94 and accompanying text. Thus, for example, the Connecticut Supreme Court interpreted its state constitution as mandating that all local school districts, as agents of the state, provide certain instructional amenities to all students. See Conn. Coal. for Justice in Educ. Funding v. Rell, 990 A.2d 206, 253-54 (Conn. 2010) (citing CONN. CONST. art. 8, § 1).


122. See MOLLY SELVIN, THIS TENDER AND DELICATE BUSINESS: THE PUBLIC TRUST DOCTRINE IN AMERICAN LAW AND ECONOMIC POLICY, 1789-1920, at 63-64, 108 (1987). While waterways and submerged lands were held to be inherently public, see Carol Rose, The Comedy of the Commons: Custom, Commerce, and Inherently Public Property, 53 U. CHI. L. REV. 711, 727-28 (1986), streets were normally transferred—“dedicated”—to the public by their owners and then held by the government as the public’s trustee. See Joseph D. Kearney & Thomas W. Merrill, Private Rights in Public Lands: The Chicago Lakefront, Montgomery Ward, and the Public Dedication Doctrine, 105 NW. U. L. REV. 1417, 1450 (2011).

123. See Rose, supra note 122, at 727-28.
owner: The properties were “subject to [the state’s] absolute direction and control . . . over which [the state] holds despotic sway.” 124 The city, by contrast, held public trust assets merely as its residents’ agent.125 Consequently, it held over them only the limited powers of a trustee.126 As one court declared, “[T]he street . . . has been given to [the city] as a trust for the use of the public, and [thus] it is not authorized to relinquish” exclusive control over it.127 A legal encyclopedia written during the nineteenth century’s closing decade authoritatively announced: “Municipal corporations hold the titles to streets, alleys, public squares, wharves, etc., in trust for the public; and upon principle, such trust property can no more be disposed of by the corporation than can any other trust property held by an individual.”128

As the public’s trustee, the city could not divest itself of the trust properties or close them to the public; it could only manage them to promote the public trust’s goals.129 Effective management might require entering contracts that could enhance the public benefit derived from the properties.130 But once a contract was thus permissible, what were the duties to which the contracting city was subject? An early New York decision provided the answer—an answer of great importance for this Article’s claim because it was resolutely grounded in the private law of the trust and the corporation.

In 1852, New York City’s board of aldermen resolved to allow a private entity to operate a passenger railway on Broadway, a decision several residents challenged in court.131 The street, like all city streets, was held by the city in

124. See, e.g., In re Phila. & Trenton R.R. Co., 6 Whart. 25, 43-44 (Pa. 1840).
125. See, e.g., Milhau v. Sharp, 15 Barb. 193, 231 (N.Y. Gen. Term. 1853) (opinion of Strong, J.) (“There is undoubtedly a wide difference in this respect between the acts of the state legislature and of municipal corporations. . . . The [city] council has no authority under the city charter or any statute, to give away, or make an improvident grant of, the public property . . . . Its disposition of such property . . . is therefore subject to the common law principles applicable to the grants made by trustees to whom the management of private property is confided.”).
126. See, e.g., City of Quincy v. Jones, 76 Ill. 231, 242 (1875) (“Holding [the streets] in trust for the public and having no authority to convey or divert them for other uses, . . . [the city] can have no power to grant to individuals rights or easements in the street which might in any way interfere with the duty of preparing them for the public use . . . .” (emphasis added)).
130. Cf. City of Milwaukee v. State, 214 N.W. 820, 831 (Wis. 1927) (holding that a grant for harbor improvement does not violate the public trust because such trusts “should be administered to promote . . . the public health and welfare generally”).
trust for the public’s benefit. But under the board of aldermen’s decision, the street was to remain open to the public, so there was no arguing that the city’s grant of access to the passenger railway violated the public trust doctrine. Instead, the plaintiffs contested the details of the specific grant made, arguing that the city was conveying “these privileges for a trifling sum . . . when the trustees might have obtained a million of dollars for the grant,” and that this amounted to a “palpable breach of trust.”

This claim was extraordinary: It asked the court to strike down a city decision, duly authorized by state law, merely because it was improvident. Nonetheless, the court, relying on the distinction between the city’s role as government and its role as private property holder, accepted the plaintiffs’ claim. The justices agreed that “as far as [the city] acts in the exercise of its public political powers, and within the limits of its charter, it is vested with the largest discretion.” Whether its laws are wise or unwise; whether they are passed from good or bad motives, it is not the province of this court to inquire. But the court proceeded to draw a clear line dividing such acts from others:

[A]s regards the acts of the corporation in reference to its private property, it stands upon a very different footing. Such property is held for the common benefit of all the [city residents]. In respect to that, the corporation is charged with high duties. It is the depositary of a trust which it is bound to administer faithfully, honestly and justly. And no one will contend that the body of men, who for the time being, may be its duly authorized representatives, can legally dispose of its property of great value, without any or for a nominal consideration; and if they shall presume to do so, it will be no excuse for such a gross and unwarrantable breach of trust to say that they acted in their legislative capacity; for the very simple reason that they will not act in that capacity. They will be acting in reference to the private property of the corporation, and, in this respect, will stand upon the same footing as if they were the representatives of a private individual, or of a private corporation.

When it was transacting in public trust assets—as opposed to when it was exercising “political power[s]”—the city council was the equivalent of the “board of directors” of [b]anking corporations, and railroad and insurance

132. See id. at 209.
133. See id. at 198 (argument for the plaintiffs).
134. Cf. id. at 243 (opinion of Morris, J.) (objecting that the other justices had improperly decided the question “whether the power has been wisely exercised or not”).
135. See id. at 218 (opinion of Edwards, P.J.); see also id. at 231-32 (opinion of Strong, J.) (“I concur with my brother Edwards in the opinion that the papers submitted to us prove a clear breach of trust, which invalidates the grant.”).
136. See id. at 212 (opinion of Edwards, P.J.); see also id. at 231 (opinion of Strong, J.).
137. Id. at 212 (opinion of Edwards, P.J.).
138. Id. (emphasis added).
companies. The court thus subjected the city council to the same obligations governing those bodies. Consequently, the court faulted the city council for accepting an offer that was much worse than other offers presented to it.

The council had violated its obligation toward the residents—referred to as “corporators”—in a “gross and unwarrantable” manner. The New York court thus clearly delineated two realms of city power: one of public political powers, the other of property holding and contracting powers. The court agreed that the former was not subject to duties from private law; it had no doubt that the latter was.

Other state courts similarly acknowledged the city’s dual public and private nature and, over the ensuing few decades, elaborated on the contents of the city’s private duties and their application to city deals. This work was accomplished through two categories of cases: one involving government contracts, the other the sale of services to nonresidents. The city’s expanding role in the rapidly industrializing nation of the late nineteenth century created the factual underpinnings for both groups of disputes. The legal underpinnings for their resolution were squarely found in the fiduciary law of trusts and corporations, almost perfectly paralleling modern notions of private fiduciary law.

The first group of cases dealt with city contracts. As cities grew in size and economic importance, they increasingly assumed responsibility for providing expanded public services—such as water, sewage, and garbage collection—for which they often entered contracts. In turn, many contracts raised ethical

139. See id. at 212-13.
140. See id. at 217-19.
141. See id. at 212.
142. See id. at 212-13.
143. See id.
144. A third group of cases prominently alluding to fiduciary notions dealt with municipal liability for acts of city employees. Courts stressed:

   It is the duty of the corporation to exercise proper care and prudence in the selection and employment of suitable agents and servants; to retain the requisite degree of control and superintendence over them in the performance of their duties; and to enforce such measure of vigilance and care as will guard against all unusual or unreasonable exposure to injuries.

   See, e.g., Mayor of Memphis v. Lasser, 28 Tenn. (9 Hum.) 757, 761 (1849). But those duties derived from tort law principles, not from corporations’ fiduciary duties to their stockholders (or in the case of cities to their residents). See id.
146. See AUSTIN F. MacDonald, AMERICAN CITY GOVERNMENT AND ADMINISTRATION 67 (rev. ed. 2d prtg. 1937) (noting the rapid increase of city services between 1865 and 1890); see also Richard C. Schragger, Mobile Capital, Local Economic Regulation, and the Democratic City, 123 HARV. L. REV. 482, 499-500 (2009).
concerns because the boundaries between municipal political leadership and local business interests were at the time famously porous. In reaction to this problem, courts drew on standard private law fiduciary theories that made contracts voidable if tainted by an agent’s or a trustee’s self-dealing. In this vein, for example, courts voided a contract through which a city hired a councilmember to provide horses for a Fourth of July procession and a city’s transfer of land to a railroad company on whose board a councilmember sat. Courts reasoned that upon joining a city council, a councilmember takes on certain fiduciary duties toward the city’s residents. Among those duties was a prohibition on engaging in self-dealing transactions. In reaching this rule, courts explicitly held the city to be the corporation’s or trust’s equivalent and


148. Those courts drew from the rule developed to bar the potential for self-dealing by trustees: the “sole interest” standard, famously pronounced in Thorp v. McCullum, 6 Ill. (1 Gilm.) 614, 625-27 (1844). See John H. Langbein, Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest?, 114 YALE L.J. 929, 931, 934 & n.17 (2005) (explaining trust law’s “sole interest” rule and citing Thorp as an early influential case). That standard requires that the trustee administer the trust “solely in the interest of the beneficiaries.” See 3 RESTATEMENT (THIRD) OF TRS. § 78(1) (AM. LAW INST. 2007). Thus, any transaction that could further the trustee’s own interests—even if only potentially and in addition to the transaction’s benefit to the beneficiary—was prohibited.


150. See President of the City of San Diego v. San Diego & L.A. R.R. Co., 44 Cal. 106, 111-13 (1872); see also Nunemacher v. City of Louisville, 32 S.W. 1091, 1091-92 (Ky. 1895) (voiding a city contract with a printing company, where one of the printing company employees was a city councilmember, as contrary to the spirit of a state statute on city governance).

151. See President of the City of San Diego, 44 Cal. at 113 (“The general principle is, that no man can faithfully serve two masters, whose interests are or may be in conflict. The law, therefore, will not permit one who acts in a fiduciary capacity to deal with himself in his individual capacity.”); Nunemacher, 32 S.W. at 1091 (“It is a well-established and salutary rule in equity that he who is intrusted with the business of others cannot be allowed to make such business an object of pecuniary profit to himself.”).
city officials to be fiduciaries. Decisions were based on the leading treatise on agency and on cases involving trustees.

The second group of local government law cases in which courts used private fiduciary law precepts involved extraterritorial service delivery. As the century progressed, cities began providing their residents with water, gas, and electricity. Sometimes a city’s utility would produce a surplus that the city would sell to nonresidents. City residents challenged these acts as ultra vires—acts not authorized by law, or in those cases, city acts not authorized by the state. As a public entity, a city had to pinpoint an authorization in state law for each of its actions. Furthermore, by this point local government law was defined by a rule, named “Dillon’s Rule” after a famous treatise writer, holding that state statutes enabling local actions were to be interpreted narrowly. Jurists deeply mistrusted city officials because of widespread corruption and thus sought to limit their power by requiring the city to identify an explicit state authorization for each of its acts. Therefore, plaintiffs could compellingly claim that the relevant state statute enabling a city to provide utility services authorized it to do so only within the city’s own boundaries—the natural limits of its sphere of action.

152. See President of the City of San Diego, 44 Cal. at 116-17; see also, e.g., People ex rel. Plugger v. Twp. Bd., 11 Mich. 222, 226 (1863) (opinion of Manning, J.) (also using the example of a guardian and a ward); State v. Consumers’ Water Co., 28 A. 578, 580 (N.J. 1894); Pickett v. Sch. Dist. No. One, 25 Wis. 551, 553 (1870).
153. See, e.g., Smith, 61 N.Y. at 445-46 (quoting JOSEPH STORY, COMMENTARIES ON THE LAW OF AGENT § 210, at 200 (Boston, Charles C. Little & James Brown 1839)).
155. Even for water, the most important early service they provided, most cities did not begin developing a sophisticated distribution network until around 1850. See, e.g., CARL SMITH, CITY WATER, CITY LIFE: WATER AND THE INFRASTRUCTURE OF IDEAS IN URBANIZING PHILADELPHIA, BOSTON, AND CHICAGO 29, 40 (2013).
156. See, e.g., Bd. of Comm’rs v. City of Ft. Collins, 189 P. 929, 929-31 (Colo. 1920).
157. See State ex rel. Boycott v. Mayor of La Crosse, 84 N.W. 242, 244-45 (Wis. 1900) (striking down as unauthorized a city’s attempt to only partially adopt a state statutory scheme for grading streets); supra notes 91-93 and accompanying text.
159. See Barron, supra note 159, at 2285-86.
160. See City of Henderson v. Young, 83 S.W. 583, 583 (Ky. 1904) (“This action was instituted by the appellee . . ., a resident and taxpayer of the city of Henderson, to enjoin the city . . .

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Nonetheless, the many courts that dealt with these resident suits rejected them—by referring to corporate law principles. They explained that Dillon's Rule applied only to the city's governmental powers, not to its proprietary actions. Reverting to the supposedly rejected idea of the city as a business corporation, they referred to the city entering the utilities market as a "business concern or enterprise." Acting as such, it "is governed largely by the same rules that apply to a private corporation." Among these rules figured a duty toward its members—city residents—to exercise "common prudence," or to act in accordance with a theory of "good business." Like any other corporation, decisions about "[w]hen to sell and when not to sell must be left, as other matters of business are left, to [municipal corporations'] sound judgment."
These descriptions smoothly glided from a discussion of corporations to a discussion of cities. Citing cases regarding private corporations, courts concluded that a prudent business would sell surplus product. Indeed, some courts hazarded that prudence may in fact require cities to sell resources they produce but cannot consume. The reasoning was always premised, once more, on the public trust notion: The city “holds the property represented by the investment . . . in trust for its citizens,” and thus city officials are subject to “the duty to gain the greatest benefit to the taxpayers.”

Like the rulings in the city contracts cases, the rulings in the extraterritorial utility provision cases treated the city as a private entity because it was acting as such. Moreover, these two groups of cases specifically subjected city officials to the fiduciary duties prevailing in corporate and trust law. The prohibition on councilmembers’ self-dealing developed in the city contracts cases echoes the duty of “loyalty.” The duty to exercise prudence developed in the extraterritorial services cases traces the duty of “care.” Indeed, one court’s conclusion, in 1876, that due care in city management required city officials to act “as prudent persons ought to allow themselves in the management of their own affairs” amounts to a canonical statement of the trust law standard of care.

170. See, e.g., Pikes Peak Power Co. v. City of Colorado Springs, 105 F. 1, 13 (8th Cir. 1900) (citing Union Pac. Ry. Co. v. Chi., R.I. & P. Ry. Co., 51 F. 309, 321 (8th Cir. 1892)).

171. See, e.g., City of Ft. Collins, 189 P. at 930-31. Dillon himself acknowledged this city privilege as an exception to his rule. See 3 DILLON, supra note 99, § 1300.

172. See, e.g., Pikes Peak Power, 105 F. at 13 (discussing municipalities’ “duty . . . to apply the surplus power and use of all public utilities under their control for the benefit of their cities and citizens”); Milligan, 153 P. at 279 (“Common prudence requires that [the city] . . . make such disposition of any surplus or by-product as will promote economy in its operation and gain for the people . . . .”)

173. Milligan, 153 P. at 279.

174. See supra notes 146-54 and accompanying text.

175. Courts referred to trust and corporate duties interchangeably because at the time the two bodies of law were not well defined. Corporate law developed as a field distinct from the law governing other associations—such as partnerships—only in the late nineteenth and early twentieth centuries. On the emergence of modern corporate law, see MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY 65-107 (1992).

176. See Meinhard v. Salmon, 164 N.E. 545, 546, 548 (N.Y. 1928) (“Joint adventurers, like copartners, owe to one another, while the enterprise continues, the duty of the finest loyalty.”).

177. See 2 RESTATEMENT (THIRD) OF AGENCY § 8.08 (AM. LAW INST. 2006).

178. Tuggle v. Mayor of Atlanta, 57 Ga. 114, 117 (1876).

179. See, e.g., Harvard Coll. v. Amory, 26 Mass. (9 Pick.) 446, 461 (1830) (“All that can be required of a trustee to invest, is, that he shall conduct himself faithfully and exercise a sound discretion. He is to observe how men of prudence, discretion and intelligence manage their own affairs . . . .”).
C. Summary: City Officials as Common Law Fiduciaries

The common law viewed city officials as paradigmatic fiduciaries. As this Part has argued, city officials are in this respect different from other public officials, who can only be viewed as private fiduciaries by analogy. The city’s legal status originated in the private law of associations, fiduciary duties’ customary domain. Although over the course of the nineteenth century the law came to view the city as a creature of public law, the common law persisted in recognizing those acting on behalf of cities as de jure private law fiduciaries in certain contexts.180 Courts readily distinguished the city’s public attributes—on display when the city was governing—from private attributes—it shared with private entities—on display when it was acting as a property owner. Transacting in those properties, the city was like a trust or corporation, and its officials were thus subject to fiduciary duties of loyalty and care. The common law thereby provides a source for city officials’ fiduciary duties.

II. The Current State of City Officials’ Fiduciary Duties

As Part I illustrated, nineteenth century courts unequivocally subjected cities’ market transactions to the same fiduciary scrutiny prevalent in the law of trusts and corporations.181 But fiduciary duties were not even mentioned by the Illinois court faced, in 2014, with the challenge to Chicago’s sale of the revenue from its parking meters.182 What transpired in the intervening century? Has the city’s banishment from the realm of private law finally been completed? Have the decisions subjecting the city to fiduciary law been overruled? This Part addresses these questions, concluding that the doctrine as presented in Part I is still good, albeit dormant, law.

This Part first notes the endurance of the public trust doctrine that originally served as the basis for treating the city as a private corporate entity when transacting in the market. It then highlights other consequential doctrines from private associations law that have more recently been developed and applied to local governments. Finally, this Part finds that despite this continued and expanding insistence that the city is not dissimilar to private entities when engaging the market, modern courts have applied fiduciary law to such city actions in a partial, and unsatisfactory, manner. They have applied fiduciary duties when addressing city officials’ conflicts of interest

180. For another example of a court viewing city officials as agents of the public, see Green v. Town of Canaan, 29 Conn. 157, 163-64 (1860) (holding that because the public had already accepted a dedication of a highway, city officials—the public’s mere “agents”—need not do so).
181. See supra Part I.B.3.
182. See supra notes 12-14 and accompanying text.
but not when addressing those officials’ sound management. Therefore, this Part concludes that while the common law still provides a source for applying fiduciary duties to the city, the substantive content of those duties, particularly for the duty of care, requires new elaboration.

A. The City and the Public Trust Doctrine Today

The nineteenth century’s public trust doctrine served as the beachhead for the application of private law’s fiduciary duties to the city even after it had been transformed into a public law entity. This doctrine of the public trust still forms part of U.S. law today, indicating that the grounds for perceiving the city as a private entity, at least in some contexts, have remained firm.

The public trust doctrine has persisted as a vital tool through which courts limit cities’ ability to transfer lands covered by the trust. Thus, for example, late in the twentieth century the Illinois Supreme Court clarified that “public streets are held in trust for the use of the public. . . . Streets do not exist and were not created as . . . revenue-producing property for municipalities.” Many modern state statutes similarly employ corporate and trust language; an Illinois statute, for instance, provides: “[T]he premises intended for any street, alley, way, common or other public use in any city, village or town . . . shall be held in the corporate name thereof in trust to and for the uses and purposes set forth or intended.” When Chicago’s City Council authorized its mayor and chief financial officer to sell income from its parking meters, it specifically inserted an acknowledgement of this legal fact into the contract that would be signed: “The City agrees, and the Concessionaire acknowledges and accepts, that the City holds and administers the public way in trust under the public trust doctrine . . . .”

Many questions plague the public trust doctrine’s current operation, and we will not attempt to answer them here. Our point rather is that modern

183. See JOSEPH WILLIAM SINGER, PROPERTY 87 (3d ed. 2010). States embrace the doctrine to varying degrees. See, e.g., Fencl v. City of Harpers Ferry, 620 N.W.2d 808, 813-14 (Iowa 2000) (declining to extend the “narrow” public trust doctrine beyond natural resource properties to alleys).
185. 765 ILL. COMP. STAT. ANN. 205/3 (West 2017).
186. CITY COUNCIL OF THE CITY OF CHI. JOURNAL, 2007 Council 50,576 (Dec. 4, 2008), https://perma.cc/E5W3-5PVJ. Chicago’s ordinance authorizing the contract set out its exact terms in an exhibit and required its mayor and chief financial officer to enter into an agreement “in substantially the same form” as the exhibit “or with such changes as are not inconsistent with this ordinance and are approved by the executing officer.” See id. at 50,508-09.
courts still routinely rely on the public trust doctrine.\textsuperscript{188} That doctrine is grounded on notions of trust emanating from private law. It restricts cities' freedom in transacting with assets because the public is held to be the assets' beneficial owner.\textsuperscript{189} That conception of the public's status has served as the historical, and analytical, ground for applying fiduciary duties to the city.

B. The City and Modern Corporate Law Doctrines

In addition to retaining the public trust doctrine, modern courts have built on the foundation laid by that doctrine to conceive of the relationship between the city and its residents—at least in some settings—as characteristic of a private association. At least two key twentieth century doctrines policing those private associations have been applied to the city when it enters the market, one procedural and the other substantive: the derivative lawsuit and antitrust law.\textsuperscript{190} Separately and in tandem, these doctrines' application indicates that current law continues to recognize the relevance of private law concepts to the city.

\textsuperscript{188} This is certainly the case with respect to lawsuits involving bodies of water, land adjacent to those bodies, and perhaps other natural resources. See Richard J. Lazarus, \textit{Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine}, 71 IOWA L. REV. 631, 643 (1986) ("Since 1970 the public trust doctrine indisputably has had a major impact on litigation brought by parties on behalf of natural resource protection . . . ."); see also Friends of the Parks v. Chi. Park Dist., 160 F. Supp. 3d 1060, 1066-69 (N.D. Ill. 2016).

\textsuperscript{189} See supra notes 122-28 and accompanying text.

\textsuperscript{190} Another important field where the city has recently been subjected to private, corporate-like treatment is § 1983 litigation. See \textit{generally} 42 U.S.C. § 1983 (2016) ("Every person who, under color of [state law], subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to that party injured in an action at law, suit in equity, or other proper proceeding for redress . . . ."). In \textit{Monell v. Department of Social Services}, the Court, reversing its earlier ruling, held that local governments are "person[s]" that can be held liable under § 1983. See 436 U.S. 658, 700-01 (1978), \textit{overruling in part} Monroe v. Pape, 365 U.S. 167 (1961). The Supreme Court has also carved out a "market participant" exception to the Commerce Clause's prohibition on discrimination against outside business by state and local governments. See \textit{White v. Mass. Council of Constr. Emp'rs, Inc.}, 460 U.S. 204, 206-08 (1983).
1. Derivative lawsuits

The derivative lawsuit is a unique feature of private entities law; its availability in local government law thus signifies the city’s continued legal status as a private entity. In a derivative lawsuit, a third party, not directly injured by the defendant, is granted standing to sue that defendant for an injury inflicted on an entity in which that third party holds a beneficial interest.\(^{191}\) The individual's suit is “derivative” in that the plaintiff's rights and standing are derived from the entity’s.\(^{192}\) Accordingly, any recovery from the lawsuit will generally be awarded to the entity, not to the plaintiff.\(^ {193}\)

Derivative suits are the primary enforcement mechanisms for fiduciary law in corporations.\(^ {194}\) If the board of directors, in breach of a fiduciary duty, were to sell an asset of the corporation at an unreasonably low price, the corporation—the wronged party—could bring a lawsuit to have the transaction rescinded or to seek recovery from the directors for their breach. But those who typically make litigation decisions on behalf of the wronged corporation—the board of directors—are the same whose decision would be challenged. The corporation's lawsuit against the agents, therefore, would likely never be brought.\(^ {195}\) The law solves this problem by enabling a lawsuit brought not by the corporation itself but derivatively by its shareholders.\(^ {196}\)

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191. See 2 JAMES D. COX & THOMAS LEE HAZEN, COX & HAZEN ON CORPORATIONS: INCLUDING UNINCORPORATED FORMS OF DOING BUSINESS § 15.03 (2d ed. 2003) ("Suits that shareholders can prosecute on behalf of the corporation in a representative capacity because they involve a corporate cause of action are called derivative suits."). Derivative lawsuits implicate a variety of procedural nuances not relevant for purposes of this Article, including whether there is a requirement that the shareholder make a demand on the corporate board of directors and whether a special litigation committee may take back control of the litigation. See id. §§ 15.06-.08.

192. See id. § 15.03.

193. See id. §§ 15.03-.04. Individual plaintiffs in a derivative suit may recover under special circumstances and may be entitled to attorneys’ fees. See id. § 15.04.

194. See id. § 15.03. Likewise, trust law recognizes a beneficiary’s derivative suit. See, e.g., Riviera Cong. Assoc. v. Yassky, 223 N.E.2d 876, 880 (N.Y. 1966) ("The derivative suit is, in effect, ‘a combination of two causes of action’—one against the trustee for wrongfully refusing to sue and the other against the party who is liable to the trust." (quoting Koral v. Savory, Inc., 11 N.E.2d 883, 885 (N.Y. 1937))). The trust, however, is not a separate legal entity, so the beneficiaries of a trust need not resort to the derivative suit when breaches of loyalty or care by a trustee are at issue. See JESSE DUKEMINIER & ROBERT H. SITKOFF, WILLS, TRUSTS, AND ESTATES 587-88 (9th ed. 2013). Rather, beneficiaries may proceed directly against a trustee, see id. at 587, and so our focus in this Subpart is on derivative actions in the corporate context.

195. See Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 547-48 (1949) ("Equity . . . allowed [the stockholder] to step into the corporation's shoes and to seek in its right the restitution he could not demand in his own.").

196. See id.; see also, e.g., Levine v. Smith, 591 A.2d 194, 205 (Del. 1991) (holding that a derivative claim may be brought when "a majority of the board of directors either has a..." footnote continued on next page
Precisely because the justification for derivative lawsuits is so peculiar to the circumstances of the private association, such a lawsuit cannot be brought on behalf of a government. Government entities, as the Supreme Court has explained, are not mere agglomerations of their taxpayers’ interests, and thus individual taxpayers have no standing to sue government agents, or those with whom the agents deal, absent a direct injury individual to them. A government’s lawsuit is not its citizens’ lawsuit. If officials are not pursuing the lawsuit citizens desire, those citizens’ only recourse is found at the ballot box. Hence, with very few exceptions, explicitly created by statute and

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finances in the challenged transaction or lacks independence or otherwise failed to exercise due care), overruled in other part, Brehm v. Eisner, 746 A.2d 244 (Del. 2000).

197. For the rule that citizens cannot bring derivative suits against government policymakers by virtue of belonging to the polity, see Fairchild v. Hughes, 258 U.S. 126, 129-30 (1922) (“Plaintiff has only the right, possessed by every citizen, to require that the Government be administered according to law and that the public moneys be not wasted. Obviously this general right does not entitle a private citizen to institute [a suit] in the federal courts . . . .”).

198. See Massachusetts v. Mellon, 262 U.S. 447, 487-88 (1923) (stressing that unlike the corporation, not all of the government’s funds can be traced to members).

199. Cf. Steven L. Winter, The Metaphor of Standing and the Problem of Self-Governance, 40 STAN. L. REV. 1371, 1502-03 (1988) (explaining that by rejecting the derivative suit under Article III standing doctrine, federal constitutional law subverts the “constituent” model of government, which “recognizes that, altogether, individuals are the entity they constitute”).

200. See Lujan v. Defs. of Wildlife, 504 U.S. 555, 575-77 (1992) (holding that “[j]indicating the public interest (including the public interest in Government observance of the Constitution and laws) is the function of Congress and the Chief Executive,” not the courts and individual plaintiffs); Mellon, 262 U.S. at 488-89 (holding that to prevent the execution of a law alleged to be unconstitutional by someone not “immediately in danger of sustaining some direct injury as the result of its enforcement . . . would be not to decide a judicial controversy, but to assume a position of authority over the governmental acts of another and co-equal department, an authority which plainly we do not possess”).

201. See Michael S. Greve, The Private Enforcement of Environmental Law, 65 TUL. L. REV. 339, 343 (1990) (“While Congress has on occasion put private enforcers to work for public purposes, it has done so rarely, reluctantly, and in recognition of the problematic nature of its undertaking.”).

202. The earliest example is the Civil War-era False Claims Act, which authorizes qui tam actions against government contractors suspected of fraud. Ch. 67, 12 Stat. 696, 696-99 (codified as amended at 31 U.S.C. §§ 3729-3733 (2016)); see also CONG. RESEARCH SERV., R40785, QUI TAM: THE FALSE CLAIMS ACT AND RELATED FEDERAL STATUTES 5 (2013). During the eighteenth century, some tax laws and tariff statutes were enforced by private “informers” who were entitled to statutory rewards if their complaints against public officials resulted in fines. See LEONARD D. WHITE, THE FEDERALISTS: A STUDY IN ADMINISTRATIVE HISTORY 415-17 (1948). More prominently, ever since the 1970s, environmental laws have included provisions allowing citizen suits against violators. See MICHAEL D. AXLINE, ENVIRONMENTAL CITIZEN SUITS, at xv (1991). These provisions
not premised on an associational view of government, citizens cannot bring a lawsuit on behalf of a government. The line in U.S. law is thus clear: Derivative lawsuits are available in private law but not in public law. Still, ever since the induction of derivative suits into U.S. law, many courts have held that such lawsuits can be brought on behalf of local governments. As early as 1879, the Supreme Court announced

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203. Citizen lawsuits are premised on the idea of the private attorney general: Government desires assistance because it lacks resources to pursue the enforcement of all laws itself. See, e.g., Del. Valley Toxics Coal. v. Kurz-Hastings, Inc., 813 F. Supp. 1132, 1142 (E.D. Pa. 1993) ("The purpose of citizen suits is to supplement the EPA's enforcement abilities because the EPA lacks sufficient resources to bring all necessary actions."). Statutes granting the power to bring citizen suits therefore clarify that the suit is brought on behalf of the citizen, not the public. See, e.g., 42 U.S.C. § 4911(a) (providing that "any person (other than the United States) may commence a civil action on his own behalf" to prosecute violations of the Noise Control Act (emphasis added)).

204. See, e.g., Gallagher v. Cont'l Ins. Co., 502 F.2d 827, 832-33 (10th Cir. 1974) ("[A]bsent statutory authorization citizens and taxpayers may not bring a derivative suit on behalf of the state."); Elliott v. Superior Court, 5 Cal. Rptr. 116, 118 (Dist. Ct. App. 1960) ("It is the general rule that a taxpayer cannot maintain an action in behalf of the state to enforce a claim or demand inuring to the state itself."); see also Lyons v. Ryan, 780 N.E.2d 1098, 1104 (Ill. 2002) ("[T]he state was the real party in interest, and the authority to bring an action on behalf of the state was derived from the Illinois Constitution. Under our constitution, the authority to initiate litigation has been vested exclusively in the Attorney General."). Even the legislature cannot allow for derivative suits on behalf of the state when the state constitution provides otherwise. See, e.g., Doe v. Dart, No. 08 C 5120, 2009 WL 1138093, at *2-4 (N.D. Ill. Apr. 24, 2009). Delaware is an exception to the general rule in that it allows taxpayers to bring derivative suits challenging improper spending on behalf of the state. See Richardson v. Blackburn, 187 A.2d 823, 824 (Del. Ch. 1963).

205. See Robert Charles Clark, Vote Buying and Corporate Law, 29 CASE W. RES. L. REV. 776, 804 (1979) ("But in the political arena, nothing corresponds to the derivative suit as a way to overcome difficulties of collective action; an individual citizen cannot sue on behalf of the polity to remove an incompetent politician or to force him to return embezzled funds.").

that “there is at this day no serious question” that local property owners could sue on behalf of a city to compel another party to return assets the city had unlawfully distributed.207 Explaining why this rule applies only to local governments and not to other governments, Justice Sutherland later stressed the city’s affinity with the private corporation and attendant dissimilarity to other governments:

The interest of a taxpayer of a municipality in the application of its moneys is direct and immediate . . . . The reasons which support the extension of the equitable remedy to a single taxpayer in such cases are based upon the peculiar relation of the corporate taxpayer to the corporation, which is not without some resemblance to that subsisting between stockholder and private corporation. But the relation of a taxpayer of the United States to the Federal Government is very different.208

The city, courts have further explained, shares with private entities not only a corporate nature but also the agency problem the derivative lawsuit is meant to alleviate in the private context.209 Some courts, acting on this rationale and further equating the law of the city with corporations law, even condition residents’ derivative standing on proof that misconduct tainted city leadership’s decision not to bring the lawsuit.210 As Dillon observed, if “our jurisprudence is not so defective as to leave creditors or shareholders remediless” when directors refuse to bring a lawsuit that would benefit the corporation but harm themselves, “Why should a different rule apply to a

209. See Crampton, 101 U.S. at 609 (“[T]here would seem to be no substantial reason why a bill by or on behalf of individual tax-payers should not be entertained to prevent the misuse of corporate powers.”); Gram v. Village of Shoreview, 106 N.W.2d 553, 557 (Minn. 1960) (“[T]he right of a taxpayer to maintain such suit is based on the same principles as the right of a stockholder in a private corporation to bring an action against the corporation or its officers to protect the corporate assets from the illegal and fraudulent acts of its officers.”).
210. Some courts require, as they do for corporate law derivative suits, that the taxpayer-plaintiff make a demand on the city to bring the lawsuit or produce evidence that such a demand would have been futile. E.g., City of Chicago ex rel. Konstantelos v. Duncan Traffic Equip. Co., 447 N.E.2d 789, 792-93 (Ill. 1983) (“[A] taxpayer must allege in his complaints facts to show either that a demand had been made and the proper authorities refused to act or which would show that such a demand would have been futile.”); accord Evans v. Metro. Utils. Dist., 166 N.W.2d 411, 413 (Neb. 1969); Wash. Pub. Tr. Advocates v. City of Spokane, 69 P.3d 351, 353-54 (Wash. Ct. App. 2003); Madison Metro. Sewerage Dist. v. Comm. on Water Pollution, 50 N.W.2d 424, 434 (Wis. 1951), abrogated in other part by City of Appleton v. Town of Menasha, 419 N.W.2d 249 (Wis. 1988). Not all courts insist on this requirement. See, e.g., Harman v. City & County of San Francisco, 496 P.2d 1248, 1254 (Cal. 1972) (holding that taxpayer-plaintiffs have standing to sue if they demonstrate unlawful expenditure or waste of city funds); McIntyre v. Bd. of Comm’rs, 61 P. 237, 241 (Colo. App. 1900).
municipal corporation? In holding that a different rule should not apply, modern courts have acknowledged an inevitable procedural incident of the enduring legal notion that the city holds assets as the residents' agent, as in the trust or corporation.

2. Antitrust

Through their approach toward the law of the derivative suit, as through their conservation of the public trust doctrine, modern courts in the United States have continuously set up the city as an entity sharing some substantive—and therefore legal—characteristics with private entities such as the corporation or trust. In another, even newer, branch of law, courts have gone still further: They have flat-out characterized the city as a private business.

U.S. antitrust law, primarily the Sherman Act of 1890, was created as a tool to regulate big business and restrict anticompetitive behavior in the modern capitalist economy. This purpose has informed antitrust law's...

211. 4 DILLON, supra note 99, § 1580.
212. A few courts, however, appear to disallow the municipal derivative lawsuit. See, e.g., Common Cause/Ga. v. City of Atlanta, 614 S.E.2d 761, 763-64 (Ga. 2005) (announcing that "there is no basis in Georgia law" for a derivative taxpayer action).
213. See 74 AM. JUR. 2D Taxpayers' Actions § 60 (West 2017) ("The right of a taxpayer to maintain an action on behalf of a municipal corporation or other public body, for the recovery of public funds illegally disbursed or appropriated, has been upheld in many cases."); see also 18 MCQUILLIN, supra note 120, § 52:19 ("Taxpayers may bring suit to recover property belonging to the municipality, or for any money which has been paid out or released without authority of law, or to enforce a cause of action belonging to the municipality against a person having money or property belonging to the municipality or who is otherwise liable to suit, provided conditions required by the particular court or state are complied with." (footnotes omitted)); 5 SANDRA M. STEVENSON & WENDY VAN WIE, ANTEAUX ON LOCAL GOVERNMENT LAW § 73.01[1] (2d ed. LexisNexis 2017) ("The right of taxpayers to sue on behalf of their local governments is authorized by constitution in some states. . . . Statutes frequently authorize taxpayers to sue on behalf of their local governments. . . . Even in the absence of constitutional or statutory provisions, the law authorizes a taxpayer to bring suit on behalf of himself and others similarly situated, where the officers of a local government refuse to take the necessary judicial action."). The doctrine has been codified in certain states. See, e.g., 65 ILL. COMP. STAT. ANN. 5/1-5-1 (West 2017) ("A suit may be brought by any taxpayer, in the name and for the benefit of the municipality, against any person to recover any money or property belonging to the municipality, or for any money which may have been paid, expended, or released without authority of law.").
215. See Herbert Hovenkamp, The Sherman Act and the Classical Theory of Competition, 74 IOWA L. REV. 1019, 1044 (1989); see also Standard Oil Co. v. FTC, 340 U.S. 231, 248-49 (1951) (noting that Congress's antitrust statutes "deal[] with competition, which it sought to protect, and monopoly, which it sought to prevent" (quoting A.E. Staley Mfg. Co. v. FTC, 135 F.2d 453, 455 (7th Cir. 1943))).
distinct attitude toward governments. Reasoning that the Sherman Act’s goal was to police private business practices, not governments’ regulation of economic activities, the Supreme Court has held that the Act does not apply to actions taken by the states. The Court thus created the “state action” doctrine of immunity from antitrust laws.216 That is, if raisin producers combine to coordinate a marketing strategy, they will be subject to antitrust regulation; if the state adopts a coordinated market strategy for all raisin producers in the state, it will not be subject to antitrust regulation.217

Given that cities are, as noted in Part I.B.1 above, supposedly public entities and mere branches of state government, this protection from antitrust law’s reach could have been expected to extend to them.218 Nonetheless, the Supreme Court reckoned otherwise, opting to treat cities as private corporations. A plurality of the Court ruled that cities, like private entities,219 are only shielded from antitrust liability when acting pursuant to a specific, clearly articulated state policy.220 Only the state itself is entitled to immunity; that immunity extends to another entity—be it a city or a private corporation—only if that entity, in the given case, clearly acts on the state’s behalf.221 Thus, for example, a municipal hospital’s acquisition of a competing hospital was deemed subject to antitrust regulation,222 and so were a municipal electrical utility’s anticompetitive practices.223 By contrast, a municipal ordinance prohibiting signs’ placement near existing ones—thereby protecting the interests of the existing signs’ owner—was not subjected to antitrust prohibitions because the

216. See Parker v. Brown, 317 U.S. 341, 351-52 (1943); see also FTC v. Phoebe Putney Health Sys., Inc., 133 S. Ct. 1003, 1007 (2013) (“Under this Court’s state-action immunity doctrine, when a local governmental entity acts pursuant to a clearly articulated and affirmatively expressed state policy to displace competition, it is exempt from scrutiny under the federal antitrust laws.”).

217. See Parker, 317 U.S. at 352-53.


219. Cf. Cal. Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980) (detailing the requirements a private entity’s action must meet if it is to be shielded by the state’s immunity).


223. See City of Lafayette, 435 U.S. at 417 (plurality opinion).
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Court held that the municipality was employing a state-assigned power to regulate land uses rather than acting on its own policy judgment.224

Irrespective of the coherence of its reasoning,225 the distinction the Court drew in these more recent cases again treats the municipality as a corporation whenever it enters the market (for example, the health services market or the utilities market) as opposed to when it acts as a traditional government (for example, when zoning or designing the built environment).226

C. The City and Fiduciary Duties in Contemporary Law

The normative and doctrinal grounds that led nineteenth century courts to apply fiduciary duties to cities hence still stand. As illustrated by the discussion of the derivate lawsuit and antitrust law, circumstances in which the city is treated as a private entity have actually been expanding in contemporary law. Thus, fiduciary duties should have preserved their standing in the law of the city. And indeed, throughout the twentieth century the law has remained formally committed to the old proposition that city officials are fiduciaries.227 But as exemplified by the Chicago parking meters case, the actual enforcement of those duties is not as effective today as it was before. This Subpart presents and critiques today’s legal attitude.

Modern courts have continued to announce their adherence to the principle that local officials are fiduciaries.228 “It is well established that a public officer occupies a fiduciary relationship to the political entity on whose behalf he serves”229 and that “public officers hold[] positions of public trust.”230 Public officers “stand in a fiduciary relationship to the people whom they have

225. The relationship between the city’s empowerment by the state to zone and the city’s decision to prioritize existing signs is not particularly tight—probably not any tighter than that between the municipality’s empowerment by the state to provide health services and its decision to acquire a hospital.
226. See Peter F. Nascenzi, Note, FTC v. Phoebe Putney and Municipalities as Nongovernments, 110 NW. U. L. REV. 963, 986-87 (2016) (discussing the Court’s distinction and noting that “[i]t seems as though the Court is uncomfortable with the allocation to local governments of anything other than those powers traditionally seen as the purview of local governments”).
227. See, e.g., Chi. Park Dist. v. Kenroy, Inc., 402 N.E.2d 181, 185 (Ill. 1980) (“There can be no doubt that . . . [an alderman] occupied a fiduciary relationship to the City.”); Carter v. City of Greenville, 178 S.E. 508, 510 (S.C. 1935) (reproducing the county circuit judge’s order in the case) (“Of course, all property owned by the city is held in a fiduciary capacity for the use or benefit of its citizens and residents . . . .”).
228. See 67 C.J.S. Officers § 6 (West 2017); 63C AM. JUR. 2D Public Officers and Employees § 241 (West 2017).
been elected or appointed to serve." Courts have also explicitly refused to note any difference between the city official and the private association official. For example, one court remarked: "In the case of a defendant who occupied a fiduciary position in the private sector, [the complaint's] allegations, if proved, would establish that he had exploited his fiduciary position for his personal benefit. The fiduciary responsibility of a public officer cannot be less than that of a private individual." Explicating these responsibilities, the Supreme Court of New Jersey stated:

As fiduciaries and trustees of the public weal [local officials] are under an inescapable obligation to serve the public with the highest fidelity. In discharging the duties of their office they are required to display such intelligence and skill as they are capable of, to be diligent and conscientious, to exercise their discretion not arbitrarily but reasonably, and above all to display good faith, honesty and integrity.

This postwar statement mirrors nineteenth century courts' decisions subjecting local officials to the two fiduciary duties by which private agents must routinely abide: a duty of loyalty ("to display good faith, honesty and integrity") and a duty of care ("to be diligent and conscientious"). Yet in practice all cases dealing with the application of common law fiduciary duties to city officials since the 1920s address only the fiduciary duty of loyalty.

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231. Id.; accord City of Boston v. Dolan, 10 N.E.2d 275, 281 (Mass. 1937); City of Minneapolis v. Canterbury, 142 N.W. 812, 814 (Minn. 1913).

232. City of Chicago ex rel. Cohen v. Keane, 357 N.E.2d 452, 456 (Ill. 1976); see also Marjohn Realty Co. v. City of Long Beach, 204 N.Y.S. 53, 54 (Sup. Ct.) ("The general principles of law and equity as to transactions and contracts by and with persons sustaining fiduciary relations, of course, apply to municipal officers."); aff'd mem., 207 N.Y.S. 876 (App. Div. 1924).


234. See Driscoll, 86 A.2d at 221; see also supra text accompanying notes 176-77.

235. Many courts have adopted a formulation whereby a city decision will be held invalid if city officials commit fraud or grossly abuse their discretion. See, e.g., Hamsley v. City of Unadilla, 458 S.E.2d 627, 627-28 (Ga. 1995) (interpreting a section of the Georgia state code requiring city governments to act in good faith and determining that the city officials "did not abuse [their] discretion or commit fraud" (citing GA. CODE ANN. § 36-30-2)); City of Cincinnati ex rel. Ritter v. Cincinnati Reds, L.L.C., 782 N.E.2d 1225, 1237 (Ohio Ct. App. 2002); Robinson v. City of Philadelphia, 161 A.2d 1, 5 (Pa. 1960); Christie v. Port of Olympia, 179 P.2d 294, 304 (Wash. 1947); see also 18 MCQUILLIN, supra note 120, § 52:23 ("In the absence of fraud or of a gross abuse of discretion, a taxpayers' suit may not be used to control or interfere with the discretion of a municipal board or officer." (footnote omitted)). Courts then act only under the fraud heading and often conflate the two categories, collapsing abuse of discretion into fraud. See, e.g., Dep't of Transp. v. Brooks, 328 S.E.2d 705, 714 (Ga. 1985) (per curiam) (holding that the court
There has been a dearth of cases interpreting and enforcing the local official's other fiduciary duty, the duty of care: the obligation to not only refrain from corrupt practices but also act in accordance with principles of sound judgment. Even New Jersey's highest court, when making the quoted pronouncement requiring officials to display "intelligence" and be "diligent," discussed and applied in detail only the duty to refrain from conflicts of interest.

The reasons contemporary courts have neglected the duty of care are opaque—as the reasons for tacit decisions to refrain from action always are. The neglect is clearly not principled: It represents a movement away from existing principles of law without acknowledgement, let alone explicit justification. Courts did not gradually change the standard of review in a manner that could have led to the complete disappearance of claims for breach of duty of care by local officials. Indeed, such a development would have been unlikely given that the amount of litigation surrounding cities' actions has only grown in the past decades and that courts have expanded the procedural openings for challenging local officials' actions.

"will only interfere if it appears that the [city's] act is ultra vires or fraudulent and corrupt"); City of Columbus ex rel. Willits v. Cremeans, 273 N.E.2d 324, 331 (Ohio Ct. App. 1971) (conflating abuse of discretion with bad faith or collusion); Osborne v. Keith, 177 S.W.2d 198, 200 (Tex. 1944) (holding that actionable abuse of discretion is only found in cases of illegal as opposed to "unwise or indiscreet expenditures").

236. The last such case we were able to find is Haesloop v. City Council of Charleston, 115 S.E. 596, 600-01 (S.C. 1923), in which the court equated the city's discretion in evaluating the consideration offered for one of its assets to a private trustee's discretion. The one law review article written about city officials' fiduciary duties we could locate similarly focuses only on the duty of loyalty, that is, on local government self-dealing and officials' integrity. See David M. Lawrence, Local Government Officials as Fiduciaries: The Appropriate Standard, 71 U. DET. MERCY L. REV. 1, 3 (1993) ("After all, elected local government officials and a variety of appointed officials are fiduciaries, subject to the fiduciary's duty of loyalty.").

237. See Jersey City, 115 A.2d at 11-17.

238. Cf. Brooks, 328 S.E.2d at 717 n.14 ("Judicial review of the legislative acts of municipal governing authorities traditionally has been more intense than judicial review of the acts of the General Assembly.").

239. See infra text accompanying notes 394-98; see also, e.g., CAL. CIV. PROC. CODE § 526a (West 2017) ("An action to obtain a judgment, restraining and preventing any illegal expenditure of, waste of, or injury to, the estate, funds, or other property of a county, town, city or county and county of the state, may be maintained against any officer thereof, . . . either by a citizen resident therein, or by a corporation . . . ."); League of Women Voters of Atlanta-Fulton Cty., Inc. v. City of Atlanta, 264 S.E.2d 859, 860-61 (Ga. 1980) ("This court has many times recognized the right of a taxpayer to apply to a court of equity to prevent public officers from taking action or performing acts which they have no authority to do." (quoting Irwin v. Crawford, 78 S.E.2d 609, 611 (Ga. 1953))); 43A C.J.S. Injunctions § 211 (West 2017) ("Taxpayers have the right to restrain public servants from transcending their lawful powers, or violating their legal duties

footnote continued on next page
One potential explanation for the dearth of recent cases applying fiduciary law to municipalities may be the successful entrenchment of fiduciary principles through codification.\(^{240}\) As discussed in Part I.B.3 above, the late nineteenth century confluence of the expanded demand for local government action on the one hand and the alleged corruption and incompetence of urban politicians on the other hand produced court decisions enforcing local officials’ fiduciary duties.\(^{241}\) It also sparked the Progressive Era’s reform movement, which famously fostered an array of transformations in U.S. local government law.\(^{242}\) These included the codification of ethical standards and conflict of interest rules—the traditional purview of the common law duty of loyalty—into municipal ordinances and state statutes.\(^{243}\)

Such codes were enacted to embody and in some cases amplify common law rules and thus did not explicitly displace existing fiduciary law.\(^{244}\) Courts continued to apply the common law duty of loyalty in cases where statutes did not provide a remedy.\(^{245}\) But municipal ethics codes provided detailed rules in any unauthorized mode, which will increase the burden of taxation or otherwise injuriously affect the taxpayers or their property.” (footnotes omitted).

\(^{240}\) The attitude is particularly striking here because modern law normally prioritizes the distinction between “private” business executives and “public” city officials to free the former from obligations and limit the actions of the latter. See Frug, supra note 73, at 1131-32.

\(^{241}\) See supra notes 146-48 and accompanying text.


\(^{243}\) See Robert H. Wiebe, THE SEARCH FOR ORDER, 1877-1920, at 167-68 (1967) (discussing reformers’ discontent with corrupt practices of local governments and relative success in regulating those practices). The standards adopted by the different states are not identical. For example, while some states prohibit all self-interested contracts by local officials, e.g., IDAHO CODE § 74-501 (2017), others merely require that the official abstain from voting on a contract in which she holds a substantial personal interest, e.g., TEX. LOC. GOV’T CODE ANN. § 171.004 (West 2017).

\(^{244}\) See, e.g., Smith v. City of Albany, 61 N.Y. 444, 447 (1875) (“The [state] act . . . making it unlawful for a member of any common council of any city in this State to become a contractor under any contract authorized by the common council . . . has not wrought a change in the law . . . ; it is, so far as it goes, simply declaratory of the law as it existed previous to its passage. It does not encroach upon the common law, and is not, therefore, to be construed strictly.”).

\(^{245}\) See, e.g., Dept’ of Transp. v. Brooks, 328 S.E.2d 705, 715-16 (Ga. 1985); Montgomery v. City of Atlanta, 134 S.E. 152, 157 (Ga. 1926); Marjohn Realty Co. v. City of Long Beach, 204 N.Y.S. 53, 55-56 (Sup. Ct.), aff’d mem., 207 N.Y.S. 876 (App. Div. 1924).
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(such as the maximum value of a gift an official could accept)\(^{246}\) and thus were easier to apply than the common law’s standard-based duty of loyalty. The very specific ethical rules governing conflicts of interest and disclosure requirements under which local governments have been operating for much of the twentieth century\(^{247}\) largely supplanted the general requirements of the duty of loyalty.\(^{248}\) They are often more exacting—setting higher standards—and more mechanical in their application—spelling out terms and definitions—than judge-made fiduciary duties.\(^{249}\) In cases where officials’ actions are called into question by conflicts of interest, litigation has shifted to concentrate on breaches of statutes or ordinances rather than the common law.\(^{250}\)

This understandable focus on codified obligations in corruption cases—the traditional realm of the fiduciary duty of loyalty—has, less understandably, prompted a similar move in cases of unsound management—the traditional realm of the fiduciary duty of care. There too, courts have analyzed cases in light of existing statutes and ordinances that, for example, set bidding procedures.\(^{251}\) Courts have accepted challenges to a city’s unsound management practices when the city breached specific statutory obligations applicable to transactions named in the statute\(^{252}\) while rejecting such challenges brought

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\(^{246}\) See, e.g., 50 ILL. COMP. STAT. ANN. 105/3 (West 2017) (providing detailed quantitative measures for determining when elected or appointed officials “may provide materials, merchandise, property, services, or labor”).

\(^{247}\) See, e.g., ALA. CODE § 36-25-5 (2017); LA. STAT. ANN. § 42:1112 (2017); N.Y. PUB. OFF. LAW § 74 (McKinney 2017); SAN MARCOS, TEX., CODE OF ORDINANCES § 2.424(b) (2017).

\(^{248}\) See Little v. City of Lawrenceville, 528 S.E.2d 515, 517-18 (Ga. 2000) (holding that the decision whether a government official misbehaved in pursuing a rezoning application hinges on whether he breached statutory procedures).

\(^{249}\) See generally 2 JOHN MARTINEZ, LOCAL GOVERNMENT LAW § 106 (West 2017) (explaining that statutes cover broader matters than the common law prohibition and that they often clearly define issues subject to debate at common law).


\(^{251}\) See, e.g., Domar Elec., Inc. v. City of Los Angeles, 885 P.2d 934, 935, 939 (Cal. 1994) (assessing whether a city’s choice to add a requirement to its bidding process was in conflict with the city charter).

\(^{252}\) See, e.g., Inge v. Bd. of Pub. Works, 33 So. 678, 681 (Ala. 1903) (reversing a demurrer sustained in favor of a city whose charter required that it accept the lowest bid for work in a case in which the city council did not compare bids for pricing); Harman v. City & County of San Francisco, 496 P.2d 1248, 1255 (Cal. 1972) (overruling demurrers granted in a case in which
in the absence of specific statutes.\textsuperscript{253}

The tendency of courts and litigants to fall back on legislation and refrain from resorting to the common law fiduciary duty, satisfactory enough in cases involving potential breaches of the duty of loyalty, can easily leave unaddressed cases of potential breaches of the duty of care. In contrast to the duty of loyalty, with its clear decree against self-dealing,\textsuperscript{254} the common law’s flexible duty of care resists translation into statutory prescriptions.\textsuperscript{255}

Moreover, to the extent legislatures have endeavored to overcome this difficulty, many of the statutory schemes they have created simply do not apply to cities.\textsuperscript{256} The statutory core of the modern duties of sound management for governments has been the purview of administrative law since the first decades of the twentieth century.\textsuperscript{257} Administrative law can dictate procedures for drafting government contracts, adopting regulations, and handling public properties.\textsuperscript{258} However, state administrative law standards, set up under state administrative procedure acts, do not always

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253. See, e.g., Silver v. City of Los Angeles, 366 P.2d 651, 652-53 (Cal. 1961); Borgelt v. City of Minneapolis, 135 N.W.2d 438, 446-47 (Minn. 1965) (rejecting all claims against the city’s action other than one based on a specific charter requirement); Schatz v. City Council of City of New England, 61 N.W.2d 423, 427-28 (N.D. 1953) (declining to impose a requirement of presale appraisal not included in the relevant state constitutional provision).

254. See supra notes 148-54 and accompanying text.

255. Some judges have argued as much, criticizing their peers. In Ferch, one justice agreed with his colleagues that the complaint should be accepted but stressed that a breach of a charter provision was not necessary for finding a violation; the court itself could provide a remedy when the city abused its discretion in its transaction. See 174 P.2d at 726 (Stone, J., specially concurring) ("R)egardless of the validity of the ordinance, . . . it is a right of the people and to the advantage of faithful officials that the doors of the courts be open for investigation and any resulting necessary accounting by public servants as to their stewardship . . . .")

256. See Nestor M. Davidson, \textit{Localist Administrative Law}, 126 YALE L.J. 564, 605 (2017) ("Many local agencies . . . operate without any . . . mandatory overarching legislative procedural guidance. In nearly half the states, local agencies do not fall within the ambit of the relevant state [administrative procedure act].").

257. See \textit{generally} Horwitz, supra note 175, at 230-46 (discussing the rise of administrative law as the means to regulate the bureaucratic state).

apply to local governments, as the latter are often excluded from those acts' definitions of administrative agencies. Thus, in many states only individual obligations that apply to specific, narrowly defined actions cover local governments. Consequently, statutes and codes do not systematically perform the traditional role of the fiduciary duty of care in ensuring sound management in all local government private market dealings. The unfortunate neglect of the common law fiduciary duty of care thus creates a lacuna—and an inconsistency—in the law.

D. Summary: Contemporary Law and the City’s Fiduciary Duties

The Chicago parking meters litigation is emblematic of the anomaly of contemporary U.S. law’s treatment of the city when it enters the market. That case highlights both the continuity with the traditions and logic of the nineteenth century common law as well as the unexplained forgoing of the doctrinal tool those traditions and logic spawned. As the Illinois court held, the City of Chicago was not acting as a government—that is, was not regulating—when it sold the meters’ revenue. Rather, it was acting as a market actor, selling an asset for the sole purpose of maximizing its value. In the lease

259. See Davidson, supra note 256, at 605. Municipalities are explicitly excluded from the definition of “agency” in many state administrative procedure acts. See, e.g., ALA. CODE § 41-22-3(1) (2017) (“The term [‘agency’] shall not include . . . municipalities, or any agencies of local governmental units, unless they are expressly made subject to this chapter by general or special law.”); DEL. CODE ANN. § 29, § 10102(1) (2017) (“Agency does not include . . . municipalities . . . .”); FLA. STAT. § 120.52(1) (2017) (“This definition of ‘agency’ does not include a municipality or legal entity created solely by a municipality . . . .”); WYO. STAT. ANN. § 16-3-101 (2017) (“Agency’ means any authority . . . or employee of the state, a county, city or town . . . , except the governing body of a city or town . . . .”). In other states no provision of the administrative procedure act explicitly exempted municipalities, but courts nonetheless excluded local bodies from its reach. See, e.g., County of Westchester v. Rent Guidelines Bd., 419 N.Y.S.2d 6, 7 (App. Div. 1979) (per curiam); Inc. Vill. of Great Neck Plaza v. Nassau Cty. Rent Guidelines Bd., 418 N.Y.S.2d 796, 796-99 (App. Div. 1979) (setting forth and interpreting New York’s administrative procedure act at that time); Jenkins ex rel. Riggins v. Hous. Auth. of Seattle, 549 P.2d 480, 481-82 (Wash. 1976).

260. See, e.g., 50 ILL. COMP. STAT. ANN. 510/1 (West 2017) (“It shall be the policy of the political subdivisions of the State of Illinois to negotiate and enter into contracts for architectural, engineering and land surveying services on the basis of demonstrated competence and qualifications for the type of services required and at fair and reasonable compensation.”); N.Y. GEN. CITY LAW § 3-c (McKinney 2017) (disallowing informal agreements for fare increases on omnibus lines).

261. Recently, Nestor Davidson highlighted “the lack of clear statutory or administrative common-law procedures at the local level” and the resultant legal concern. See Davidson, supra note 256, at 607.


263. See id. at 265-67.
agreement, the city explicitly acknowledged that it held the asset as a trustee on behalf of its residents. The court allowed one of these residents to bring a derivative lawsuit on behalf of the city against the buyer. Everything was progressing along the logic—and doctrine—of the law of private associations. The natural next move, accordingly, would have been to examine whether in transacting in the public trust asset the trustee (the city) had breached its fiduciary duty toward the beneficiary (the resident). But the court did not make that step; nor did the litigants demand it. Having proceeded along the corporate or trust track, the court then stopped short.

In contemporary U.S. law the traditional standing of the city as a private association in certain circumstances has been fortified: Courts have retained and expanded the public trust doctrine, treated the city as a private corporation for purposes of the modern derivative lawsuit and antitrust laws, and continued to acknowledge the fiduciary status of city officials. Courts have insisted that those officials' fiduciary duties are “more than mere rhetoric” and that such “obligations are not mere theoretical concepts or idealistic abstractions of no practical force and effect.” They have—correctly, based on Part I’s findings—identified the local official’s duty as originating in the “common law.” But as the Chicago case illustrated, and as this Part has explained more generally, contemporary courts have not taken the opportunity to fill the common law fiduciary duty of care with meaning. Part III below thus turns to modern fiduciary law to synthesize a duty of care that courts can and should apply to cities.

III. The Contents of City Officials’ Fiduciary Duties

Part I established that under the common law of the city, local officials are subject to fiduciary duties. Part II showed that without explanation or normative justification, courts have ceased to fill those duties with meaningful content—particularly as pertains to city officials’ fiduciary duty of care. Under current law, in other words, the fiduciary analysis of city officials’ obligations

264. See supra note 186 and accompanying text.

265. Indeed, the court never even mentioned, let alone questioned, the grounds for allowing the plaintiff, a taxpayer, to bring the lawsuit on the city’s behalf. See Indep. Voters of Ill., 13 N.E.3d at 255.

266. See supra Part II.A.

267. See supra Part II.B.

268. See supra Part II.C.


271. See id. (quoting Driscoll, 86 A.2d at 222).
is only half finished. For once fiduciary status is established, the contents of the fiduciary’s duties must be discerned. As the U.S. Supreme Court once explained, identifying an individual as a fiduciary “only begins analysis; it gives direction to further inquiry. . . . What obligations does he owe as a fiduciary? . . . [W]hat are the consequences of his deviation from duty?”272 As discussed above, courts confronting cases in local government law have ceased to ask these questions.273 Luckily, a rich body of law now addresses these questions in cases involving private entities.274 This Part analyzes these modern cases in trust and corporate law and suggests ways the answers developed in those contexts can be used to devise the missing contents of city officials’ fiduciary duty of care.

In modern private law, an individual’s fiduciary duty is carefully adjusted in light of the particular type of fiduciary relationship and the costs and benefits of imposing fiduciary duties in that context.275 As we have seen, early courts routinely applied fiduciary duties to cities by analogizing the city to both the trust and the corporation.276 Grouping trusts and corporations together may have appeared intuitive to those nineteenth century courts, given that both institutions separate ownership from management. Modern law, however, has developed markedly different fiduciary duties for each of these two institutions, owing to their distinctive features.277 This development is instructive in discerning the proper fiduciary standards for city officials.

Part III.A presents the disparate duties of care currently used for trusts and for corporations: a relatively exacting duty of care enforced in the law of trusts as opposed to a deferential standard applied to corporations. Part III.B then examines the reasoning behind this difference, explaining that the costs and benefits of a stricter duty of care vary according to each entity’s institutional setting. Part III.C projects the costs and benefits of a duty of care applied to the city by comparing and contrasting the institutional attributes of the city with those of trusts and corporations. Based on this exercise, Part III.D recommends the duty of care appropriate for the circumstances of the city, finding that the most suitable standard is one similar to the corporate duty of care, which focuses judicial review on the process officials used to enter large transactions.

273. See supra Parts II.C-.D.
274. See infra Part III.A.
275. See DeMott, supra note 48, at 881 (“The evolution of fiduciary obligation . . . owed much to the situation-specificity and flexibility that were Equity’s hallmarks.”).
276. See supra notes 152-54 and accompanying text.
277. See infra Part III.A.
A. The Distinct Duties of Care in Trust Law and Corporate Law

The fiduciary duties modern law applies to trust and corporate agents developed alongside, and because of, the gradual move toward empowering those agents to actively manage those entities' affairs. Traditional law required a specific legal basis—in the entity's charter or in applicable laws—for every act of a trustee or a corporate board. Thus, in trust law, prior restraints on trustee powers were prevalent, at least as a matter of default law, until the mid-twentieth century. Similarly, trustee investment discretion was, until that time, constrained by legal lists of acceptable investments, often consisting solely of government bonds and securitized loans. In corporate law, until the late nineteenth century, any action taken by a board of directors without explicit authorization in the corporate charter (say, acquiring another corporation when the corporate charter did not explicitly confer a power to acquire other corporations) was ultra vires and voidable by any shareholder.

Modern law has largely retreated from this emphasis on prior restraints on trustees and corporate boards, thereby bestowing broad managerial authority on trustees and corporate directors. Trustees may now undertake any action they deem beneficial to the trust unless otherwise constrained by the trust instrument. The Uniform Trust Code, for instance, provides that trustees hold the same power to deal in trust assets as if they owned them personally, and the Uniform Prudent Investor Act declares that there are no prohibited categories of investments. For more than a century, corporations

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278. See HERBERT HOVENKAMP, ENTERPRISE AND AMERICAN LAW, 1836-1937, at 59-62 (1991) (discussing the ultra vires doctrine, which strictly forbade the corporation or its officers from performing acts outside the corporation's authority); Langbein, supra note 70, at 54 ("Trustee disempowerment was . . . the original system of beneficiary safeguard in the law of trusts . . . ."); Robert H. Sitkoff, Trust Law as Fiduciary Governance Plus Asset Partitioning, in THE WORLDS OF THE TRUST 428, 430 (Lionel Smith ed., 2013) ("Under traditional law, . . . [t]he trustee's powers were limited to those granted expressly in the trust instrument.").

279. See Sitkoff, supra note 278, at 430-31.

280. See Mayo Adams Shattuck, The Development of the Prudent Man Rule for Fiduciary Investment in the United States in the Twentieth Century, 12 OHIO ST. L.J. 491, 494, 499-504 (1951) (detailing the transition from the "legal list" rule to the "prudent man" rule). Even attempts to modernize the law under the "prudent man" rule nevertheless created presumptions in favor of "safe" investments, such as government bonds. See Max M. Schanzenbach & Robert H. Sitkoff, Did Reform of Prudent Trust Investment Laws Change Trust Portfolio Allocation?, 50 J.L. & ECON. 681, 681-88 (2007).

281. See HOVENKAMP, supra note 278, at 59-62.

282. See UNIF. TR. CODE § 815(a)(2) (UNIF. LAW COMM’N 2000) (providing that “except as limited by the terms of the trust,” a trustee has “all powers over the trust property which an unmarried competent owner has over individually owned property”).

283. See UNIF. PRUDENT INV’R ACT § 2(e) & cmt. (UNIF. LAW COMM’N 1994).
have been able to organize for "any lawful purpose," and their boards have accordingly been empowered to undertake and pursue any business as long as it provides a benefit to shareholders.

As their importance declined, prior restraints on powers of management no longer meaningfully addressed the agency problem inherent in trusts and corporations. The dramatic shift toward an empowered management exercising broad discretion in handling trust or corporate affairs thus necessitated increased reliance on fiduciary duties. Instead of imposing prior constraints on trustees and corporate directors, the law now subjects them to ex post judicial scrutiny. That scrutiny, though, assumes different forms in trust and corporate law. In trust law, the judicially imposed fiduciary duty of care presents a meaningful restraint, at least as a matter of default law. By contrast, courts apply much lower fiduciary standards in corporate law, with the "business judgment" rule insulating a great deal of decisionmaking from judicial review.

The approach in trust law, as stated in the Uniform Trust Code, holds that trustees must "administer the trust as a prudent person would." Prudence encompasses all aspects of trust administration, including making investment decisions and distributions and fulfilling the trust’s general purposes. Thus no trustee action is shielded from prudence review even by language seeming to grant the trustee absolute discretion. Prudence is defined as "reasonable

285. See HOVENKAMP, supra note 278, at 59-60, 64.
286. See Cooter & Freedman, supra note 5, at 1046-47; Langbein, supra note 70, at 54 (describing how the law subjected newly empowered trustees to duties that "were elaborated into a new body of law that we now recognize as trust fiduciary law").
287. For a thorough discussion of these differences, see Robert H. Sitkoff, An Agency Costs Theory of Trust Law, 89 CORNELL L. REV. 621, 656-57 (2004), which distinguishes the "loose constraint" of the business judgment rule from the "more restrictive reasonable person standard" of trust law.
288. UNIF. TR. CODE § 804 (UNIF. LAW COMM’N 2000).
289. See id. (requiring trustees to administer trusts "by considering the purposes, terms, distributional requirements, and other circumstances of the trust").
290. As Judge Learned Hand explained, "[N]o language, however strong, will entirely remove any power held in trust from the reach of a court of equity." Stix v. Comm’r, 152 F.2d 562, 563 (2d Cir. 1945). Even if the trust instrument specifies that certain or all decisions shall be made in the trustee’s "sole" and "absolute" discretion, her actions are still subject to review for care and loyalty. See UNIF. TR. CODE § 814(a) (“Notwithstanding the breadth of discretion granted to a trustee in the terms of the trust, . . . the trustee shall exercise a discretionary power in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries.”); 2 RESTATEMENT (THIRD) OF TRS. § 50 cmt. c (AM. LAW INST. 2003) ("It is contrary to sound policy, and a contradiction in terms, to permit the settlor to relieve a ‘trustee’ of all accountability."). A New York court recently explained that the phrase "sole discretion not subject to judicial
care, skill, and caution." The fiduciary standard covering trustee administration is thus negligence, as in traditional tort law. Although the natural focus of prudence analysis in trusts is on whether the trustee used reasonable processes in arriving at her decision, the substance of her decision can also be assessed for its reasonableness.

Corporate law has opted for a much lower fiduciary standard of care than the negligence standard prevalent in trust law. The corporate duty of care is significantly circumscribed by the business judgment rule, under which courts presume that board decisions were taken in good faith and, absent a showing of disloyalty or bad faith, will not substantively review those decisions.

The business judgment rule's precise definition is the subject of controversy; at least two versions can be found. Under the minority view, courts read

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the business judgment rule as shielding all disinterested business decisions from the judicially enforced duty of care, leaving corporations subject only to a fiduciary duty of loyalty (the “abstention” version of the business judgment rule).

296 Under the majority view, reflected in Delaware case law and in the widely adopted Model Business Corporation Act (MBCA), the business judgment rule does not wholly immunize nonconflicted decisions from fiduciary review. Rather, it applies a bad-faith, gross negligence, or recklessness standard to fiduciary duty of care claims. This second view focuses not on the substance of a decision but rather on the decisionmaking process. This version of the rule stipulates that judicial deference to a board’s decision under the business judgment rule requires an actual decision made by the board, and actual decisions are only those produced through rational processes.

297 MODEL BUS. CORP. ACT (AM. BAR ASS'N 2016); see also Corp. Laws Comm., Am. Bar Ass'n Bus. Law Section, Model Business Corporation Act (2016 Revision), 72 BUS. LAW. 421, 421 (2017) (reporting that the model act has been “substantially adopted by a majority of the states”).

298 See, e.g., AmeriFirst Bank v. Bomar, 757 F. Supp. 1365, 1376 (S.D. Fla. 1991) (requiring a showing of “abuse of discretion, fraud, bad faith or illegality” to rebut the presumption of good faith).

299 See, e.g., Stone v. Ritter, 911 A.2d 362, 369 (Del. 2006) (identifying “gross negligence” as the level of conduct that would “give[e] rise to a violation of the fiduciary duty of care”); Brehm v. Eisner, 746 A.2d 244, 264 (Del. 2000); MODEL BUS. CORP. ACT § 8.30 cmt.; see also Lyman Johnson, Unsettledness in Delaware Corporate Law: Business Judgment Rule, Corporate Purpose, 38 DEL. J. CORP. L. 405, 425 (2013) (suggesting that the business judgment rule should not require courts to “weigh in on the substantive soundness of director decisions”).

300 WILLIAM T. ALLEN ET AL., COMMENTARIES AND CASES ON THE LAW OF BUSINESS ORGANIZATION 263 (2d ed. 2007) (“The business judgment rule protects boards that have made decisions...[T]he relatively few cases that actually impose liability on directors for breach of the duty of care are not cases in which a decision proved disastrously wrong but cases...in which directors simply failed to do anything [reasonable] under [the] circumstances...”). The Supreme Court of Delaware’s clearest statement of this principle comes in Brehm v. Eisner, in which the court explicitly rejected a request to review a decision for substantive due care, holding that courts do not “weigh or quantify directors’ judgments” or “decide if they are reasonable in this context.”
Therefore, while the fiduciary review of the substance of a board’s nonconflict-ed decisions is circumspect even under the Delaware/MBCA version of the business judgment rule, a court adhering to that rule may still review how those decisions are made.\textsuperscript{301}

The degree of diligence required for a rational decisionmaking process is determined by the nature of the decision.\textsuperscript{302} The more unusual the legal and financial aspects of the decision and the greater its financial consequences, the more important process, including external advice, becomes.\textsuperscript{303} Most ordinary business decisions require little such process or advice because they fall within the directors’ existing expertise, and hence the Delaware/MBCA standard in practice only subjects large or unusual decisions to judicial fiduciary review.\textsuperscript{304}

It is therefore unsurprising that the leading cases in the field involve the sale of the corporation—an extraordinary decision carrying high stakes for shareholders.\textsuperscript{305} In the famous case \textit{Smith v. Van Gorkom}, a corporate board approved a sale of the corporation after a two-hour meeting, relying “solely upon” the oral presentations of three board members, an internal study of the merger, a legal opinion, and the board’s own experience.\textsuperscript{306} The Supreme Court of Delaware held that by not considering all material information reasonably available, the board had violated its fiduciary duty of care in that “specific

\textsuperscript{301} See, e.g., Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984) (requiring the board to make a decision on an “informed basis”), overruled in other part, Brehm, 746 A.2d 244; In re Citigroup Inc. S’holder Derivative Litig., 964 A.2d 106, 122 (Del. Ch. 2009) (“[A] director’s duty of care can never appropriately be judicially determined by reference to the content of the board decision that leads to a corporate loss, apart from consideration of the good faith or rationality of the process employed.”); see also \textit{Model Bus. Corp. Act} § 8.30 cmt. (“Section 8.30 sets standards of conduct for directors that focus on the manner in which directors make their decisions, not the correctness of the decisions made.”).

\textsuperscript{302} See, e.g., McMullin v. Beran, 765 A.2d 910, 918 (Del. 2000) (reiterating that boards must pursue the best value reasonably available for shareholders in a sale and that they “must be especially diligent” in executing their fiduciary obligations in this context).


\textsuperscript{304} See \textit{id}.

\textsuperscript{305} Bainbridge argues that the abstention approach, see \textit{supra} note 296 and accompanying text, should apply to “operational” decisions, such as where to build a factory, and that Delaware’s departure from the abstention approach to the business judgment rule is best understood as occurring in high-stakes contexts such as changes in control. \textit{See} Stephen M. Bainbridge, \textit{The Business Judgment Rule as Abstention Doctrine}, 57 Vand. L. Rev. 83, 129 (2004).

\textsuperscript{306} 488 A.2d 858, 869 (Del. 1985), \textit{overruled in other part} by Gantler v. Stephens, 965 A.2d 695 (Del. 2009).
context of a proposed merger."\textsuperscript{307} After this decision, the Delaware corporate code was amended to permit articles of incorporation that eliminate director liability for breaches of the duty of care.\textsuperscript{308} Nonetheless, \textit{Van Gorkom} still sets the fiduciary standard of care for the corporation.\textsuperscript{309} Similar (though not identical) language to the \textit{Van Gorkom} standard is found in the MBCA, which requires a director to gather information "with the care that a person in a like position would reasonably believe appropriate under similar circumstances."\textsuperscript{310}

Other influential cases have further clarified the corporate board's fiduciary care duties when selling the corporation.\textsuperscript{311} It is now commonly acknowledged that a haphazard or unduly hasty process can lead to liability.\textsuperscript{312} As the Supreme Court of Delaware has noted more than once, "Boards 'that have failed to exercise due care are frequently boards that have been rushed.'"\textsuperscript{313} Additionally, in a line of important cases, Delaware's highest court developed

\textsuperscript{307} See id. at 872-73, 893.
\textsuperscript{308} See \textsc{Del. Code Ann.} tit. 8, § 102(b)(7) (2017); see also Bernard S. Sharfman, \textit{The Enduring Legacy of Smith v. Van Gorkom}, 33 \textit{Del. J. Corp. L.} 287, 289 (2008) (noting that section 102(b)(7) gives shareholders the authority to undo the result in \textit{Van Gorkom}).
\textsuperscript{309} See \textsc{Stephen M. Bainbridge, \textit{Corporation Law and Economics}} § 6.6, at 299-301 (2002); Sharfman, \textit{supra} note 308, at 302 & n.97.
\textsuperscript{310} \textsc{Model Bus. Corp. Act} § 8.30(b) (\textsc{Am. Bar Ass'n} 2016). The \textit{Van Gorkom} standard appears to be higher, seemingly requiring the gathering of all reasonably available material information. Even if the board fails the standards set forth in section 8.30 of the MBCA, director liability does not necessarily follow. Under section 8.31(b), directors can be liable for, inter alia, bad-faith actions, failure to exercise oversight over an extended period, or acting despite not reasonably believing that they acted with the necessary information or that their actions would benefit the corporation. See id. § 8.31(b) & cmts. B, C, E. Nonetheless, for our purposes, the standards of director conduct set forth in section 8.30 are relevant because equitable relief could still result from their violation. As the official comment states, "[S]ection 8.30 compliance may influence a court's analysis where injunctive relief against a transaction is being sought." Id. § 8.30 cmt.
\textsuperscript{311} Similar liability outside the merger context remains possible but not particularly likely. For example, in \textit{Brehm v. Eisner (In re Walt Disney Co. Derivative Litigation)}, the Delaware Supreme Court analyzed a board's decisions regarding the compensation, termination, and severance package of an executive, ultimately finding no liability but noting that a board's passivity could constitute bad faith. See 906 A.2d 27, 35, 67-68, 73 (Del. 2006). The court had to analyze the decision in light of a bad-faith standard—rather than the \textit{Van Gorkom} standard—because after \textit{Van Gorkom}, Delaware's corporate code was amended to permit articles of incorporation to eliminate director liability for breaches of fiduciary duties other than loyalty or those taken in bad faith, see \textsc{Del. Code Ann.} tit. 8, § 102(b)(7), and most corporations adopted such provisions, see \textit{infra} note 420 and accompanying text.
so-called *Revlon* duties.314 Under *Revlon*, after the board decides to sell the corporation, the discretion afforded to the board’s decisionmaking process decreases considerably.315 The board bears the burden of demonstrating good faith in the sale or resistance to a takeover.316 Although the business judgment rule insulates from judicial review the board’s original decision whether to sell, once the sale process commences, the board operates under a judicially enforceable fiduciary duty to attain the best deal possible for shareholders.317

The Delaware/MBCA understanding of the business judgment rule thus retains a meaningful role for the fiduciary duty of care in corporate law, at least for major transactions. Nonetheless, even this version of the corporate standard of care is significantly less demanding than that prevalent in trust law, which imposes a negligence standard and does not call on courts to abstain from reviewing any of the trustee’s actions. Perhaps the clearest acknowledgment of this key difference is found in the section of the Uniform Trust Code dealing with trustees who can influence corporate decisions as directors or shareholders. Section 802 of the code requires such trustees to vote their shares of stock “in the best interests of the beneficiaries,” thereby subjecting trustees’ business decisions made in the corporate form to the fiduciary standards of trust law.318 The comment to that section specifically asserts: “The trustee may not use the corporate form to escape the fiduciary duties of trust law.”319

A couple of examples may further aid in illustrating the difference between the corporate and trust fiduciary duties of care and that difference’s practical ramifications. First, consider the case in which an entity held an investment and that investment soured. If the investing entity is a corporation,

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315. See *Revlon*, 506 A.2d at 182; see also *Odyssey Partners*, 735 A.2d at 416 (“Under *Revlon*, once the sale of a corporation is inevitable, the duty of the board of directors changes from the preservation of the company as a corporate entity to the maximization of the company’s value at a sale for the stockholders’ benefit.”).

316. See *Revlon*, 506 A.2d at 180.

317. See id. at 180-82; see also *Paramount Commc’ns Inc. v. QVC Network Inc. (In re Paramount Commc’ns Inc. S’holders Litig.),* 637 A.2d 34, 43 (Del. 1994) (“The consequences of a sale of control impose special obligations on the directors of a corporation. In particular, they have the obligation of acting reasonably to seek the transaction offering the best value reasonably available to the stockholders. The courts will apply enhanced scrutiny to ensure that the directors have acted reasonably.”).

318. See UNIF. TR. CODE § 802(g) (UNIF. LAW COMM’N 2000).

319. Id. § 802(g) cmt. The comment provides the following example: A trustee must vote his shares to support dividend payments consistent with the terms of the trust and the needs of the beneficiaries. Id. By contrast, under corporate law, dividend distributions are subject to the business judgment rule. See, e.g., *Gabelli & Co. v. Liggett Grp.,* 479 A.2d 276, 279-80 (Del. 1984).
absent a showing of bad faith or of a conflict of interest, courts will not second-guess the business judgment of the directors who decided to make the investment. By contrast, if a trustee made the investment decision, the decision will be scrutinized for compliance with an external investment standard (namely, the prudent investor rule). Retention of an undiversified portfolio or of a consistently underperforming investment can result in liability even if the trustee made a good-faith business judgment in fashioning the investment.320

Second, consider the decision of a corporate entity that owns a baseball team not to hold night games. In Sh lensky v. Wrigley, an Illinois court refused to even consider a challenge to such a decision and dismissed the case on the pleadings, even though the plaintiff claimed that he could demonstrate the profitability of night baseball.321 Setting hours of operation, the court ruled, is a business decision to be made by the corporate directors and is not to be second-guessed by courts absent a showing of a conflict of interest, fraud, or illegality.322 By contrast, if the baseball team were held in trust, a decision to refrain from scheduling night games would be subject to fiduciary review for prudence and reasonableness.323

B. The Reasons for the Distinct Duties of Care in Trust Law and Corporate Law

The contrast between the relative strictness of the duty of care enforced on a trust and the leniency of that enforced on a corporation is born of the different purposes animating the two institutions. A trust is created to benefit specific people, sometimes throughout the course of their remaining lives (frequently while preserving benefits for succeeding beneficiaries). A substantial portion of the beneficiaries’ wealth might be tied up in the trust.324 Beneficiaries usually cannot sell their interest in the trust or remove the

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320. An illustrative and leading case is In re Estate of Janes, in which a bank trustee held on to a concentrated position in Kodak stock. 681 N.E.2d 332, 334-35 (N.Y. 1997). The bank’s defense that it exercised investment judgment in retaining a “blue chip” stock like Kodak, see id. at 336, was ineffective in light of the prudent investor standard that encouraged diversification and greater attention when a portfolio is concentrated, see id. at 338-39. Such a business judgment defense, however, would have prevented corporate liability for a bad acquisition or takeover. There is no external corporate law standard governing the retention of an investment. Cf. Bernard S. Black, The Value of Institutional Investor Monitoring: The Empirical Evidence, 39 UCLA L. REV. 895, 909 (1992) (noting that policing bad acquisitions by directors can be achieved much more effectively ex ante, through vigilance by shareholders).


322. See id.

323. See UNIF. TR. CODE § 802(g).

324. For the paradigmatic trust for the benefit of orphans, for instance, all of the wealth may be in trust.
trustee without judicial approval. 325 By contrast, a corporation is formed to enable risk-taking, 326 and the identities and needs of shareholders in publicly traded corporations are normally unknown to the corporate directors. The shareholders, for their part, have the right to approve major corporate undertakings (such as a merger) and to vote the directors out. 327 Relatedly, a corporation, unlike a trust, is subject to, and thus disciplined by, market pressures: Shareholders may exit the corporation by selling their shares, the corporation sells a product or service to third parties, and the corporation may have to issue shares or borrow to raise funds. Due to these divergent characteristics, the costs and benefits of judicial scrutiny differ between the trust and the corporation.

1. Costs of the duty of care

By imposing some form of judicial review, a fiduciary duty of care inevitably carries costs. 328 Judicial review undermines the separation of ownership and control that the trust and corporation were devised to accomplish: A searching judicial analysis transfers some control back to the owners by enabling them, through litigation, to exert influence over decisions made by their agents. This interference with the powers of agents—who may be empowered in part because they are likely to make better decisions than the owners—comes with risks. A risk of judicial error (a court mistakenly ruling that an agent’s decision was unreasonable) is introduced, which in turn has a chilling effect on agents (who, fearful of such a potential judicial error, refrain from pursuing desirable but risky decisions). 329 The costs and chilling effects of judicial error vary in accordance with the nature of the entity whose decisions are reviewed—and specifically, as we explain below, with the degree to which that entity is intended to assume risk.

325. See generally UNIF. TR. CODE § 502 (providing for “spendthrift” trusts, which restrict transfer of the beneficiary’s interest); id. § 706 (providing for judicial oversight over requests to remove trustees).
326. See infra notes 330-34 and accompanying text.
327. Courts are particularly vigilant in protecting shareholding voting rights in cases involving mergers, see, e.g., Blasius Indus., Inc. v. Atlas Corp., 564 A.2d 651, 661 (Del. Ch. 1988), and entrenchment of directors, see, e.g., Schnell v. Chris-Craft Indus., Inc., 285 A.2d 437, 438-40 (Del. 1971).
The corporate entity is designed to encourage entrepreneurship and risk-taking. Courts, which lack business acumen, are prone to err if asked to strictly review, in hindsight, the decisions of such an entity. Even more importantly, the frequency of such errors will bias corporate boards toward conservative courses of action—undermining a key rationale for the private corporation. Shareholders assume an interest in a corporation so as to take on risks they would not be willing to bear individually. Thus, the corporation’s directors are supposed to be businesspeople taking calculated risks on behalf of individuals who are presumed to be risk-neutral regarding any individual corporation’s investments.

By contrast, the paradigmatic modern private trust holds financial assets to be managed not by an entrepreneur, but rather by a professional investor taking close account of the risk tolerance of the specific trust beneficiaries as well as of the goals of the trust as specified by its donor. In a trust, therefore,

330. See Gagliardi v. TriFoods Int’l, Inc., 683 A.2d 1049, 1052 (Del. Ch. 1996) (“[I]t is in shareholders’ economic interest for the corporation to accept in rank order all positive net present value investment projects available to the corporation, starting with the highest risk adjusted rate of return first. Shareholders don’t want (or shouldn’t rationally want) directors to be risk averse.”); Kenneth B. Davis, Jr., Once More, the Business Judgment Rule, 2000 Wis. L. Rev. 573, 582 (“C)orporate law recognizes that successful business leadership often entails risk-taking, innovation, and experimentation, qualities inimical to insistence on routine procedures and standardized practices.”).

331. See Fischel, supra note 328, at 1288 (“Courts (and shareholders) do not possess the experience, expertise, or information necessary to make complicated business decisions.”).


333. See William T. Allen et al., Realigning the Standard of Review of Director Due Care with Delaware Public Policy: A Critique of Van Gorkom and Its Progeny as a Standard of Review Problem, 96 Nw. U. L. Rev. 449, 455 (2002) (“A standard of review that imposes liability on a board of directors for making an ‘unreasonable’ (as opposed to an ‘irrational’) decision could result in discouraging riskier yet socially desirable economic decisions, because an ordinary negligence standard of care will tend to make directors unduly risk averse.”).

334. Courts have explicitly mentioned this principle as a justification for the rule. See, e.g., Gagliardi, 683 A.2d at 1052 (noting that “[s]hareholders can diversify the risks of their corporate investments” and therefore want the corporation to take on risky investments, but directors may not do so if they “must assume some degree of personal risk relating to ex post facto claims of derivative liability for any resulting corporate loss”).

335. See Langbein, supra note 292, at 638-39 (“[T]he prototypical modern trustee is the fee-paid professional, whose business is to enter into and carry out trust agreements. . . .

footnote continued on next page
risk is not to be generally enabled, but to be managed and calibrated considering the beneficiaries' circumstances and the trust's goals. Trustees are not businesspeople taking calculated risks for risk-neutral parties; instead, they are professional money managers who must be attuned to the risk tolerance of individual beneficiaries. The likelihood of judicial error in reviewing actions adopted to pursue such a defined mission is somewhat decreased. For the same reason, the law is much less concerned about any potential chilling effects the threat of such an error may portend for trustees' propensity to assume risk.

2. Benefits of the duty of care

Like its costs, the potential benefits of a strict judicial duty of care also differ between the corporation and the trust. Judicial intervention is less beneficial if there are other tools that can address the agency problem generated by the separation of ownership and control. In the corporate context, alternative mechanisms help alleviate the agency problem, thereby reducing the marginal benefit of additional judicial regulation. The trust form, conversely, largely lacks these alternatives to judicial monitoring, and consequently the duty of care promises greater benefits when applied to trusts.

Corporate law offers at least three alternatives to judicial review—private ordering, corporate structure, and external markets—that help address the agency problem by aligning the incentives of shareholders and managers.

First, the corporate form provides ample opportunity for private ordering: contractual and structural mechanisms within the corporation that create incentives for sound management or expand the control rights of shareholders.

Under the liability regime of trust law, the trustee places its substantial capital at risk in the event that the trustee misperforms its duties. . . . The liability risk creates a further incentive for the trustee to perform the trust deal faithfully. (footnote omitted).

336. Cf. Sitkoff, supra note 287, at 657 (“Trust law, in contrast [to corporate law], assumes that the beneficiaries are not diversified, so the trustee's default duty of care is set at the more restrictive reasonable person standard.”).

337. Trustee behavior can be undesirably chilled and may in fact have been so under the older "prudent man" investment rule, which took a skeptical view of equity investments—hence the new law's emphasis on taking on the correct amount of risk required to accomplish the purposes of the trust. See Schanzenbach & Sitkoff, supra note 280, at 681-88.

338. For a discussion of the agency problem, see notes 2-5 and accompanying text above.

339. The Supreme Court of Delaware has pointed to the private ordering—"self-ordering" in the court's usage—available to shareholders as reason to refrain from fashioning broader remedies or extending fiduciary duties. See Nixon v. Blackwell, 626 A.2d 1366, 1379-80 (Del. 1993). The court has given numerous examples of private ordering, including buy-out provisions, voting trusts, and earnings tests. Id. at 1380. For a classic exposition in the legal literature, see Frank H. Easterbrook & Daniel R. Fischel, The
The corporation is arguably a “nexus of contracts” between its members, and in drafting those contracts that create and mold the corporation, members can craft for themselves their desired protections from their agents. Such contractual protections include shareholder voting agreements, additional shareholder voting rights, incentive pay for managers, share repurchase agreements, and the like.

Second, the corporate structure itself awards members two powerful tools to control agents: voice and exit. Shareholders can vote to remove directors failing at their jobs. Alternatively, unhappy shareholders can simply exit the firm by selling their shares, possibly to an activist investor who wishes to acquire a sufficiently large ownership stake to allow it to replace ineffectual directors.

Third, the market imposes an external restraint on corporate agents and limits shareholders’ vulnerability to the risks those agents generate. A
mismanned corporation will be unable to raise capital or profitably sell its products on the market, increasing the likelihood of bankruptcy or takeover—a threatening prospect for directors concerned with maintaining their jobs and reputations. Moreover, such a corporation, if its shares are traded in public markets, will see its share prices decline, providing an important performance metric for shareholders. The capital market also allows shareholders to protect themselves from the corporation’s mismanagement by owning diversified portfolios, thereby reducing their exposure to the risk generated by any one corporation’s poor management decisions.

These three nonjudicial protections against mismanagement by agents prevalent in the corporate setting—private ordering, voice and exit, and external markets—are either absent or greatly diminished in the trust setting. Often, the trust beneficiary is not a party to the trust instrument and thus cannot negotiate contractual protections. In most instances, she does not vote to appoint the trustee (voice), nor can she freely sell her trust interest (exit). Indeed, trusts are frequently created specifically to remove any such powers from the beneficiary, who may be deemed improvident with funds or unlikely to consider the interests of successor beneficiaries. Finally, because trust interests are not traded, the market does little to regulate the trust’s managers, and the beneficiary cannot freely spread trust assets among other investments to reduce her exposure to risks generated by mismanagement of the trust assets.

Given the relative weakness of nonjudicial mechanisms for addressing the agency problem in the trust context, the benefits of the fiduciary duty of care are greater for trusts than for corporations. At the same time, as already seen, the costs of judicial intervention in a trust’s management are lower than those generated by such intervention in a corporation’s management. Accordingly, as Part III.A above showed, courts have set a duty of care for trusts that is much more interventionist than its counterpart for corporations.

347. Cf. Kowal v. MCI Commc’ns Corp., 16 F.3d 1271, 1276 n.1 (D.C. Cir. 1994) (discussing, but not passing on, the plaintiffs’ “fraud-on-the-market theory, which presum[ed] that in an efficient securities market all publicly available information regarding a company’s prospects has been reflected in its shares’ price”), abrogated in other part by Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).


349. Some—though limited—private ordering may be available in trusts. For example, exculpatory and no-contest clauses are prevalent. See Restatement (Third) of Trusts § 96 & cmt. (Am. Law Inst. 2012).


352. See Sitkoff, supra note 287, at 675.
C. The City and the Trust Law/Corporate Law Divide

As the role played by prior restraints on the powers of trustees and corporate directors decreased in importance, the law subjected trustees and directors to fiduciary duties of care. Through a combination of common law evolution and legislation, a duty of care was crafted to fit the distinct contexts of the trust and the corporation. As Part II above showed, the law has failed to similarly develop the contents of the fiduciary duty of care for city officials—although, as seen in Part I, these officials are broadly empowered to act as agents, and the black-letter law considers them to be fiduciaries.353 This Subpart draws on the experience with corporations and trusts to fill that void and devise a fiduciary duty of care to treat the agency problem prevalent in the city context. To achieve this goal, it poses the question: Does the agency problem in the municipal context require relatively aggressive judicial regulation, as in the trust context, or does it call for a highly attenuated, process-oriented approach, as in the corporate context? We conclude that given the circumstances of the city, the cost-benefit tradeoff suggests that the fiduciary duties of city officials should be similar to those of corporate directors.

1. Costs of a duty of care applied to the city

How costly would judicial oversight and its attendant chilling effect on city officials be if those officials’ actions were reviewed by courts? U.S. law charges the city with providing some of the most vital public services. Education, policing, and land use regulation are local responsibilities.354 In addition, local governments manage transportation, public spaces, public

353. In a slightly different context, Aaron Saiger hazards that courts’ refusal to apply a demanding test in reviewing city actions may have encouraged courts to more narrowly interpret initial delegations of power from the state allowing those actions. That is, given that courts know that they will not meaningfully question the discretion of city officials once exercised, they may refuse to allow those officials any discretion to begin with, reverting to a model mirroring the old prior restraint model for corporations and trusts. See Aaron Saiger, Local Government as a Choice of Agency Form, 77 OHIO ST. L.J. 423, 445 (2016). There is fierce debate among scholars about the relative powerlessness of the city in the U.S. governance scheme. Compare, e.g., Frug, supra note 73, at 1062-67, 1107 (arguing that city governments are powerless and state power is centralized), with Richard Briffault, Our Localism: Part II—Localism and Legal Theory, 90 COLUM. L. REV. 346, 352 (1990) (highlighting that at least for some types of municipal corporations, particularly the modern suburb, “local legal powers are more likely to be sufficient for the satisfaction of local wants”).

354. See ROBERT L. LINEBERRY, EQUALITY AND URBAN POLICY: THE DISTRIBUTION OF MUNICIPAL PUBLIC SERVICES 10 (1977) (“The services performed by municipalities are those most vital to the preservation of life (police, fire, sanitation, public health), liberty (police, courts, prosecutors), property (zoning, planning, taxing), and public enlightenment (schools, libraries.”).
Local officials are thus tasked with actively designing and overseeing the management of a complicated entity that produces a diverse set of complex public goods.

True, local government law restricts the city’s power to initiate policy and to act on business impulses. It does not prioritize officials’ freedom of action quite as much as in the corporate world. Cities are not created to facilitate risk-taking in the pursuit of profit for diversified investors. Still, even if limited, the city’s freedom of action in the provision of key public services is unquestionably important for economic, political, and social reasons. U.S. law, always dedicated to values of localism, does not imagine the city as a passive, supervisory, trust-like regime. Potential judicial error in overturning city policies and the consequent chilling effect on city initiative and the local democratic process present a more serious risk in the city context than in that of the trust, even if the risk is not of quite the same magnitude as in the corporate context.

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356. For a powerful argument regarding the critical role cities play in enabling a thriving society, see Richard Schragger, City Power: Urban Governance in a Global Age (2016).

357. Most prominently, as noted in Part I above, cities must find a basis for all their activities in state law. See supra notes 90-93, 158-60 and accompanying text.

358. See Ellickson, supra note 73, at 1577 (acknowledging and normatively justifying this attitude).

359. For example, local governments’ investment practices are limited by state constitutions prohibiting them from providing financial assistance to private enterprises. The import of such “public purpose” requirements is debatable. See Richard Briffault, Foreword, The Disfavored Constitution: State Fiscal Limits and State Constitutional Law, 34 RUTGERS L.J. 907, 910-15 (2003).


362. See Gerald E. Frug & David J. Barron, City Bound: How States Stifle Urban Innovation 70 (2008) (discussing and critiquing the chilling effect the threat of legal challenges questioning cities’ authority has on a city’s otherwise legal action, with “the shadow of preemption” serving as “a prime constraint on the independent local assertions of authority”).
2. Benefits of a duty of care applied to the city

To assess the benefits of the fiduciary duty of care as applied to the city, the presence and potency of the nonjudicial substitutes for that duty—contractual ordering, voice and exit, and the external market—must be evaluated. We conclude that unlike in the trust context, these substitutes mitigate the agency problem inherent in city action, though they cannot allay it as effectively as they do in the corporate context.

In theory the city, like the corporation from which it evolved, can be imagined as a contractual arrangement that can accordingly generate contractual safeguards reducing agency costs—the first substitute for the judicial duty of care. City charters can restrict officials’ powers, set governance structures and procedures, and empower residents to require voter approval for certain city decisions.

Yet while such requirements are reminiscent of corporate contractual provisions limiting directors’ authority, the analogy to the corporate setting is imprecise. Corporate law is mostly a law of defaults: It contains some important mandatory provisions, but statutes in the field are viewed primarily as enabling acts. Indeed, there are only four mandatory provisions for a corporation’s articles of incorporation under the MBCA, and the incorporators are free to empower the corporation to pursue any lawful purpose. The law governing the formation and design of cities is starkly different. As Part I.B.1 above stressed, under current law cities are perceived first and foremost as creatures of the state, not contractual creations of their

363. See, e.g., Des Moines, Iowa, Code of Ordinances § 2-170 (2017) (defining the powers and duties of the mayor); id. § 2-201 (city manager).


365. See, e.g., Seattle, Wash., Charter art. IV, § 1(H) (setting procedures for residents to demand a referendum to approve a city ordinance). But see Heider v. City of Seattle, 675 P.2d 597, 598 (Wash. 1984) (limiting the referendum power in the case of “administrative” rather than legislative actions).

366. See Bernard S. Black, Is Corporate Law Trivial?: A Political and Economic Analysis, 84 NW. U. L. Rev. 542, 544, 555-59 (1990) (arguing that corporate laws that appear mandatory are actually “trivial” in one of four senses, including the “quintessential avoidable corporate rule”: the “default” rule); Roberta Romano, Answering the Wrong Question: The Tenuous Case for Mandatory Corporate Laws, 89 Colum. L. Rev. 1599, 1599-1603 (1989) (arguing that even corporate law rules that some commentators identify as “mandatory” in practice are not truly so).


368. See Fletcher, supra note 284, § 102.
residents.\textsuperscript{369} Therefore, unlike the incorporators of a corporation, the
incorporators of a city are not free to design the management regime they
desire. State statutes strictly confine the options: Some cities cannot adopt a
charter,\textsuperscript{370} and almost all others must choose from a menu of governance
forms the state dictates.\textsuperscript{371} Such mandatory charters may not faithfully reflect
residents' subjective preferences and thus are not perfect equivalents of the
freely drafted corporate charter offering an internal, voluntary substitute for
the external, judicially imposed duty of care.

The second substitute for the judicial duty of care, voice and exit, is much
more clearly available in the city context. Like corporate shareholders (and
unlike trust beneficiaries), residents elect the officials governing their affairs
and can replace them on a regular basis. Indeed, due to their small size and the
civic spirit they engender, cities are often celebrated as the best arenas for
democratic participation and popular control of government.\textsuperscript{372} City residents
can also regulate their officials by leaving the city if they are unhappy with
those officials.\textsuperscript{373} Here again, they enjoy a power—exit—shared with the

\textsuperscript{369} See supra Part I.B.1; see also, e.g., 65 ILL. COMP. STAT. ANN. 5/2-1-1 to -3-19 (West 2017)
(dictating the incorporation of municipalities and the powers and standing of their
officials).

\textsuperscript{370} See, e.g., WASH. CONST. art. XI, § 10 (providing that only cities with ten thousand
inhabitants or more may frame a charter for their own government).

\textsuperscript{371} See, e.g., CONN. GEN. STAT. § 7-193 (2017); IOWA CODE ANN. § 32.1 (2017)
(defining the permissible forms of city government and requiring cities to select one of the forms);
DES MOINES, IOWA, CODE OF ORDINANCES § 2-32 (2017) (selecting the council-manager-
ward form of government); id. § 2-61 (“The council shall possess and may exercise all
executive, legislative and judicial powers not inconsistent with statutes applicable to
cities organized under the council-manager-ward form . . . conferred by law upon
 councils or cities organized under the general laws of the state.”); MISS. CODE. ANN.
§§ 21-3-1 to -9-83 (2017) (listing and establishing rules for the permissible forms of
government among which localities can choose); MONT. CODE ANN. § 7-3-102 (2017)
(listing the permissible forms of city government); cf. W. VA. CODE § 8-3-3 (2016)
(prescribing that the state attorney general shall review and approve or reject a draft
city charter based on “whether it is consistent in all respects with the Constitution and
general law of this State”); Hartig v. City of Seattle, 102 P. 408, 409-10 (Wash. 1909)
(approving an amendment to the city’s charter adopted by referendum that enabled
residents to propose or reject council ordinances by popular vote only after verifying
that state law did not prevent such mechanisms for resident participation).

\textsuperscript{372} See, e.g., ARENDT, supra note 360, at 240-43 (discussing, and praising, Jefferson’s plan to
divide counties into smaller wards); Robert A. Dahl, \textit{The City in the Future of Democracy},
61 AM. POL. SCI. REV. 953, 967 (1967). Though data clearly show that turnout rates tend
to be rather low in local elections, see, e.g., Charles S. Bullock, III, \textit{Turnout in Municipal
Elections}, 9 POL. STUD. REV. 539, 539 (1990), these elections are still probably a more
effective device for regulating officials than the famously ineffective corporate board
elections, see BAINBRIDGE, supra note 309, § 1.5, at 37.

\textsuperscript{373} See Tiebout, supra note 360, at 418-19 (relying on an assumption that “[c]onsumer-
voters are fully mobile and will move to that community where their preference
patterns . . . are best satisfied”).
corporate shareholder who can sell her stock, but not with the trust beneficiary who cannot alienate her interest. Still, exit is much costlier for a resident than for a corporate shareholder.\textsuperscript{374} Leaving a city is not as easy as selling a share in a corporation. It may involve a socially and financially expensive move, a home sale, or a change of jobs.\textsuperscript{375}

The analysis of the final substitute for the judicial duty of care, external markets, is similar: Markets can ameliorate the agency problem in cities, but not as effectively as in the corporate context. First, like the corporation and unlike the trust, the city turns to capital markets to raise debt.\textsuperscript{376} In deciding whether to lend money to an individual city, investors rely on a grade awarded to that city by rating agencies.\textsuperscript{377} These grades are highly sensitive to the city’s economic standing and explicitly consider the city’s quality of "governance."\textsuperscript{378} Mismanaged cities’ access to credit can thus be curtailed, restricting careless officials’ ability to invest in local amenities and curry favor with voters.\textsuperscript{379}

Second, city officials also face some competitive market pressures because residents and businesses choose where to locate. Their decisions affect city tax revenues and the market values of local properties, supplying residents with metrics to evaluate officials’ performance.\textsuperscript{380} This mechanism is far from perfect: Unlike corporations, cities are not actively traded, and housing prices are determined by many factors—not primarily the quality of the city’s management.\textsuperscript{381}

Finally, the protections shareholders can achieve through diversification are almost wholly absent for city residents. Residents cannot easily diversify

\textsuperscript{374}. See Richard Schragger, Consuming Government, 101 Mich. L. Rev. 1824, 1828 (2003) (book review) ("Tiebout assumed perfect mobility because without it consumer-voters could not 'exit' a jurisdiction that was not providing the preferred combination of taxes and public goods. The assumption of perfect mobility is easily criticized as unrealistic . . . .").

\textsuperscript{375}. See Briffault, supra note 353, at 420.

\textsuperscript{376}. In 2014 alone, municipalities issued debt bonds to the tune of $314.9 billion—and that was "well below the 10-year average of $370.6 billion." See SIFMA, Municipal Bond Credit Report: Fourth Quarter 2014, at 2 (n.d.), https://perma.cc/TKV3-EWAQ.

\textsuperscript{377}. For an overview of the market for municipal debt, see Nadav Shoked, Debt Limits' End, 102 Iowa L. Rev. 1239, 1246-51 (2017).


their holdings as a way to limit their exposure to the city’s mismanagement. They will usually only hold an interest—a residence—in one city. For most individuals, the family home is a significant and undiversified investment, uniquely exposed to the problems of local government.382 Worse still, residents’ social and human capital investments are also often tied to their residence, magnifying the risk irresponsible city management poses to residents’ interests.383

D. The Duty of Care for the City

Based on this analysis of the costs and benefits of a duty of care applied to the city, we can now flesh out in this Subpart the proper fiduciary standard to apply to city officials. We will also explain how the suggested duty of care would be implemented, thereby addressing potential objections.

The balance of the costs and benefits of a duty of care applied to the city, as just reviewed, does not fully mirror that in either the trust or corporate setting. It is somewhere in between. Overall, however, an appreciation of the costs and benefits of the fiduciary duty of care when applied to the city suggests that the optimal city standard is closer to that applied to the corporation. On the costs side, city officials’ freedom of action is an important normative value, and thus an aggressively applied duty is somewhat less desirable than in the trust setting.384 On the benefits side, the presence of two of the three nonjudicial regulatory mechanisms—voice/exit and the external market—renders the duty somewhat less indispensable than in the trust setting.385

The city’s nature is thus markedly different from the trust’s, and the latter’s duty of care is therefore unsuitable. A negligence review of all the agent’s decisions is appropriate for a regime, like the trust, grounded in the idea of an agent managing assets in compliance with predefined goals and of true owners who, other than through litigation, have little say.386 That is not the city regime, which permits some imaginative city action and assumes some resident control. The city regime is therefore more reminiscent of the

383. See William A. Fischel, Voting, Risk Aversion, and the NIMBY Syndrome: A Comment on Robert Nelson’s Privatizing the Neighborhood, 7 Geo. Mason L. Rev. 881, 885 (1999) (“The exposure to risk that homeowners face is analogous to having nearly all of one’s retirement wealth invested in the stock of a single, undiversified company with only one huge plant.”).
384. See supra Part III.C.1.
385. See supra Part III.C.2.
386. See supra notes 349-52 and accompanying text.
corporate form, which is invested in directors’ freedom of action and assumes some nonjudicial shareholder monitoring of those actions.\textsuperscript{387}

But what version of the corporate duty of care should be applied to the city: the abstention doctrine or the Delaware/MBCA process-oriented review?\textsuperscript{388} While, as just noted, the city has many of the attributes of a corporation—unsurprising given that, as highlighted in Part I.B.1 above, the two types of entities share a history—it is not the corporation’s normative equivalent. Cities are not imagined as profit-seeking enterprises,\textsuperscript{389} and thus fears of judicial regulation’s chilling effect on business initiative,\textsuperscript{390} while very relevant, are not as grave as they are for corporations. Similarly, though some nonjudicial mechanisms for curbing the agency problem are available, their effectiveness and thus their capacity to replace the fiduciary duty of care is more limited in the city context: Contractual arrangements are mostly unavailable, exit is expensive, the market for residents is not particularly effective, and the financial market does not provide residents with diversification opportunities. Thus, judicial intervention is not as costly in the city as in the corporate setting, and market substitutes for judicial intervention are not as readily available.

Courts should therefore not abstain from duty-of-care review of city actions—as some of them do for corporate actions—but rather apply the duty of care embodied in the process-oriented Delaware/MBCA standard.\textsuperscript{391} Applying this standard to cities would mean that when entering major deals, city officials would be required to undertake a sufficiently rational process in good faith, including informed investigation, meaningful deliberations and, if appropriate, consultation with experts.

A somewhat stricter standard than a process-oriented review, substantially increased process requirements, or an extension of the number of deals the review covers may appear advisable for the city context. As highlighted, the city is not the corporation’s equivalent as far as the costs and benefits of the duty of care are concerned, and accordingly a more demanding judicial review for its actions might be in order. But a key aspect of the city’s nature and

\textsuperscript{387.} See Andrews, supra note 346, at 215 (“The exercise of ethical leadership in organizations requires values and skills in intricate combinations that cannot be prescribed by black letter law.”).

\textsuperscript{388.} See supra notes 296-301 and accompanying text.

\textsuperscript{389.} See, e.g., Olesen v. Town of Hurley, 691 N.W.2d 324, 329 (S.D. 2004) (refusing to allow a city to expand its statutorily authorized alcohol business into a restaurant business that could provide much greater revenue); see also Robin Paul Malloy, The Political Economy of Co-financing America’s Urban Renaissance, 40 VAND. L. REV. 67, 121-22 (1987) (distinguishing the proper role of government from that of the market).

\textsuperscript{390.} See supra text accompanying note 329.

\textsuperscript{391.} See supra notes 297-317 and accompanying text.
standing may militate against a stricter standard. Unlike the corporation or trust, the city is a political entity. This characteristic raises normative concerns alien to the corporate or trust context—concerns a strict judicial standard of review may magnify.

Even the quite lax process-oriented Delaware/MBCA standard may raise these concerns. Judicial review of a public entity’s decisions may be perceived as undermining basic tenets of separation of powers and the supremacy of the democratic process. Yet with respect to the suggestion made here—but not with respect to a stricter fiduciary duty of care—this perception is mostly unfounded: Applying the process-oriented, relatively nonintrusive Delaware/MBCA duty of care to cities would not undermine the separation of powers. The suggested standard of review would neither expand the opportunities for judicial interference in political decisions nor expose political officials to potentially stifling personal liability.

The introduction of a new—or rather, retrieved—basis for challenging local action generates a risk of increased litigation. Such expanded recourse to legal action threatens to shift the locus of local decisionmaking away from local officials—who draw on both expertise and democratic legitimacy—and onto inexpert and unaccountable courts. This troubling prospect is premised on the assumption that a fiduciary duty of care applied to cities will open boundless possibilities for residents to second-guess local leadership through legal action. But such a concern is misplaced for two reasons.

First, due to the current realities of local government law, a fiduciary duty of care should not afford much new opportunity for challenges to local officials’ actions. For the past few decades, courts have dramatically relaxed standing rules for lawsuits against local governments. Coupled with a local government’s need to pinpoint an authorization for each of its actions, this procedural move has subjected practically all local government decisions to legal challenge. Even seemingly insignificant local decisions—the dedication of

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392. See State v. City of Panama City Beach, 529 So. 2d 250, 256 (Fla. 1988) ("[T]he function of this Court is not to decide whether the proposed [local] financing is wise or even fiscally sound."); overruled in other part by State v. City of Orlando, 576 So. 2d 1315 (Fla. 1991); cf. John Hart Ely, Democracy and Distrust: A Theory of Judicial Review 75-77 (1980) (discussing courts’ limited role in regulating the political process to keep it open to all and free from undue restriction or curtailment (citing United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938))).


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a bike lane\textsuperscript{396} or the placement of a bike share docking station,\textsuperscript{397} for
example—have therefore been challenged in courts. Local decisions—including
Chicago's parking meters deal itself—are already being litigated.\textsuperscript{398} The
addition of a cause of action based on a fiduciary duty of care, therefore, is not
likely to generate much new litigation. It would instead merely channel some
existing litigation toward exploration of a more normatively pertinent
question: whether the city exercised its power in a proper fashion.

Second, the Delaware/MBCA standard of care was specifically designed to
reduce the threat of unwarranted judicial interference. It does not offer an
open-ended invitation for shareholder challenges to any decision made by
management. Instead, it strikes a compromise that leaves most management
decisions beyond courts' reach. It leaves day-to-day, routine decisions
unreviewable.\textsuperscript{399} Only unusual decisions, which require significant process
because of their exceptional nature, are reviewable. Large transactions—if done
hastily—are the only candidates likely to run afoul of the standard of review.\textsuperscript{400}
Thus, whether in its current corporate setting or in the city setting suggested
here, the fiduciary duty of care has the most bite in the sale of major assets.\textsuperscript{401}
In other words, under a Delaware/MBCA fiduciary duty of care applied to a
city, a contract with a supplier for the repair of parking meters will not be
reviewable for a breach of care.\textsuperscript{402} Such normal, "operational" decisions would


\textsuperscript{397}. See Mitch Smith, Condo Residents Go to Court over Divvy Bike Sharing Station, CHI. TRIB. (Aug. 22, 2013), https://perma.cc/NMJ7-B3BW.


\textsuperscript{399}. See supra notes 302-05 and accompanying text.

\textsuperscript{400}. See supra notes 305, 311-13 accompanying text.

\textsuperscript{401}. It is possible to review actions other than sales, see, e.g., Brehm v. Eisner (In re Walt Disney Co. Derivative Litig.), 906 A.2d 27, 35 (Del. 2006) (involving a nine-figure severance package), but such cases are few and, even though the Disney court criticized much of the board's conduct, the board ultimately prevailed, see id. at 67-68, 73. See also supra note 311.

\textsuperscript{402}. Cf., e.g., Chostkov v. City of Pittsburgh, 177 F. 936, 942 (C.C.W.D. Pa. 1910) (holding that a city's routine decisions pertaining to municipal improvements, such as whether to remove a hump in the pavement, were not reviewable); McAdam v. Sheldon, 216 A.2d 193, 196 (Conn. 1965) (holding that a decision regarding the location of a new school building was not reviewable despite allegations that the site selection would result in a waste of public funds); Erickson v. City of Cedar Rapids, 185 N.W. 46, 53 (Iowa 1921) (holding that a decision about the manner of constructing a wall could not be challenged in court); Butler v. Karb, 117 N.E. 953, 955 (Ohio 1917) (holding that the apportionment of electricity between private consumers and public spaces was not reviewable).
be insulated from judicial review by the business judgment rule.\footnote{3} By contrast, a contract to sell all income from those parking meters would be reviewable.

In their approach to local government dealings, courts already recognize this distinction. Determining whether to entertain different challenges to city action, they often assess the magnitude of the action’s economic impact on the city’s coffers\footnote{4} or ask whether it is merely an exercise of discretion in managing an asset\footnote{5}—as they would do under the Delaware/MBCA duty of care suggested here. That fiduciary duty thus would not open the door for courts to routinely substitute their own judgment for officials\footnote{6}.

Furthermore, even with respect to major, and hence judicially reviewable, deals, the Delaware/MBCA fiduciary duty’s judicial reach is functionally limited. The duty does not permit a searching review of the original decision to sell, or not sell, a major asset. Under the Revlon line of cases, the fiduciary duty is most strictly applied after the decision to sell has been made.\footnote{7} This limitation somewhat decreases the risk of judicial interference in political matters through a fiduciary duty of care applied to the city. Unlike the original decision to sell a major public asset,\footnote{8} the choice of a buyer for that asset is normally not an act demanding intense policy analysis and political tradeoffs. It is often a decision with one predetermined goal—to obtain the highest return possible.\footnote{9} A review to ensure that decisions likely to be straightforward in

\footnotetext[3]{See Bainbridge, supra note 305, at 129; see also supra note 305.}

\footnotetext[4]{See, e.g., City of Pueblo v. Flanders, 225 P.2d 832, 833 (Colo. 1950) (“[I]t is generally held that an action against corporate authorities for injunction may not be maintained by a taxpayer upon the ground alone of the illegality of their conduct, except in cases of great public concern, but only upon showing of substantial financial damage . . . .”).}

\footnotetext[5]{See, e.g., Mayer v. Kostes, 71 S.W.2d 398, 402 (Tex. Civ. App. 1934); Lamm v. Chambers, 18 S.W.2d 212, 214 (Tex. Civ. App. 1929). Many such routine decisions may be regulated through statutes instituting specific administrative requirements for public procurements or hiring contracts. See supra notes 256-60 and accompanying text. Perhaps paradoxically, the much more major decisions made through city ordinances, such as sales of major assets, are not regulated by such statutes, see supra note 259—and thus require fiduciary review.}

\footnotetext[6]{Of course, to begin with, the duty would only apply to market transactions, and thus its intrusion into political decisionmaking would be limited. Courts already appear, in different contexts, to agree that heightened scrutiny can apply to dealings with private entities and that there is a meaningful difference between cases involving an internal political decision and those involving a market interaction with a private actor. See, e.g., Dep’t of Transp. v. Brooks, 328 S.E.2d 705, 717 (Ga. 1985).}

\footnotetext[7]{See Revlon, Inc. v. MacAndrews & Forbes Holdings, 506 A.2d 173, 182 (Del. 1986); see also supra notes 314-17 and accompanying text.}

\footnotetext[8]{Cf. Borgelt v. City of Minneapolis, 135 N.W.2d 438, 445-46 (Minn. 1965) (“The wisdom of acquiring a new plant instead of repairing the old one is a matter of policy that ordinarily does not concern the courts if the city is within its legal authority.”).}

\footnotetext[9]{Some, therefore, argue that such city sales should not be analyzed in the same manner as are privatization deals, such as the disposal of unwanted or surplus government-
their rationale were made in keeping with certain procedural practices accords
with the separation of judicial and legislative functions: It offers only limited
opportunity for judicial overreaching into the realm of politics.

Indeed, in all probability, as applied to the city, the fiduciary duty of care
would leave officials with even more discretion in this regard than their
corporate counterparts currently enjoy. For corporations selling major assets,
Revlon requires that directors consider only the sale’s value for shareholders,
disregarding its benefits for other constituencies.410 It is hard to imagine courts
ever applying this approach to city officials, even when subjecting them to a
fiduciary duty of care as suggested here. As political agents, city officials can, of
course, consider the tradeoffs attendant in an asset sale between the interests of
different constituencies.411 There is no rule of “taxpayer primacy” in local
government law akin to the shareholder primacy theory currently dominating
corporate law.412 Thus, for example, the city selling its meters may prefer a
lower cash offer in exchange for an ability to later retire spots from the system
and make more free parking available to future residents;413 or it may opt to
accept such a reduced price in exchange for worker protections or the
continued employment of its parking employees. These are political tradeoffs
the city would be able to continue to make under the fiduciary duty suggested
here.

But once such tradeoffs have been made and a city is considering offers that
all meet the conditions it has set, or is comparing offers based on price alone, a
Revlon-like duty would apply. The city would have no excuse for selecting a

410. See Revlon, 506 A.2d at 182.
411. Cf., e.g., City of Cincinnati ex rel. Ritter v. Cincinnati Reds, L.L.C., 782 N.E.2d 1225,
1237-38 (Ohio Ct. App. 2002) (holding that in its dealings with the local professional
baseball team, a county was not obliged to consider only its taxpayers’ financial interest
in collecting rents from the team).
412. On the ascent of the shareholder primacy theory, see Henry Hansmann & Reinier
413. In a case similar in its facts to Milhau v. Sharp, 15 Barb. 193 (N.Y. Gen. Term. 1853), the
New York case that first introduced city officials’ duty of care, see supra notes 131-43
and accompanying text, the Supreme Court of Wisconsin approved the granting of a
rail franchise when the reduced cash payment offered by the franchisee was offset by
the lower fares it was committed to charging. See Linden Land Co. v. Milwaukee Elec.
Ry. & Lighting Co., 83 N.W. 851, 855 (Wis. 1900) (emphasizing that this choice “was a
question for the council, in its discretion, to decide”). On the tension between the
interests of current taxpayers and those of future residents, see Shoked, supra note 377,
at 1270-71.
lower or less desirable bid among those that meet its conditions, for not actively seeking bids from those willing to accept those constraints it imposes, or for not procuring an independent appraisal of the value of the asset sold subject to its requirements.\footnote{414} Officials’ decisionmaking would thus be regulated—but only in a limited fashion that would preserve their freedom of political action almost in its entirety.

Furthermore, and importantly, those officials would not face monetary damages liability for breaches of the fiduciary duty suggested here, a threat that could indeed chill behavior.\footnote{415} Under existing local government law, local legislators receive immunity for their decisions.\footnote{416} The fiduciary duty of care would therefore not present a personal risk to lawmakers—preserving their political independence.

This state of affairs would be similar to that prevalent in corporate law. Delaware law permits broad indemnification of corporate actors, including for legal expenses and the purchase of insurance.\footnote{417} As part of the immediate legislative reaction to \textit{Van Gorkom},\footnote{418} many state statutes were reformed to allow articles of incorporation that eliminate director liability for breaches of the fiduciary duty of care.\footnote{419} Many corporations have included such provisions in their charters.\footnote{420} Similar provisions are allowed under the MBCA.\footnote{421} The practical result is that corporate directors are personally insulated from duty of care liability.\footnote{422}

\footnote{414}Cf. \textit{In re Air Terminal Servs., Inc.}, 393 P.2d 60, 81-83 (Haw. 1964) (explaining that a public entity is not obliged to accept the lowest bid, but it must seek competitive bids and detail its specifications so as to allow meaningful competition).

\footnote{415}Cf. Julian Velasco, \textit{A Defense of the Corporate Law Duty of Care}, 40 J. CORP. L. 647, 655 (2015) (discussing, in the corporate context, the incentives toward risk aversion that would be created by ‘ruinous personal liability’ for violations of the duty of care).

\footnote{416}See \textit{OSBORNE M. REYNOLDS, JR., LOCAL GOVERNMENT LAW} 815-16 (3d ed. 2009); id. at 816 n.11 (collecting cases).

\footnote{417}See \textit{DEL. CODE ANN. tit. 8, § 145} (2017).

\footnote{418}See supra note 308 and accompanying text.

\footnote{419}See \textit{DEL. CODE ANN. tit. 8, § 102(b)(7)}; Roberta Romano, \textit{Corporate Governance in the Aftermath of the Insurance Crisis}, 39 EMORY L.J. 1155, 1160 (1990) (“Delaware’s innovation diffused rapidly among the states. Within two years, forty-one states, including those with the largest public corporations, amended their corporation statutes to reduce directors’ liability exposure.”).

\footnote{420}See Romano, supra note 419, at 1160-61 (finding that 90% of a random sample of Delaware corporations adopted a limited liability provision within one year of section 102(b)(7)’s enactment).

\footnote{421}See \textit{MODEL BUS. CORP. ACT § 202(b)(5)} (AM. BAR ASS’N 2016).

\footnote{422}See Margaret M. Blair & Lynn A. Stout, \textit{Trust, Trustworthiness, and the Behavioral Foundations of Corporate Law}, 149 U. PA. L. REV. 1735, 1790-91 (2001) (“[A] practical matter, a negligent director is more likely to be hit by lightning after leaving her board meeting than she is to pay damages.”).
In the city setting as in the corporate setting, therefore, the remedy sought in lawsuits for breach of the duty of care would not be damages payable by the officials; rather, it would be voiding the transaction the officials entered in breach of their duty of care. Contracts made in breach of fiduciary duties are not enforceable.\footnote{See 2 Restatement (Second) of Contracts § 193 (Am. Law Inst. 1981) ("A promise by a fiduciary to violate his fiduciary duty or a promise that tends to induce such a violation is unenforceable on grounds of public policy.").} A proposed contract that would breach a fiduciary duty can be enjoined or modified by a court.\footnote{See, e.g., Omnicare, Inc. v. NCS Healthcare, Inc., 818 A.2d 914, 936 & n.74 (Del. 2003) (citing 2 Restatement (Second) of Contracts § 193 & cmt.) (refusing to enforce a merger agreement that did not contain adequate safeguards allowing the board to consider other offers); Paramount Commc’ns Inc. v. QVC Network Inc. (In re Paramount Commc’ns Inc. S’holders Litig.), 637 A.2d 34, 51 (Del. 1993) (holding a no-shop provision invalid because it forbade the directors from considering competing offers, which was necessary for them to fulfill their fiduciary duties).} An already signed contract can be voided or rescinded in certain circumstances.\footnote{See, e.g., Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 350-51, 371 (Del. 1993) (holding that the court may “fashion any form of equitable and monetary relief as may be appropriate, including rescissory damages,” in a duty of care claim (quoting Weinberger v. UOP, Inc., 457 A.2d 701, 714 (Del. 1983))); Smith v. Van Gorkom, 488 A.2d 858, 889 (Del. 1985) (stating that a board’s failure to exercise business judgment in a merger constitutes a “voidable” act, though one that in theory could be ratified by shareholders), overturned in other part by Gantler v. Stephens, 965 A.2d 695 (Del. 2009).} Courts are willing to disregard the resultant injury to the counterparty’s reliance interests if that party had reason to know that the fiduciary was “on thin ice.”\footnote{See, e.g., ACE Ltd. v. Capital Re Corp., 747 A.2d 95, 104 (Del. Ch. 1999) (requiring as well that the contract be “as yet still unperformed”).} Sophisticated parties are usually deemed to understand the legal environment in which they act and will therefore generally have reason to know that the entity with which they transact may have acted in breach of its duty of care.\footnote{Cf. id. at 109 n.52 (reasoning that the law should give precedence to stockholders harmed by a fiduciary breach over the interests of an acquirer because the acquirer could have chosen to deal directly with the stockholders). Indeed, many cases do not even discuss whether the other party had knowledge of the breach, apparently presuming such knowledge. See, e.g., Omnicare, 818 A.2d at 936; Paramount Commc’ns, 637 A.2d at 51.} Such informed counterparties may even be liable for restitution if the sale contract has been performed and cannot be unwound.\footnote{Parties who aid and abet a breach of a fiduciary duty may also be held liable. See, e.g., In re Rural Metro Corp. Stockholders Litig., 88 A.3d 54, 97 (Del. Ch. 2014) (“If the third party knows that the board is breaching its duty of care and participates in the breach by misleading the board or creating the informational vacuum, then the third party can be liable for aiding and abetting.”), aff’d sub nom. RBC Capital Mktgs., LLC v. Jervis, 129 A.3d 816 (Del. 2015); In re BioClinica, Inc. S’holder Litig., No. 8272-VCG, 2013 WL 5631233, at *11 (Del. Ch. Oct. 16, 2013) (“It is possible that an aider and abettor could be liable for a directors’ [sic] otherwise exculpated breach of the duty of care.”); In re Celera footnote continued on next page}
who are actually at risk in challenges to city transactions reached in violation of a duty of care will be the counterparties to the transaction, not city officials whose political judgment the law seeks to preserve.

The fact that officials will thereby be spared the threat of liability may lead some to question whether imposing the fiduciary duty of care will improve the quality of city officials’ decisionmaking. In the corporate context, such critiques of *Van Gorkom* abound and, admittedly, there is no definitive evidence about the effects of that decision or of the *Revlon* line of cases on social welfare.

Immediately following *Van Gorkom*, some commentators argued that the ruling would primarily benefit consultants and lawyers as corporate boards sought to add more process to their decisions.429 Others have similarly expressed skepticism regarding the utility of shareholder suits generally.430 By contrast, some have suggested that although *Van Gorkom* itself was perhaps wrongly decided on its facts, the process requirements embedded in the opinion likely improved corporate decisionmaking.431

Empirically, there is some evidence that *Revlon* and shareholder litigation in the merger context can lead to higher merger premiums,432 benefiting the acquired firm’s shareholders, without reducing the number of deals

429. See, e.g., Daniel R. Fischel, *The Business Judgment Rule and the Trans Union Case*, 40 Bus. Law. 1437, 1446-47 (1985) (arguing that outside advice was unlikely to produce a better price, that “[n]o doubt some reputable firm would have been willing to state that [the] premium . . . was ‘fair,’” and that it was unclear how different outside advice would have altered the outcome). Fischel calls *Van Gorkom* “one of the worst decisions in the history of corporate law.” Id. at 1455.

430. See, e.g., Roberta Romano, *The Shareholder Suit: Litigation Without Foundation?*, 7 J.L. Econ. & Org. 55, 84 (1991) (“The data support the conclusion that shareholder litigation is a weak, if not ineffective, instrument of corporate governance.”).

431. See, e.g., Jonathan R. Macey, *Smith v. Van Gorkom*: *Insights About C.E.O.s, Corporate Law Rules, and the Jurisdictional Competition for Corporate Charters*, 96 NW. U. L. Rev. 607, 607 (2002) (stating that *Van Gorkom* is “intellectually frustrating” because although it “may have dramatically improved the quality of deliberations in corporate boardrooms,” imposing liability on the defendants in that case “seem[ed] profoundly unjust”); see also id. at 621 (explaining circumstances in which *Van Gorkom*’s proceduralism would be “most likely to improve the decision-making process in firms”).

executed.433 The court’s intervention in Revlon itself actually led to a bidding war that substantially increased the price ultimately paid to shareholders.434 Thus, in the corporate setting, as elsewhere, there is some good evidence that agents are sensitive to the fiduciary standard of care.435 Hence there is no reason to think that city officials (and the private sector parties whose deals may be undone if a court finds a fiduciary breach) would not similarly respond to judicial review of cities’ market transactions.

Evidence from foreign jurisdictions likewise suggests that benefits could be obtained from increased process review of local government market decisions. In Australia and Europe, the law regulates the procedures employed by local governments before contracting with market actors, insisting on reliance on expert advice and careful economic valuations.436 The International Monetary Fund has endorsed such procedures.437 The duty of care outlined here, focusing on process and good-faith reliance on expert opinion, could bring the United States into line with the internationally preferred approach.

E. Summary: City Officials’ Fiduciary Duty of Care Retrieved

Let us return to the litigation over Chicago’s parking meters deal. The Illinois court dismissed the derivative lawsuit filed by a resident there on the ground that the city was authorized, under state law, to lease the meters.438 It


435. For survey evidence that trustees pay attention to the standard of care and adjust their behavior accordingly, see Martin D. Begleiter, *Does the Prudent Investor Need the Uniform Prudent Investor Act—An Empirical Study of Trust Investment Practices*, 51 ME. L. REV. 27, 30 (1999) (finding that bank trustees readjusted portfolios to comply with the new standard). In two articles, Schanzenbach and Sitkoff find evidence that trustees systematically took on more risk by owning more stock, see Schanzenbach & Sitkoff, supra note 280, at 703-07, and rebalanced portfolios more often when the investment standard of care was changed from one that presumptively disfavored risk to one that required risk to be managed, see Schanzenbach & Sitkoff, supra note 292, at 164-65.


was unwilling to review the process by which city officials had exercised that authority in picking the lessee.

Now imagine the manner in which the litigation would have unfolded had the court followed through on the judicial commitment to the status of city officials as fiduciaries—highlighted in Part I above—and applied to the case the fiduciary duty of care suggested in this Article.

The plaintiffs’ request for the court to void the contract, brought against the consortium that had acquired the Chicago parking meters’ revenue, would have proceeded. City officials—the mayor, aldermen, members of the administration—would not have been personally liable; immunity would have shielded them.439

The plaintiffs would have been tasked with persuading the court that the process these officials used before entering the contract with the chosen buyer was a breach of a duty of care given the nature of the transaction. They may well have succeeded: The city council’s behavior—its rushed votes, its refusal to obtain substantive, relevant, and timely counsel from experts, and the almost blind faith it put in the presentation made by the mayor’s office440—is almost indistinguishable from the board’s behavior deemed faulty in Van Gorkom. The expert opinion was cursory; the legal analysis, nonexistent.441

The court could thus have enjoined the deal, or perhaps even unwound it after it had been consummated.442 The court may have been willing to inflict this cost on the third-party lessee because a city’s decisions are made through an open process, making it highly likely that the sophisticated lessee had actual knowledge that city officials breached their fiduciary duties.443

As this hypothetical treatment of the actual Chicago parking meters deal highlights, a process-based fiduciary duty of care can be devised that would reduce the agency problems endemic to city transactions without undermining other important values. As Part II above explained, courts have failed to develop the specific contents of such a duty.444 This Part assumed that task on their behalf, constructing that fiduciary duty by reference to duties developed

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439. Local administrators enjoy immunity whenever their acts are “discretionary”—acts for which the worker is free to exercise judgment in determining the manner in which the work is performed. See Reynolds, supra note 416, at 816-18. The negotiations surrounding a transaction are a clear example of discretionary acts.


441. See supra text accompanying note 306.

442. More likely, perhaps a settlement could have been reached modifying some terms in the deal.

443. Accordingly, courts have already been ordering restitution in derivative taxpayer lawsuits against counterparties to city deals. See, e.g., Chi. Park Dist. v. Kenroy, Inc., 402 N.E.2d 181, 186-87 (Ill. 1980).

444. See supra Part II.C.
for the trust and the corporation. In light of the law’s experience with those entities, as well as the city’s similarities and dissimilarities to each, the fiduciary duty of care for city officials should be centered on reviewing the rationality of processes used in extraordinary transactions such as the sale of major assets.

Such process-oriented, limited judicial review does not upend normative commitments to the value of local political policymaking. It still achieves the goal of introducing a degree of regulation that should improve city contracting practices. Chicago’s deal—of questionable quality but for which a legal remedy was absent—could be struck down by a court in light of the rushed processes leading up to it.

Moreover, the suggested fiduciary duty would not only provide ex post judicial remedies for problematic deals such as this one but also inevitably have an ex ante effect on city dealmaking. Fearful of potential judicial regulation, city officials would improve their practices. They would deliberate before entering major transactions, seek outside advice and independent appraisals of the value of assets sold, and try in good faith to procure multiple offers. Potential buyers (the city’s counterparts to sales deals), fearful that a court might later rescind their deal with the city, would insist that the city go through these procedures.

Implementing such procedures should improve the quality of cities’ decisions. Officials would be faced with the actual assessed quality of a deal. The public would be made aware. Of course, bad deals might still result. But that risk is inevitable in a system rightly dedicated to local political decisionmaking. The suggested fiduciary duty of care would mitigate the risk of bad deals while preserving that democratic system.

Conclusion

In late 2012, the City of Rialto, California became one of the first in the nation to outsource its water and sewage systems to a private equity firm. The concession agreement gave the firm, for thirty years, the right to operate, manage, maintain, and collect revenue from the city’s water and sewer facilities. In return, and in addition to a cash payment, the firm had to upgrade the aging and underfunded system. The deal was the culmination of a three-year process that included multiple votes—and initial deadlock—by Rialto’s city council. The endeavor was so lengthy and fraught because the

446. Id.
447. See id.
448. Id.
city went through a procurement process requiring competitive proposals for each of the two different contractual structures considered (a concession agreement approach and a qualified management agreement approach). Both approaches and all proposals were then compared with the aid of outside counsel. Community members were invited to voice their concerns at different points along the way, before the deal’s completion.

The process leading to Rialto’s deal is the antithesis of the process leading to Chicago’s parking meters deal. The aftermath of Rialto’s deal is similarly the inverse of Chicago’s. More than four years after its closing, the deal has been hailed as one of the few successful private takeovers of municipal infrastructure: Rialto’s water system has been upgraded, residents had a say in all the rate increases introduced since (one was even delayed), and all the city utility’s employees kept their jobs, with better pay.

If this happy outcome is to become the norm rather than the outlier, Rialto’s decisionmaking process—an informed, deliberative, and rational affair—will have to first become the standard. Fortunately, Rialto’s officials chose this elaborate and thoughtful process. Unfortunately, Chicago’s officials and the officials of many cities chose, and are choosing, a very different process.

The quality of decisionmaking processes when cities enter the market largely hinges on the choices made by elected officials. This Article showed that this need not be the case. Through the fiduciary duty of care, the common law can be used to ensure that officials do not have the option of avoiding


450. See id. at 9; UNC Envtl. Fin. Ctr., Rialto Water and Wastewater Concession Agreement: Capital Flows 2 tbl.1 (2016), https://perma.cc/B6QJ-3T47 (listing the business, technical, and legal advisors who worked with the city through the structuring of the deal).


452. But see id. (discussing the poor track record of local sales of waterworks to private investors).

453. See, e.g., id.; supra text accompanying note 440.

procedures of sound management when transacting in city assets.\footnote{455} That fiduciary duty can, and should, be reclaimed for cities. For Chicago, as its current mayor admitted, there is no going back to the parking regime that preceded its ill-advised deal;\footnote{456} for cities everywhere, there should be no going back to the faulty process that bred that ill-advised deal.

\footnote{455} Naturally, the result could also be reached through legislation. Cities could adopt ordinances themselves. \textit{See, e.g.,} CHI., ILL., MUNICIPAL CODE §§ 2-164-010 to -250. These, however, are subject to change by the city. Alternatively, states could enact statutes requiring cities to adopt certain procedures when entering the market. As seen in Part II.C above, statutes currently provide a partial solution at best due to their limited coverage. Of course, those laws could be changed to treat all local governments as administrative agencies; for a suggestion in this vein, see Saiger, \textit{supra} note 353, at 441-42. Davidson shows, however, that even local government bodies that are administrative agencies are strikingly different from their federal—and probably state—counterparts, and hence it would be misleading to apply to them existing principles of administrative law designed to deal with those higher-level governments. \textit{See} Davidson, \textit{supra} note 256, at 571-72 (advocating for a "new, distinctly localist administrative jurisprudence").

\footnote{456} \textit{See} Mick Dumke, \textit{How Mayor Emanuel Locked the Parking Meter Deal in Place}, Chl. READER (June 6, 2013), https://perma.cc/LD3P-VXFM.