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## Land Assembly Districts

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## ARTICLE

## LAND ASSEMBLY DISTRICTS

*Michael Heller & Rick Hills*

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## LAND ASSEMBLY DISTRICTS

Michael Heller\* & Rick Hills\*\*

*Eminent domain for economic development is both attractive and appalling. States need the power to condemn because so much land in America is inefficiently fragmented. But public land assembly provokes hostility because vulnerable communities get bulldozed. Courts offer no help. The academic literature is a muddle. Is it possible to assemble land without harming the poor and powerless? Yes. This Article proposes the creation of Land Assembly Districts, or "LADs." This new property form solves the age-old tensions in eminent domain and shows, more generally, how careful redesign of property rights can enhance both welfare and fairness. The economic and moral intuition underlying LADs is simple: when the only justification for assembly is over-fragmentation of land, neighbors should be able to decide collectively whether their land will be assembled. Our legal theory solution is equally simple: use property law to retrofit communities with a condominium-like structure tailored to land assembly. Let's try giving those burdened by condemnation a way to share in its benefits and to veto projects they decide are not worth their while.*

### I. INTRODUCTION

The time has come for legislatures to stop denouncing eminent domain while governments continue to condemn land.<sup>1</sup> States should face up to the fundamental tension that makes eminent domain both attractive and appalling. From an efficiency standpoint, we need eminent domain to consolidate overly fragmented land. But such land assembly often works a distributive injustice on the owners

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<sup>1</sup> See generally MICHAEL HELLER, *THE GRIDLOCK ECONOMY: HOW TOO MUCH OWNERSHIP WRECKS MARKETS, STOPS INNOVATION, AND COSTS LIVES* (forthcoming August 2008) (locating the LADs experiment in its broader social and political context).

whose land is taken. How do we get the efficiencies of land assembly without unfairly enriching developers who receive land at condemnees' expense?

This Article proposes an experiment for legislatures to venture — the solution of Land Assembly Districts, or “LADs.” The function of LADs is to unify property interests without expropriating from property owners. LADs can solve the dilemma of eminent domain and, more generally, show how careful redesign of property rights may enhance both welfare and fairness.<sup>2</sup>

Until now, most observers have assumed that solutions to land assembly must be based either on private contracting or public intervention. With private voluntary contracting, holdouts lead to underassembly.<sup>3</sup> Developers may attempt to assemble land secretly, but negotiations frequently collapse when owners discover that each is a monopoly supplier as to the undivided land. On the other hand, eminent domain, which is the public intervention route, leads to capricious redistributions.<sup>4</sup> Because landowners are entitled only to the “fair market value” of their land, not to any of their subjective surplus or any of the assembly value, landowners bitterly fight condemnation. They fight even where the value of land assembly to the public exceeds its costs to the condemnees. Failure to pay landowners the true value of land assembly can cause (1) the government to ignore those costs, leading to inefficient *overassembly*, or (2) the private landowner to fight land assembly too vociferously, leading to wasteful *underassembly*.

To get a sense of the values at stake, consider the recent assembly and condemnation of a dozen buildings housing fifty-five businesses on a seedy part of Times Square. New York City handed over the site on Eighth Avenue between 40th and 41st Streets to the New York Times Company for the “fair market value” of \$86 million. Based on several standard valuation methods, the assembled value that private developers would have paid for that site would have been as much as three times higher.<sup>5</sup> While the dollar gap is large, the values implicated by

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<sup>2</sup> See generally Michael A. Heller & James E. Krier, *Deterrence and Distribution in the Law of Takings*, 112 HARV. L. REV. 997 (1999) (showing the benefits that flow from uncoupling efficiency and fairness in takings law).

<sup>3</sup> See Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621, 639, 673–74 (1998) (describing underuse caused by fragmentation and holdouts); see also Lee Anne Fennell, *Common Interest Tragedies*, 98 NW. U. L. REV. 907, 926–29 (2004) (same).

<sup>4</sup> See Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 86 (1986) (describing this effect of eminent domain).

<sup>5</sup> Paul Moses, *The Paper of Wreckage*, VILLAGE VOICE, June 25, 2002, at 34 [hereinafter Moses, *The Paper*]; see also Paul Moses, *The Times' Sweetheart Deal*, VILLAGE VOICE, Nov. 24–30, 2004, at 16.

eminent domain are not only, or even primarily, financial. Consider another example: in Detroit during the 1980s, General Motors threatened to leave town unless the city promptly condemned and handed over the Poletown neighborhood.<sup>6</sup> GM got the land quickly and cheaply, but Detroit never explained to the thriving neighborhood why their interests should be so capriciously sacrificed for the common good, and no market test ever showed that the transfer was even efficiency-enhancing on its own terms.

The \$150 million discrepancy in value for part of one Times Square block and the bare-knuckle politics behind the razing of Poletown illustrate the stakes in using eminent domain for land assembly, but these are not isolated cases. There are hundreds of examples worth billions of dollars of this controversial nationwide phenomenon.<sup>7</sup>

Land assembly is a critical issue because, across America today, urban land is often broken up into unusably small parcels. Land sits idle in a tragedy of the anticommons — the wasteful underuse caused by too-abundant entitlement holders.<sup>8</sup> The challenge is to solve this tragedy without creating another tragic outcome, expropriating the homes and businesses of existing entitlement holders who are often poor and vulnerable. This type of dilemma, where there is no good mechanism to bridge the gap between the individual scale of ownership and the socially optimal use of land, is just where property law innovation can prove most useful.

Enter the Land Assembly District. The economic and moral intuition underlying the LAD is simple: persons who hold a legal interest in a neighborhood's land should *collectively* decide whether the land ought to be assembled into a larger parcel. Our legal theory solution is equally simple: property law can retrofit a community with a condominium-like structure tailored to solve the problem of land assembly. To allow people to overcome collective action barriers that might otherwise prevent them from selling their neighborhood, the LAD places them in a special district with the power, by a majority vote, to approve or disapprove the sale of the neighborhood to a developer or municipality seeking to consolidate the land into a single parcel. Unlike voluntary transactions between individual owners and a private land assembler, the LAD's decision avoids holdout problems by requiring the landowners to make their decision through some sort of

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<sup>6</sup> Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455, 465–71 (1981) (Ryan, J., dissenting).

<sup>7</sup> The Institute for Justice, Kelo's pro bono counsel in *Kelo v. City of New London*, 545 U.S. 469 (2005), maintains a detailed listing of uses (or abuses, depending on your point of view) of eminent domain for land assembly. See Castle Coalition, Eminent Domain Map, <http://maps.castlecoalition.org> (last visited March 8, 2008).

<sup>8</sup> See generally Heller, *supra* note 3 (introducing anticommons theory).

collective voting procedure. Unlike eminent domain, the residents controlling the LAD would have a veto over whether or not to proceed with land assembly: if the municipality or developer does not offer a price satisfactory to the LAD's constituents, then the assembly of land would not go forward.

LADs create a mechanism by which neighbors can bargain effectively for a share of the neighborhood's "assembly value" — its value after the fragmented interests are united into a single parcel — and not merely the value of each lot before land assembly. By giving neighbors a chance to get a share of the land's assembly value, LADs help enlist them to be supporters of land assembly whenever such an assembly really will have a higher value than the neighborhood that it will replace. Moreover, it is not difficult to design LADs in such a way that individual owners within a LAD have the right to opt out and receive the full, existing measure of constitutional protection (that is, condemnation based on fair market value) if they are dissatisfied with the bargain struck by the LAD. Thus, LADs can be designed so each individual is at least as well off as under current law and most are substantially better off.

Given these benefits of LADs, is there any reason to use traditional eminent domain at all? We argue that LADs make eminent domain unnecessary when the problem is simply the assembly of *fragmented* land. For instance, if the state has authorized the creation of LADs, then eminent domain for the economic redevelopment of "blighted" neighborhoods ought to be forbidden, unless "blight" is defined narrowly to include only neighborhoods that impose extraordinary external costs on outsiders, because the only function of such eminent domain is assembly of overfragmented land. By contrast, eminent domain still has a role to play where the problem is acquiring *unique* sites for traditionally public infrastructure — say, the only feasible site for a highway or airport or a uniquely noisome parcel of land. In these cases, LADs provide no solution to the problems of bilateral monopoly that would arise if monopolistic landowners were to negotiate with a monopsonistic government.

Our solution understands the assembly value of land as a common-pool resource — any landowner can obstruct its creation. We argue that, as a general matter, the best solution to a breakdown in collective action is not the application of outside expertise but support for self-government by the affected parties. Thus we reject the traditional solution to such a tragedy of the anticommons, a call for the Leviathan: disinterested experts employed by a larger-scale government who figure out what the parties would have done were they capable of contracting or self-government. Indeed, the dominant proposals in the legal literature for reforming eminent domain have followed this script, relying on the promise of legal or economic expertise. For instance, legal scholars occasionally call for measures of "just compensation" that

would approximate the landowners' subjective valuations.<sup>9</sup> Likewise, there is periodically a call to revive the constitutional requirement that condemnations serve a "public use."<sup>10</sup> Both of these solutions overestimate the power of expertise and underestimate the potential of self-government.

The owners' subjective valuations of their own land are by definition best known (and therefore best revealed or concealed) by the landowners themselves, as opposed to experts. Likewise, the public use solution improbably assumes that judges are better at calculating the public benefits of land assembly than developers and politicians, groups whose particular expertise is discerning and catering to the desires of consumers and voters. The LAD is an institution through which *the interested parties themselves*, landowners and land assemblers, can determine whether the game of land assembly is worth the candle.

One can view LADs in a larger context by comparing them to other forms of group property that have radically transformed the management of analogous common-pool resources. For example, the condominium form took a hop through Puerto Rican law into mainstream American law in the early 1960s and has since become ubiquitous.<sup>11</sup> More recently, thousands of "business improvement districts" (BIDs) have sprung up following the passage of state enabling regulations.<sup>12</sup> The voluminous literature on the governance of a wide variety of limited-access common-pool resources, ranging from forests to groundwater, has repeatedly suggested that they flourish best when the users have mechanisms of self-government that enable them to overcome collective action problems.<sup>13</sup> LADs illustrate the principle that *self-government*, not *expert government*, is the best way to control a limited-access commons — in this instance, to manage the struggle for the assembly value of fragmented land.

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<sup>9</sup> See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 55–61 (7th ed. 2007).

<sup>10</sup> See, e.g., RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 161–81 (1985); Ashley J. Fuhrmeister, Note, *In the Name of Economic Development: Reviving "Public Use" as a Limitation on the Eminent Domain Power in the Wake of Kelo v. City of New London*, 54 *DRAKE L. REV.* 171 (2005).

<sup>11</sup> See Horizontal Property Act of 1958, P.R. LAWS ANN. tit. 31, §§ 1291–1293k (1993 & LexisNexis Supp. 2005); Robert G. Natelson, *Condominiums, Reform, and the Unit Ownership Act*, 58 *MONT. L. REV.* 495, 500 (1997) (describing the historical origins of condominiums).

<sup>12</sup> See Richard Briffault, *A Government for Our Time?: Business Improvement Districts and Urban Governance*, 99 *COLUM. L. REV.* 365, 366–74 (1999) (describing the rise of BIDs and their general legal structures); Brian R. Hochleitner, Note, *BIDs Fare Well: The Democratic Accountability of Business Improvement Districts*, 78 *N.Y.U. L. REV.* 374, 374–76 (2003) (same).

<sup>13</sup> See, e.g., Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 *U. CHI. L. REV.* 711, 742–49 (1986) (discussing successful examples of group management of limited-access commons resources).



To be sure, LADs face distinctive challenges that condos, BIDs, gas and oil unitization, and other forms of retrofitted group property do not face.<sup>14</sup> In these existing group property forms, the owners typically have homogeneous interests and engage in repeated interactions. By contrast, our proposal for LADs faces the daunting prospect of heterogeneity and a one-shot deal. This combination is perhaps the most difficult challenge for any new group property form. If LADs can work — and we think they can — then it is difficult to imagine another intermediate-level collective action problem that could not be solved by our method of property law entrepreneurship and experimentation.

Part II frames the problem; Part III proposes our LAD solution; and Part IV tweaks the solution to address some problems of neighborhood power that our solution might raise. Finally, Part V shows why it is not so radical after all to think that people can solve problems of land assembly for themselves if the law gives them the right tools.

## II. THE LANDSCAPE BEFORE LADS

This Part explores the legal landscape that informs our approach to LADs. First, we rehearse the theoretical arguments for why existing methods of land assembly are both unfair and inefficient. Second, we support these arguments against the existing approaches with a brief survey of the failed experiment with urban renewal from the 1950s to the 1970s. Both theory and history caution against recent efforts to cure “blighted” neighborhoods with eminent domain.

### A. *The Defects of Private Land Assembly*

Absent strategic behavior by landowners, the ideal method of land assembly would be to require the assembler to secure the consent of the landowners whose land is sought for a larger parcel. When a land assembly goes forward on this basis, one can be reasonably confident that it enhances social welfare because the landowners would not sell unless the assembly surplus exceeded the owners’ valuations of their properties. These valuations would include peculiar values not reflected in market value, such as the landowner’s sentimental attachment to the land or special adaptations to the particular site that generate producer or consumer surplus for the landowner (for instance, location near longtime customers).

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<sup>14</sup> On the dilemmas of contracting for oil unitization, see Gary D. Libecap & Steven N. Wiggins, *Contractual Responses to the Common Pool: Prorationing of Crude Oil Production*, 74 AM. ECON. REV. 87 (1984).

The familiar collective action problem arises, however, as soon as the landowners realize that a purchaser is attempting to assemble a larger parcel by combining several smaller lots. After the land assembler has purchased a part of the planned larger parcel, the assembler becomes locked into purchasing the rest of it to avoid duplicating the site-specific investment at another site. Thus, existing owners become monopoly suppliers of the assembled land.<sup>15</sup> Knowing that the assembler requires each of their parcels, every owner may seek to be the last to sell, and then to hold out for all of the extra value created by the assembly. With several such holdouts, negotiations collapse because the assembler, of course, cannot pay the entire surplus to each owner.

Empirical confirmation of such holdout problems is plentiful and colorful.<sup>16</sup> Tales are legion of speculators who swoop in to purchase options on lots of land from less informed owners as soon as they get wind that the parcels lie in the boundaries of an impending assembly. Even where developers successfully assemble land by using dummy corporations and shill buyers, the transaction costs of the assembly are so high that only a small fraction of the most valuable projects go forward. Knowing *ex ante* that up-front costs will be high and impasse is likely, potential assemblers seek extraordinary returns or make alternative investments. On many city blocks, competing developers and holdouts may play a waiting game that lasts for decades.<sup>17</sup> Under this regime, predictably, too little land is assembled.

This is not to say that voluntary land assembly is always doomed to failure. There are rare examples in the United States in which a group of owners has come together to initiate its own land assembly without any formal property institution to structure its dealings or economize on transaction costs. As Professors Robert Ellickson and Vicki Been note, homeowners are reasonably well placed to put informal pressure on their holdout neighbors to accept a good deal from a developer for a group of properties and to pressure the local government for the necessary zoning changes and permits.<sup>18</sup> In a rare case that worked, one of the participants noted: “[t]he real story is how you manage to get 144 people to agree to let three of their neighbors negotiate the sale of their homes.”<sup>19</sup> Likewise, Professors Gideon Parcho-

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<sup>15</sup> See Lee Anne Fennell, *Taking Eminent Domain Apart*, 2004 MICH. ST. L. REV. 957, 971–72 (describing power of individual landowners to hold out in a “thin market” situation); Merrill, *supra* note 4, at 75 & n.49 (describing the problem of landowners becoming monopoly suppliers and providing examples).

<sup>16</sup> See, e.g., ANDREW ALPERN & SEYMOUR DURST, *HOLDOUTS!* (1984) (cataloguing lengthy negotiations and costly modifications of buildings to accommodate landowners holding out for a piece of assembly surplus).

<sup>17</sup> See *id.*

<sup>18</sup> ROBERT C. ELICKSON & VICKI L. BEEN, *LAND USE CONTROLS* 853–54 (3d ed. 2005).

<sup>19</sup> *Id.* at 854.

movsky and Peter Siegelman chronicle the tale of how the American Electric Power Company (AEP) purchased the entire town of Cheshire, Ohio, from its residents.<sup>20</sup> Professors Parchomovsky and Siegelman attribute the absence of holdouts to the residents' shared interest in maintaining a sense of community: as more residents agreed to sell their homes, this sense unraveled, leading the balance of residents to sell at a discount.<sup>21</sup>

But the rarity of the voluntary approach suggests its limits: its vulnerability to holdouts, to other coordination difficulties, and to the need to reinvent from scratch a costly administrative and negotiating process. Moreover, the sale of Cheshire, Ohio, is hardly a success story. Because they had no mechanism for collective action, the residents of Cheshire could not plan a coordinated method for evaluating AEP's offers or assessing whether their individual decisions would actually preserve the community whose sale they were assessing.<sup>22</sup> In short, uncoordinated individual action results in holdouts that obstruct cost-justified sales or in panic sales that hinder retention of community.

### B. *The Defects of Eminent Domain*

As an alternative, assemblers pressure local governments to condemn land on their behalf. Eminent domain overcomes the holdout problem, but only at the expense of introducing other fairness and efficiency concerns. The difficulty with eminent domain is that it must substitute a court's objective valuation for a value determined by the parties' bargaining. But the administrative costs of judicial valuation require courts to choose crude measures of value — for instance, "fair market value" (meaning the court's estimate of the value that a willing buyer would pay a willing seller for the particular parcel at its highest and best use on the open market).<sup>23</sup> Such measures of value necessarily fail to give landowners the same compensation that they would have demanded in a fully voluntary transaction.<sup>24</sup> In this purely de-

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<sup>20</sup> Gideon Parchomovsky & Peter Siegelman, *Selling Mayberry: Communities and Individuals in Law and Economics*, 92 CAL. L. REV. 75 (2004).

<sup>21</sup> *Id.* at 122–24.

<sup>22</sup> *See id.*

<sup>23</sup> *See* United States v. 564.54 Acres of Land, 441 U.S. 506, 511 (1979) ("Because of serious practical difficulties in assessing the worth an individual places on particular property at a given time, we have recognized the need for a relatively objective working rule. . . . The Court therefore has employed the concept of fair market value to determine the condemnee's loss. Under this standard, the owner is entitled to receive 'what a willing buyer would pay in cash to a willing seller' at the time of the taking." (quoting United States v. Miller, 317 U.S. 369, 374 (1943)) (citing United States v. Cors, 337 U.S. 325, 332 (1949))).

<sup>24</sup> *See* EPSTEIN, *supra* note 10, at 82–86; Steven J. Eagle, *Privatizing Urban Land Use Regulation: The Problem of Consent*, 7 GEO. MASON L. REV. 905, 915 (1999) ("[G]iven that the destruction of subjective value almost always occurs in eminent domain proceedings, 'just compen-

scriptive sense, we can say that eminent domain “undercompensates” landowners. (We explore in the next sections whether this undercompensation should be regarded as a normative problem.)

1. *Undercompensation.* — Consider two sources of undercompensation that are built into the concept of fair market value. First, landowners frequently derive some sort of consumer or producer surplus from their lots that is higher than the price the average buyer would pay for the parcel.<sup>25</sup> Homeowners might build up sentimental attachments to property simply by living in it. They develop ties to neighbors through connections at local churches, favorite coffee shops, bars, clubs, or other familiar local watering holes — what some have called “social capital.”<sup>26</sup> These connections can enable neighbors to overcome collective action problems more easily in monitoring crime or pressuring government for help in maintaining neighborhood quality. Homeowners also change the property to suit their unique tastes with expensive but eccentric modifications that are not reflected in the market price. Shopowners build up connections to regular customers who patronize the shops through habit and because of their convenient location. Fair market value does not include any compensation for such lost subjective value.<sup>27</sup> One way to understand what it means when a landowner says property is “not for sale” is that the owner’s subjective value in the land is higher than its fair market value.

Second, with a caveat, fair market value does not include any of the enhancement of value resulting from the land assembly itself.<sup>28</sup>

sation’ is hardly ever ‘full compensation.’”); Daniel B. Kelly, *The “Public Use” Requirement in Eminent Domain Law: A Rationale Based on Secret Purchases and Private Influence*, 92 CORNELL L. REV. 1, 26 (2006) (“[Subjective] values are difficult to quantify. . . . [E]xisting owners have an incentive to inflate their selling prices opportunistically to augment their own compensation. . . . As a result, in calculating just compensation for any taking, courts ignore the actual valuations of existing landowners.” (footnotes omitted)); Christopher Serkin, *The Meaning of Value: Assessing Just Compensation for Regulatory Takings*, 99 NW. U. L. REV. 677, 679 (2005) (“Fair market value excludes, for example, consequential damages and compensation for any of the real but subjective harms suffered by the property owner.”).

<sup>25</sup> See *Kimball Laundry Co. v. United States*, 338 U.S. 1, 5 (1949) (“[L]oss to the owner of non-transferable values deriving from his unique need for property or idiosyncratic attachment to it, like loss due to an exercise of the police power, is properly treated as part of the burden of common citizenship.”).

<sup>26</sup> See generally ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2000).

<sup>27</sup> See *Coniston Corp. v. Vill. of Hoffman Estates*, 844 F.2d 461, 464 (7th Cir. 1988) (“Many owners are ‘intramarginal,’ meaning that because of relocation costs, sentimental attachments, or the special suitability of the property for their particular . . . needs, they value their property at more than its market value (i.e., it is not ‘for sale’).”). State statutes, however, sometimes go beyond what the Fifth Amendment requires, for example, by compensating for lost business goodwill. See, e.g., Nicole Stelle Garnett, *The Neglected Political Economy of Eminent Domain*, 105 MICH. L. REV. 101, 123–24 (2006).

<sup>28</sup> See *Miller*, 317 U.S. at 375 (“[Compensation] cannot be enhanced by any gain to the taker. . . . [S]pecial value to the condemnor as distinguished from others who may or may not pos-

This assembly surplus can be considerable: a quarter-acre parcel in a rundown residential neighborhood might be worth a small fraction of a quarter-acre parking lot next to a glittering new festival mall.

2. *Is Undercompensation Unfair? The Question of Distributive and Corrective Justice.* — Is such “undercompensation” unfair? We believe that no general answer is possible to this question of distributive justice: as we explain below, the answer will depend on the contingent facts of each condemnation. But the very contingency of the question indicates something deeply wrong with our current system of eminent domain. Eminent domain invariably relies on “one-size-fits-all” formulas — for instance, “fair market value” — to reduce administrative costs.<sup>29</sup> This emphasis on simple formulas is the inevitable result of eminent domain’s procedures, which include no method for encouraging neighbors and land assemblers to bargain honestly, thereby revealing their true preferences concerning land assembly.<sup>30</sup> The result is an administratively cheap but ethically crude system that ignores most of the context-specific concerns relevant to distributive justice.<sup>31</sup>

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sess the power to condemn, must be excluded as an element of market value.” (citations omitted)). There is one setting in which a property owner might be entitled to some of the assembly value. The owner has to show that a private developer could realistically have assembled the land, and created the incremental value, within a reasonable time at a reasonable price without the use of eminent domain. *Consumers Power Co. v. Allegan State Bank*, 202 N.W.2d 295, 299 (Mich. 1972). However, the incremental value cannot be established by introducing evidence of private offers for the land or for neighboring sites that never closed and that contained unusually restrictive conditions tantamount to the offers’ being call options. *Mauldin v. Hous. Auth. of Marietta*, 477 S.E.2d 317, 318–19 (Ga. Ct. App. 1996). We thank Professor George Lefcoe for bringing this example to our attention.

<sup>29</sup> See *United States v. 320.0 Acres of Land*, 605 F.2d 762, 781 (5th Cir. 1979) (listing various “working rules” and “practical standards” courts usually apply in eminent domain cases, regardless of the idiosyncrasies of underlying facts).

<sup>30</sup> Statutes authorizing eminent domain typically require the assembler to make a good-faith offer for the voluntary purchase of the property sought to be condemned. See 6 JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN § 24.13[1][a] (3d ed. 2006). But the requirement is almost never judicially enforced to limit eminent domain. *Id.* This lack of judicial enforcement is hardly surprising given the evidentiary difficulty of proving lack of good faith in an initial offer.

<sup>31</sup> We sidestep the more general question of whether government should ever pay any compensation to landowners whose land is confiscated for land assembly. The traditional academic criticism of the obligation is that government does not routinely compensate persons for losses incurred as a result of other legal transitions — for instance, when government repeals a tax exemption or prohibits a previously legal activity. Why should losses resulting from the compensation of land be any different? See generally Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 509 (1986). If landowners are averse to the risk of governmental confiscation, they can purchase insurance against the possibility of confiscation. See Lawrence Blume & Daniel L. Rubinfeld, *Compensation for Takings: An Economic Analysis*, 72 CAL. L. REV. 569, 572 (1984). Any government subsidy for such insurance would predictably lead to the moral hazard of landowners ignoring the risk of confiscation when they build on their property, erecting inefficiently large structures in the face of impending freeways and airports. Kaplow, *supra*, at 602–03; Blume & Rubinfeld, *supra*, at 622–23.

The familiar riposte to these arguments is that confiscation is especially demoralizing to landowners, not because it creates uncertainty but because it is perceived by landowners as being

(a) *The Fairness of Denying Condemnees Any Share of the Assembly Surplus.* — Consider, first, whether landowners ought to receive any share of the increased value resulting from the land assembly itself. Conventional wisdom suggests that landowners do not deserve any share of such gains because they do not create the assembly. The Supreme Court has held that landowners do not deserve to receive a windfall from the beneficial activities of government simply because their land stands in the path of progress.<sup>32</sup>

There are, however, at least two objections to such a position. First, failure to pay over some share of the assembly value to condemnees deprives them of value that landowners normally retain. Private landowners selling their land in a voluntary transaction ordinarily bargain not merely for the opportunity costs of replacing their home, but also for any appreciation of value resulting from general market or community conditions. We will assume that the ordinary social understanding of ownership is the benchmark for defining distributive justice.<sup>33</sup> With this benchmark in mind, one might regard

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unjust. This special demoralization might result from the sense that confiscation of specific assets defines a closed class of specifically identified persons. Unlike the people who happen to lose as a result of a generally applicable regulatory scheme, the person whose land is taken might feel especially aggrieved or vulnerable by being targeted by the state for no more ethically plausible reason than the location of his or her land. The Court seems to have held that laws burdening such “closed classes” of people are more susceptible to challenge as regulatory takings than general legislation that identifies a more open category of burdened persons. *See generally* E. Enters. v. Apfel, 524 U.S. 498 (1998). Because this demoralization cost has nothing to do with uncertainty, Professors Fischel and Shapiro argue that insurance would not eliminate the welfare loss resulting from demoralization: the landowner would be just as demoralized by the need to pay an insurance premium. William A. Fischel & Perry Shapiro, *Takings, Insurance, and Michelman: Comments on Economic Interpretations of “Just Compensation” Law*, 17 J. LEGAL STUD. 269 (1988).

For the purposes of this Article, we take as given the obligation of the government to pay compensation to landowners when the government confiscates or permanently occupies their land. This obligation, after all, is well ensconced in constitutional text and doctrine, as well as social mores. As a matter of practical policymaking, the right to compensation is not going away any time soon. The only issues on the table are the details: how, and how much.

<sup>32</sup> *Miller*, 317 U.S. at 377.

<sup>33</sup> Thus, we do not offer any “comprehensive” theory of distributive or corrective justice as a standard by which to assess “market value” as a measure of compensation. Instead, we infer some less abstract principles from popular intuitions about what constitutes just treatment of persons whose land is confiscated by the government.

For those who seek more comprehensive theories to explain social practices, this “mid-level” approach to theory will seem unsatisfying. Certainly, a more “top-down” comprehensive approach that deduced the theory from some master value — for instance, welfare maximization — would be more parsimonious in its premises. Such an approach, however, might rest on the illusion that there is a persuasive free-standing theoretical platform, independent of our actual social practices, on which a theorist can make a convincing stand: why, for instance, should anyone believe that there is a duty to maximize welfare? If one has a more pragmatist view, there is nothing but the ladder: kick it away, and one simply falls outside the domain of normal social discourse. Occam’s Razor may be fine as one theoretical commitment among many. Use it too often, however, and one may end up giving oneself a philosophical lobotomy.

the denial of such a bargaining right to condemnees as distributionally unjust: they are deprived of the ordinary perquisites of ownership simply because their land lies in the path of a highway or shopping mall.

This apparent injustice is especially stark when noncondemned land abutting the assembly project appreciates in value as a result of that project, yet government makes no effort to recover such appreciation through any sort of benefits charge. The landowner whose land was condemned for the project gets only a fraction of the value that the abutting landowner receives, even though the former actually made some contribution to the project.<sup>34</sup> It was precisely this perception of injustice that led several states during the mid-nineteenth century to abandon the "benefit-offset" rule in assessing compensation to farmers whose land was condemned for railroads.<sup>35</sup> Of course, this problem of morally arbitrary redistribution could be solved by special assessment districts that stripped both abutting landowners and condemnees of the windfall resulting from the assembly project.<sup>36</sup> But governments very rarely attempt such recovery, perhaps because the administrative costs of measuring the marginal increase in value of abutting land would be too high. The result is that failure to pay any share of the gains from assembly to condemnees leads to a morally arbitrary redistribution of wealth from condemnees to abutting landowners.

Second, it is an error to suppose that landowners make no contribution to the success of land assembly beyond giving up their land. The speed with which land is condemned depends critically on the attitude of the condemnees. If they are highly litigious or politically obstreperous, they can delay the condemnation and run up the legal costs of the land assembler. If they are more cooperative and trusting of the government, condemnation can go forward much more quickly. By denying cooperative landowners any share of the assembly gains, the system of eminent domain provides no reward to landowners who actually help create those gains through cooperative behavior.

(b) *The Fairness of Denying Condemnees Their Subjective Valuation.* — Quite apart from the possibility that landowners might deserve some share of the assembly surplus, eminent domain typically denies condemnees any compensation for lost consumer or producer

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<sup>34</sup> See *Miller*, 317 U.S. at 375, 376-77 (stating rules that just compensation is determined at the commencement of a taking, but that any lands condemned after the taking has been planned receive compensation according to their changed value at the time of this second decision).

<sup>35</sup> WILLIAM A. FISCHER, *REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS* 83-84 (1995).

<sup>36</sup> See ELLICKSON & BEEN, *supra* note 18, at 630-34 (discussing special assessment districts in the form of business improvement districts).

surplus above fair market value.<sup>37</sup> A normal attribute of ownership is the right to hold out for a sale price that will leave one in as good a position as before the sale. Eminent domain obviously strips the condemnee of this perquisite. It is well known that landowners tend to value their own land above the market value.<sup>38</sup> To the extent that eminent domain is supposed to achieve this sort of corrective justice by placing condemnees in the position that they would have occupied but for the condemnation, "fair market value" is an unjust measure of compensation.<sup>39</sup>

Courts and commentators typically justify the exclusion of subjective valuation as a way to reduce the administrative costs of the condemnation system.<sup>40</sup> Because eminent domain has no reliable mechanism for eliciting the true valuation of landowners, any consideration of subjective valuation would be an invitation to perjury. Moreover, one might argue that landowners' tendency to place a higher valuation on their land than does the market is the result of a transitory "endowment effect" that creates an "offer/ask" disparity.<sup>41</sup> Humans have a well-verified psychological inclination to value their current endowments more than identical items that they currently lack but could purchase: they will pay more to avoid losing an item than they will to acquire the identical item.<sup>42</sup> Thus, a landowner will ask for more to give up a house she currently occupies than she will offer to purchase the identical house in the identical neighborhood. If this endowment effect amounts to nothing more than a temporary preference for the status quo, then one might regard it as irrational or transitory, since preferences will change as soon as the status quo does. If, in the long run, the landowner will be just as satisfied with the substitute housing to which he relocates as he is now with his condemned house, then market value might seem an adequate measure of compensation. (There is some evidence that the endowment effect diminishes as people gain more experience with buying and selling.)<sup>43</sup> Such an aversion

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<sup>37</sup> See *Miller*, 317 U.S. at 375 (noting that the land's particular suitability to the buyer or seller "must be disregarded . . . in arriving at 'fair' market value").

<sup>38</sup> See *Coniston Corp. v. Vill. of Hoffman Estates*, 844 F.2d 461, 464 (7th Cir. 1988); Fennell, *supra* note 15, at 963; Garnett, *supra* note 27, at 107-09; Merrill, *supra* note 4, at 83.

<sup>39</sup> See *Coniston Corp.*, 844 F.2d at 464; EPSTEIN, *supra* note 10, at 182-86; POSNER, *supra* note 9, at 55-61.

<sup>40</sup> See *United States v. 564.54 Acres of Land*, 441 U.S. 506, 510-11 (1979); Richard A. Epstein, *The Supreme Court, 1987 Term—Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4, 62 n.167 (1988); Kelly, *supra* note 24, at 25-26.

<sup>41</sup> See FISCHER, *supra* note 35, at 207-09; Daniel Kahneman, Jack L. Knetsch & Richard H. Thaler, *Experimental Tests of the Endowment Effect and the Coase Theorem*, 98 J. POL. ECON. 1325 (1990).

<sup>42</sup> See Kahneman et al., *supra* note 41.

<sup>43</sup> See generally Russell Korobkin, *The Endowment Effect and Legal Analysis*, 97 NW. U. L. REV. 1227 (2003).



to change, without any connection to the actual characteristics of one's current or future situations, might not plausibly justify an increase in compensation because taxpayers themselves may suffer from a similar endowment effect regarding their incomes. If they do, then it would make no sense to protect landowners' attachment to their real estate endowments, for such protection would undermine a similar attachment of taxpayers to their current level of cash.<sup>44</sup> In short, one might defend the use of "fair market value" on the ground that it is simply too costly to determine landowners' long-term, "genuine" subjective valuation of their land.

These arguments, however, assume that the only procedure for determining subjective valuation is that traditionally used in eminent domain proceedings. This procedure makes heavy use of expert testimony, but has no mechanism (beyond the penalties of perjury) for encouraging neighbors to state honestly their valuation of their land. Similarly, the procedure lacks a mechanism for encouraging neighbors to engage in any collective deliberation concerning the value of their neighborhood. Many landowners will value their current land more highly precisely because they know and value their current neighbors, who might be social friends or reliable customers.<sup>45</sup> Each landowner, therefore, needs to know whether those other landowners will remain in the neighborhood in order to come to some reliable long-term estimate of her own valuation of her parcel. Eminent domain procedures reject all such efforts at neighborhood democratic deliberation in favor of judge-managed expertise.

The result, predictably, is that consideration of the neighbors' subjective valuation of their neighborhood might be prohibitively costly. However, if different procedures could gauge subjective valuation more cheaply and effectively, there is little doubt that such procedures would be more just, as measured by the goals of corrective justice already implicit in the system of just compensation.

3. *Is Undercompensation Inefficient?* — Quite apart from the question of fairness, there is the additional difficulty of whether eminent domain sends to government and private condemnees an accurate signal of the relative value of preserving the status quo or assembling fragmented ownership patterns.<sup>46</sup> Under one (in our view, excessively

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<sup>44</sup> FISCHER, *supra* note 35, at 209–10.

<sup>45</sup> See Parchomovsky & Siegelman, *supra* note 20, at 116 (discussing the "social capital" of friendships, and the value they add).

<sup>46</sup> One might ask whether government needs such a fiscal signal to ensure that it adequately considers constituent interests. Ordinarily, government has an adequate signal of constituent interests simply through the process of democratic elections. The claim is occasionally made, however, that governmental decisionmakers ignore nonfiscal costs, at least when they are experienced by a minority of constituents. See, e.g., POSNER, *supra* note 9, at 56–61. As Professor Daryl Levinson notes, the difficulty with such a theory of "fiscal illusion" is that we do not normally assume

rosy) theory, the requirement that government pay just compensation can be regarded as a way to improve the political process by which land assembly decisions are reached, regardless of whether one regards condemnees as politically weak or politically powerful. If condemnees are politically weak because they are numerically insignificant, poor, or both, then the government's obligation to pay just compensation gives municipal government a fiscal incentive to take their interests into account, because the majority will have to feel the pain of increased taxation necessary to compensate the condemnees.<sup>47</sup> On the other hand, if such landowners are politically effective because the concentrated costs that they face give them an incentive to overcome collective action problems and lobby city hall to avoid loss of their land, then just compensation should reduce the intensity of their opposition to just the right level. At this level, cost-justified land assembly should move ahead because the primary opponents have been bribed to step aside.<sup>48</sup>

Just compensation, however, does not really indemnify landowners for the true cost of eminent domain. The result is that incentives to use or forgo eminent domain are skewed. Government and private land assemblers have an incentive to overuse eminent domain when landowners are politically ineffective. Politically effective landowners have reason to object excessively to eminent domain, possibly deterring its use even when it is necessary.

Consider the first danger: that government will overuse eminent domain. As Professor Thomas Merrill notes in his important article,

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that government will ignore regulatory benefits experienced by private parties unless the government can recover those benefits through fees or benefits charges. Why, then, should we assume that government will ignore regulatory burdens absent some fiscal incentive to take them into account? See Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 377 (2000).

It is worth noting, however, that local government policies seem to take greater care to compensate private persons for the costs of confiscating private property (through payment of just compensation) and the private benefits of *bestowing public property* (through recapture of infrastructure benefits with special assessments and other benefits charges). Perhaps government takes greater care in spreading both the costs and benefits of infrastructure precisely because these benefits are so clearly focused on specific, geographically identified individuals. Where the victims and beneficiaries of governmental action constitute such a clearly delineated class, the dangers of rent-seeking and majoritarian exploitation are heightened.

<sup>47</sup> See, e.g., *Kelo v. City of New London*, 545 U.S. 469, 496 (2005) (O'Connor, J., dissenting) ("Together [the public use and just compensation requirements] ensure stable property ownership by providing safeguards against excessive, unpredictable, or unfair use of the government's eminent domain power — particularly against those owners who, for whatever reasons, may be unable to protect themselves in the political process against the majority's will."); Daniel A. Farber, *Economic Analysis and Just Compensation*, 12 INT'L REV. L. & ECON. 125, 137 (1992) ("[B]ecause the legislature will usually offer compensation voluntarily, the takings clause can be defended as a barrier against a serious form of discrimination against politically disfavored groups.")

<sup>48</sup> Merrill, *supra* note 4, at 85–88.

*The Economics of Public Use*, private land assemblers have an incentive to lobby for eminent domain even when there is little danger of a holdout problem, simply because the inadequate measure of just compensation ensures that the assembler need not pay the landowners any share of the assembly value or even the landowners' true loss.<sup>49</sup> Merrill argues that such "secondary rent-seeking" ought to be discouraged through more intensive judicial review where "one or a small number of persons will capture a taking's surplus," but he offers no further elaboration of how to identify situations in which such heightened scrutiny is warranted.<sup>50</sup> One is left with the uneasy impression that secondary rent-seeking could be ubiquitous enough to swallow Merrill's general argument in favor of judicial deference to eminent domain.

By contrast, consider the opposite possibility — that landowners are politically effective.<sup>51</sup> The measure of just compensation offered by eminent domain provides them with no incentive to collaborate with government in land assembly. At the very best, they will receive fair market value, which likely undercompensates many of them. Because they cannot receive any share of the assembly value, landowners are indifferent to whether land assembly turns out to be a success or a failure. The predictable result is that landowners hire a lawyer on a contingency fee basis to fight fiercely for the maximum possible delay of land assembly. It is frequently argued that condemnees deserve no share of the assembly value because they are merely "passive participants" who do nothing to assist in the process of land assembly but involuntarily supply the factor of land.<sup>52</sup> This argument, however, forgets that landowners need not be passive: they can do much to hasten or delay the pace of a land assembly through litigation, demonstrations, and sheer political muscle. By giving them no incentive to promote a project, the market value measure of just compensation makes it likely that they will actively oppose it.

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<sup>49</sup> See *id.* at 87.

<sup>50</sup> *Id.*

<sup>51</sup> The assumption that homeowners, at least, will tend to be effective and extremely vocal participants in the local land use political process is supported by WILLIAM A. FISCHER, *THE HOMEVOTER HYPOTHESIS* (2001). Briefly, the "hypothesis" of the title is that homeowners will pay careful attention to local regulatory burdens and local tax and spending levels because these governmental actions will tend to be capitalized into the value of their homes, depressing or increasing this value depending on whether the governmental actions are on net beneficial or harmful to local properties. Because homeowners cannot insure against value loss resulting from bad regulation, they tend to be risk-averse, opposing any risky governmental action that could cause them to lose their equity. This risk-aversion is expressed by surprisingly well-informed and intense levels of local political participation by homeowners, or, as Professor Fischer calls them, "homevoters."

<sup>52</sup> Merrill, *supra* note 4, at 86 (describing the condemnor as the "active agent, the supplier of the idea and initiative").

### C. No Easy Fixes Within Eminent Domain

Of course, there might be easy ways to solve the problems of eminent domain that would not require the creation of new institutions. It is possible that changing compensation practice or increasing judicial supervision of condemnations would solve the core dilemmas of eminent domain. But we doubt it.

1. *New Compensation Formulas Do Not Reveal Which Neighborhoods Should Be Condemned.* — A government might try to use voluntary payments of money above fair market value to buy off bitter landowner opposition to eminent domain. But this expedient assumes what the case for eminent domain denies — namely, that holdout problems and strategic behavior by landowners will not bog down negotiations for a voluntary solution. Having only eminent domain and voluntary transactions with which to gauge landowners' valuation of their neighborhood, government has no institution by which to get an *accurate* appraisal of what an unassembled neighborhood — the status quo — is really worth.<sup>53</sup>

One might also try to solve the problems of distributive and corrective justice by uniformly increasing the measure of compensation from fair market value to some higher amount, which would presumably reflect the margin by which landowners value their own land above market value. Nevertheless, a problem with such a uniform “kicker” would remain: it would be uniform. It would ignore the distinction between vibrant neighborhoods from which neighbors derive high subjective value and neighborhoods composed of transients with little interest in preserving their mutual social ties. These proposals replace arbitrary undercompensation in some cases with arbitrary overcompensation in others.

Likewise, one might increase the measure of compensation so that owners of condemned land share in its assembly value. But there is no algorithm for calculating what share of the assembly value condemned landowners “ought” to receive. Horizontal equity would require that landowners be treated the same as their neighbors. But this would require the often prohibitively expensive process of assessing the proposed project's benefit to all abutting land, whether condemned or uncondemned, with either confiscation of all such assembly value from everyone through special assessments or award of such value to the condemnee. In short, fair market value might be the best that we can do in eminent domain proceedings.

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<sup>53</sup> See Abraham Bell & Gideon Parchomovsky, *Taking Compensation Private*, 59 STAN. L. REV. 871, 887–90 (2007) (describing additional flaws in the current just compensation “regime” that lead to under- and overcompensation due to defects in the bargaining and litigation process).

Professors Amnon Lehavi and Amir N. Licht offer an innovative reform of eminent domain to increase the condemnees' share of the assembly surplus.<sup>54</sup> Their proposal, however, would simply increase compensation; it would do nothing to improve the decision about whether or not to condemn any given neighborhood. Under their proposal, condemnees would have the option of accepting shares in a special-purpose development corporation that would take title to the assembled parcel of land. The value of the corporation's shares, therefore, would reflect the gains from assembly, and the condemnees could share in these gains when they sold their stock. But Professors Lehavi and Licht would not give the condemnees any power to stop the condemnation altogether if their neighbors believed that the assembly gains were smaller than the value of the land as an ongoing neighborhood. As they note, they "do not question whether eminent domain should be exercised for promoting large-scale . . . projects."<sup>55</sup> Thus, the Lehavi-Licht proposal does nothing to improve the efficiency of the initial decision about whether and where to condemn. Neighbors inhabiting a vibrant and viable community would still face the eminent domain bulldozer even though they valued their ongoing community more than the public would profit by a proposed mall or casino. Improving this decision about whether to condemn land is precisely the problem posed by the disaster of urban renewal.

The point of criticizing "fair-market-value-plus-some-percentage" as the measure of compensation is not to improve the details of eminent domain but rather to raise the possibility of eliminating it altogether. If there were some other procedure for overcoming holdout problems that was administratively cheap but also gave landowners their subjective valuation of land — that is, their *actual* valuation of land — and gave them some share of assembly value equal to that of their neighbors, then such a procedure would be superior to eminent domain. It would be fairer and more efficient. The central question for those seeking sensible land assembly, therefore, is whether such a device could exist.

In answering this question, it is essential to keep one central issue always in mind: all of the criticisms of eminent domain offered above are criticisms of process as much as result. The problem is not only that the law often chooses the wrong number. The problem is that the law has no process for taking into account the right considerations — for instance, the peculiar values that neighbors place on their particular communities. The solution to the problem, therefore, should probably be institutional rather than substantive — a solution that

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<sup>54</sup> Amnon Lehavi & Amir N. Licht, *Eminent Domain, Inc.*, 107 COLUM. L. REV. 1704 (2007).

<sup>55</sup> *Id.* at 1734.

creates a new form of governance rather than a new formula for compensation.

2. *Judicial Deference: Right Answer, but Wrong Question.* — Much of the literature surrounding eminent domain revolves around whether courts should more aggressively control condemnations by barring condemnations that do not (in the judge's opinion) serve a "public use."<sup>56</sup> In theory, it is well-settled law that the U.S. Constitution's Fifth and Fourteenth Amendments do not permit the federal and state governments to condemn land unless the condemnation serves some public use.<sup>57</sup> State constitutions (either as written or as construed by state courts) often contain similar requirements.<sup>58</sup> In practice, the great majority of courts defer to the political decisionmakers' assessment about whether some proposed land assembly serves a public use.<sup>59</sup>

Part of the reason for such deference is doctrinal incoherence: courts are not at all clear about what exactly a public use is. The idea seems to be that a public use is a use that predominantly benefits the public at large rather than the private party seeking the land assembly.<sup>60</sup> Such a requirement might imply that the proposed land assembly must be necessary to produce a public good in the economic sense of the term.<sup>61</sup> Some state courts have gone further to suggest that the

<sup>56</sup> See, e.g., sources cited *supra* note 10.

<sup>57</sup> See U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation."); *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 158 (1896) (applying "public use" requirement to states under the Fourteenth Amendment's Due Process Clause).

<sup>58</sup> See, e.g., CAL. CONST. art. 1, § 19 ("Private property may be taken or damaged for public use only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner."); KY. CONST. § 13 ("[N]or shall any man's property be taken or applied to public use without the consent of his representatives, and without just compensation being previously made to him."); MASS. CONST. pt. 1, art. 1, § 10 ("And whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor."); N.Y. CONST. art. 1, § 7(a) ("Private property shall not be taken for public use without just compensation.").

<sup>59</sup> See *Kelo v. City of New London*, 545 U.S. 469, 487–90 (2005); *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 239–43 (1984); *Berman v. Parker*, 348 U.S. 26, 32–33 (1954); *Moskow v. Boston Redev. Auth.*, 210 N.E.2d 699, 704 (Mass. 1965); *Courtesy Sandwich Shop, Inc. v. Port of N.Y. Auth.*, 190 N.E.2d 402, 404–06 (N.Y. 1963). *But see* *County of Wayne v. Hathcock*, 684 N.W.2d 765, 779–87 (Mich. 2004).

<sup>60</sup> See *Midkiff*, 467 U.S. at 241 (holding that state may not take property only for another's private use, but may take property if it is "rationally related to a conceivable public purpose"); *Strickley v. Highland Boy Gold Mining Co.*, 200 U.S. 527, 531 (1906) (citing *Clark v. Nash*, 198 U.S. 361 (1905)) ("In discussing what constitutes a public use [the *Clark* Court] recognized the inadequacy of use by the general public as a universal test.").

<sup>61</sup> See EPSTEIN, *supra* note 10, at 166–69; Ugo Mattei, *Efficiency in Legal Transplants: An Essay in Comparative Law and Economics*, 14 INT'L REV. L. & ECON. 3, 7 (1994) ("As far as the public use requirement is concerned, the economic theory of public goods provides both a justification and a limit. The justification is that the government needs to be able to acquire the inputs that are necessary to provide public goods for which the market cannot easily provide. The limit is set by the consideration that any private use of the power of eminent domain will be inefficient

proposed land use actually be owned or comprehensively regulated by the government if the condemned land is not “blighted.”<sup>62</sup> The broad principle underlying the public use requirement, however, could be construed as a rule that the courts need to prevent private land assemblers from using eminent domain for what Professor Merrill calls “secondary rent-seeking” — that is, cheap acquisition of land through lowballing the condemnee.<sup>63</sup> The implicit premise behind calls for stricter enforcement of the public use requirement is that private land assemblers have too much power relative to private landowners.

There are several legal difficulties with such calls for stronger judicial enforcement of public use requirements.<sup>64</sup> However, as a matter of sensible policy, the deeper objection to the debate over the public use requirement is that it is simply beside the point. Judicial deference to the political process may indeed be the right answer — but it is an answer to the wrong question.

At best, a tough public use requirement simply ensures that government does not condemn *more* land than necessary. But, as noted above, it could be the case that we have *too little* land assembly. As several commentators have noted, government rarely uses eminent domain because potential condemnees often have sufficient clout to stop such efforts or make them extraordinarily costly.<sup>65</sup> Eminent do-

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since it produces a result that private parties were not able to reach by bargaining.” (footnote omitted)).

<sup>62</sup> See *Hathcock*, 684 N.W.2d at 783 (describing three situations in which transferring condemned property to a private entity satisfies the “public use” requirement: “(1) where ‘public necessity of the extreme sort’ requires collective action; (2) where the property remains subject to public oversight after transfer to a private entity; and (3) where the property is selected because of ‘facts of independent public significance,’ rather than the interests of the private entity to which the property is eventually transferred” (quoting *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455, 477–81 (Mich. 1981) (Ryan, J., dissenting))).

<sup>63</sup> See Merrill, *supra* note 4, at 87.

<sup>64</sup> As Professor Jed Rubenfeld notes, the literal text of the Fifth Amendment does not justify such judicial limitation of eminent domain: the “public use” clause is a limit on government’s *obligation* to pay compensation, not a limit on its *power* to condemn land. See Jed Rubenfeld, *Usings*, 102 YALE L.J. 1077, 1078–80, 1096–97 (1993). The precedents also do not unambiguously favor tougher enforcement of limits on eminent domain: although some state courts have hinted at more vigorous “public use” requirements in their state constitutions, see, e.g., *Manufactured Hous. Communities of Wash. v. State*, 13 P.3d 183, 188–90 (Wash. 2000) (relying on the difference in the texts of the state and federal constitutions to conclude that “Washington courts . . . forbid the taking of private property for private use even in cases where the Fifth Amendment may permit such takings”), the federal precedents of *Berman* and *Midkiff* remain good law governing the interpretation of the Fifth Amendment.

<sup>65</sup> See Abraham Bell & Gideon Parchomovsky, *A Theory of Property*, 90 CORNELL L. REV. 531, 605 (2005) (“Given the high cost of eminent domain litigation for the government — both in monetary and political terms — the government will often choose to secure consensual agreement over going to court. Thus, the eminent domain power is likely to be invoked only where there is a large surplus to be obtained through public ownership of the property and where there are significant and costly barriers to successful negotiations.”); Merrill, *supra* note 4, at 80 (“[C]asual observation suggests that when governments acquire interests in land they prefer, if possible, to do so

main gives none of the participants — government officials, private land assemblers, or landowner-condemnees — the right incentives to oppose or support eminent domain with the correct level of intensity. As a result, eminent domain might give private condemnees *too much* incentive to oppose eminent domain, with the result that we have *too little* land assembly. Judicial policing of eminent domain does nothing to solve this problem.

Aside from being irrelevant to the problem posed by eminent domain, the arguments in favor of a tougher public use standard fail because of their excessive optimism about courts. The implicit premise behind all such arguments is that ordinary politicians are corrupted by private advocates of land assembly into condemning too much or at least the wrong sort of land.<sup>66</sup> But the advocates of heightened public use requirements have yet to explain why judges and the litigation process are not also affected by these pressures from “special interests.” The litigation process, after all, is biased in favor of the well-heeled and well-organized interests who can contribute to (mostly elected) state judges’ electoral campaigns and hire good lawyers and stables of well-paid experts to “spin” judicial opinions that use mushy public use tests to limit or allow eminent domain. Why will such judicial oversight control eminent domain when political oversight has failed?

The answer to the problems of eminent domain, in short, cannot be simply better valuation methods or smarter judges: all such solutions assume the existence of what we palpably lack — namely, some expert methodology for sorting out when a proposed land assembly is better (for the “public,” for the various parties to the transaction, for the world) than the status quo of fragmented land. The premise behind proposals for heightened judicial scrutiny of eminent domain is that somehow judges can answer this question with impartial expertise. However, this premise is just as unfounded as the analogous premise of advocates for better valuation methods.

The contrary premise of this Article is that expertise is no substitute for self-governance. We need institutions that will encourage the parties themselves — condemnees and condemnors — to reveal how much they value the rival uses of fragmented neighborhoods or assembled land. As we argue below, LADs may be precisely such an institution.

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by market transactions. Government officials frequently complain about the costs and delays of eminent domain.”)

<sup>66</sup> See *Kelo v. City of New London*, 545 U.S. 469, 504–05 (2005) (O’Connor, J., dissenting) (arguing that without a stronger “public use” standard, no home or personal property, “however productive or valuable to its owner,” is secure from private interests “with disproportionate influence and power in the political process” (quoting *Poletown*, 304 N.W.2d at 464 (Fitzgerald, J., dissenting))).



### III. AN OUTLINE OF LADS

LADs are essentially a form of special district with the power of eminent domain over all of the land located within the district's jurisdiction. The essential purpose of this district is to allow the LAD's residents to overcome collective action problems arising from fragmentation of ownership. The LAD accomplishes this task by giving these stakeholders the collective power to force each member of the LAD to accept a land assembler's proposal to buy the neighborhood.

This general proposal opens up a host of questions about the details of LAD design. These details are important: they raise critical questions about how to balance the goals of individual dominion and democratic self-government. We address these questions in Part IV. For now, it is important to avoid getting lost in a tangle of rules. Therefore, we set forth a rudimentary portrait of LADs, focusing on (1) how LADs are formed (formation rules); (2) how LADs' jurisdiction is defined (jurisdictional rules); and (3) how individual owners can escape from a LAD (exit rules).<sup>67</sup> After sketching out these rules, we explain in Part IV how they address the normative shortcomings of eminent domain.

#### A. Formation Rules

The rules for LAD formation can be divided into four categories: rules about (1) who would be permitted to propose a LAD; (2) which government agency would initially approve the LAD; (3) how LAD proposals would be publicized and negotiated with the neighbors affected; and (4) how LADs would be approved through some sort of vote of the neighbors. This section provides only a skeletal overview of these issues, leaving the resolution of difficult questions for section B below.

1. *Who Initiates the LAD?* — A LAD promoter, whether resident or outside assembler, would propose a LAD to city planners, including its boundaries and proposed uses. The LAD promoter could be anyone — whether a full-time developer or neighborhood activist or Community Economic Development Corporation — who spies an opportunity in developing underutilized but overfragmented urban real estate. The opportunity need not be motivated by profit: the promoter could be a nonprofit organization trying to revitalize an economically stagnant block. Sometimes a developer will have assembled part of a block and have a project planned, either to build directly or to sell to another builder. An enterprising developer may, however, have an option on only some of the land to be assembled. Other times, an entre-

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<sup>67</sup> This tripartite framework for analyzing and refining group property forms is developed in Hanoch Dagan & Michael A. Heller, *The Liberal Commons*, 110 YALE L.J. 549, 581–602 (2001).

preneurial resident or neighborhood organization may choose to organize a particularly suitable neighborhood district in the path of development. By marketing itself to developers as assembly-ready, such a neighborhood would be well placed to capture assembly gains.

Placing the LAD within the planning process gives the municipality a substantial voice in the process and serves to promote transparency. In addition, early involvement by the local authorities gets them on board for the subsequent planning approvals that determine in large measure the final value of the site. LADs typically contemplate a change of use of the land, for example, by way of rezoning to some sort of "Planned Unit Development" (PUD) zone.<sup>68</sup> Thus, it makes sense to place the issue of LAD formation in the hands of the same governmental body that will make the initial recommendation concerning the site plan required for PUD rezoning.

BID enabling legislation would serve as the template for much of this aspect of the governance mechanism, particularly in terms of establishing the relationship with the municipality, defining LAD boundaries, establishing a LAD Board, and selecting governing directors.<sup>69</sup>

2. *Who Oversees LAD Formation? The Public Role.* — Because so much of the value from assembly comes from the rezoning that developers of larger parcels are often able to negotiate, and from the additional scale that the development makes possible, the local planning commission will be a necessary first step in the process. The steps for approving the LAD formation are substantially parallel to those involved in existing redevelopment and condemnation procedures. Enabling legislation would require municipal planners to designate areas where LADs could be attempted, to specify minimum and maximum areas for LADs, and to determine acceptable purposes.

In particular, the planning commission would have to certify that a LAD is necessary to overcome the problem of excess fragmentation of land. Such certification would generally be easy to determine from a title search showing divided title. Indeed, the inquiry would be self-policing, because few developers would gratuitously assume the high administrative costs of creating a LAD when voluntary transactions would ensure the assembly of the parcel.

More controversially, the planning commission would have to determine whether the proposed development should be advanced through eminent domain rather than LADs. As we explain in more detail below, LADs replace eminent domain as the method of land as-

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<sup>68</sup> For a general discussion of planned developments, see DANIEL R. MANDELKER, *CONTROLLING PLANNED RESIDENTIAL DEVELOPMENTS* (1966).

<sup>69</sup> See Briffault, *supra* note 12, at 377–81 (describing BID enabling legislation).

sembly for a particular category of development — namely, land assembly for the purpose of economic development of “blighted” neighborhoods. Land assembly for other purposes, such as developing transportation infrastructure (highways, railroad routes, airports, etc.) would continue to be governed by eminent domain. We defer defending and defining this distinction, noting only that this boundary between eminent domain and the LAD process would be policed initially at the formation stage. Also, LADs will require some governmental determination that eminent domain is not necessary for the proposed project. In effect, the planning commission, with probable legislative review by the city council or county commission, must establish the boundary between LADs and ordinary eminent domain. If the jurisdiction authorizes a LAD, then in effect it is giving a group of neighbors the right to bargain for the assembly surplus and a veto over the ordinary, confiscatory form of condemnation — both valuable concessions that give the locality a special seat at the land use table. As currently proposed, LADs would substitute only for eminent domain used primarily to promote economic development. It would not necessarily be applicable for highways or other condemnations where the ultimate user is more “public,” and where it would be difficult to create the market price mechanism that we propose here.

One might ask why a government would have any incentive to prefer LADs over eminent domain. The self-interested local government, after all, might be keen on retaining for itself as much of the assembly surplus as possible. Sharing this surplus with the neighbors would reduce the local government’s revenue, especially if the local government were effectively funding condemnation through a combination of own-source revenue and grants-in-aid.

This worry about a self-interested underutilization of LADs by the local government suggests a role for judicial review of planning commission decisions to deny neighbors the use of LADs. However, one should not exaggerate the likely hostility of local governments to LADs, because the latter provide politicians with some significant benefits. In particular, LADs redirect hostility about eminent domain away from politicians, allowing land assembly without political fallout. This is no small benefit in a political atmosphere in which eminent domain is an increasingly embattled concept at both the state and federal levels. By defusing hostility toward eminent domain and avoiding drastic limits on local governments’ capacity to assemble land, LADs provide an important service to a local government with overfragmented real estate in its jurisdiction.

3. *Negotiations to Final Vote.* — To educate the neighbors about the potential benefits and costs of a LAD, the government would hold a series of hearings in which the private land assembler could make the case for land assembly to the neighbors. (Again, the planning commission would be the natural venue.) Such presentations would

strongly resemble PUD rezoning hearings — the developer would display 3D cardboard models, sketch plats, and an artist's rendering to an audience of neighbors, who would then get an opportunity to comment on the proposal. The usual procedures would be used to give notice to affected landowners and tenants — all persons living within a designated number of feet of the proposed LAD would receive some paper announcements. The planning department staff could also engage in more aggressive in-person canvassing of neighborhoods to increase attendance where the neighbors might be primarily renters or low-income households. To the extent that the neighbors were homeowners, however, such efforts would probably be unnecessary, as their down payments and accumulated equity in their houses alone would provide sufficient incentive for participation.

At these hearings, one would expect the developer to pitch the LAD by suggesting how much the proposed land assembly would increase the value of the neighbors' property and how much the typical resident could expect to reap from the sale. At this early stage, however, the numbers would have to be nonbinding, for neither the city nor the developer would have accurate information concerning the valuation of individual lots or even certainty that the local zoning code would be amended to allow the project (as it almost certainly would have to be amended, probably to a PUD designation).

Opposed to the developer would presumably be neighborhood activists — including persons not residing within the LAD areas who would likely object to the increased congestion costs (traffic, noise, etc.) resulting from the proposed project. In particular, one would expect tenants' groups to express worries that the proposed project would increase their rents (if the project would replace existing housing with more valuable housing) or evict them entirely (if the project replaced multi-family housing with commercial or office developments). It would be especially important to clarify the role of tenants in LAD procedures — especially those concerning their share of the relevant vote of the LAD's constituents.

4. *The Vote.* — The catalyzing expression of intra-neighborhood democracy would be the vote by the residents of the proposed LAD. Assuming the local government allowed the vote to go forward, the creation of the LAD would then have to be approved by the LAD's residents. Because the LAD process would replace eminent domain entirely in those cases where only fragmented ownership prevented land assembly, *the neighbors residing in the LAD would have an absolute collective veto on all economic redevelopment requiring coercive land assembly.* If the neighbors refused to approve a LAD, then all possibility of assembly by any means other than voluntary private assembly would be at an end.

Again, we defer until the next section a defense of the limits LADs place on eminent domain. For now, it is important only to highlight a

central and controversial institutional question left open by our LAD proposal — the proper allocation of voting rights among neighbors who are given the power to sell or refuse to sell their neighborhood. LAD legislation creates only a special district with the power to make a one-shot decision concerning land assembly. Therefore, under the Supreme Court's precedents governing local government voting rights, it is likely (although not certain) that such laws could allocate voting power among neighbors based on the relative size of their property holdings within the LAD area rather than on the basis of "one person, one vote."<sup>70</sup> Thus, persons owning a great deal of property — for example, an entire apartment building — would have many times more voting power than tenants with title only to leaseholds.

Should voting power be allocated on the basis of property rather than personhood? We recommend that voting power be allocated on the basis of property ownership, a position that we defend at greater length below. The details of such voter definition are obviously critical for the success of the LAD. For now, we note only that LADs, like other special districts, place pressure on the distinction between private property and public power.

### *B. Jurisdictional Rules*

Once a LAD has been formed, two questions arise concerning the LAD's jurisdiction. First, there is the question of whether and to what extent LADs can preclude all eminent domain. Second, there is the question of how LADs negotiate for the sale of their neighborhood to a developer, a sale requiring a second vote by the LAD's constituents or their representatives.

1. *The Border Between LADs and Eminent Domain.* — The first jurisdictional rule for LADs is that LADs replace eminent domain as the exclusive means of land assembly in a certain range of situations. Specifically, LADs replace eminent domain only when land assembly is blocked by "target fragmentation," not when the problem is "target uniqueness." Target fragmentation results whenever a piece of land cannot be acquired because ownership of the land is fragmented among several different landowners. Target uniqueness results when-

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<sup>70</sup> See *Ball v. James*, 451 U.S. 355, 360, 366-72 (1981) (upholding Arizona water district's property-based voting scheme because the powers exercised by the district, including the rights to "condemn land, to sell tax-exempt bonds, and to levy taxes on real property," were sufficiently limited and specialized in scope to be distinguished from general governing authority); *Sailors v. Bd. of Educ.*, 387 U.S. 105, 111 (1967) (upholding Michigan school district's process of selecting its board because, for "nonlegislative officers, a State can appoint local officials or elect them or combine the elective and appointive systems" without violating the principle of one person, one vote). *But see Bd. of Estimate v. Morris*, 489 U.S. 688, 692-94, 703 (1989) (striking down the New York Board of Estimate's geography-based voting system, in part because the Board exercised general legislative powers).

ever a parcel of land is uniquely suited for some particular land use, such that the next best substitute parcels are much more costly alternatives — for example, where the parcel under consideration is the only site for a port, highway, or airport that is practically feasible from an engineering standpoint.

We urge that LADs be the exclusive procedure for land assembly only where assembly is blocked by target fragmentation. As a practical matter, this means that LADs will replace eminent domain when the purpose of land assembly is redevelopment of economically or aesthetically underperforming neighborhoods, consolidation of prematurely subdivided land in suburbs, or reconstruction of obsolete infrastructure in aging neighborhoods. In these and like cases, there is no argument that the land in question is somehow uniquely suited for some public function beneficial to the community beyond the neighborhood. Instead, the problem is that some usually drab, nondescript parcel of land suffers from problems of internal governance. Thus, even if the residents wanted to sell their neighborhood, they could not do so easily because of the holdout problems created by fragmentation.<sup>71</sup> LADs solve the problem of neighborhood fragmentation, eliminating the rationale for using eminent domain to overcome the collective action problem of getting unanimous consent from all of the neighbors.

By contrast, eminent domain would still be used where acquisition of the site is impeded by target uniqueness. Where one neighborhood, by some fortuity, controls some unique resource, we suggest that LADs do nothing to solve either the problem of fairness or that of efficiency that arise from giving neighbors a veto over land assembly. The situation of such a neighborhood is exactly analogous to the position of a single landowner who has a monopoly over some resource needed by the public and who seeks to appropriate all of the assembly value of the lot for himself simply by exerting his naked power to veto assembly through refusing to sell for a smaller sum.<sup>72</sup> The problem of fairness is matched by a problem of efficiency as well. To the extent that the government is the only purchaser of land uniquely suited for large infrastructure — usually transportation-related, such as highways, airports, ports, or bridges — the neighborhood and the government will confront each other as bilateral monopolists.<sup>73</sup> The resulting dickering

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<sup>71</sup> See Fennell, *supra* note 3, at 928–29 (describing the fragmentation holdout problem); Heller, *supra* note 3, at 639, 673–74 (similar).

<sup>72</sup> See POSNER, *supra* note 9, at 55, 61; Merrill, *supra* note 4, at 75–76.

<sup>73</sup> See Eric Kades, *Windfalls*, 108 YALE L.J. 1489, 1558 (1999) (“When the government is trying to buy a specific piece of property, however, it is in a bilateral monopoly with one landowner.”).

and deception may eat away all of the gains from trade and at least inefficiently delay public works.

Therefore, our proposal contemplates that eminent domain might still be available whenever the government intends to use eminent domain to construct public infrastructure that cannot be sited elsewhere except at great cost. In practical effect, LADs would replace eminent domain whenever the government sought to redevelop some blighted area but not when the government sought to build public works that would be difficult to relocate elsewhere. This jurisdictional rule leaves open two distinct questions: (1) what is the ethical justification for this distinction between target fragmentation and target uniqueness? and (2) how do we define the border between two concepts that, in reality, bleed into each other? We defer both of these issues until the next section, in which we set forth a defense of LADs and argue that they provide the solution to the problems of eminent domain.

Interestingly, the distinction between target fragmentation and target uniqueness tends loosely to correlate with the distinction between projects that are often said to serve no public use and those that are uncontroversially considered to be public uses suitable for eminent domain. Facilities like large, transit-oriented infrastructure tend to be owned as well as subsidized by the government. Moreover, such projects tend to be regarded as public goods by all but the most diehard libertarians. As a result, when eminent domain is used to overcome the problem of target uniqueness, it tends to be the least controversial as a public use. By contrast, where the purpose of land assembly is simply to consolidate fragmented land, the process is controlled by private developers (for example, James Rouse,<sup>74</sup> Sam Zell,<sup>75</sup> and Mort Zuckerman<sup>76</sup>). These developers can make only the weakest case that the few "blighted" blocks they need for their project are uniquely suited for their proposed festival market, shopping mall, or entertainment district. Rather, the developer seeks the use of eminent domain simply because the land is too fragmented to assemble expeditiously through voluntary transactions. These private developers usually own or lease the resulting improvements, which are often difficult to defend as true nonrival, nonexcludable public goods.<sup>77</sup> Thus, it is not surprising that this sort of eminent domain is most controversial and is frequently decried as "not a public use."

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<sup>74</sup> See Neal Peirce, *Urban Developer James Rouse: The Great Oak Falls*, TIMES-PICAYUNE (New Orleans), Apr. 22, 1996, at B5.

<sup>75</sup> See Suzanne Woolly et al., *The New World of Real Estate*, BUSINESS WEEK, Sept. 22, 1997, at 78.

<sup>76</sup> See Nick Paumgarten, *The Tycoon*, NEW YORKER, July 23, 2007, at 44.

<sup>77</sup> See, e.g., Moses, *The Paper*, *supra* note 5 (describing the New York Times Company and Forest City Ratner's leasing of space in the New York Times building).

In a wide range of cases, therefore, LADs can solve the public use problem. Eminent domain need not be used for the sorts of projects most likely to be denounced as “not public,” because LADs make eminent domain unnecessary when the only purpose of eminent domain is consolidation of fragmented land. In effect, LADs occupy the twilight zone between “public” (eminent domain) and “private” (voluntary transactions):

TABLE I. LADs, BETWEEN PRIVATE AND PUBLIC

	<i>Private Land Assembly</i>	<i>Land Assembly Districts</i>	<i>Eminent Domain</i>
<i>Description</i>	Owners get subjective value (SV) but holdouts may block creation of assembly value (AV)	LADs more efficient in ensuring that $AV > SV$ ; also more just because most neighbors get SV plus a chance to bargain for AV	Owners get fair market value (FMV); SV and AV confiscated by government or developer
<i>Application</i>	Only option for developer if locality does not ratify public use from assembly	Available when land assembly is blocked by target fragmentation — primarily economic development of “blighted” neighborhoods	Allow only when state condemns land uniquely suited for public use, as with infrastructure

2. *The LAD's Power: Auctioning Off the Neighborhood.* — Once a LAD is created by its constituents, what can it do? The answer, in short, is that it can negotiate to sell the neighborhood. The LAD would have the power to accept or reject proposals by developers to assemble the land for some new land use — a festival mall, auto factory, casino, or perhaps simply a nicer version of what it already is, a mixed residential-commercial district. At this stage of the LAD process, one would expect the land assembler to pony up specific figures on the total purchase price for the neighborhood and LAD constituents' share of that price. The shares would be rooted in the constituents' share of voting power: in effect, the land assembler would propose some lump sum, which would then be divided among the neighbors based on their proportional real estate holdings within the LAD's area.

The critical facts to emphasize are that (1) the LAD need not accept any proposal (although one would assume that no LAD would be formed unless the residents had some initial interest in land assembly), and (2) the LAD could invite other developers aside from the LAD promoter to submit rival proposals to increase the price offered. In ef-



fect, the LAD would auction off the neighborhood in hopes that different bids from rival developers would drive up the price. If the LAD accepted a bid from some developer other than the LAD promoter, then the winning bidder would have to compensate the LAD promoter for the administrative costs of going forward with the LAD's creation. Otherwise, the LAD would have broad discretion to choose any proposal to redevelop the neighborhood — or reject all such proposals. Presumably, the LAD would be represented by an attorney in negotiations over the purchase price; this agent would be compensated by the same sort of contingency fees that eminent domain practitioners typically collect today.<sup>78</sup>

Because the sale of the neighborhood is a matter of utmost gravity to the residents, we would require the decision to be approved by a second vote of the LAD's constituents, again voting by shares of property. As discussed in more detail below,<sup>79</sup> majority approval by each of several different classes of stakeholders might be required.

3. *Dissolution of the LAD.* — Not all LADs will succeed. Some will stall at early stages. Others will not receive the required voting majority. What happens then? LADs must incorporate procedures for their dissolution if deadlines for the various steps are not met or if the vote fails. Otherwise, the neighborhood could be frozen in a nondevelopment limbo, like neighborhoods today that have been designated as blighted but have not yet been condemned. We would leave the timelines and details on dissolution to be decided by each state in its LAD enabling statute. After a LAD dissolves, new LAD proposals would have to start from scratch, with the drawing of new boundaries and authorizations.

### C. *Landowner Exit from LADs*

The final aspect of LADs is the right of any individual landowner to opt out of the proposal even if that proposal is approved by whatever type of majority vote the LAD statute requires. In such a case, the dissenting landowner would have the right to insist that his or her parcel be purchased through ordinary eminent domain procedures. Such a landowner would receive fair market value (FMV) rather than the sum proposed by the land assembler. Opting out, however, does not give landowners a new route to delay or derail the LAD's decision to sell. Condemnation statutes in many states already allow redevel-

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<sup>78</sup> See Lester Brickman, *Effective Hourly Rates of Contingency-Fee Lawyers: Competing Data and Non-Competitive Fees*, 81 WASH. U. L.Q. 653, 659 n.12 (2003) (describing the contingency-fee system for eminent domain cases).

<sup>79</sup> See *infra* pp. 1523–24.

opment projects to begin even before the validity of the condemnation has been adjudicated or compensation awarded.

If opting out does not stop the sale, and LAD payments are by definition above FMV, why would dissenters ever opt out? We expect that opt-out would be used when an owner believes that the LAD payment (expressed as  $FMV * LAD$  multiplier) is nevertheless below the “true” FMV. Many properties are hard to value; FMV estimates can range widely; the LAD may pick an FMV base that is too low. Nevertheless, we expect there would be few opt-outs because the contingency fee lawyers who litigate condemnation cases get paid only if they can improve on the LAD’s initial offer. In sum, we include the opt-out provision to help ensure that in a world with LADs, landowners receive no less than the constitutional measure of just compensation. Opting out is a backstop against potential overreaching and bad behavior of LAD boards.

#### IV. HOW LADS PROTECT THE VALUES OF PRIVATE PROPERTY AND DEMOCRATIC COMMUNITY

Most American landowners will approach LADs with a deep skepticism grounded in an aversion to coerced sale of their homes. Eminent domain, even for uncontroversially “public” uses, such as highways,<sup>80</sup> still raises objections because of the forced nature of the transfer, and the often unseemly political infighting over just whose neighborhood gets bulldozed.<sup>81</sup> Distaste for coerced sale far exceeds distaste for the social waste that comes from underassembly of land. Moreover, the premise of the preceding criticism of eminent domain is that landowners have some sort of entitlement to their real estate that is superior to the entitlement of taxpayers to their income. Only such a premise explains why it is more important to ensure that owners receive their subjective valuation of their land than it is to keep taxes low by paying only fair market value to landowners.

At the same time, the existence of eminent domain attests to a rival intuition — that democratically approved plans to change land use patterns within a community should not be held hostage to the stub-

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<sup>80</sup> See ROBERT A. CARO, *THE POWER BROKER: ROBERT MOSES AND THE FALL OF NEW YORK* 850–94 (1974) (describing the decision to run the Cross-Bronx Expressway through the residential neighborhood of East Tremont). Professor Nicole Garnett observes that neighborhoods that are politically well-organized, such as certain Catholic neighborhoods in Chicago, are effective at lobbying to reroute freeways to avoid parish churches and parish boundaries. See Garnett, *supra* note 27, at 112–15. But Professor Garnett notes that political clout is less likely to protect neighborhoods that lack the cohesive community and strong organizational system of the Catholic dioceses in Chicago. See *id.* at 120–21.

<sup>81</sup> See generally Donald J. Kochan, “Public Use” and the Independent Judiciary: *Condemnation in an Interest-Group Perspective*, 3 TEX. REV. L. & POL. 49 (1998) (describing eminent domain in the context of special interest politics).

bornness or greed of private property owners. In short, we have competing intuitions about the role of property and democracy in our republic. The test for our LAD proposal is whether it does a better job of reconciling these values than do the existing institutions of eminent domain and voluntary purchase.

In this Part, we argue that the proposal outlined above is likely to pass this test. We evaluate the proposal in light of particular goals: preservation of the sense of individual autonomy implicit in the right of private property and preservation of the larger community's right to self-government. On these metrics, we argue that LADs are superior to the status quo. But aside from merely defending LADs, we discuss the relevant variables with an eye to refining our admittedly sketchy outline of LADs. Once the values are clarified, we can focus on the details of the proposed institution and the empirical questions that need to be resolved to refine these details.

#### A. *Safeguards for Landowners Against Neighborhood Tyranny*

Implicit in the concept of private property is the belief that landowners have the right to refuse any offer, even if the price exceeds their actual valuation of their land. Eminent domain obviously qualifies this absolute dominion over land. As suggested in Part II, this limit on landowners' powers can burden condemnees in ways that are both inefficient and unfair. How do LADs restore some of the landowners' traditional prerogatives?

Most obviously, the LAD gives landowners a collective veto over whether to assemble their land into a larger parcel. LADs, therefore, ensure that the people most affected by an assembly have the power to determine whether the assembly goes forward. Especially if the rationale for the assembly is improvement of the land being assembled — say, replacement of aging infrastructure or removal of “blighted” structures — then the case is strong that the alleged beneficiaries of the assembly ought to decide for themselves whether they want the proffered gift.

In response to this claim, one might object that *neighborhood* control is hardly the same as *individual* control. The neighborhood might endorse a proposed land assembly that an individual landowner within the neighborhood would reject. In such a case, the landowner would be forced to elect between the compensation offered by the LAD or the (presumably lesser sum of) fair market value of the landowner's parcel. The compensation offered by the LAD would presumably reflect the median neighbor's subjective value of his or her land, weighted by the landowner's proportional share of the land. Such a figure would be at least as great as the fair market value of each parcel, but it might be lower than the subjective valuation that an individual landowner places on his or her land. After all, the largest landowners might be

institutions — Real Estate Investment Trusts, corporate landowners, and so forth — who hold land primarily as an investment and derive relatively little producer or consumer surplus from the land above the land's fair market value. The landowner whose subjective valuation of his or her parcel exceeded *both* the fair market value *and* the LAD's best offer would, therefore, be forced to sacrifice the difference between his or her actual valuation of his or her parcel and the money provided by the LAD. In effect, LADs substitute neighborhood control for municipal control. Is there any reason to believe that neighborhood control protects landowners better?

Yes. We do not minimize the danger that neighborhood control could become a curse of majoritarian tyranny to the very landowners that LADs are supposed to benefit. But LADs include safeguards that contain these dangers within reasonable limits.

To understand the safeguards, it is important to appreciate the risks against which they guard. Since Madison's *Federalist No. 10*, it has been a bromide of American political theory that, as one shrinks the size of a jurisdiction, one increases the likelihood that a majority of the jurisdiction's residents will share a common interest in oppressing the minority.<sup>82</sup> Smaller jurisdictions tend to have more homogeneous populations with fewer divisions of interest, making it more difficult for a minority to use offers of vote-trading to divide a homogeneous majority. Thus, there is the danger that the majority will enact rules solely benefiting itself at the expense of a minority for no better reason than that the majority can hold together a coalition of the selfish. In the context of land use law, courts have been exceedingly skeptical of neighborhood control over zoning regulations for precisely this reason: the courts fear that a majority of neighbors will unite around the goal of restricting a nearby parcel's uses and thereby enhance the value of the neighbors' own land at the burdened parcel owner's expense.

Because of this worry about "parochial" and "selfish" behavior, courts have limited the power of neighborhoods to impose new zoning restrictions on parcels, relying either on the nondelegation doctrine or on a theory of procedural due process. Under these theories, neighbors can be given the power to waive a preexisting restriction on land by approving a variance, but they cannot impose a new restriction. In one view, imposition of new restrictions by neighbors violates the landowners' right to an impartial decisionmaker, as the neighbors might be directly interested in the restriction that they are imposing.<sup>83</sup>

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<sup>82</sup> THE FEDERALIST NO. 10, at 78 (James Madison) (Clinton Rossiter ed., 1961) ("[T]he smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plans of oppression.")

<sup>83</sup> See *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 122–23 (1928) (holding that the supermajority vote required of neighbors for new construction violated the Due Proc-

In another view, the local legislature cannot delegate its zoning power to the neighbors, because this power is essentially legislative in character.<sup>84</sup> But the doctrinal niceties that distinguish these two theories are less important than the practical concern underlying both doctrines — the concern that the legislature of a larger jurisdiction must supervise the decisions of the neighbors to prevent them from expropriating value from parcels in their immediate vicinity.

Should LADs be subject to similar restrictions for the prevention of majoritarian oppression? Consider three safeguards that mitigate such dangers — using LADs to create homogeneous interests within the community, the special voting rules governing LADs, and, finally, the dissenters' right to a buyout at fair market value if they are dissatisfied with the LAD's offer to purchase their land. As we suggest in more detail below, we think that these safeguards make unlikely the prospect that LADs will exploit landowners at the behest of their neighbors.

1. *The Homogeneity of Interests Within a LAD.* — LADs exist for a single narrow purpose — to consider whether to sell a neighborhood. Given this narrow mission, many of the economic cleavages that might divide a neighborhood into antagonistic factions in the context of zoning or service provision can find no outlet within a LAD. Institutions with a broader range of functions can more easily redistribute wealth between members, creating the risk of majoritarian exploitation. For instance, business improvement districts provide various services — street cleaning, security, parking facilities, street furniture, signage, and public relations — to the owners of land within their boundaries.<sup>85</sup> But these services can affect landowners in very different ways, based on the landowner's current use of his or her land. For example, merchants may want to increase the number of parking spaces for customers, while residential owners might want to cut down on traffic. These differences in self-interest make for contentious neighborhood politics and result in poor governance. Even apparently homogeneous groups

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ess Clause); *Eubank v. City of Richmond*, 226 U.S. 137, 143–45 (1912) (striking an ordinance allowing a two-thirds vote of neighbors to draw a building line because the ordinance “enables the convenience or purpose of one set of property owners to control the property right of others”).

<sup>84</sup> See *Tex. Boll Weevil Eradication Found., Inc. v. Lewellen*, 952 S.W.2d 454, 457 (Tex. 1997) (holding that assessments of cost for boll weevil eradication on plaintiff's land, per delegation of state statute, was unconstitutional under Texas's nondelegation doctrine); Asmara Tekle Johnson, *Privatizing Eminent Domain: The Delegation of a Very Public Power to Private, Non-Profit and Charitable Corporations*, 56 AM. U. L. REV. 455, 460–67 (2007) (describing the private nondelegation doctrine generally and in the context of eminent domain).

<sup>85</sup> See, e.g., Lisa Chamberlain, *Cleveland Pulls Back from the Edge*, N.Y. TIMES, Sept. 28, 2005, at C9 (noting Cleveland's creation of a BID for “cleanup and beautification” purposes); Terry Pristin, *For Improvement Districts, Restored Alliance with City*, N.Y. TIMES, Feb. 18, 2002, at B1 (describing the functions of BIDs and their relationship with New York City's government).

can find grounds for disagreement when the jurisdiction that they are attempting to govern provides services that affect each individual in a unique way: the condo owners near the top of a building will care more about elevator maintenance than the owners on the ground floor, and so forth. In short, even trivial differences in current land use can create political conflict in jurisdictions that provide services to their members.

By contrast, LADs simplify the interests of their constituents by addressing only one issue — the net price that those constituents receive from the sale of their neighborhood. All differences of interest based on the constituents' different activities or investments, therefore, merge into a single question: is the price offered by the assembler sufficient to induce the constituents to sell?

To minimize the danger that even this simple decision will result in governance-impeding redistributive politics, LAD-enabling legislation ought to remove the question of how the neighborhood's total price is divided up among the neighbors. State law should require that the proceeds be distributed according to each landowner's share of property within the LAD. These shares could be measured by percentage of total square footage, percentage of total valuation, or any other easily ascertainable measure. The important point is that no owner could increase his or her share of the total purchase price by organizing a coalition to expropriate from noncoalition members. The shares would be written in statutory stone, and the constituents of the LAD could vote only on whether to accept the total price for their neighborhood. In this way, the self-interest of each landowner would be linked to the collective goal of getting the highest total price for the neighborhood.

This is not to say that the LAD's politics would be devoid of self-interested conflicts. There would still be the possibility that some constituents of the LAD would be more willing to sell than others, because they would place less value on the particular use of their land. Landowners who held their parcels purely as a form of passive investment — say, Real Estate Investment Trusts (REITs) — would derive little surplus value from their land above its market value. They might sell as soon as their percentage of the neighborhood's assembly value exceeded the market value of their lots.<sup>86</sup> By contrast, landowners who derived some sort of producer or consumer surplus from their parcels above market value might be reluctant to agree to an offer that would tempt a REIT. The dry cleaner, for instance, who has invested time and money in cultivating the good will of local customers could not

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<sup>86</sup> This account of REITs' incentives ignores the tax consequences for REITs of capital gains, a matter that would need to be addressed at the federal level as states begin enabling local governments to experiment with LADs.

easily transfer this investment to another site. Such owners would be reluctant to sell at a price that might tempt the passive investor, because their investment in good will would be lost if they relocated their businesses.

In short, there would remain a danger that owners who valued their parcels above their market value would be exploited by investors who valued the parcels at a lower amount. But how great is the risk of exploitation? It is important to note that the potential victims of the LAD form a large and heterogeneous group, including homeowners (or condo owners) who value proximity to their workplace and friends; professionals who value the prestige of a particular address; retailers who value proximity to particular customers; and manufacturers who value proximity to suppliers. Opposed to these owners are investors who place no special value on their parcels above their market value — REITs and others. What is the realistic likelihood that such investors would dominate a particular neighborhood? Owners who buy land as an investment typically diversify their holdings as a hedge against risk: it would be odd for a REIT to buy out an entire city block rather than invest in a particular office building. Thus, one would not expect investment-oriented owners to control a single LAD.

Of course, the LAD itself might encourage an investor to acquire a majority interest within a single neighborhood, anticipating that the LAD will facilitate its resale to a land assembler. To prevent any neighborhood from being dominated by a single landowner with a homogeneous interest, one could use a variety of devices akin to rules for discouraging “greenmail” in corporate law.<sup>87</sup> One could, for instance, bar any landowner from voting more than 30% of the property within a LAD.<sup>88</sup> One could also force landowners intent on controlling a majority interest of a LAD to disclose their intention before they acquire a majority interest in the LAD’s shares. We discuss these options in more detail when we consider LADs in light of analogous legal institutions — in particular, legal rules regulating shareholder “freezeouts” by a controlling shareholder.

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<sup>87</sup> See generally David Manry & David Stangeland, *Greenmail: A Brief History*, 6 STAN. J.L. BUS. & FIN. 217, 224–30 (2001) (defining “greenmail” and describing legislation designed to regulate it).

<sup>88</sup> By analogy, state law sometimes limits the power of a single landowner to acquire a majority of the votes within a BID by requiring that the BID be approved by a majority of property owners as well as by the owners of a majority of property within the BID. See, e.g., MASS. GEN. LAWS ANN. ch. 40O, § 3 (West 2004) (approval of BID requires approval by owners of 51% of assessed valuation and 60% of owners); N.M. STAT. ANN. § 3-63-6 (Michie 1995) (petition for creation of BID can be submitted to council by majority of owners of either business or general real property within the proposed district); TENN. CODE ANN. § 7-84-511 (2005) (BID petition must be “signed by not less than a majority in number of the owners of real property in the district” who also own two-thirds of assessed valuation).

In sum, the risk that a LAD will ignore the interests of any subset of owners seems remote. To be sure, it is conceivable that owners with only transient interests in a neighborhood will gang up on owners with deep connections to their parcels. But balanced against this risk is the rival danger that city officials, elected by voters with no interest whatsoever in a neighborhood's real estate, will authorize eminent domain in utter indifference to whether the residents' valuation of their current use exceeds the value of the proposed assembly. The track record of eminent domain suggests that landowners have more to fear from city hall than from their own neighbors.

2. *Voting Rights Within LADs.* — The critical factor for determining the relative power of landowners within a LAD would be the LAD's voting rules. LADs require neighbors to vote on two different issues: the initial establishment of the LAD and the ratification of the LAD's proposal to sell the neighborhood to an assembler. How should voting rights be allocated concerning these two decisions?

There is an intuitively plausible, albeit constitutionally controversial, argument in favor of allocating votes according to each neighbor's share of property holdings within the LAD. The LAD has only one purpose — to overcome the landowners' collective action problems that prevent them from selling their land for an efficient assembly. As noted above, to focus the landowners exclusively on the task of maximizing the total purchase price for the neighborhood, each owner's share of that price would be statutorily determined by the landowner's share of the property within the LAD. The same goal suggests allocating voting rights in proportion to the owner's share of land. The alternative rule of giving each resident within a LAD an equal share of votes would encourage speculators to make a minimal investment in areas ripe for assembly in hopes of forcing a profitable sale. Such opportunistic investments are likely to be small and transient — say, short-term leases — and would not reflect the special value that owners with more permanent attachments place on the location of their parcels. Equal voting rights, therefore, would seem to invite the exploitation of owners with high subjective value of their parcels by residents who value their property interest at no more than the interest's resale value. Given that the LAD's narrow agenda is focused exclusively on maximizing the sale price of a neighborhood, it would seem odd to give residents power over LADs that is unrelated to their stake in that sale price. Therefore, one might model LADs after business improvement districts and allocate voting power according to the property owner's share of property within the district.

Would the U.S. Constitution's Fourteenth Amendment permit such a property-based system of voting rights? The doctrine is murky on



the issue. The Court's "one person, one vote" doctrine bars states from limiting the franchise to property owners even when such owners would seem to have the predominant interest in a decision.<sup>89</sup> However, the Court has drawn an exception for special districts that are authorized to pursue only narrowly defined goals disproportionately affecting property owners.<sup>90</sup> Thus, the plurality in *Ball v. James*<sup>91</sup> permitted Arizona to allocate votes for control over an agricultural improvement district based on each landowner's share of acreage within the district, on the theory that the district had the narrow task of distributing water stored behind its dams to property owners in proportion to their share of the district's acreage.<sup>92</sup> The critical fact in *Ball* was the narrow function performed by the special district — the management of a water supply that had already been allocated according to acreage.<sup>93</sup> The analogy to LADs is easy to draw: landowners' shares of the proceeds from the LAD's sale of a neighborhood would be allocated according to each landowner's share of real estate within the district. Given that the power of LADs would be narrowly drawn to avoid redistribution of wealth, it would be odd to allocate voting power in a way that would facilitate such prohibited redistribution.

One might object that LADs would dramatically affect the interests of lessees in ways that are disproportionate to their common-law entitlement to property. The tenant who has resided in the same apartment for many years may have built up friendships and networks of support that are not reflected in the value of her year-to-year lease. Land assembly may eliminate the apartment building and dispossess the tenant of her neighborhood. Why should the lessee be denied an equal vote in a decision so fundamentally affecting her interest? But there is an obvious rejoinder to this objection: if the individual landlord can dispossess the tenant by refusing to renew the lease, then it is

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<sup>89</sup> See *Hadley v. Junior Coll. Dist.*, 397 U.S. 50 (1970) (requiring districts for electing board of junior college to be drawn to achieve equal population); *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621 (1969) (holding denial of the vote in a school district election to a resident neither owning or leasing taxable real property nor having children attending the public school unconstitutional under the Equal Protection Clause); *Avery v. Midland County*, 390 U.S. 474 (1968) (holding that local election districts must be drawn according to the equipopulation principle).

<sup>90</sup> See *Ball v. James*, 451 U.S. 355 (1981) (upholding an Arizona water district electoral scheme enfranchising only property owners to vote); *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719 (1973) (upholding California water storage district's apportionment of votes according to the amount of property owned in district).

<sup>91</sup> 451 U.S. 355.

<sup>92</sup> *Id.* at 370 ("The functions of the Salt River District are therefore of the narrow, special sort which justifies a departure from the popular-election requirement of the *Reynolds*[ *v. Sims*, 377 U.S. 533 (1964)] case.").

<sup>93</sup> *Id.* at 367-68 ("The constitutionally relevant fact is that all water delivered by the Salt River District . . . is distributed according to land ownership, and the District does not and cannot control the use to which the landowners who are entitled to the water choose to put it." (footnote omitted)).

not obvious why a group of landlords should not have an equal power to terminate tenants' interests through collective land assembly. If condo conversions do not violate the tenants' rights of democratic equality, then why should one balk at conversion of a neighborhood through the device of a LAD?

The Court's voting rights jurisprudence provides no certain answer to this question. The most one can say is that, under *Ball*, if procedures for collective decisionmaking are closely connected to the management of private property, then voting rights can be allocated on the basis of those private property interests. Lower court decisions upholding such allocations of voting rights for business improvement districts suggest that voting rights in LADs could be allocated according to the owners' share of property.<sup>94</sup> But it would be tendentious to assert that the case law provides any clear answer to the constitutional question.

The constitutional difficulty of assigning unequal voting rights based on persons' interests in real estate need not disenfranchise tenants. Leaseholds, after all, are a form of property, just as are fees simple absolute. Therefore, LADs could assign voting rights to lessees based on the terms and value of the leases. A critical issue would be the alienability of such voting rights. In eminent domain, the lessee's right to compensation can be assigned to the landlord by the express terms of the lease. Allowing the parties to assign the compensation right *ex ante* in this manner has been defended as a way to reduce the cost and unpredictability of litigation.<sup>95</sup> There is no good *a priori* reason, however, why the right to vote ought to be assignable in this manner; many rights are not alienable, such as the rights created by laws that control or stabilize rents.<sup>96</sup> Likewise, tenants have statutory rights to relocation expenses in eminent domain that they cannot

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<sup>94</sup> See *Kessler v. Grand Cent. Dist. Mgmt. Ass'n*, 158 F.3d 92, 104 (2d Cir. 1998) (upholding a class voting system based on property-owning status for election of managers to a BID's board because the BID did not "exercise the core powers of sovereignty typical of a general purpose governmental body" and "both the burdens and the benefits of [the BID's] activities disproportionately impact[ed] property owners").

<sup>95</sup> See Victor P. Goldberg et al., *Bargaining in the Shadow of Eminent Domain: Valuing and Apportioning Condemnation Awards Between Landlord and Tenant*, 34 UCLA L. REV. 1083, 1106-25 (1987).

<sup>96</sup> See Victoria A. Judson, *Defining Property Rights: The Constitutionality of Protecting Tenants from Condominium Conversion*, 18 HARV. C.R.-C.L. L. REV. 179, 210 (1983).

waive by lease.<sup>97</sup> One might analogize the right to vote in a LAD to other inalienable rights like the right to vote more generally.<sup>98</sup>

We are agnostic about the merits of making such interests inalienable, noting only that the issue has been thoroughly canvassed in the literature.<sup>99</sup> To the extent that the tenants' interests are inalienable, then the terms of the lease would not dictate the assignment of voting rights based on those property interests. Moreover, even if one deemed the right to vote one's LAD shares to be assignable to the landlord, courts might still construe ambiguous leases to favor the tenant's retention of the right to vote.<sup>100</sup> Most important, in appraising the value of the tenants' property rights on which voting rights would be based, the LAD statute should take into account not only the dollar amount of rent payable under the lease, but also the actual market value of the property interest. Thus, rent-controlled units would be worth far more than the rent owed under the terms of the lease. Likewise, the LAD statute would supplement the value of the leasehold with the value of the tenants' statutory rights to relocation assistance, for such rights are a very considerable part of the value to which the tenant is entitled upon condemnation of a leasehold.<sup>101</sup> The general principle defining the tenants' share of the vote would be that the tenant is entitled to "vote the value" of whatever the tenant would be entitled to receive were the land actually condemned. Only such voting rights can provide the tenant with protection from displacement analogous to the protections available under the old regime of eminent domain.<sup>102</sup>

Such a rule would, in some cases, give tenants a substantial voice in LADs' decisionmaking: commercial tenants with long-term leases

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<sup>97</sup> The Uniform Relocation Assistance and Real Property Acquisition Policies Act, 42 U.S.C. §§ 4601-4655 (2000), obliges all agencies that condemn land with federal funds to provide advisory assistance, *id.* § 4625, and financial benefits, *id.* § 4622, to tenants displaced by eminent domain.

<sup>98</sup> For a defense of the position that the right to vote ought to be alienable in some circumstances, see Saul Levmore, *Voting with Intensity*, 53 STAN. L. REV. 111 (2000).

<sup>99</sup> See, e.g., Margaret Jane Radin, *Residential Rent Control*, 15 PHIL. & PUB. AFF. 350 (1986); William H. Simon, *Social-Republican Property*, 38 UCLA L. REV. 1335 (1991).

<sup>100</sup> Cf. *Pennsylvania Ave. Dev. Corp. v. One Parcel of Land*, 670 F.2d 289, 294-95 (D.C. Cir. 1981) (awarding just compensation to lessee because condemnation clause was ambiguous).

<sup>101</sup> For an assessment of the value of such relocation rights relative to the value of the lease, see Joseph J. Cordes, *Compensation Through Relocation Assistance*, 55 LAND ECON. 486 (1979). The inclusion of the relocation rights as a basis for defining the tenants' voting rights assumes, of course, that the tenant would not be entitled to such relocation assistance if the LAD voted to sell the neighborhood and the tenant accepted her share of the LAD's sale price. If the tenant intended to exercise her opt-out option, then she would be entitled to the normal recovery in eminent domain — including the normal relocation assistance.

<sup>102</sup> Admittedly, the proposal that the votes associated with a parcel be divided between landlord and tenant raises difficult valuation questions, as there is often not a thick market in leases by which the lease's value can be measured. One might instead measure the value of a lease by the present value of rental payments due under the term of the lease.

might, indeed, have estates worth more than their lessor's fee simple absolute. The voting power of short-term residential lessees, by contrast, would be relatively tiny and largely symbolic: even when aggregated, the value of such leases would rarely constitute a substantial share of a parcel's value.

Would such a rule leave short-term tenants worse off than the current regime of eminent domain? Under eminent domain, the short-term tenant would likely be entitled to no compensation whatsoever: under the prevailing doctrine, the condemnation of leased property terminates lease obligations, and this elimination of the tenants' obligation to pay rent normally constitutes just compensation for the loss of a short-term lease.<sup>103</sup> LADs, by contrast, give all tenants great and small some voice in the decision to assemble land. When opposed by the landowners, to be sure, this voice would not count for much, at least for short-term leases. But when landowners were closely divided, tenants could potentially cast a decisive vote.

This compromise on voting rights best reconciles the values of democratic equality and private property implicit in a LAD. In order to succeed, LADs must not become vehicles for the redistribution of wealth. Any such redistributive mission will create paralyzing clashes between heterogeneous interests. As the history of other institutions suggests, owners with heterogeneous interests are not successful managers of enterprises.<sup>104</sup> To avoid such conflict, therefore, the rules for voting should mirror the rules for dividing up the asset price that LADs receive in exchange for the sale of their property. Lessees should be entitled to a share of both votes and dollars in proportion to the value of their leases. But they cannot receive more without defeating the whole point of LADs. Indeed, we strongly suspect that landowners would successfully lobby to defeat LAD enabling legislation if voting rights were allocated equally among interest holders.

*B. Safeguards for Community Against Holdout Neighborhoods:  
Defining Uniqueness*

A neighborhood might not only exercise unjust power over an individual landowner. One neighborhood's stubborn refusal to sell its land could threaten the welfare of the whole municipality, region, county, and so forth, whenever the land controlled by the neighborhood is necessary for some project with regional benefits. One would not worry

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<sup>103</sup> See *Alamo Land & Cattle Co. v. Arizona*, 424 U.S. 295, 304 (1976) ("The measure of damages is the value of the use and occupancy of the leasehold for the remainder of the tenant's term, plus the value of the right to renew . . . , less the agreed rent which the tenant would pay for such use and occupancy." (omission in original) (quoting *United States v. Petty Motor Co.*, 327 U.S. 372, 381 (1946)) (internal quotation marks omitted)).

<sup>104</sup> See generally HENRY HANSMANN, *THE OWNERSHIP OF ENTERPRISE* (1996).

about this threat when there are multiple possible sites for some regionally beneficial project. The real difficulty with "holdout neighborhoods" arises when a neighborhood sits astride some unique site for which there is no practical substitute — say, the only site on which a port, highway, or airport can be built.

Our proposal requires government to use LADs in place of eminent domain only when the property sought is not unique. But when is a site sufficiently unique that eminent domain would be permitted? The answer is ambiguous because parcels of land are never perfectly fungible substitutes for one another. To answer this question, therefore, one must offer a definition of uniqueness that does not make the normal nonfungibility of land an excuse for condemnation. Purchasers normally cannot find a perfect substitute for a land purchase. It would be odd, however, to use the normal condition of land markets as a reason to bypass market exchange in favor of a forced sale.

To provide a more specific definition of "uniqueness" that would justify eminent domain rather than a LAD, we consider two different circumstances in which the owner of a parcel might be said to have a unique resource. First, there is the case of unusually substandard — "blighted" — land. Second, there is the case of unusually valuable land.

1. *Condemnation of Blighted Land.* — Sometimes a site is unique not because it is especially valuable but because it is especially blighted. Neighborhoods with a higher-than-average percentage of rundown or abandoned buildings and vacant lots are likely to generate crime and depress nearby property values. Nearby landowners afflicted with such a blighted neighborhood cannot seek relief from such an eyesore from anyone except the owners of the blighted land. In this sense, blighted land gives its owners monopoly power.<sup>105</sup> Even if those owners were organized into a LAD, one might reasonably believe that there is a distributive injustice in allowing such owners to extort revenue from the local government as the price for discontinuing their noisome effects on the rest of the city. Likewise, voluntary bargains between a LAD composed of the owners of blighted land and the city might fail as a result of the dickering arising from bilateral monopoly. For these reasons, eminent domain rather than LADs might be the best way to address blight.

The difficulty with this justification for eminent domain is that the statutory definitions for "blight" tend to require far less than the sort of extraordinary decay that undermines LADs. Often state statutes list

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<sup>105</sup> See Fennell, *supra* note 15, at 975 (explaining that owners of blighted land exercise "monopoly power on the resource that must be acquired in order for the government's goal to be accomplished").

several different criteria for defining blight and allow condemnation of any neighborhood characterized by any *one* of those criteria.<sup>106</sup> The predictable result is that neighborhoods are condemned as “blighted” even when their quality is not noticeably lower than the quality of an average city block.<sup>107</sup> Neither distributive justice nor barriers to bargaining would seem to require eminent domain in such a case. The owners of average-quality land impose no higher cost on the rest of the community than the rest of the community imposes on them. Moreover, the average-quality neighborhood lacks any monopoly power, for there are — by definition — many other neighborhoods with precisely the same “power” to impose their mediocrity on the rest of the community. A local government that wishes to upgrade one such neighborhood could organize several such mediocre neighborhoods into competing LADs, offering a mix of financing — tax abatements, tax increment financing, outright grants, and the like — to the neighborhood that agrees to assemble its land at the lowest cost. Since all such neighborhoods would be equally “blighted,” none would have any special power to hold out for a sum in excess of its true opportunity costs of vacating the property. There is, in short, no reason to forgo LADs to address “blight” when the blight in question is simply mediocrity.

Therefore, to constrain the use of eminent domain, one might require that local governments use LADs rather than eminent domain to remedy “blight” whenever the jurisdiction defines blight to include neighborhoods of average quality. That a neighborhood, like most urban neighborhoods, has room for improvement is no reason to impose the extraordinary burden of eminent domain on its residents. Instead, the city can induce the neighborhood to improve itself by holding an auction in which different neighborhoods compete for scarce city resources. In this way, the city can assemble those neighborhoods in which the residents are least attached to the current use of their land.

2. *Condemnation of Uniquely Valuable Land.* — What about especially high-quality land — land that has the quality of being, in some sense, uniquely suited to the government’s purposes? We urge that LADs be required whenever the assembler can make a credible threat to develop an alternative site. The alternative site need not be a per-

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<sup>106</sup> See, e.g., ALA. CODE §§ 24-2-2(c), 24-3-2 (2007); CAL. HEALTH & SAFETY CODE § 33031 (West 1999); N.J. STAT. ANN. §§ 13:17-20, 40:55C-3 (West 2003) (latter section repealed 1992). See generally Hudson Hayes Luce, *The Meaning of Blight: A Survey of Statutory and Case Law*, 35 REAL PROP. PROB. & TR. J. 389, 394-404 (2000) (providing an overview of state definitions and criteria for “blight”).

<sup>107</sup> See Amanda W. Goodin, Note, *Rejecting the Return to Blight in Post-Kelo State Legislation*, 82 N.Y.U. L. REV. 177, 197-98 (2007) (describing how broad pre-Kelo definitions of “blight” in state legislation failed to limit the use of eminent domain).

fect substitute for the proposed parcel: it need only be comparable enough to constrain the sellers from demanding rents in excess of their opportunity costs. Since the buyer is likely to be far better informed about the requirements of the assembled parcel, the buyer will be able to make a credible threat whenever the seller could reasonably believe that the buyer could develop elsewhere. This is the normal protection for buyers of land; there is no obvious reason why governments need greater protection from the power of sellers to decline the buyers' bids.

The example of Detroit's condemnation of Poletown illustrates the circumstance in which LADs would be a feasible substitute for eminent domain. The Poletown site for General Motors Corporation's Detroit Assembly Plant was chosen over nine other potential sites considered by a joint committee of city officials and General Motors representatives. Although other sites were feasible locations for an assembly plant, they did not meet all of GMC's exacting demands for size, shape, rail access, proximity to existing plants, and quick availability. Because GMC refused to compromise on any of its criteria, the Poletown site was selected even though that choice threatened more businesses and homes with destruction than several other sites.<sup>108</sup>

There is no doubt, however, that several of the nine other sites presented credible alternatives to Poletown. GMC could not maximize all of its criteria simultaneously. Given the complexity of the criteria, it would be impossible for any of the proposed sites to believe that theirs was GMC's ideal site. Had each proposed site been formed into a LAD, then the City of Detroit could have held an auction in which each LAD competed to sell its land to GMC. The competition for sites would resemble the normal bidding process by which contractors compete to sell goods to cities.

The advantage of such a process is that it would reveal information about how attached residents were to the current use of their neighborhood: the higher the price demanded by a LAD, the more likely it would be that the neighbors placed a high value on their current use. Of course, municipal planners attempt to estimate the degree to which current residents value their neighborhood by examining the number of residents and businesses that would be displaced by eminent domain. It is common for assemblers of land to argue that a proposed assembly will minimize disruption of residents and businesses because the land to be assembled is underpopulated.<sup>109</sup> But this method of assessing the value of the current use focuses on residential

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<sup>108</sup> See BRYAN D. JONES & LYNN W. BACHELOR WITH CARTER WILSON, *THE SUSTAINING HAND: COMMUNITY LEADERSHIP AND CORPORATE POWER* 74-76 (1986).

<sup>109</sup> See, e.g., Michael Barbaro, *Baltimore Makes a Bold Bid To Transform Neighborhood*, WASH. POST, Dec. 1, 2003, at A1 (describing a biotechnology development plan in a hollowed-out neighborhood).

density and ignores residents' intensity of preferences. Intensity is at least as important as density; for instance, the condemnation of a hotel with short-term residents would surely be less disruptive than the condemnation of a neighborhood with only a few homeowners who had lived in the vicinity for a long time. An auction among competing LADs provides a measure of intensity that such cursory surveys of density lack by forcing each resident to put his money where his mouth is — that is, to choose between the status quo and the assembler's check.

Such a mechanism is valuable not only to residents, but also to the assembler. It is not uncommon for city officials to complain that residents demand excessive amounts of money to mitigate the costs of land assembly.<sup>110</sup> The rival bids of LADs place a ceiling on such demands. So long as those bids are credible to the seller-LADs, they ensure that the auction among LADs will function just as well as an ordinary land market — that is, good enough for government work.

Against the danger of sellers' monopolistic power, one must also consider the power of the land assembler backed by the government. The assembler might have exclusive access to the mix of financing devices sufficient to purchase an entire neighborhood. GMC, for instance, effectively dictated the terms of the Poletown sale, because GMC was the only investor interested in purchasing several hundred acres of land in Detroit.<sup>111</sup> Likewise, the city itself will frequently be the only feasible bidder on large-scale assemblies, because only the city will have control over the tax abatements, tax-increment financing, density bonuses, and federal grants by which such parcels are typically purchased. In short, assemblers are just as likely to be monopsonists as neighborhoods are to be monopolists. Such an assembler will frequently be able to make a credible threat to invest its resources in a more tractable neighborhood if a LAD demands an excessive price. For this reason, we suspect that the problem of LADs' monopoly power will rarely arise.

#### V. PUTTING LADS IN CONTEXT: INSTITUTIONAL ANALOGIES TO LADS

The foregoing sketch is, well, sketchy. Because no jurisdiction has ever authorized the creation of LADs, we have no data on how they are likely to perform. Our speculation is that they could not do much worse than eminent domain. But this intuition rests on confidence in

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<sup>110</sup> See LYNNE B. SAGALYN, *TIMES SQUARE ROULETTE: REMAKING THE CITY ICON* 100 (2001) (describing Mayor Ed Koch's outrage that "[w]e had to buy [the] Clinton [neighborhood] twice" to appease objections to the 42nd Street development project).

<sup>111</sup> See JONES & BACHELOR WITH WILSON, *supra* note 108, at 69–74.



bargaining over centralized and expert planning. Perhaps this confidence is misplaced.

Absent an actual LAD track record, the best way to assess how LADs are likely to perform is to assess the performance of closely analogous institutions. In this Part, we compare LADs to a variety of different institutions that bear some resemblance to LADs — land readjustment districts, joint-stock corporations, business improvement districts, oil and gas unitization districts, and class actions. The point of these comparisons is to consider how well LADs are likely to deal with common pitfalls of collective decisionmaking and bargaining. As we argue below, there is no a priori reason to believe that LADs would systematically underperform these veteran mechanisms of collective decisionmaking. Of course, a priori reasoning is no substitute for actual experience. However, we think that the initial indicators are good enough for some political entrepreneur in our federal system to give LADs a try.

*A. Three Characteristics of Institutions:  
Duration, Intensity, Composition*

As a guide for assessing LADs, we consider three characteristics relevant to an institution's capacity for collective self-governance: duration, intensity, and composition.

The first characteristic concerns the *duration* of the issues governed by the institution. Some institutions govern a group for an indefinite period of time. For instance, a condo association governs its residents during the duration of their tenure. We call these institutions the "long-term commons." Other institutions govern a single transaction, after which the association between the members dissolves. For instance, a class action lawsuit exists only for the purpose of resolving a dispute between the class and the defendants, after which the class dissolves. We call these institutions "the one-shot deal." The LAD, like the class action, is a one-shot deal: once the neighborhood is sold, the neighbors go their separate ways.

The second characteristic is the *intensity* of the members' stake in the institution. Some institutions play for small stakes: business improvement districts, for instance, typically have tiny budgets and govern relatively small matters such as street furniture or extra cleanup of streets.<sup>112</sup> Likewise, the plaintiffs in a class action might each have small damages at stake in the litigation, even if the aggregate loss is

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<sup>112</sup> See Briffault, *supra* note 12, at 369–70 (describing BIDs as "low-cost tool[s]" responsible for "traditional municipal activities").

large.<sup>113</sup> Residential community associations (RCAs) and condo associations control issues such as assessments, the maintenance of common areas of the subdivision or building, and external design such as house color and fencing.<sup>114</sup> These are not trivial matters, but they are hardly the stuff of high politics. Unsurprisingly, turnout in RCA elections tends to be extremely low. By contrast, LADs govern possession of one's home or business, assets that are usually the owner's most important investment.

Intensity of one's stake depends in large part on whether one can insure oneself against a decision that is adverse to one's interests. A shareholder who has taken a controlling position in a single corporation has a highly intense stake in the performance of that corporation because his investment is not diversified. As Professor William Fischel has noted, homeowners likewise tend to have an intense stake in decisions affecting the value of their home, because their assets are concentrated in that one investment.<sup>115</sup> By contrast, a shareholder with a set of small investments in a diversified portfolio might rationally ignore the glossy corporate literature that arrives in her mailbox, trusting in an efficient market rather than shareholder democracy to protect her position.

The third characteristic is the *composition* of the institution's members. Different institutions' activities affect their members' interests in different ways. Business improvement districts, for instance, govern retailers who seek to attract customers, residents who hate extra traffic, and manufacturers who gain little from street cleaning. Likewise, even if bargaining units are carefully policed to ensure some minimum community of interest, the members of a trade union will often have conflicting interests based on job description, seniority, or skill level. We call these institutions "heterogeneous" organizations. By contrast, members' interests in other organizations can be relatively identical. For instance, the members of LADs are uniformly interested in a high purchase price, given that their shares of the price would (under our proposal) be fixed by statute.<sup>116</sup> The owners of an oil or gas unitization district have interests in the management of a single as-

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<sup>113</sup> *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980) ("Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device. . . . Its benefits to class members are often nominal and symbolic, with persons other than class members becoming the chief beneficiaries.")

<sup>114</sup> See ROBERT JAY DILGER, *NEIGHBORHOOD POLITICS: RESIDENTIAL COMMUNITY ASSOCIATIONS IN AMERICAN GOVERNANCE* 20-25 (1992).

<sup>115</sup> See FISCHEL, *supra* note 51, at 4.

<sup>116</sup> See *supra* Part IV.A.1.

set — gas or oil — the production of which they jointly wish to maximize.<sup>117</sup> We call these institutions “homogeneous” organizations.

TABLE 2. THREE DIMENSIONS OF GROUP PROPERTY

		<i>Owners' Interests</i>			
		<i>Heterogeneous</i>		<i>Homogeneous</i>	
		<i>Small stakes</i>	<i>Big stakes</i>	<i>Small stakes</i>	<i>Big stakes</i>
<i>Type of Interaction</i>	<i>Repeat Dealings</i>	BIDs, street closing, traffic calming	Trade unions, worker-owned businesses	Residential community association	Land adjustment, oil & gas unitization
	<i>One-Shot Deals</i>	Class members in a class action	Ordinary eminent domain	Small corporate shareholder	LADs, controlling shareholder

These three characteristics — duration, intensity, and composition — are importantly related to institutional performance. Since Professor Henry Hansmann published *The Ownership of Enterprise*, it has become a familiar point that institutions controlled by persons with heterogeneous interests in that institution tend to be difficult to govern.<sup>118</sup> Likewise, the literature on the governance of limited access commons resources suggests that commoners may be able to police opportunistic behavior more readily if they have repeated dealings with each other.<sup>119</sup> Finally, members with low stakes in an institution might confront collective action problems in monitoring the institution's performance. Because each member's individual interest in the outcome might be less than the cost of her participating in every decision (for example, attending boring meetings in the evening, hiring a babysitter, and reading dull technical literature), each member will be

<sup>117</sup> Gary D. Libecap, *Unitization*, in 3 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 641 (Peter Newman ed., 1998); see also Charles Lockwood, *In the Los Angeles Oil Boom, Derricks Sprouted Like Trees*, SMITHSONIAN, Oct. 1980, at 187 (describing the scene when bargaining fails).

<sup>118</sup> See HANSMANN, *supra* note 104, at 39-43.

<sup>119</sup> The classic game-theoretical account of how repeated play leads to cooperation is ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* 12-14 (1984). For a communitarian account of the same tendency, see MICHAEL TAYLOR, *COMMUNITY, ANARCHY AND LIBERTY* 65-90 (1982).

tempted to free ride off of the efforts of her fellow members in policing the institutions' agents.<sup>120</sup>

Given the centrality of these characteristics, one might compare LADs to other institutions to see how LADs measure up in terms of their composition, intensity, and duration. LADs tend to affect their members in fairly homogeneous ways, boding well for their power to avoid intra-LAD conflict. But LADs also provide a one-shot deal concerning an intensely valued asset — the home or business. Can the LAD's members be trusted not to be opportunistic?

*B. An Alphabet of Acronyms: Some Institutional Analogies to LADs*

As the analogies below indicate, LADs differ from many other mechanisms of collective self-governance in that they provide a one-shot deal: the community dissolves once the neighborhood is sold. By contrast, the members of a business improvement district, land adjustment district, condo association, or joint-stock corporation must continue to work together indefinitely over the course of many different transactions.

According to the conventional wisdom, the one-shot deal is a recipe for institutional failure. Members know that, after the transaction, they will never have to deal with each other again — knowledge that, one might suspect, would encourage opportunism. Yet we argue that the lack of continuing relations among neighbors after the LAD sells the neighborhood actually advances cooperation. The greater power to eliminate entirely the neighbors' possession and control increases the homogeneity of the neighbors' interests. This homogeneity, in turn, reduces the danger of welfare-reducing factions and conflicts. In this way, LADs may prove to be more successful than analogous forms of collective governance. At the same time, the one-shot deal poses problems akin to those raised by corporate freezeouts whenever LAD members have nonhomogeneous interests. These considerations do not guarantee LADs' success, but do suggest that LADs are worth a try.

1. *LADs and Land Readjustment.* — The closest analogy to LADs, one which gives us substantial confidence in their potential, comes from the land pooling and readjustment procedures developed in Germany in the late nineteenth century and used today most often in Japan, Korea, Taiwan, and Australia. About thirty percent of Japan's

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<sup>120</sup> In public law, the classic account of the problem is ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* 260–76 (1957). In private law, the problem arises in the form of the agency costs of insuring that officers of a corporation faithfully represent the interests of rationally ignorant shareholders.

urban land has been developed using these techniques, through over 11,000 land readjustment projects.<sup>121</sup>

The essence of land readjustment is that the owners of the area to be “readjusted” consolidate their land into a common pool, which is then redivided into smaller lots to provide infrastructure — roads, sewers, parks, and so forth — that will raise the value of the property. The owners receive in return some share of the consolidated land, usually but not necessarily in the form of a smaller but better serviced and therefore more valuable parcel. Alternatively, the owners could receive stock in the development created from the readjusted land. For instance, the reconstruction of war-torn Beirut during the 1990s, after the Lebanese civil war, was financed in part by downtown property owners’ contributions of 1650 parcels of real property.<sup>122</sup> In return, these landowners received shares in Solidere, the development company rebuilding Beirut’s central district. In Taiwan and Japan, private landowners can initiate the process of readjustment, but only if large majorities of the landowners consent.<sup>123</sup> In Germany, the government initiates land readjustment without the consent of the affected landowners.<sup>124</sup>

Readjustment resembles LADs in one key respect: both give the existing landowners some share of the gains from assembling land. This stake in the assembly ensures that the landowners will have an incentive to promote rather than obstruct the assembly — a key benefit, given the power of landowners to throw a wrench in the assembly process.<sup>125</sup>

But readjustment differs from LADs in at least three important respects. First, readjustment is not primarily a mechanism for giving landowners the power to bargain over whether or not to sell their neighborhood. Instead, readjustment assumes that the neighborhood ought to be readjusted and simply gives the landowners some share of the assembly gains. In some jurisdictions, such as Germany, landowners simply have no say in whether readjustment goes forward. In Japan, landowners can veto a readjustment, but there is no mechanism

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<sup>121</sup> André Sorensen, *Consensus, Persuasion, and Opposition: Organizing Land Readjustment in Japan*, in ANALYZING LAND READJUSTMENT 89, 89 (Yu-Hung Hong & Barrie Needham eds., 2007); see also WORLD BANK, HOUSING: ENABLING MARKETS TO WORK 132 (1993).

<sup>122</sup> Lynne B. Sagalyn, *Land Assembly, Land Readjustment, and Public-Private Redevelopment*, in ANALYZING LAND READJUSTMENT, *supra* note 121, at 159, 172–73.

<sup>123</sup> Yu-Hung Hong, *Assembling Land for Urban Development: Issues and Opportunities*, in ANALYZING LAND READJUSTMENT, *supra* note 121, at 3, 19.

<sup>124</sup> See generally Benjamin Davy, *Mandatory Happiness? Land Readjustment and Property in Germany*, in ANALYZING LAND READJUSTMENT, *supra* note 121, at 37.

<sup>125</sup> For proposals on how to bring land readjustment to America, see generally George W. Liebmann, *Land Readjustment for America: A Proposal for a Statute*, 32 URB. LAW. 1 (2000); Sagalyn, *supra* note 122; Michael M. Shultz & Frank Schnidman, *The Potential Application of Land Readjustment in the United States*, 22 URB. LAW. 197 (1990).

by which landowners can bargain with an assembler over the purchase price.<sup>126</sup> Thus, readjustment is not really an *allocative* mechanism for determining whether land ought to be assembled. Instead, readjustment is simply a *distributive* mechanism for giving landowners a share of the assembly gains.<sup>127</sup>

Second, readjustment does not permit the wholesale transformation of the neighborhood. Instead, readjustment simply “readjusts” the boundaries of the lots, requiring each landowner to contribute a certain percentage of land in exchange for better infrastructure. The landowner’s share of the total cost of the project may depend on the nature of the “readjusted” lot that he receives in return: owners who receive lots on especially wide streets or favorable corners might be called upon to contribute a larger share to the cost of infrastructure.<sup>128</sup> Thus, readjustment is not a useful mechanism for transforming a residential neighborhood to a completely different use such as an auto factory or festival mall.

Third, readjustment forces the neighbors to bear some of the risk of the assembly by giving them shares of the project rather than cash. The residents do not sell their neighborhood; instead, they trade their individual lots for shares in a new, improved neighborhood of uncertain value. Assuming that the neighbors are not experienced real estate developers, they might be averse to bearing this sort of risk. In any case, they might be incapable of determining whether their share in the final project will be worth their contributions of land. Unlike a simple percentage of a total purchase price, a share in a consolidated project is a lumpy asset, difficult for an amateur to evaluate.

These three differences between LADs and readjustment are rooted in one critical fact about the latter: readjustment forces the neighbors to be long-term partners in land assembly. Far from being a one-shot deal, readjustment creates a long-term commons in which the existing landowners contribute the capital, bear the risk, and retain a possessory interest in land assembly. Absent a neighborhood composed entirely of real estate experts, this cumbersome arrangement will frequently be impractical as a method of financing urban redevelopment.

2. *LADs and CDCs*. — The Community Development Corporation (CDC) can bear a family resemblance to the LAD, especially if the

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<sup>126</sup> See Sorensen, *supra* note 121, at 107–09.

<sup>127</sup> As noted above, Professors Lehari and Licht’s proposal to give neighbors a share in a special-purpose development corporation is roughly analogous to land readjustment and suffers from this same failing: the proposal does not give the condemnees any veto over land assemblies that have a value lower than the neighborhood that the assembly would destroy. See *supra* Part II.C.1.

<sup>128</sup> This method of dividing up contributions is used in South Korea. See Ik-Jin Kim, Myong-Chan Hwang & William A. Doebele, *Land Readjustment in South Korea*, in *LAND READJUSTMENT* 127, 127 (William A. Doebele ed., 1982).

CDC is endowed with the power of eminent domain by the state.<sup>129</sup> Formed in the wake of the urban riots of the 1960s, CDCs are non-profit corporations dedicated to the improvement of economically depressed neighborhoods. CDCs resemble LADs to the extent that both aspire to represent the values and preferences of the residents within their jurisdictions. Typically, CDCs make some effort to represent local residents on the CDCs' boards, sometimes even holding elections among the neighbors to ensure such representation.<sup>130</sup>

CDCs, however, differ from LADs in one critical respect: CDCs do not make a single high-stakes decision that focuses the attention and homogenizes the interests of the constituency that they purport to represent. Instead, CDCs perform a wide variety of low-visibility tasks such as lobbying for infrastructure and better services from the city, providing affordable housing, and aiding local businesses. The range of CDCs' activities ensures that their constituents' interests are not likely to be homogeneous, and the low visibility of their decisions ensures that the turnout at CDC elections will be small. The Dudley Street Neighborhood Initiative, for instance, managed to rouse only 100-odd residents to vote for its board members, even though its decisions affected the Roxbury area of Boston, containing 24,000 people.<sup>131</sup> Indeed, it is a common criticism of CDCs that they do an imperfect job of actually mobilizing the constituencies that they purport to represent.<sup>132</sup>

LADs, by contrast, focus the residents' minds on a single, dramatic decision that no one can afford to ignore: the sale of the neighborhood. The narrowness of the decision increases the neighbors' homogeneity of interest, while the impact ensures that they will likely show up to vote. One might, on these grounds, prefer LADs to CDCs. This is not to say that CDCs would play no role in the formation of LADs. CDCs would be prime candidates for organizing neighbors to form LADs dedicated to the purpose of creating low-income housing or other benefits desired by the community. The difference between eminent domain via a CDC and a LAD, however, is that the residents whose land was condemned would themselves receive shares of the revenue from the condemnation and would have a majority veto over the actual de-

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<sup>129</sup> See Johnson, *supra* note 84, at 492-97.

<sup>130</sup> See NEIL S. MAYER, NEIGHBORHOOD ORGANIZATIONS AND COMMUNITY DEVELOPMENT: MAKING REVITALIZATION WORK 42-43 (1984); PETER MEDOFF & HOLLY SKLAR, STREETS OF HOPE: THE FALL AND RISE OF AN URBAN NEIGHBORHOOD 58-60 (1994) (describing elections for the board of the Dudley Street Neighborhood Initiative).

<sup>131</sup> See MEDOFF & SKLAR, *supra* note 130, at 59, 319. *But see id.* at 59 (relating story of resident who took great pains to vote).

<sup>132</sup> See, e.g., Ram A. Cnaan, *Neighborhood-Representing Organizations: How Democratic Are They?*, 65 SOC. SERV. REV. 614, 621 (1991); Randy Stoecker, *The CDC Model of Urban Redevelopment: A Critique and an Alternative*, 19 J. URB. AFF. 1, 8-10 (1997).

cision to condemn. To the extent that one worried that CDCs answered more to the private foundations that supplied their funds and less to the residents who were imperfectly represented on the CDCs' boards, this difference might be deemed an improvement.

3. *LADs, RCAs, CICs, and Condos.* — The most successful intermediate-level property institution of the last half-century has been the condominium, also called the residential community association (RCA) or the common interest community (CIC). These institutions provide for an ever-increasing share of American housing, now with about 250,000 associations housing approximately fifty million people.<sup>133</sup> They occupy a niche above the level of individual ownership. Although their status as a “private” form of property is sometimes contested, they operate below the lowest level of public control. Because of their ubiquity, familiarity, and success, they provide the most ready analogy for building new group property forms, particularly due to their democratic self-governance mechanisms and autonomy-based protections for exit.

We draw much of the decisionmaking apparatus for LADs from the well-developed law of condominiums. However, the analogy breaks down at several important points, which requires us to look further afield in designing a new mechanism. Most importantly, condominiums are created *ex ante*, by a single developer who writes the rules<sup>134</sup> and who has a strong incentive to maximize the value of the development as a whole. In writing those rules, usually the developer attracts a relatively homogeneous set of initial owners, each of whom voluntarily elects to become a member of that community.<sup>135</sup> With their repeated interactions over time, owners develop a densely textured set of informal norms that supplement the formal rules.

Unlike condominiums, LADs are retrofitted *ex post* to an existing community — not even necessarily a self-identified community, but rather one that may be identified *ad hoc* for redevelopment by an outsider. Along with retrofitting comes heterogeneity. Existing noncondominium communities typically comprise an array of commercial and residential uses, owners and renters, who may have quite opposing attitudes toward selling based on their wealth, tax position, cash flow needs, and so on. Because selling is a one-shot decision with a huge financial consequence, informal norms cannot be relied on to play much of a role in smoothing over conflict in LADs. Designing a governance mechanism that can be retrofitted onto a developer-defined,

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<sup>133</sup> Nancy Kubasek, *From the Environment*, 33 REAL EST. L.J. 203, 203 (2004).

<sup>134</sup> See Wayne S. Hyatt, *Condominium and Home Owner Associations: Formation and Development*, 24 EMORY L.J. 977, 979–83 (1975) (describing the process of creating condominiums and the rule-making power of developers).

<sup>135</sup> See *id.*



heterogeneous community for a high-stakes, one-time decision poses design challenges that the condominium example cannot meet.

LADs, however, reduce the dangers of intra-group exploitation considerably because the only decision for the group is to accept or reject a purchase price for the neighborhood. Of course, there will still be differences in the group members' priorities — especially the difference between investment- and use-oriented owners, as the former might be quicker to sell than the latter. But this single division of interest might be easier to manage than the multiple differences that would emerge if the residents of a LAD had to interact over several different transactions.

4. *LADs, BIDs, BLIDs, and PNAs.* — Business Improvement Districts (BIDs) provide a less familiar but also successful analogy, one with the benefit of demonstrating how a group property institution can be retrofitted onto an existing community. BIDs are territorially-defined districts within a city, usually created on the initiative of business owners, that collect funds from all BID members and spend them on supplementing city services. They can be used to provide additional security, manage parking lots, or improve streetlights and benches. BIDs provide a useful model for structuring enabling legislation, drawing district boundaries, establishing voting procedures to protect dissenting owners, and collecting, controlling, and accounting for funds. On the other hand, the BID analogy loses some force because the financial stakes are relatively low, benefits are easily monitored to ensure that there is no covert redistribution, and everyone is engaging in repeat play. Even with these advantages, BIDs are kept on an extraordinarily tight leash: states typically give BIDs minimal powers to issue bonds or raise revenue with assessments, perhaps because the heterogeneity of property owners within BIDs gives rise to high levels of conflict.<sup>136</sup>

Recently, Professor Robert Ellickson proposed block-level improvement districts (BLIDs), essentially a residential equivalent of BIDs that would retrofit existing residential communities to enable them to acquire the same types of local public goods available in condominiums, such as better landscaping and security.<sup>137</sup> As with BIDs, BLIDs would pay particular attention to protecting the rights of dissenting landowners, who could be obliged to pay into a new district without their consent.<sup>138</sup>

Professor Robert Nelson has worked out the most ambitious proposal for creating a new group property form for managing land. His

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<sup>136</sup> See Briffault, *supra* note 12, at 384–85.

<sup>137</sup> Robert C. Ellickson, *New Institutions for Old Neighborhoods*, 48 DUKE L.J. 75, 97–98 (1998).

<sup>138</sup> See *id.* at 100–04 (describing BLID formation procedures and voting requirements).

form of a Private Neighborhood Association (PNA) would in essence operate as a general purpose condominium that neighbors could retrofit on their existing community.<sup>139</sup> Created by concurrent supermajorities of existing owners and renters of residential and commercial property, a PNA would be able to coerce individual owners to join.<sup>140</sup> Like a condominium, a PNA board would have the power to sell changes in use, including selling the community as a whole for redevelopment — a sort of “LADs plus” property form.<sup>141</sup>

But this mechanism has not proven easy for Professor Nelson to sell to legislatures, perhaps because his vision more or less involves privatizing a substantial part of the city’s zoning power.<sup>142</sup> Quite apart from the problem of spillover effects, the opportunities for intra-group exploitation are high in a neighborhood composed of different-sized structures serving different functions. The possibility that residential owners would burden commercial structures with onerous restrictions is matched only by the possibility that commercial owners would burden residential owners with noxious uses. Even among residential owners, the owners of large and small buildings would have persistently different interests that would invite intra-neighborhood squabbling.

LADs avoid this problem of intra-group conflict by simplifying the members’ interest in the LAD’s decision. Because LADs are not responsible for the ongoing management of different land uses, differences arising from those uses will generally be irrelevant to the LAD’s operation. Again, the one-shot deal is a blessing as well as a curse: it reduces the capacity, but also the need, for intra-group cooperation.

5. *LADs and Corporate “Freezeouts.”* — The problem of corporate “freezeouts” provides one of the closer analogies to LADs, because, like a LAD, a “freezeout” involves a private party forcing other private parties to sell an asset against their will. In the freezeout, a controlling shareholder uses its power over the corporate decisionmaking process to force other shareholders to divest their voting shares in exchange for cash or nonvoting stock.<sup>143</sup> There is a debate in corporate law literature about whether the forced buyout of minority shareholders serves

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<sup>139</sup> See Robert H. Nelson, *Privatizing the Neighborhood: A Proposal to Replace Zoning with Private Collective Property Rights to Existing Neighborhoods*, 7 GEO. MASON L. REV. 827, 833–34 (1999) (listing five parts of the PNA plan).

<sup>140</sup> See *id.* at 834 (requiring a vote of 90% of the total value of the neighborhood and 75% of the unit owners to agree to the formation of a PNA).

<sup>141</sup> See *id.* at 848–49 (discussing “selling of zoning”); *id.* at 872–73 (describing how the PNA proposal allows neighborhoods to decide for themselves how to use land).

<sup>142</sup> See *id.* at 872–73.

<sup>143</sup> For an overview of freezeouts, see ROBERT CHARLES CLARK, CORPORATE LAW §§ 12.1–12.2 (1986).

any valid corporate purpose.<sup>144</sup> But the analogy to LADs is straightforward. Like the controlling shareholder, the landowner(s) within a LAD who control a majority of the property (measured by valuation, square footage, etc.), can force the owners of a minority share of the land to sell their interest against their will. In either case, the controlling shareholder or landowner effectively has a power of private eminent domain.

What can one learn about LADs from the corporate context? LADs have one advantage over corporate freezeouts: unlike the controlling shareholder, the controlling landowners in a LAD must divest themselves of their land at the same time that they force the other landowners to sell. Therefore, assuming that the controlling landowners have no secret affiliation with the assembler-buyer, the dissenting minority and the majority will both receive the benefits of the assembly. By contrast, the chief objections to a corporate freezeout are rooted in the controlling shareholder's continued stake in the enterprise following the forced sale of the minority interest. For instance, it is sometimes argued that the market price paid to the minority shareholders will not reflect the true value of the stock, either because the controlling shareholder will suppress inside information about the company until after the freezeout or because the market price will anticipate self-dealing by the controlling shareholder after the freezeout.<sup>145</sup> But LADs require that the controlling landowners liquidate their interest in the neighborhood at the *same time* that they force the minority to liquidate its interest: lacking any interest in the post-assembly neighborhood, the controlling landowner cannot transfer wealth from minority landowners to itself. This one-shot deal destroys any continuing relationship between the neighborhood and the neighbors, thus eliminating an avenue for redistribution present in the corporate context.

Joint-stock corporations, however, have an important advantage over LADs: the interests of shareholders are more homogeneous than the interests of landowners. Shareholders large and small generally hold stock as an investment and place little subjective value on it above market value. Therefore, if a controlling shareholder's decision to take the company private by buying back the minority's shares

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<sup>144</sup> Compare Frank H. Easterbrook & Daniel R. Fischel, *Corporate Control Transactions*, 91 YALE L.J. 698, 705–08 (1982) (describing possible business gains stemming from freezeouts), with Victor Brudney & Marvin A. Chirelstein, *A Restatement of Corporate Freezeouts*, 87 YALE L.J. 1354, 1357 (1978) (describing freezeouts as objectionable because they are “coercive: minority stockholders are bound by majority rule to accept cash or debt in exchange for their common shares, even though the price they receive may be less than the value they assign to those shares”).

<sup>145</sup> See, e.g., Guhan Subramanian, *Fixing Freezeouts*, 115 YALE L.J. 2, 31–34 (2005) (describing ways in which a majority shareholder can affect market value paid to minority shareholders in a freezeout).

maximizes the value of the company, the minority shareholders should benefit from the decision without making any special sacrifice.<sup>146</sup> By contrast, if an investment-oriented landowner — say, a REIT — were to force the sale of a neighborhood over the objections of longtime residents, then the latter might have to sacrifice their special valuation of their parcels. Even if the controlling landowner's decision really did maximize the overall value of the neighborhood and even if the residents' gain from the assembly premium exceeded their lost subjective value, they might still feel that they were forced to bear a disproportionate burden. In short, the difference in interest between investment-oriented landowners and landowners who use their land as a business or residence could lead to acrimonious politics and resentment.

What could be done to increase the LADs' homogeneity of interests and thereby make LADs' politics more harmonious? One possible reform is suggested by the bankruptcy code. In bankruptcy, different classes of creditors (defined by the nature of their security interest and priority) vote separately to approve a reorganization plan.<sup>147</sup> The plan is not approved unless concurrent majorities of each class approve it.<sup>148</sup> By analogy, one might attempt to divide landowners into classes based on their attachment to the neighborhood, requiring concurrent majorities of each class for approval of the assembly. Investment-oriented landowners such as REITs and lenders holding foreclosed security interests in land could compose one class, while landowners who occupied their real estate for business or residential use could compose the other class. Neither could unilaterally force a sale of the neighborhood without the consent of the other.

The idea of concurrent majorities, however, faces administrative hurdles that might make it impractical. It is not easy, for instance, to classify landowners as passive investors or active users, given that land can simultaneously be a factor of production, a consumption item, and an investment. A simpler proposal that might accomplish the same objective would be prohibiting any landowner from casting a percentage of votes above a minority ceiling of, say, thirty percent. This limit on voting power would prevent any single landowner from purchasing a majority share of a neighborhood with an eye to selling the assembled neighborhood over the objections of the other landowners. As a practical matter, this ban on single controlling landowners might ensure that investors with only a transient interest in a

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<sup>146</sup> See Easterbrook & Fischel, *supra* note 144, at 704 (“[I]f the terms under which the directors obtain control of the firm call for them to maximize the wealth of the investors, their duty is to select the highest-paying venture . . .”).

<sup>147</sup> 11 U.S.C. § 1126 (2000).

<sup>148</sup> *Id.* § 1126(c).

neighborhood could not use LADs to dominate the assembly decision and ignore the preferences of more permanent residents.

6. *LADs and Class Actions.* — Like LADs, class actions constitute a system of collective governance for a one-shot deal. Class actions aggregate the common interests of plaintiffs in litigation, allowing one attorney to represent all of the interests of the class. The purpose of this joint representation is to overcome a familiar collective action problem in managing a common-pool resource: if the cost of maintaining a common-pool resource exceeds any individual's benefit from the resource, then each individual will have an incentive to shirk in doing his or her share to maintain the resource, even if the collective benefits of the resource exceed the collective costs of maintenance.<sup>149</sup> Absent some centralized mechanism for forcing the beneficiaries to contribute a share of the costs, the resource will be neglected.

In the context of a class action, the common-pool resource is successful litigation. Because "small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights,"<sup>150</sup> plaintiffs with small stakes might each have insufficient reason to hire a lawyer to vindicate their claims, even if the sum of their claims would justify the expense of attorneys' fees. Since such claims might share common legal issues, a single attorney could advance everyone's claim, if only the plaintiffs could figure out a way to divide the cost of representation. Class actions provide such a mechanism, in which dissenters have a limited right to opt out.

The analogy to LADs is again straightforward. LADs address the common-pool resource of land assembly. Landowners lack the incentive to maintain this resource through cooperative action, even when the benefits exceed the costs of cooperation. LADs force every landowner to participate in the assembly, giving dissenters a limited right to opt out for just compensation.

But the specific nature of the collective action problem explains why class actions suffer from agency costs that are largely missing in LADs. The small stakes that give rise to the need for class actions also make it unlikely that claimants will closely monitor the lawyer representing them. Not being closely monitored by rationally apathetic class members, this lawyer will have an incentive to collude with the defendants against whom he is supposed to be litigating, settling for a

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<sup>149</sup> This problem has been familiar at least since the eighteenth century when Hume examined the dilemma of meadow drainage. See DAVID HUME, A TREATISE OF HUMAN NATURE 345 (David Fate Norton & Mary J. Norton eds., 2000) (1740).

<sup>150</sup> *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997)).

small recovery but high fees.<sup>151</sup> Ensuring faithful representation from the class's lawyer, therefore, becomes a major focus of class action jurisprudence.<sup>152</sup>

Agent faithlessness is less of a difficulty for LADs, because the collective action problem of LADs does not arise out of the constituents' small stakes. Rather, land assembly suffers from the opposite problem: each landowner refuses to cooperate in order to extort from the others the entire value of the common-pool resource, that is, the assembly surplus.<sup>153</sup> This collective action problem need not give rise to rational apathy on the part of landowners, because the landowners have large and usually undiversified assets at stake in any land assembly — their homes and businesses. The prospect of losing possession and a considerable amount of value in one's largest investment focuses the mind wonderfully. Unsurprisingly, landowners aggressively participate in condemnation proceedings and would be unlikely to overlook an inadequate settlement by their agent.

Nevertheless, LADs require some policing of agents akin to the monitoring of class action lawyers. There is a danger that assemblers will surreptitiously purchase a controlling share of a neighborhood through frontmen or dummy corporations. The assembler would then use those shares to force the remainder of the landowners to accept a low price for the neighborhood. Although landowners are likely to be alert, they might nevertheless be unable to detect a covert relationship between a controlling landowner and the assembler. To forestall such conflicts of interest, LAD-enabling legislation should require especially stringent disclosure requirements and bar any landowner from voting in a LAD if that landowner has any affiliation with the assembler.

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<sup>151</sup> See John C. Coffee, Jr., *The Corruption of the Class Action: The New Technology of Collusion*, 80 CORNELL L. REV. 851, 854–55 (1995).

<sup>152</sup> See Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 SUP. CT. REV. 337, 351–52.

<sup>153</sup> Thus, land assembly is akin to the "limited fund" class action under FED. R. CIV. P. 23(b)(1)(B), in which claimants must all simultaneously establish their rights to some limited fund in order for any claimant to recover. The requirement of joint action gives each an incentive to hold out for an excessive share of the fund.

7. *Summary.* — Table 3 below summarizes how LADs fit in with a broad array of devices for governing common-pool resources.

TABLE 3. KEY FEATURES AND LESSONS  
FROM ANALOGOUS INSTITUTIONS

<i>Institution</i>	<i>Key Feature</i>	<i>Comparison to, and Lessons for, LADs</i>
Land Readjustment	Requires neighbors to continue interacting; limits ability of assembler to purchase entire neighborhood.	LADs provide more radical transformation of neighborhood by conferring greater discretion on landowners.
CDC	Governs a heterogeneous set of issues; provides no high-stakes decision to focus attention of residents on CDC decisions.	LADs provide greater incentives for neighbor participation and fewer risks of majority exploitation of minority interests in neighborhood.
Condo, CIC, RCA	Voluntary institution that governs self-selected members who must interact over a long period of time and broad range of issues.	LADs govern a more heterogeneous, less self-selected constituency that, therefore, may be more prone to intra-group conflict and exploitation. However, a one-shot deal may also constrain opportunities for exploitation.
BID, BLID, PNA	Ex post institution that works because of homogeneous interests and limited powers.	LADs govern a less extensive and durable set of issues, reducing likelihood of intra-group exploitation. Use voting rules for formation and termination to limit coercion of dissenters.
Corporate Freezeouts	Controlling shareholder can force minority to sell interest while retaining its own interest.	Requirement that controlling landowner sells interest in land limits power to redistribute wealth. Perhaps add limits on a landowner's power to act alone.
Class Actions	Retrofits governance mechanism on diverse range of underlying interests for one-shot resolution.	Focus on ways to ensure agent fidelity to principals, perhaps using public/court supervision and disclosure requirements.

In some respects, LADs can learn from their elders, borrowing reforms needed in corporate law, bankruptcy, and condominiums to ensure that the commons can be governed without exploitation. We argue that the track record of these other group property forms suggests one conclusion with confidence: LADs are worth a try.

## VI. CONCLUSION

The law governing land assembly for economic development is a mess. We have failed to come up with good solutions either through private contracting, which leads to holdouts and underassembly, or through public regulation, which leads to transparently politicized, coercive, and confiscatory condemnations. Courts have not fared better: jurisprudence regarding public use and “just compensation” provides too crude a tool to constrain legislatures and to generate either fair or efficient solutions. In sum, current approaches to land assembly provoke widespread hostility, discredit both courts and legislatures, and cost society a staggering amount in forgone social value.

LADs are the solution, so long as one accepts our premise that those burdened by condemnation should be able to share more directly in some of its benefits. To function well, LADs must address all the concerns raised by any “liberal commons” property form, including the spheres of individual dominion, democratic self-government, and community-enhancing exit.<sup>154</sup> Closely analogous liberal commons forms, such as BIDs and land readjustment, provide much of the LADs’ needed governance mechanisms, though they must be tailored to account for the specific values people bring to land assembly. By forcing owners to reveal their reserve price, LADs promote efficient assemblies and deter inefficient ones. And by letting neighbors bargain for assembly gains, LADs can mitigate the unfairness surrounding condemnation.

Property rights entrepreneurs add value by identifying how private contracting and public regulation interact to create social welfare costs, and by engineering solutions to these seemingly intractable collective action dilemmas. More generally, LADs illustrate how property rights innovation can and should operate.

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<sup>154</sup> See Dagan & Heller, *supra* note 67.