Eminent Domain, Inc.

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Abstract

This Essay proposes a novel solution for "squaring the eminent domain circle" when large-scale, for-profit development projects require the assembly of land from numerous private property owners. Such "anticommons" situations may justify government intervention through eminent domain yet they often leave landowners under-compensated. This may skew the incentives for initiating land development projects and lead to considerable injustice. While the taking component of eminent domain may need to remain an involuntary non-market transaction, we propose a market-based mechanism for the compensation component in the form of a Special-Purpose Development Corporation (SPDC) that would acquire unified ownership of the land and the development project. Offering condemnees a choice between receiving pre-project "fair market value" compensation or pro rata shares in the SPDC would make it more likely that compensation is closely linked to true economic value of the land and, consequently, that land assembly projects are both more just and genuinely social-welfare maximizing.

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INTRODUCTION

The U.S. Supreme Court's *Kelo v. City of New London* decision[i] sparked a fierce debate throughout the United States when it validated the use of eminent domain for purposes of economic development, especially when the confiscated lands are then transferred to private parties that implement the project and enjoy its gains.

Opponents, coming practically from all wings of the political spectrum, see the decision as pronouncing the ultimate death of the Constitution's Fifth Amendment requirement that eminent domain be restricted to property taken for "public use,"[ii] claiming it grants governments a *carte blanche* for a compulsory transfer of private property from ordinary citizens to politically-powerful real estate entrepreneurs.[iii] Lobbying groups such as the Castle Coalition have argued that the *Kelo* decision has "opened the floodgates" of eminent domain abuse, spurring governments to proceed with hundreds of projects in which homes, small businesses, and other properties would be razed in favor of high-profile private developments, leaving landowners with minimal compensation based on the pre-project "objective" land values.[iv]

This version of events is only partially correct, however, both in theory and in fact. Many state legislatures and courts have already taken steps to mitigate the potential overuse of eminent domain powers. In more than half of the states, legislatures have placed new prohibitions on the use of eminent domain, either by prohibiting its use for private economic development, redefining more stringently the terms "public use" or "blight," or otherwise increasing restrictions on the use of eminent domain for such projects.[v] In addition, some state courts, as in Ohio[vi] and Oklahoma,[vii] have interpreted state legal limits on the use of eminent domain for private economic development more stringently than the Supreme Court's reading of the federal Constitution in *Kelo*. In this sense, post-*Kelo* reality may not necessarily be heading in only one direction.

Moreover, as we argue in this Essay, on the policy level, a flat prohibition on the use of eminent domain to assemble land from numerous owners to allow large-scale, financially profitable projects is highly problematic. Development or redevelopment projects involving dozens or hundreds of landowners, each holding an exclusive entitlement to a fragment of the designated project's area, could be impossible to implement if every affected property owner could veto the plan by refusing to sell his parcel. Unanimous consent is not a reasonable requirement for such large-scale projects in view of such "anticommons" scenarios.[viii] Cases of land assembly for development or redevelopment plans are thus rife with market failures, which in turn may justify maintaining the land assembly process itself as an involuntary non-market transaction carried out through the governmental power of eminent domain.

At the same time, however, since the constitutionally-mandated "just compensation" to the landowners is currently based on the pre-project objective "fair market value," the government or third parties that take part in the implementation of the project may enjoy the entire increment in the assembled land value. This compensation regime may seem unfair due to its distributional consequences, and it could distort governmental decision-making by encouraging use of its eminent domain power even when it is socially undesirable or unnecessary for practical purposes.

This Essay proposes a novel solution for "squaring the eminent domain circle" for large-scale, for-profit projects that require land assembly from private property owners, by separating the two components of eminent domain: taking and just compensation. The goal of our proposal is to restore market mechanisms to the extent possible by re-structuring the legal compensation regime. We develop a market-based solution for the compensation component that would take advantage of the market's powerful price system to align the interests of landowners, public authorities, and land developers. In brief, our proposed model would offer condemnees a choice between receiving either traditional "fair market value" compensation or pro rata shares in a special-purpose development corporation that would acquire unified ownership of the land and the development project. This innovative mechanism would make it more likely that compensation is closely linked to true economic value of the land and, consequently, that land assembly projects are both more just and genuinely social-welfare maximizing.

The Essay is structured as follows. Part I presents the dilemma concerning projects that require the assembly of land from numerous owners. It explains the substantial transaction costs embedded in attempts to reorganize a certain area for development or redevelopment and the difficulty in distinguishing between authentic "benign" reservations and strategic holdout tactics, and points accordingly to the very limited success of voluntary-based land assembly cases. It then addresses the dark side of current eminent domain-based land assembly, by pointing to the skewed incentives and unjust distribution that result from the current legal "just compensation" regime, especially in view of the somber socio-economic history of urban renewal projects, as well as the abundance of current instances in which the interests of ordinary homeowners and businesses are pushed to the side in favor of politically- and financially-powerful private bodies.

Part II explains why current land use regulation and land tax laws in the U.S. make *Kelo*-type scenarios particularly dramatic, by offering a brief comparative review of the legal regime and current reformatory trends in Britain, which is facing similar dilemmas especially with regard to large-scale urban redevelopment programs. In particular, it shows how recent policy imposing planning obligations and the designated taxation of land betterment resulting from the land assembly and implementation of the redevelopment project make the "public" trait of land assembly in Britain more highly developed and authentic than is currently the case in the U.S.

Part III briefly reviews current proposals for reforms (beyond the aforementioned growing restrictions on the very use of governmental powers in for-profit projects), discussing mainly calls to implement the planning tool of land readjustment that is prevalent in many countries, as well as various proposals to change the legal "just compensation" formula. We argue that these suggested reforms, while intriguing, are either impracticable or normatively problematic, and thus do not offer a systematic solution to the land assembly dilemma.

Part IV proposes our new approach to eminent domain that is based on a corporate finance perspective. It introduces the Special-Purpose Development Corporation (SPDC), explains the method by which shares would be allocated to private and public parties, and discusses several prominent issues pertaining to the institutional design of the SPDC, its corporate governance mechanism, and the way in which corporate and securities law can be utilized to adequately protect the interests of the private-landowners-turned-shareholders. We conclude by pointing to the larger potential that the corporate structure entails for solving land use related collective action problems.

I. THE LAND ASSEMBLY DILEMMA

A. The (Post) Kelo Saga

In the *Kelo* case, the 90-acre Fort Trumbull plan that includes construction of waterfront hotels, marinas, offices, retail spaces, and other commercial uses--and which was presumably made with the purpose of revitalizing the economy of the then-distressed City of New London--implicated 115 privately owned properties, as well as 32 acres of publicly owned lands.[ix]

The New London Development Corporation (NLDC), the City's development nonprofit corporation in charge of the redevelopment plan, was able to successfully negotiate the purchase of most privately owned properties in the plan's designated area. NLDC, however, failed to reach agreement with nine property owners holding fifteen properties altogether (ten of which were occupied by the owner or a family member, and the rest held as an investment).[x] Following this, the City and NLDC--to which the City delegated its eminent domain powers--initiated the condemnation procedures under state law, which were validated by both the Connecticut courts and later by the U.S. Supreme Court.[xi]

Following the Supreme Court's decision, the City and NLDC, that won legal victory but faced a public relations debacle, sought to settle with the petitioners to make unnecessary the consummation of the eminent domain proceedings and to move forward with redevelopment. Up until early June 2006, seven of the landowners settled, while two remained defiant: Susette Kelo and Pasquale Cristofero. On the night of June 5, 2006, the City Council voted to proceed with eminent domain proceedings for the two properties, located in Parcel 4A.[xii] Shortly afterwards, Kelo and Cristofero also settled.[xiii]

The settlement efforts proved costly for the City and NLDC. The last six deals alone cost them more than $4.2 million--$2.3 million above the properties' total appraised value in 2000--in addition to waiving almost $1.2 million in fees for use and occupancy by the landowners for the post-condemnation period. Kelo accepted an offer totaling $442,155 for her house, more than $319,000 above its appraised value in 2000, and was permitted to stay on the land until June 15, 2007. Cristofero received $475,000 for a house formerly appraised at $105,000. These deals aroused the discontent of landowners that settled previously (and enjoyed substantial yet lower premiums), who noted that the City and NLDC "rewarded them [the last to settle] for holding out further."[xiv]

Nor did Susette Kelo show (explicit) signs of content. In the months following the settlement, Kelo toured the country, passionately describing to her audience the love and care she lavished on what used to be a run-down cottage when she bought it, and urging listeners to push for legislative reforms that would better protect private property rights against eminent domain.[xv] Kelo thus became a national symbol for private property advocates, but at the same time she serves as a vivid illustration of the intricate dilemmas that haunt land assembly.

B. Land Assembly as an Anticommons Setting

Land assembly problems are far from new. The law has long dealt with types of scenarios in which the assembly of land is especially rife with potential and actual market failures, and chiefly with the problem that is nowadays dubbed "anticommons."[xvi] When large-scale projects implicate numerous property owners each holding an exclusive entitlement to a fragment of the designated project's area, then if each owner were able to effectively veto the plan unless he consents to it, such over-fragmentation of private property rights could prevent the pooling together of the land for its more efficient reorganization.[xvii]

1. From Quintessential Public Projects…

Probably the most frequent scenario in this context concerns the establishment of roads, navigable water routes, pipelines, and other types of linear infrastructures and utilities. In such cases, the market for the purchase of land or of a right of way in it is particularly thin, because often there may be only one feasible route.[xviii] Even in other cases, once the railroad, pipeline, etc. has begun building the line, abandoning it for an alternative route might be very costly. Accordingly, persons owning land along the designated path are tempted to hold out for a high price in excess of the land's opportunity cost.[xix]

To prevent the *de facto* monopolistic power of each one of the landowners along the path, governments often resort to their eminent domain powers.[xx] Governments have also delegated these powers to private corporations that build or operate such transportation or infrastructure services. Although this delegation has been somewhat scaled back as of the early twentieth century,[xxi] many legislatures still expressly authorize such private corporations to use the power of eminent domain because of the public nature of their service, and courts generally defer to the use of such powers.[xxii] Moreover, when the good or service for which the power of eminent domain is employed possesses the economic traits of a public good or otherwise mandates substantial centralized intervention for its provision, the use of eminent domain is generally considered less problematic even by proponents of strong private property rights.[xxiii] Beyond the use of eminent domain, the law has employed other methods to prevent monopolistic holdouts in such types of resources, such as the nineteenth century based judicial development of implied "prescription" or "dedication" theories which deprived private owners of the right to exclude from segments of roads or navigable water routes that were used by the general public and thus were subject to particularly high negotiation costs.[xxiv]

2. … to Non-Profit Private Development Projects…

The case of large-scale development or redevelopment projects for residential, commercial, or industrial purposes is less straightforward. The federal urban renewal programs that ran between the late 1940 and the mid 1960s, in which entire neighborhoods were razed in the name of removing "blight" through the use of eminent domain to make room for middle- and upper-income housing, is considered in retrospect a resounding failure, which only exacerbated the socio-economic problems of the priced-out, former residents of what were physically run-down yet socially vibrant communities.[xxv]

At the same time, however, even current, more subtle redevelopment programs realize the essentiality of systematic and comprehensive area-wide solutions to problems of urban decline. A recent report commissioned by the Environmental Protection Agency (EPA), which studied redevelopment projects in nine states, stresses that since "no property is an island," most successful redevelopment initiatives focus on areas in their entirety.[xxvi] Thus, even "social" redevelopment initiatives that are currently carried out chiefly by nonprofit organizations such as Community Development Corporations, and are explicitly committed to helping out low-income residents by building or rehabilitating affordable housing in addition to providing social services such as job training, youth programs, crime watch, small business assistance, etc., must spread to the entire map to succeed.[xxvii] Accordingly, vacant lots or neglected buildings that remain as such within the patchwork of a neighborhood adversely influence the prospects of "moving up" the community.[xxviii]

Interestingly (yet not surprisingly), one of the most celebrated cases of grassroots, community-based revival of an impoverished urban neighborhood, the Dudley Street Neighborhood Initiative (DSNI) in Boston, is also the only instance in the U.S. in which a community organization--DSNI--was granted the power of eminent domain by the City and the Boston Redevelopment Agency (BRA).[xxix]

The Triangle, a 64-acre area in the heart of Dudley neighborhood, which was home to about 2,000 people in the late 1980s, was also where most vacant land in the neighborhood was concentrated. Out of the 30 acres of vacant land in the Triangle, 15 were owned by the City. The other 15 acres, comprised of 181 lots, were privately owned. Out of the 181 lots, 101 were in tax title, with municipal liens placed against them, or under petition for tax foreclosure. Moreover, the public / private ownership map looked like a jigsaw puzzle, so that there was no substantial territorial consecutiveness of public property, with little "islands" of private holdings spread all over the Triangle. Although most private properties were tax delinquent, their formal foreclosure one-by-one would have nevertheless been an onerous, time-consuming process which might have hampered any revival efforts.[xxx]

It was then that the idea of community-based use of eminent domain was conceived. DSNI, well aware of the traumatic experience of Bostonians with previous eminent domain projects, suggested two distinguishing principles for the use of this power, so that (1) it would be restricted to vacant lots, meaning that no homes or businesses would be displaced, and (2) eminent domain would be exercised only for land owned by persons living outside the neighborhood: 81 of the 131 private owners of vacant land in the Triangle lived outside Roxbury or Dorchester, many of whom land speculators holding it in anticipation for future profit.[xxxi] Following the mayor's support and formal approval by the BRA, and a subsequent process, which took over three years, to raise the funds for compensation (over $2 million, coming from private grants and a loan from the Ford Foundation), DSNI exercised its eminent domain powers through judicial decree for the privately owned, non-resident vacant lots in the Triangle, and simultaneously received the City owned vacant lots for a nominal fee of $1.[xxxii]

To ensure both the concentrated control over the land and its affordability for low-income residents for generation to come, DSNI set up a Community Land Trust (CLT).[xxxiii] The Dudley CLT thus owns the land in perpetuity, and the individual homeowner leases the land for a long period and is the owner of the building. The resale price is restricted to a formula aimed at giving the departing homeowner a fair return on his investment, while at the same time giving future homebuyers a fair and affordable access to this housing. Other mechanisms embedded in the CLT, and especially its unique tri-layered property structure, preserve the on-going, collective neighborhood control over the project.[xxxiv]

3. … and For-Profit Ones

We now move to the issue of land assembly for what is essentially a for-profit development or redevelopment project, such as the Fort Trumbull plan. Whereas the constitutional "publicness" of such projects is fiercely debated, with a growing gap between the federal legal regime and that of many states,[xxxv] and a largely unfavorable approach in the literature for the use of takings in such contexts,[xxxvi] one cannot overlook the fact that land assembly for such projects is prone to the same basic anticommons hurdles that haunt public or private non-profit projects.

In some cases, private entrepreneurs may be able to assemble large tracts of land mainly through the use of secret buying agents, as in the now-famous cases of Walt Disney's secret purchases of thousands of acres from numerous property owners in Florida and in Virginia.[xxxvii] Yet such techniques are often inapplicable, and would usually be legally prohibited for governmental development or redevelopment plans.[xxxviii] In such publicly-known cases, potential holdouts are very likely.

Importantly, when a designated project becomes public knowledge, the ability of the governmental entity or a private entrepreneur to move forward with contractual land assembly hinges to a large extent on the question, whether under the law of the specific jurisdiction, the power of eminent domain may be used to non-consensually take properties of landowners who refuse to sell or move out. When the project's initiators have good reason to believe that they would be able to resort to eminent domain when push comes to shove, and to prevail against legal challenges, the more leverage they typically enjoy during the negotiations (even though they may often be inclined to offer landowners above-market prices to save the delays and costs involved in actual condemnation proceedings).[xxxix]

A recent vivid example is the $4 billion Atlantic Yards project in Brooklyn, New York. Shortly after buying the NBA's New Jersey Nets franchise in 2004, developer Bruce Ratner announced plans to make Brooklyn the Nets' new home, and to turn a 22-acre site in the heart of the borough into a mixed-use development that will include the basketball arena, thousands of rental and condo apartments, office towers, retail space, and a boutique hotel.[xl] Forest City Ratner Companies (FCRC) has won support for the project from both the State and the City of New York, which also directly subsidize the project at hundreds of millions,[xli] especially after FCRC committed to designating a portion of the 6,400 planned apartments to low- and moderate-income families.[xlii]

FCRC did not await the receipt of all the required regulatory approvals for the project (finally obtained in December 2006) to start with the massive purchase of land in the project's footprint.[xliii] With the background support of the City and the State, and especially of the Empire State Development Corporation--the state agency holding the power of eminent domain on behalf of the state, which publicly announced its plans to use this power against unwilling property owners--FCRC has been able to privately buy out the vast majority of properties and to reach agreement with many rent-stabilized tenants on temporary and permanent solutions.[xliv] Yet a few dozen apartment owners, rent-stabilized tenants, and small businesses remain defiant, and have recently filed a number of lawsuits in state and federal courts, arguing, inter alia, that Empire State Development Corporation may not use eminent domain for this private development. In a rhetoric that should sound familiar enough to *Kelo* veterans, Daniel Goldstein, the spokesman for the lobby group Develop Don't Destroy Brooklyn,[xlv] and the only remaining apartment owner in a building bought out by FCRC, declared that "our victory will force a reshaping of the project, while protecting owners and renters nationwide from abuses of eminent domain."[xlvi] The legal and financial fate of these last pockets of resistance to the Atlantic Yards project remains to be seen.

The motives for vetoing contractual land assembly for private for-profit development or redevelopment projects may vary considerably. In some cases, these may be benign, at least in the eye of the beholder. Susette Kelo seems authentic in her staunch position against leaving her cottage, even after receiving a fat premium from NLDC. She places an exceptionally high emotional value on her house and thus serves as a vivid illustration of the personhood-building theory of private property,[xlvii] which could not have been overridden from her own perspective even if she were to share directly in the profits of ambitious Fort Trumbull plan. Property owners may accordingly experience a subjectively genuine insult to their sense of autonomy and liberty resulting from the forced turnover, especially when the property is retransferred to a powerful developer.[xlviii]

Landowners of agricultural or natural landscape properties may object to new development on ideological or environmental grounds. One recent fascinating example for an anti-development tactic employed for that purpose concerns "green burials." A few years ago, Billy Campbell, an avid environmentalist living in Westminster, South Carolina, a small town in the foothills of the Appalachian Mountains, came up with the idea to use burials to preserve land from future development. In 1996, he bought 33 acres along a creek and offered residents "green burials." Joining forces with Tyler Cassity, a consultant on HBO's *Six Feet Under* and the owner of celebrity cemetery Hollywood Forever, they intend on bringing this concept to the different states, with the goal to "preserve 1-million acres over the next 30 years." In August 2004, the two closed on a 32-acre parcel beneath San Francisco's Golden Gate Bridge. Within a month, some 500 people have signed up on the waiting list.[xlix]

In other cases, however, objections might be purely financial, the result of strategic holdouts by those attempting to maximize their gains. In these instances, the collective action problem might more bluntly unfairly reward strategic holdouts with a substantial premium, or cause the plan to fail altogether. Naturally, it may be exceedingly difficult to distinguish a landowner's opportunistic holdout behavior from regular bargaining.[l] But the main point in our view is that whether the holdout is "authentic" or merely tactical, awarding a sweeping right of veto to each one of the landowners in the designated development area would in many cases prevent innovation, economic growth, and the realization of genuine public preferences. This, in our opinion, justifies maintaining the possibility of assembling land also through the non-consensual mechanism of eminent domain. At the same time, however, we call to remand the just compensation component, which currently makes many cases of land assembly inefficient or unjust.

C. The Ill Effects of Just Compensation

The current legal regime governing eminent domain creates an uneasy dichotomy. When the use of eminent domain for certain types of for-profit developments is forbidden, projects offering potential private and public benefits may not happen. However, when eminent domain is validated to solve anticommons problems, the government or third parties involved in the project may enjoy the entire increment in the assembled land value, since compensation to the landowners is based on the pre-project "fair market value" (although, as the post-*Kelo* turn of events demonstrates, in some cases landowners, and especially the last to hold out *de facto*, are able to enjoy a substantial extra-legal premium).

At any rate, there is nearly universal consensus that legal "fair market value" is practically a euphemism, in the sense that it generally does not fairly compensate landowners.[li] As Lee Anne Fennell observes, a landowner restricted to such a measure of compensation is denied the "subjective premium" (that is, the unique value that people often place on their properties, especially their homes); the chance for a share in the appreciation brought about by the land assembly and future project; and the intrinsic value that a landowner may attribute to making autonomous decisions about the fate of her property.[lii] Such a compensation regime seems unfair due to its distributional consequences in the trilateral relationships between landowners, governments, and project developers.[liii] Moreover, it could also distort governmental decision-making by encouraging use of eminent domain even when the project is socially inefficient, or when the use of this power is unnecessary in fact.[liv]

To fully understand the inherent problems embedded in the current "just compensation" regime, one thus needs to view eminent domain law not only from the landowner's perspective, but also from that of the government and the private third parties that promote and later implement the project. Several authors have recently criticized the conventional economic rationales for requiring governments to compensate landowners for land expropriation--namely public internalization of costs and avoidance of "fiscal illusion,"[lv] as well as the lack of a private insurance market for landowners against possible takings.[lvi] According to these critics, governments often respond not only to economic incentives, but also, and often almost exclusively, to political incentives.[lvii]

This analysis, which largely builds on the public choice theory, typically points to the disproportionate influence that special interest groups, and chiefly politically powerful real estate entrepreneurs, have over governmental decisions in land policy issues.[lviii] According to this view, such state of affairs is facilitated and further exacerbated by the fact that the payment of just compensation for takings is dispersed among all taxpayers in the relevant constituency, whereas the private parties who implement the project and enjoy its gains are usually not required to reimburse the government for the cost of compensation, thus making eminent domain a skewed vehicle for costless acquisitions in the service of such private developers.[lix] These propositions are allegedly supported by the history of eminent domain, and especially of high-profile cases such as *Berman v. Parker*,[lx] *Poletown Neighborhood Council v. City of Detroit*,[lxi] the recent *Kelo* case,[lxii] and many other instances in which the power of eminent domain was arguably abused to transfer lands from ordinary citizens--typically members of politically disempowered minorities--to the hands of mighty corporations at a nominal rate.[lxiii] In *Poletown*, for example, the City of Detroit paid more than $200 million for taking the properties, demolishing them, and preparing them for redevelopment, and then transferred the land to General Motors for about only $8 million.[lxiv]

This depiction of governments (specifically local ones) as politically-captured, passive vehicles for "naked transfers" of private property is, however, somewhat lacking. Whereas local decision-makers are obviously influenced by self-promoting political motives, they also place a considerable weight on fiscal considerations, with land use regulation being probably local governments' most fiscally-driven area of activity, in which proposed plans are judged based also on the government's fiscal opportunity cost for the land.[lxv] However, in the context of large-scale developments, and more prominently of redevelopment schemes, the present legal regime often causes the local government to align with the interests of aspiring developers at the expense of current landowners, and sometimes also at the expense of the general public which the government is supposed to serve.

This is especially the case in view of the proliferation of governmental redevelopment projects that are financed through Tax Increment Financing (TIF).[lxvi] Such schemes, which are authorized in most state legislations for the purpose of reviving "blighted" areas, allow a redevelopment agency or corporation, which is a subsidiary of the general-purpose local government, to incur expenditures (including the up-front costs involved in land assembly) and to issue revenue bonds that are paid back over time by earmarking the future increment in property taxes in the designated development area. This means that throughout the period until the bonds are paid in full--typically around twenty years--the redevelopment agency does not have to share the incremental revenues with all the other jurisdictions that regularly receive a proportionate amount of the taxes (counties, school districts, park districts, special-service districts, etc.).[lxvii]

In some states, redevelopment agencies are entitled to participate directly with the developer in the profits of the development, beyond the receipt of taxes. This is especially the case when the agency and the developer disagree about the value of the land during the pre-development negotiations because of differing estimates about the project's future economic performance so that part of the payment for the land is deferred in that manner, or when the agency's participation in the cash flow provides it a means to recover expenditures it made, such as for parking and highway interchanges, that cannot be recouped as part of the price of the land.[lxviii]

Given this fuller account of the forces that drive local governments, it becomes clear why it is in their self-interest to designate areas as "blighted" to facilitate redevelopment schemes and to over-use their powers of eminent domain. Moreover, as several studies have shown, although TIFs are hailed as "self-financing," thereby imposing no burden on public resources, many such projects are in fact detrimental to the overall social welfare. This is the case whenever the redevelopment scheme does not generate genuine municipality-wide gains, but is used to merely shift existing economic activity to the TIF district, so that the positive effects on property values within the TIF district may be more than offset by the negative impacts on the non-TIF portions of the municipality.[lxix] In such cases, the current legal regime creates particularly skewed incentives for local governments to collude with private developers, to the detriment of the private owners of confiscated lands, other taxing jurisdictions, and the public at large.

II. THE U.S. LEGAL REGIME IN A COMPARATIVE PERSPECTIVE

The prevailing land use regulation and land tax laws in the United States make the *Kelo* case and the use of eminent domain for private development particularly dramatic, especially as compared to other countries.

This is the case not only with the takings side, but also with the governmental "givings" awarded to a project's developer. On the one hand, following the Supreme Court's decisions in *Nollan v. California Coastal Commission*[lxx] and *Dolan v. City of Tigard*,[lxxi] local governments are (at least formally) strictly limited in their ability to require land or in-kind exactions from the developer.[lxxii] On the other hand, the U.S. tax regime imposes no betterment tax on the increased value of land resulting from a regulatory giving.[lxxiii] A private developer that receives approval for a development project, including rezoning of the land or granting of a building permit, consequently enjoys nearly the entire increment to the land value, and bears only a small portion of the total costs to the government and to affected parties in the surrounding community. This state of affairs presents landowners with a "win all or lose all" situation: retaining their land ownership interests within the project and enjoying its gains, or being unwillingly bought out through eminent domain for compensation based on the pre-project value. It is no wonder, therefore, that the post-*Kelo* public and legal waters are so stormy.

In this context, recent developments in Britain offer an interesting comparison. As in the U.S., the British legal regime gives governments a broad mandate to assemble private land for urban regeneration (redevelopment) projects and to pass on the land to private developers. For example, the *Alliance Spring Co Ltd v. First Secretary of State* case[lxxiv] dealt with a major regeneration scheme resulting from Arsenal Football Club's need for a new stadium with increased capacity.[lxxv] Validating the use of land assembly through compulsory purchase (eminent domain) for this mainly private development, the court held that the Islington Council, the local planning authority, was within its authority to take 134 privately-owned plots for the new stadium and for the larger scheme "which it regarded as a comprehensive redevelopment of the area in the public interest," and noted that "developments which result in regeneration of an area are often led by private enterprise."[lxxvi]
These governmental powers have been further broadened by the Planning and Compulsory Purchase Act 2004, which amended Section 226(1) of the Town and Planning Act 1990.[lxxvii] Section 226(1A) now allows the use of compulsory purchase for development or redevelopment that promotes or improves the economic, social, or environmental "well-being" of the area.[lxxviii] This statutory-based mandate for compulsory purchase seems to resemble and even to go beyond the *Kelo* validation of the use of eminent domain for "economic development."[lxxix]

The influx of the use of compulsory purchase for land assembly in the past few years, and its statutory and judicial vindication, are first and foremost a result of the growing recognition in Britain of the essentiality of governmentally-coordinated urban regeneration. In the past, such projects were few and restricted to areas in which land was mostly publicly owned. This was the case with the Thatcher government's most celebrated regeneration project, the Canary Wharf business district in the London Docklands.[lxxx] A fragmented, multiple ownership structure of land is still considered a serious constraint on the possibility of urban renaissance projects in British cities,[lxxxi] which is why the City of London, for example, is directing its regeneration efforts mainly in areas located outside the City's core, which have a greater proportion of government owned lands (and are also less burdened by historic preservation requirements).[lxxxii] Nevertheless, the policy of urban regeneration sometimes makes necessary the non-consensual assembly of land, even for what are mainly private enterprises, and, as stated, it generally enjoys a deferential approach by reviewing courts.[lxxxiii]

At the same time, however, and in contrast to the U.S. (although some American skeptics would argue otherwise),[lxxxiv] the Crown holds all landed property development rights in

Britain. In theory, private landowners have no development rights in their property until these are explicitly granted by a governmental agency. This gives local governments in Britain substantial latitude both in deciding whether to grant planning permissions and in negotiating with the developer over its planning obligations.[lxxxv]

An influential analysis of housing supply in Britain by economist Kate Barker considered the role of planning obligations (either requiring the developer to perform certain actions, or having him pay a sum to the planning authority that will then itself take the said action).[lxxxvi] The Barker report suggests that planning obligations actually fulfill two different economic roles: as a vehicle for compensating affected parties for the negative externalities arising from the development, and as an informal tax on land betterment.[lxxxvii]

Barker recommended that these two functions be separated so that planning obligations would be scaled back and restricted to dealing with the actual impacts of the development, whereas a new tax would extract some of the windfall gain that accrues to landowners. This tax would be passed on to the local community to help share the benefits of growth and manage its impacts. It would also allow the community to provide the infrastructure necessary to support housing growth, while still preserving private development incentives.[lxxxviii]

The British Government has adopted the Barker recommendations, and in December 2005 issued a consultation paper,[lxxxix] setting out the proposed features of the new tax, Planning-Gain Supplement (PGS), which “would capture a modest portion of the value uplift on land for which full planning permission has been granted.”[xc] Following the receipt of hundreds of responses, coming from a wide variety of stakeholders including local governments and developers, which were largely favorable of the idea but expressed concerns over many details regarding the practical application of the proposal,[xci] the Government has included further details on the PGS in its 2006 Pre-Budget Report,[xcii] and in December 2006 published three new consultation papers on elements of the design of PGS and the new approach to planning obligations, to be commented on until February 2007.[xciii]

The evolving principles of the PGS, which would not be legislatively introduced earlier than 2009, include its levying at a modest rate across the UK, its application to both residential and non-residential land, and the hypothecation of a significant majority of PGS revenues for local infrastructure.[xciv] Thus, Britain, which has experimented with land betterment taxes throughout the twentieth century,[xcv] seems on its way to using taxation once again to share the benefits of land value increments between the developer and the public.

Therefore, while landowners in Britain face the same threat of losing ground (literally) to private developments, the conflicting interests are at least more balanced there in that the project’s developer must share its gains with the public. In this respect, the public element of the use of compulsory purchase is more highly developed and authentic in Britain than is currently the case with eminent domain in the United States.

III. The Problems With Current Suggestions For Reform

The growing dissatisfaction with the current state of affairs, which has intensified following the *Kelo* decision, has prompted numerous calls for reform in American legal doctrine, beyond the aforementioned growing restrictions on the very use of governmental powers in the context of for-profit projects.[xcvi] In this Part, we briefly look at two categories of suggested reforms: first, calls to initiate institutional changes in the way developments or redevelopments are promoted and implemented, focusing attention on the planning tool of land readjustment; and second, suggestions to change the current legal "fair market value" formula. For each one of these types of suggestions, we concisely discuss their advantages but also illuminate their potential pitfalls, which make their implementation in the American context either practically infeasible or normatively undesirable.

A. Structural Changes for Developments Involving Land Assembly

An alternative mechanism for handling the collective action problems embedded in scenarios of land assembly and reorganization, which is prevalent in many European and Far East countries but has failed to gain currency in the U.S., is the planning tool of land readjustment.[xcvii]

Land readjustment was first introduced in Frankfurt, Germany, in 1902, when the City passed a law enabling it to coerce landowners to participate in what was purported to be a more efficient and viable reorganization of the lands for development. At the end of process, new tracts targeted for development were redistributed to previous property owners, whereas the City allocated to itself land required for public purposes (roads, public buildings, etc.).[xcviii] In Germany today, the reallocation of lands among private landowners is based on either pre-readjustment relative size or relative value. The amount of uncompensated taking of land for public purposes is limited to 30 percent of each original tract in the case of a relative size readjustment scheme.[xcix] This basic perception, which seeks to allow landowners to enjoy the land betterment fruits of top-down coordinated action according to what is deemed a fair internal allocation formula, while at the same time providing the government with its own land use needs, was embraced and implemented in the years that followed in other European countries, such as France, Finland, and Sweden.[c]

In contrast, Japan has traditionally emphasized the importance of centrally-coordinated land readjustment as a means of self-financing urban development or redevelopment through the government's ability to retain "cost equivalent" land parcels which it could later sell to recover the costs of providing infrastructure. This regime originated in the unique circumstances of early- and mid-twentieth century Japan, which faced enormous development challenges following major earthquakes, World War II, and its rapid economic development in the 1960s, but had no available public funds to otherwise finance urban infrastructure.[ci]

This original model, which was arguably made possible because of the Japanese culture's alleged tradition of group harmony and hierarchal obedience, has come under growing pressure in the decades that followed, as private property rights became more entrenched and the depiction of harmony and obedience in this context increasingly proved to be merely a myth.[cii] Accordingly, the land readjustment legal regime in Japan has gradually changed, and is currently based on gaining a special majority support of landowners (usually, 80 percent) within the designated project area as a pre-condition for carrying out the land readjustment. In spite of the substantial weakening of the possibility of holdout by a few defiant landowners, local governments--which are the primary advocates and initiators of such programs because of their dire needs for public lands--often struggle to gain such a majority support, with many readjustment plans getting stuck in the pipeline.[ciii]

In spite of some institutional initiatives[civ] and academic calls[cv] to introduce land readjustment in the U.S., legislatures have been generally reluctant to import this mechanism, for reasons which are not entirely clear. One reason may be that since land readjustment is based on some level of governmental coercion, this model does not seem as a sparkling replacement for the current form of coercion, thus making Americans, to paraphrase *Hamlet*, "rather bear those ills we have [eminent domain] then fly to others that we know not of [land readjustment]".[cvi]

A more substantial constraint, in our view, on the use of land readjustment according to the German model, for example, lies in the direct linkage that is kept, although in lesser force, between the landowners and the in-kind land allocations within the project's area. Especially in a reallocation system that is based on *relative* value or *relative* size, any change to the original plan with respect to the land use designation, location, or size of one of the new plots (changes which may become necessary because of planning needs as the project progresses) immediately implicates the relative status of the other plots, thereby threatening that any such change might cause the entire plan to go back to square one. This means that land readjustment schemes may be more efficient for relatively small-and medium-scale redevelopment projects which are more predictable and stable in nature, but may be problematic for large-scale or highly-dynamic projects which necessitate options for flexibility during the implementation process.

Similarly, other suggestions for institutional reforms in the governance structure of decision-making about a proposed for-profit project and dedication of lands for this purpose do not yet seem to succeed in providing a systematic and satisfying solution to the land assembly dilemma.[cvii]

B. New Formulas for Calculating "Just Compensation"

A different path followed by critics of current eminent domain law is that of amending the formula for the court-determined "fair market value" of the condemned property, at least in certain troubling circumstances.

Thomas Merrill thus suggested to award condemnees 150 percent of the fair market value when there are "suspect" conditions in the eminent domain process, such as a high subjective value for the land, a potential for rent-seeking by the government or interested third parties, or fear of a deliberate bypass of potential market purchases.[cviii] However, the incentive structure under such a rule of thumb of increased compensation is not likely to improve dramatically.[cix] Although such a regime might have a somewhat greater deterrent effect on governments, it may still result in under-compensation, or at other times, in over-compensation for landowners (thus potentially causing the failure of socially desirable plans). At any rate, such a regime does not create a reliable financial link neither to subjective land values nor to the risks and rewards of the planned project.

A different route followed by several authors is to base the compensation amount on a self-assessment made by the landowner, with the purpose of reflecting the subjective value that the owner places on his property. To avoid the obvious tendency to strategically over-estimate the property, these authors have designed accompanying deterring mechanisms to ensure genuine evaluations. One such mechanism is found, though somewhat implicitly, in Saul Levmore's work on self-assessment.[cx] Levmore, concerned with the cumbersome process of property evaluations for property tax purposes, called to shift to a system of self-assessment. To penalize against strategic assessments (in this case, under-assessments), he suggested to publicize the periodical self-assessment of the property, and to allow any willing buyer (including the government, for that matter) to take the property against payment of the owner's declared amount.[cxi]

More recently, Lee Anne Fennell, dealing directly with the problem of just compensation, and especially in the context of eminent domain resulting in re-transference to private hands, has offered to implement Levmore's insights but to actually reverse the order of events, by designing an opt-in mechanism to allow for such takings in exchange for tax benefits.[cxii] According to this proposal, when paying their annual property taxes, property owners would be able to check off a box indicating their choice to permit the property to be taken for private transfer purposes. Then, the owner would select a private valuation of his property for such a taking, expressed as a percentage between 100% and 200% of the assessed property value. The higher the percentage selected, the smaller the tax break, with the largest possible tax break achieved by making the property available at 100% of the governmentally-assessed value.[cxiii]

Following a somewhat different pattern, Abraham Bell and Gideon Parchomovsky advocate using self-assessment for all cases of eminent domain.[cxiv] Their counter-strategic mechanism is designed as sticks as opposed to Fennell's carrots. Under their proposed mechanism, once the government announces its plan to condemn a certain land, the landowner is asked to report the value he attaches to the property. Then, the government decides whether to take the land at the said price, or to forego its plan. In the latter case, two restrictions are imposed on the property owner: (1) throughout his lifetime, he will not able to transfer the property for less than the self-reported value (adjusted for housing-index), and (2) his property tax liability will be based on the self-reported valuation (after discounting certain peculiarities of property tax assessments).[cxv]

While these self-assessment models are innovative and intriguing, they do seem to possess certain inherent difficulties that threaten their practical viability. The inevitable need to design externally enforced counter-strategic rules runs counter to the alleged simplicity of self-assessment, so that it is not entirely clear whether the advantages are not more than offset by such new forms of governmental and legal monitoring. In addition, the more that these suggestions are willing to introduce flexibility mechanisms to avoid the possible harsh or seemingly unjust consequences of applying counter-strategic devices in certain unique circumstances,[cxvi] so does the model's level of complexity rises to a point in which its overall feasibility might be largely undermined.

Moreover, such self-assessment models may have an unintended distributive impact of relatively disadvantaging less well-off property owners (that usually also suffer from a corresponding inferiority in the political process). Once one places the determination of the property price in the hands of the property owner, especially against the background of a proposed governmental plan for which the power of eminent domain is sought, it seems only natural that the owner would be tempted to include not only his pre-project subjective valuation of the land, but also a speculative component which would try to capture a portion of the *post-project* land value. Here, however, the level of the landowner's risk-aversion in the face of uncertainty about whether the government would elect to take the land and the counter-strategic "fines" that follow in case of government withdrawal would gravitate less well-off landowners, whose land is their sole material asset, towards risk-aversion and lower self-assessments. In contrast, land speculators that have multiple holdings and are better able to spread risks would state much higher prices, especially when their land is strategically located so that the governmental project could not be implemented without taking their specific tract. Thus, the benignly-motivated self-assessment models might inadvertently work to the detriment of the simple-rank landowners, the taking of whose lands in favor of powerful corporations is often the paradigm of popular and academic resentment toward current eminent domain practices.[cxvii]

In sum, whereas these and other suggested models for amending the "fair market value" formulas deserve careful consideration,[cxviii] they do not yet seem to provide a systematic solution to the current problems with eminent domain law. One main reason for this is that these suggestions do not look for guidance in what we think is actually the most obvious place: the real post-project market.

IV. The Proposed Mechanism: A Special-Purpose Development Corporation

A. Uncoupling Taking and Just Compensation

The circumstances of takings in the course of land assembly for economic development vary considerably. As mentioned in Part I, some landowners place an exceptionally high emotional value on their land, for which they are not compensated, while others expect a price that reflects not only the land's market value but also the harm caused to their sense of autonomy.[cxix] Moreover, it is exceedingly difficult to distinguish a landowner's opportunistic holdout behavior, against which policy measures may be justified, from legitimate bargaining. While some development projects furthermore may be promoted by benevolent public authorities, one cannot rule out scenarios in which eminent domain proceedings are initiated by opportunistic private developers who are motivated by the below-market compensation to current landowners. The specter of a corrupt official promoting a project that is not truly welfare-enhancing with a view to deriving private gains should not be dismissed either.

How, then, does one place the eminent domain circle in the market square? We propose a new approach to eminent domain that is based on a corporate finance perspective. To this end, we call for separating the two phases of eminent domain – namely, taking and just compensation.[cxx] We argue that the taking phase resembles a notional incorporation of a firm. This phase would remain an involuntary non-market transaction. The compensation phase, however, would be market-driven. Implemented through a special-purpose corporation whose securities would be offered to condemnees, this phase will transform landowners' real interests in land into financial interests in a firm. Market mechanisms will be able to generate a more accurate assessment of compensation for takings and thus greatly diminish the current injustice of the legal "just compensation" regime.

B. Reconceptualizing Taking as Incorporation

Consider the taking phase. In his classic article *The Nature of the Firm*,[cxxi] Ronald Coase observed that firms are solutions devised to overcome market failures – in particular, when parties fail to reach a contractual agreement because transaction costs are too high. Common sources of transaction costs include the time and other resources needed for negotiation as well as parties' bounded rationality. More importantly, parties may fear that the other party would behave opportunistically by leveraging informational superiority or other forms of power. In such cases, a market failure ensues. People wishing to pool together assets for profitable projects would be unable to achieve this goal based on contracts alone. In Coase's view, firms help solve this market failure as they allow for resources to be allocated by fiat rather than by agreement. Firms were thus likened to "islands of conscious power," surrounded by an ocean of contracts, which is the market.[cxxii]

Coase's insight later was developed by Oliver Williamson. Williamson identified a major source of transaction costs in opportunism, defined as "self-interest seeking with guile, to include calculated efforts to mislead, deceive, obfuscate, and otherwise confuse."[cxxiii] As hierarchical organizations, firms could facilitate asset-specific investment that would not otherwise take place for fear of opportunistic behavior. Law and economics scholars continue to elaborate different nuances of this idea.[cxxiv] The common thread running through this strand of economic thought is that the consolidation of assets in a single entity that is subject to hierarchical governance is key to overcoming opportunism. Firms concentrate the assets they need for their operations in separate legal entities, namely, corporations. In exchange, equity investors receive non-fixed claims against the corporation in the form of shares.

The justification for takings in economic development projects requiring land assembly lies primarily in the likelihood of market failures due to collective action problems, high transaction costs, and opportunistic behavior in particular. Such market failures are not unlike the failures invoked in the economic theory of the firm. Inasmuch as one may feel sympathy for Susette Kelo and her parallels in the Atlantic Yards project, one can hardly deny that their refusal to surrender their property might also stem from "self-interest seeking with guile." Exercising eminent domain powers thus resembles an incorporation by the government of all landowners with a view to bringing all the critical assets under hierarchical governance. Actually establishing a corporation for this purpose and transferring land parcels to it thus would be merely a procedural manifestation of the substantive economic reality that already takes place in eminent domain cases.

The difference between regular incorporation and the notional incorporation (or an actual one under our proposal) in eminent domain cases is that the former is voluntary whereas the latter is not. One should thus bear in mind, that we do not question whether eminent domain should be exercised for promoting large-scale economic development projects. This issue lies beyond the scope of this Essay, having been approved as a constitutional matter in *Kelo*. Our proposal is consistent with this view and, since we part way with the current legal regime in what regards the implementation of just compensation, may actually draw support from both the conservative and liberal wings. Coupled with our proposal for implementing just compensation, the current model may support the type of governmental intervention and vertical coordination validated in *Kelo*.

C. Introducing the Special-Purpose Development Corporation

We now come to the gist of our proposal, namely, a new mechanism for implementing just compensation based on a special-purpose corporation. This section presents a skeletal scenario for the working of this mechanism, the features of which are elaborated in the following sections.

We propose that a public authority (typically, a municipal agency) exercising its eminent domain powers for an economic development or redevelopment project incorporate a Special-Purpose Development Corporation (SPDC) for that project. This corporation may be set up as a subsidiary of the municipality's regular development corporation, to which the municipality will have delegated its eminent domain powers. For instance, in the *Kelo* case, after the City of New London delegated its eminent domain powers to the New London Development Corporation (NLDC), the latter negotiated a 99-year ground lease for $1 with Boston-based developer Corcoran-Jennison. Under our proposal, NLDC would have set up a subsidiary as a Special-Purpose Development Corporation for the Fort Trumbull municipal development project.

Next, the municipality or its designated representative would exercise the city's eminent domain power to take the private properties and then grant certain rights in the land – say, a 99-year ground lease for $1 – to the SPDC. These rights would be the SPDC's sole material asset.

At this point, our proposal calls for a significant departure from the current state of affairs. Landowners whose land was condemned would have the choice of two forms of compensation: (1) just compensation under current law, which is based on the pre-project fair market value; or (2) securities[cxxv] in the SPDC in proportion to the landowners' contribution. From a financial point of view, this would be equivalent to offering landowners an option to purchase SPDC securities for the equivalent of the legal just compensation, while at the same time granting them the sum needed to cover the purchase cost (known as the "strike price"). The SPDC would emerge from this stage with several – quite likely numerous – shareholders.

Next, we envision the SPDC negotiating land rights with the private developer who initiated the project or auctioning its land rights. In many cases, the sole buyer would be the same developer. If a bidding war ensued among several private developers, it would benefit the SPDC and its shareholders. Next, the SPDC would distribute the net proceeds from the sale as dividends to its shareholders. In the final stage, the SPDC would dissolve when its role was finished.

D. Restructuring Just Compensation as a Financial Option

Having laid out the basic scenario for the working of the SPDC, we next elaborate particular features of this mechanism. The following subsections discuss general design principles, some issues concerning corporate governance of the SPDC, and considerations from landowners-turned-shareholders' perspective.

1. General Design Considerations

Market-Based Just Compensation. The first major design consideration for the proposed SPDC mechanism is the goal to bring just compensation in appropriate eminent domain cases closer to the social-welfare optimum. By overcoming the anticommons-type market failure, the SPDC will constitute a sole owner of the land necessary for the project. As a sole owner, the SPDC will be in a better position to negotiate at arm's length such that the consideration for the land would reflect its actual value for the future project without the heavy discount due to the anticommons problem.[cxxvi] Furthermore, the SPDC, as a sole owner and unlike the dispersed landowners, will be able to hold an auction for the land rights. The proposed mechanism will thus harness the market's powerful price system to generate better signals about the true economic value of the condemned land.

Only (for-profit) development projects that are truly social-welfare increasing consequently would go forward. Critically, only such welfare-increasing projects will be initiated in the first place and will be submitted to public authorities with a plea to exercise eminent domain powers because developers will know that they will have to bid a price, which is not dampened by market failures. In the least, developers and other potential bidders for the assembled land will know that they should bid a price, which is close to their best assessment of the economic value of this land. Only projects whose value to developers exceeded this threshold would be initiated.

Our model thus suggests a significant modification to the just compensation component of eminent domain. Under current law, this compensation, notwithstanding the title "fair market value," bears only a weak relation to market conditions. We propose to link this compensation more closely to the true market value of condemned land. In tandem, the aggregate proceeds likely will be greater than the legal compensation under current doctrine. In light of the general view that current law leaves landowners under-compensated, the proposed mechanism will be, by construction, also more just than current legal "just compensation."

Piggybacking Existing Law. The second major design consideration of this proposal is to advance a workable solution by relying as much as possible on existing legal infrastructure. In particular, the conceptual similarity between taking for land assembly in for-profit projects on the one hand and the concentration of critical resources in business corporations on the other hand points to the potential of corporate law to provide well-tested tools for facilitating such an enterprise. Highly-developed doctrines and rules in corporate and securities law can be utilized to mitigate the problems that currently haunt eminent domain. The most important tool, of course, is the corporation's separate legal personality. For the participants in the enterprise (called "members," "shareholders," or any other title), incorporation creates a separation between property interests and financial interests.

Vesting property interests (ownership) in the corporation overcomes transaction costs of the sort that Coase and Williamson pointed out; it allows for interests in the corporation (shares) to be fungible and transferable; it enables members to enjoy limited liability; and it facilitates putting the amalgamated assets under professional management.[cxxvii] Subjecting the amalgamated property under central management in the firm also engenders new problems, however, generally known as the agency problem.[cxxviii] Corporate law has developed an effective set of means for mitigating this problem, which our proposal can piggyback.[cxxix]

In order for landowners actually to benefit from the higher value of the entire land, it is not enough that the SPDC could negotiate with potential buyers as the land's sole owner. The land's higher value when assembled must trickle down to its former owners. In this context too, the proposed mechanism takes advantage of existing infrastructure of financial markets. The SPDC shares of landowners who elected to receive them will be transferable. The SPDC likely will be a public corporation whose shares could trade on a stock market. The share price thus should reflect their true economic value as the net present value of future corporate profits. In the setting we propose for the SPDC, this net present value will be determined by the proceeds from selling the land rights minus operation costs, which would be minimized.[cxxx] After SPDC securities are distributed to landowners but before the sale of the land is effectuated, the price of the securities will reflect the market's best assessment of the land plot's value for the planned project and all other publicly available information.[cxxxi]

Our proposal bears certain similarities to securitization transactions. In such transactions, the owner of numerous yielding financial assets (the "originator") – e.g., mortgage-backed loans, credit-card accounts, auto loans, etc. – pools them together in a separate legal entity.[cxxxii] This entity, called a Special Purpose Vehicle (SPV), may be a corporation, a trust, or other entity and is designed to be detached from the originator's financial risk (referred to as "bankruptcy remoteness"). While similar in principle, these assets nonetheless have idiosyncratic risks. By pooling these assets together in the SPV, the originator is able to generate a stable, and thus more highly valuable, stream of proceeds, against which she can issue securities that represent a fractional interest in the SPV. The SPDC too will pool together idiosyncratic assets and its securities will represent a fractional interest in its future stream of income.

A Hybrid Regime. The proposed mechanism thus would create a hybrid of regulatory and market-based legal regimes. The government would impose on landowners the decision about the assembly of land and about its use according to its judgment on the socially desirable uses of the land. But the government would not impose a price, such that the allocation of land and the compensation for infringing on property rights could be market-driven.

There are precedents for such hybrid regimes. For instance, modern environmental protection regulation sometimes features such a hybrid in the form of tradable emission rights.[cxxxiii] In the first stage, the government exercises its regulatory powers and imposes certain performance requirements according to its judgment on the socially acceptable level of pollution. Yet the rights/duties under such a regime – e.g., emission units or "allowances" – are tradable. In the second stage, private market transactions take place. Market forces thus may lead to an optimal allocation of these rights such that social welfare may be maximized.[cxxxiv]

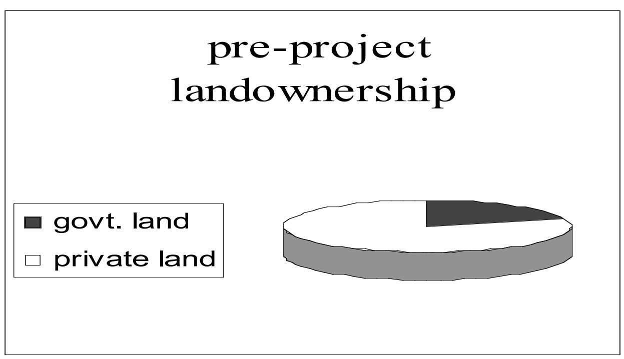
Special Government Allocation and Tax Aspects. The present proposal entails certain advantages from a tax policy perspective. Recall the basic dilemma that is the genesis of our work: Who should enjoy – and to what extent – land value appreciation resulting in large part from the governmental act of consolidating and reorganizing fragmented rights in land. Our proposal suggests a middle ground between avoiding too harsh an infringement of property rights and recognizing the essential role that the government plays in coordinating the collective action.

The latter consideration may justify taxing the landowners for this substantial governmental "giving" in the specific context of land assembly, without implicating the more general question of taxing land use regulatory benefits. Issuing a certain additional amount of shares in the SPDC to the government (beyond shares issued in exchange for government land that would be turned over to the SPDC) may serve as a form of taxing mechanism.

Allocating SPDC shares to the government (or to its development corporation) would reward it for its efforts and provide it with an immediate source of capital for funding the up-front public expenditures involved in the development project, including the setting up and administration of the SPDC. Such share allocation can in appropriate cases replace or supplement current governmental financing schemes, such as Tax Increment Financing.[cxxxv] This would be somewhat akin to the suggested PGS in England. Unlike the PGS, however, such additional share allotment would not impose a direct monetary burden on the landowners-turned-shareholders. Even more importantly, such allotment would not impose an additional, sometimes stealth, tax on the general population.

Accordingly, the amount of shares thus allocated to the government could be based on the legislature's general evaluation of the overall public costs typically involved in laying the ground (both physically and financially) for redevelopment. As a very general rule of thumb, we believe that an allocation at a rate somewhere around five percent of the overall SPDC shares would create the proper incentives for the government, while it would at the same time properly and justly preserve the financial interests of the landowners-turned-shareholders.

Thus, the transition from landownership in the fragmented area into shareholding in the SPDC owning the unified land will result in the initial allocation of shares to private landowners who wish to join the SPDC; shares to governmental entities for publicly-owned lands; the abovementioned special allocation of shares to the government; and shares acquired by the government through payment of legal fair market value (FMV) to landowners who decide not to opt-in to the SPDC. This initial transition into the SPDC may therefore look as follows:



eminent domain +
SPDC incorporation

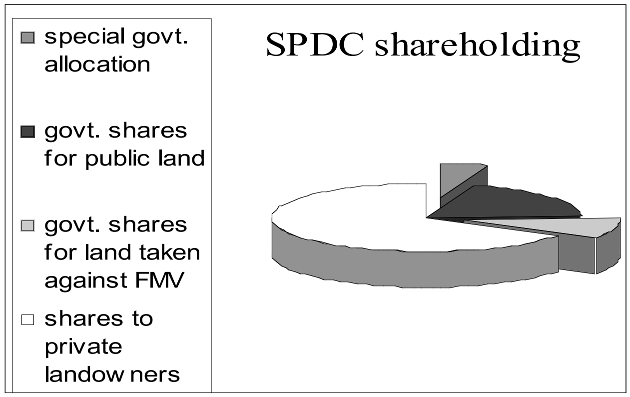


Chart 1
Turning Landowners into Shareholders

2. *Corporate Governance*

This subsection discusses the optimal corporate governance for the SPDC. Thus far, we have assumed for convenience that the SPDC would be a regular corporation that would take advantage of the standard corporate form. Here we argue that the disadvantages of the standard corporate form's flexibility dominate in the present context and call for adopting a more restricted form that is inspired by a structured finance approach.

The corporate form under modern law is an exceedingly flexible framework. There are several different forms of incorporation (a regular corporation, limited liability corporation, limited liability partnership, and so forth); the terms of incorporation, as reflected in the corporate bylaws, can be designed according to the incorporators' desire; there are very few mandatory rules of behavior. In particular, standard business corporations today are free to engage in any lawful business. Coupled with the perpetual existence of the corporation as a legal entity separate from its members, the corporate form represents an impressive success story of legal technology.

Although corporations, as firms, purport to overcome market failures in purely contractual transactions they are themselves not free of failures. Corporations are largely premised on a contractual basis, be it the bylaws or enabling corporate law provisions.[cxxxvi] Due to inevitable information incompleteness, the corporate contract too suffers from incompleteness, which, in turn, renders power to parties with superior information and gives rise to the agency problem.[cxxxvii] In a corporation with numerous dispersed shareholders, power lies mainly in the hands of management; in corporations with a dominant (majority) shareholder, the latter enjoys superior power.[cxxxviii] To keep this power in check, corporate law has developed special doctrines – primarily the duty of loyalty, and a whole set of ancillary rules. These rules purport to keep less powerful parties (mostly small shareholders) sufficiently informed and the more powerful parties (the "agents") – away from conflicts between the company's best interest and their own private interest. These rules are accompanied by structural means – most importantly, independent directors on the board and on sensitive committees.

Which corporate governance framework is most appropriate for the SPDC? In principle, a regular corporation would do, especially if it complied with certain extra-legal corporate governance requirements set by stock exchanges, e.g., for a majority of independent directors on the board.[cxxxix] Consider, for instance, situations in which the SPDC has a dominant shareholder. This dominant shareholder may be the government, thanks to former holdings of large government land tracts that were turned over to the SPDC. Such dominant shareholder may also be the developer herself, who had purchased land parcels in the project area before initiating the project.[cxl] In the transaction of selling the entire land tract to a developer, the SPDC's majority shareholder thus may be in a conflict of interest with regard to the price. To prevent conflicts of interest in such "affiliated party transactions" from harming the corporation and its minority/public shareholders, corporate law sets forth rules for full disclosure of material information and a requirement that corporate decision be taken by non-affiliated parties.[cxli]

This may not suffice, however. The fundamental premise of corporate law is that companies should be allowed, if not encouraged, to take up every risky project that their managements believe in good faith would be profitable. This broad and flexible objective may be inconsistent with the objective of condemnees, who seek to maximize the consideration for their taken land. We believe that to ensure condemnees' participation in SPDCs, the latter must have a single, well-defined objective – namely, to sell the land tract for the highest price within a certain time, following which they should distribute all proceeds as dividends and be wound up.[cxlii] While it might be possible to ground this objective in current corporate law,[cxliii] a more straightforward way will be to set this single objective and limited life span in the certificate of incorporation.

We therefore propose to adopt a structured finance approach to the SPDC such that it will be designed from the outset as similarly as possible to a special purpose vehicle (SPV) in a securitization transaction. Consisting mostly of detailed documents, an SPV is run essentially from the outside by an unrelated trustee, administrator, or the like. To ensure bankruptcy remoteness, the documents establishing the SPV provide for full ownership in the assets transferred to it from the originating company (referred to as a "true sale"), a single purpose (to use all proceeds for servicing the SPV's bonds), independence of directors from the originating company, and entrusting voting rights with a third party (to prevent changing the directors). An SPV might also have a limited life span in order to match the timing of its incoming proceeds with that of its obligations.[cxliv] The upshot is that SPVs take advantage of the corporate form's separate legal entity but beyond this feature, they are designed as automata more than as regular business firms.

An SPV-like SPDC need not have much more business activity than regular SPVs have. Following the transfer of rights in land to the SPDC, its administrators could auction these rights. Or, bidding for land rights may take the form of a tender offer for the SPDC shares. Should there be only one bidder – most likely, the developer who initiated the project – the outside directors would nominate a committee to negotiate with her. There is reason to believe that these negotiations will be reasonably beneficial to SPDC shareholders because these administrators could be special service companies who will want to build up a reputation for running SPDCs efficiently and profitably.

Thanks to their own stake in the SPDC's capital,[cxlv] local governments too will have a direct financial interest in maximizing the sale price. Over time, localities might even compete for a reputation of getting their constituents high values for their run-down properties. In any event, the fact that the SPDC in this configuration will not have an actual management represents an advantage in our view. The doctrines of corporate law notwithstanding, insiders (both managers and dominant shareholders) in U.S. corporations have substantial leeway for benefiting themselves in different ways as long as they follow proper procedures.[cxlvi] Finally, for an SPV-like SPDC, winding up the company subsequent to consummating the sale and dividend distribution would be equally straightforward.

3. *Landowners-turned-Shareholders' Perspective*

Suppose a jurisdiction adopted the present proposal. From the standpoint of condemnees contemplating whether to forego the legal compensation for SPDC shares, God is in the details: how many shares will they get; what will they do with no money and no property (especially when such property is their residence), etc. This subsection addresses these concerns.

The Key for Internal Share Allocation. Two conceptual criteria may be used for designing the key for internal share allocation in the SPDC to former landowners: the physical area of condemned land (the "physical criterion") and the value of condemned land (the "*ad valorem* criterion"). Such a key could be based solely on one criterion or on some combination of the two. According to the physical criterion, condemnees will receive SPDC shares in proportion to the ratio between their land and the total amount of land condemned for the project. In this scenario, Susette Kelo, together with ten other landowners of Parcel 4A in the Fort Trumbull Project, might have received 2.67 percent of the SPDC issued stocks for their 2.4-acre share in the 90-acre project. According to the *ad valorem* criterion, condemnees will receive SPDC share in proportion to the ratio between the pre-project economic value of their land and the total value of the entire plot for the project. Respectively, Susette Kelo might have received stocks based on her $123,000 worth of contribution to the SPDC capital, if the pre-project value were to be used.

The physical criterion's main advantage is its simplicity and clarity. Using this criterion alone to calculate the amount of shares to be issued is a straightforward task. All that is needed is an objective measurement of the area of condemned land. This information is usually available well in advance, and disputes about it can be resolved quickly and inexpensively by hiring a surveyor. Using this criterion as a sole key further can be justified on substantive grounds. In a typical for-profit (re)development project, all preexisting buildings and other fixtures are razed. Consequently, all that an individual condemnee contributes (unwillingly) to the project is her most basic ownership rights in land. The choice to receive SPDC shares thus may be seen as a decision to invest in the SPDC by contributing capital in kind. People who contribute more land would receive proportionately more shares and vice versa.

The problem with the physical criterion is that it considers only the condemnee's contribution and ignores her loss. In particular, this criterion ignores potentially large differences in the value of condemned parcels in light of their pre-project nature and use. Using this criterion alone therefore may undermine the goal of giving condemnees a more just compensation.[cxlvii] While it may be possible to augment the amount of shares issued by taking into account the pre-project properties of the condemned land, such a step would deprive the physical criterion of its simplicity advantage.

In what regards its advantages and disadvantages, the *ad valorem* criterion is a mirror image of the physical criterion. As it is often based on an assessment of economic value in the absence of a directly comparable arm's length transaction, the use of the *ad valorem* criterion is highly discretionary and therefore much more likely to be disputed. Should disputes of this kind be too numerous the actual shareholding structure of the SPDC might remain uncertain for a long time – a situation that is undesirable because such uncertainly likely will harm the SPDC's market value. Separately, adopting the *ad valorem* criterion entails making another policy choice – namely, whether the value, which is used as a basis for calculation, should be the pre-project or the post-project value of the particular parcel.

We believe that the key for share allocation in the SPDC should be based on the pre-project *ad valorem* criterion. As noted, using the pre-project *ad valorem* criterion will avoid the injustice entailed by disregarding the condemnee's loss. Since the goal of our proposal is also to increase the justice of eminent domain it would be difficult to avoid this criterion merely for reasons of administrative convenience. Using the pre-project value of the condemned land will create a seamless interface between the proposed mechanism and existing eminent domain law and practice. That is, the election decision condemnees will face will have a single economic denominator: either they receive monetary compensation according to the pre-project value under current doctrine or they receive SPDC shares in proportion to a capital contribution of the same amount. This election is economically equivalent to a rights offering granting condemnees an option to purchase SPDC share for up to their legal just compensation.

A Public Offering. The SPDC mechanism's extensive reliance on existing legal mechanisms will begin with the offer to participate in this enterprise. Under established rules concerning public offerings of securities, the offer to condemnees to choose between legally mandated just compensation and receiving SPDC shares would be deemed a public offering that requires filing a registration statement under the Securities Acts. This is because the group of offerees typically will consist of scores, if not hundreds, of landowners,[cxlviii] and in virtually all cases, these offerees will not have all the material information necessary to evaluate the securities.[cxlix] The financial scope of typical redevelopment projects – both in terms of total value and of the value of particular condemned parcels, together with the fact that many condemnees likely will be low- to middle-class individuals, indicates that an exemption under Regulation D will not be available.[cl] Depending on the circumstances, however, some offerings might come under the umbrella of purely intra-state offerings.[cli]

The upshot, that SPDC shares offerings should be accompanied by filing a registration statement with the SEC, is beneficial in our view. Granted, this regulatory requirement will increase the transaction costs of the SPDC mechanism – both directly, through legal and other incidental expenses, and indirectly, due to greater exposure to liability. In tandem, however, an SEC filing (or a filing with state securities regulators) will furnish market professionals with the information necessary to evaluate the project and the SPDC shares. This will benefit landowners in several ways. Among other things, landowners consequently will be able to make an informed decision whether to waive their legal compensation for receiving SPDC shares. Second, the availability of information will facilitate the development of a market in SPDC shares – at the very least, an over-the-counter "pink sheets" market – which will increase the liquidity of these shares and hence, their value. It may be desirable to promulgate special regulations on such offers with certain exemptions from full-fledged prospectuses.[clii] Yet the basic principle, that offerees of securities deserve protection through full disclosure, will protect landowners from excessive taking and will facilitate trading in their SPDC securities.

Financing. One of the major advantages of the present proposal is that it does not impose an excessive financial burden on condemnees who will wish to exercise their option to purchase SPDC shares. To appreciate this point, consider proposals made in a somewhat similar context of reorganization in bankruptcy under Chapter 11 of the Bankruptcy Code.[cliii] The basic problem in large-scale reorganizations[cliv] is that although the firm's (liquid) assets do not suffice to satisfy senior creditors' claims, junior creditors and even equity-holders demand, and receive, claims against the reorganized firm, ostensibly in contrast to the absolute priority rule. A large literature, which is beyond the present scope, debates the optimal mechanisms for corporate reorganizations.[clv] At bottom, the conflict among different classes of claimants arises from disagreement over the value of the reorganized firm – a conflict that is partly genuine, due to unavoidable uncertainty, and partly stems from strategic behavior.[clvi]

To overcome this conflict, Lucian Bebchuk proposed an option-based scheme, under which the most junior claimants would be given an option to buy out the claims superior to theirs at a price named by the superior claimants.[clvii] Philippe Aghion *et al.* commended this proposal as "ingenious" yet pointed out that junior claimant who will want to exercise their options will face liquidity constraints because they will have to raise the funds for buying out the senior claims.[clviii] As a way around this problem it was suggested to create a market where such options could be traded.[clix]

The SPDC mechanism resembles Bebchuk's options approach in several respects. To begin, in both contexts there are uncertainty and conflict over the value of the entire mass of assets. Both proposals give parties an option to buy into a project based on their own evaluation of it. Both proposals further rely on the market to price these options and thus provide reliable signals about the profitability of the options.[clx] Finally, as in Bebchuk's proposal, even if the return on the SPDC shares (through dividends and/or market appreciation) turned out to be lower than the legal just compensation, landowners-turned-shareholders will not have a basis for complaint because they voluntarily chose this form of compensation.

The SPDC mechanism has an advantage over Bebchuk's options, however, as it does not feature the liquidity constraints that the latter entail. The option under our proposal is not to buy out other claimants, for which new funds may be needed, but rather to choose shares over legal compensation. The financial source for purchasing SPDC shares will be found in the waiver of the legal compensation. Moreover, as active trading in SPDC shares may emerge, condemnees who will need to find an alternative residence or business on an expedited basis will be able to use their shares as collateral or sell some shares while keeping the rest, should they believe that their value will appreciate.

V. CONCLUSION

Our proposed model opens a new promising route for creating the right incentives for private developers and for public authorities to exercise eminent domain powers for land assembly only in development projects that are truly welfare enhancing. Also, whereas our mechanism does not purport to ensure that all parties involved will always be completely satisfied (given also the coercive nature of the land assembly through eminent domain and the potential obliviousness to idiosyncratic subjective land values), it does offer a significant improvement on the issue of fairness and justice toward simple-rank landowners.

The corporate structure, which largely solves the anticommons dilemma by denying each landowner the effective right of veto but at the same time providing her with sophisticated defenses against majority abuse, may have a considerable potential in solving a host of collective action dilemmas pertaining to many other issues concerning land use and development. For instance, one may think of a scenario in which neighboring landowners find themselves trapped in a deadlock over a smaller-scale self-initiative for joint improvement or redevelopment of their properties, one in which the government is not initially involved. In such case, it is possible to conceive of a mechanism in which the neighbors could hold an internal voting, and if a certain special majority threshold would be passed, they would be able to turn to the local government and request it to carry on a process which will follow, mutatis mutandis, the principles of coordinated land assembly and the creation of an SPDC, with such a special majority vote creating the presumption of a "public use" which justifies governmental intervention. The corporate and securities law mechanisms elaborated in Part IV will be instrumental in preventing the exploitation of such a possible mechanism as a mere pretext for majority abuse or for a forced cheap group buy-out of a disenfranchised minority landowner. We leave the discussion about the pros and cons of such a possible extension of our proposal for future research.

Endnotes

[i] 125 S. Ct. 2655 (2005).
[ii] U.S. CONST. amend. V, § 4.
[iii] For a survey of the wall-to-wall criticism of *Kelo*, see Abraham Bell & Gideon Parchomovsky, *The Uselessness of Public Use*, 106 COLUM. L. REV. 1412, 1423-26 (2006) (arguing against the critics that *Kelo* conforms to settled law about government powers with respect to property, and that the just compensation requirement makes eminent domain rather less pernicious than other forms of uncompensated governmental interventions). Some of the critics call for an outright ban on what they deem to be essentially private takings in disguise. *See*, *e.g.,* Charles E. Cohen, *Eminent Domain After Kelo v. City of New London: An Argument for Banning Economic Development Takings*, 29 HARV. J. L. & PUB. POL'Y 491, 547-51 (2006); Gideon Kanner, *Kelo v. City of New London: Bad Law, Bad Policy, and Bad judgment*, 38 URB. LAW. 201, 206-08 (2006).
[iv] Dana Berliner, Opening the Floodgates: Eminent Domain Abuse in the Post-*Kelo* World (2006), at http://www.castlecoalition.org/pdf/publications/floodgates-report.pdf (viewed on Feb. 1, 2007).
[v] *See* Patricia Salkin, *Swift Legislative (Over)Reaction to Eminent Domain: Be Careful what You Wish for*, 20(4) PROB. & PROP. 44 (2006); Castle Coalition, Legislative Action Since *Kelo* (Jan. 14, 2007), at http://www.castlecoalition.org/pdf/publications/State-Summary-Publication.pdf.
[vi] City of Norwood v. Horney, 853 N.E.2d 1115 (Ohio 2006).
[vii] Bd. of County Comm'rs of Muskogee County v. Lowery, 136 P.3d 639 (Okla. 2006).
[viii] *See infra* Part IB.
[ix] *Kelo*, 125 S. Ct., at 2658-60.
[x] *Id.* at 2660.
[xi] *Id.* at 2660-68.
[xii] Ellaine Stoll, *City Votes to Proceed with Property Seizures*, THE DAY (Conn.), June 6, 2006.
[xiii] Ted Mann, *Fort Trumbull Saga Ends on Costly Note*, THE DAY (Conn.), Aug. 23, 2006.
[xiv] *Id.* It should be noted that these additional funds came, as did most of the $73 million expended over the project's course up to that point, from the State Department of Economic and Community Development, which has largely underwritten New London's redevelopment efforts. *Id.*
[xv] Anne Saunders, *Kelo Urges NH to Restrict Powers of Eminent Domain*, THE UNION LEADER (Manchester, NH), Sept. 22, 2006, at A2.
[xvi] Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621, 667-79 (1998).
[xvii] The anticommons problem is obviously not unique to land. It may also deter, for example, scientific innovation, such as when granting patents in isolated gene fragments may hamper development of integrative biomedical products. Michael A. Heller & Rebecca S. Eisenberg, *Can Patents Deter Innovations? The Anticommons in Biomedical Research*, 280 SCI. 698 (1998).
[xviii] Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 74-77 (1986).
[xix] RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 55 (6th ed. 2003).

[xx] *See* Merrill, *supra* note xviii, at 97-98 (noting the high proportion of land assembly cases, and especially of public utilities, in the use of governmental eminent domain powers).

[xxi] Wendell E. Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL'Y REV. 1, 9-11 (2003).

[xxii] *See, e.g.*, Steele v. Missouri Pacific R. Co., 659 P.2d 217 (Kan. 1983); Cabletelevision of the Midwest, Inc. v. Gross, 639 N.E. 2d. 1154 (1994); Burlington Northern and Santa Fe Ry. Co. v. Chaulk, 631 N.W. 2d. 131 (2001). *See generally* 26 AM. JUR. 2d. Eminent Domain § 28.

[xxiii] RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 166-69 (1985).

[xxiv] Carol Rose, *The Comedy of Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 723-30, 762-66 (1986).

[xxv] For criticisms of these eminent domain-backed programs, and especially of their acute distributional adverse outcomes on members of low-income minorities, see JANE JACOBS, THE DEATH AND LIFE OF GREAT AMERICAN CITIES 270-90 (1961); BERNARD J. FRIEDAN & MARSHALL KAPLAN, THE POLITICS OF NEGLECT 24-25 (1975); Pritchett, *supra* note xxi, at 31-47 (noting that in cities across the U.S., urban renewal came to be known as "Negro removal"). *See also* Justice Thomas's dissenting opinion in *Kelo* , 125 S. Ct., at 2686-87.

[xxvi] INTERNATIONAL ECONOMIC DEVELOPMENT COUNCIL, TARGETED AREA REDEVELOPMENT 3-8 (2005).

[xxvii] *See* Rachel G. Bratt, Community Development Corporations and Other Nonprofit Housing Organizations: Challenges Presented by the Private Housing Market 8-11 (Lincoln Institute of Land Policy Working Paper, Aug. 2006) (on file with authors). For the work of Community Development Corporations (CDCs) and the comprehensive approach they take in rehabilitating neighborhoods, see also AVIS C. VIDAL, REBUILDING COMMUNITIES: A NATIONAL STUDY OF URBAN COMMUNITY DEVELOPMENT CORPORATIONS (1992); ALEXANDER VON HOFFMAN, HOUSE BY HOUSE, BLOCK BY BLOCK: THE REBIRTH OF AMERICA'S URBAN NEIGHBORHOODS (2003).

[xxviii] For the phenomenon of vacant lots and abandoned buildings that has reached crisis proportions in U.S. cities, and the negative effects of which that include increased crime, environmental and safety hazards, decrease in adjacent property values, and self-perpetuating disinvestments, see Michael A. Pagano & Ann O'M. Bowman, Vacant Land in Cities: An Urban Resource 1-3 (Brookings Inst. Survey Series, 2000); Lavea Brachman, *Vacant and Abandoned Property: Remedies for Acquisition and Redevelopment*, 17(4) *Land Lines* 1 (2005); ALAN MALLACH, BRINGING BUILDINGS BACK: FROM ABANDONED PROPERTIES TO COMMUNITY ASSETS 1-9 (2006).

[xxix] This was made possible by Section 121A of Massachusetts General Laws, which allows a local renewal agency to empower a charitable organization to carry out a redevelopment project and to employ the power of eminent domain for that purpose. MASS. GEN. LAWS Ch. 121A § 3 (1945).

[xxx] PETER MEDOFF & HOLLY SKLAR, STREETS OF HOPE: THE FALL AND RISE OF AN URBAN NEIGHBORHOOD 117 (1994).

[xxxi] *Id.* at 119-21.

[xxxii] *Id.* at 129-47, 154-158.

[xxxiii] *Id.* at 158-61. DSNI's activity later extended to the entire neighborhood's area. *Id.* at 161-67.

[xxxiv] For the CLT's structure and property attributes, see John Emmeus Davis, Shared Equity Homeownership: The Changing Landscape of Resale Restricted, Owner Occupied Housing 18-22 (National Housing Institute, 2006), available at http://www.nhi.org/pdf/SharedEquityHome.pdf.
[xxxv] *See supra* notes i-vii and accompanying text.
[xxxvi] *See*, *e.g.,* Symposium, *The Death of Poletown: The Future of Eminent Domain and Urban Development After County of Wayne v. Hathcock*, 2004 MICH. ST. L. REV. 837; Cohen, *supra* note iii; Kanner, *supra* note iii. *But Cf.* Bell & Parchomovsky, *supra* note iii; Nicole Stelle Garnett, *The Public-Use Question as a Takings Problem*, 71 GEO. WASH. L. REV. 934 (2003) (offering an interim "means-ends" scrutiny approach rather than a flat prohibition on certain types of projects).
[xxxvii] *See* 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, 18-31 (2006); ROBERT C. ELLICKSON & VICKI L. BEEN, LAND USE CONTROLS 845-54 (3d ed. 2005). For a critical analysis of an unusual transaction in which the American Electric Power Company (AEP) bought out the entire small town of Cheshire, Ohio, in 2002 to solve the problem of pollution from AEP's coal-fired power plant, see Gideon Parchomovsky & Peter Siegelman, *Selling Mayberry: Communities and Individuals in Law and Economics*, 92 CAL. L. REV. 75 (2004).
[xxxviii] Kelly, *supra* note xxxvii, at 31-33; STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 124-26 (2004).
[xxxix] *See* Nicole Stelle Garnett, *The Neglected Political Economy of Eminent Domain*, 105 MICH. L. REV. 101, 127-30 (2006).
[xl] *See* the project's website at www.atlanticyards.com (last viewed on Feb. 10, 2007).
[xli] In 2005, the City and the State agreed to commit $100 million each to help fund the project's infrastructure. In January 2007, the City announced it would add an extra $105 million in subsidy "for extraordinary infrastructure costs relating to the mixed use development." Eliot Brown, *Bloomberg's Budget Doubles Subsidy for Atlantic Yards*, N.Y. SUN, Jan. 30, 2007, at 3.
[xlii] Although FCRC's commitment to affordable housing within the project, including for current rent-stabilized renters, has softened some of the public criticism, neighborhood groups still contest the proposed arrangements, and have recently filed a claim in state court, arguing that these plans fail to meet state legislative standards. Andy Newman, T*enants Sue Agency over Brooklyn Project*, N.Y. TIMES, Jan. 13, 2007, at B3.
[xliii] Nichloas Confessore, *Atlantic Yards Enters New Phase, and Faces New Hurdle: Lawsuits*, N.Y. TIMES, Dec. 22, 2006, at B9.
[xliv]*Id.* See also Elaine Misonzhnik, *Getting Closer*, RETAIL TRAFFIC, Jan. 1 , 2007, at 13.
[xlv] *See* the group's website at www.developdontdestroy.org (last viewed on Feb. 10, 2007).
[xlvi] Confessore, *supra* note xliii, at 9.
[xlvii] *See* MARGARET JANE RADIN, REINTERPRETING PROPERTY 36-59 (1993).
[xlviii] Lee Anne Fennell, *Taking Eminent Domain Apart*, 2004 MICH. ST. L. REV. 957, 966-67; Garnett, *supra* note xxxix, at 109-10 (describing this type of insult as "dignitary harm").
[xlix] *See* Leonora LaPeter, *A Final Preservation*, ST. PETERSBURG TIMES, Sept. 19, 2004, at 1B.

[l] A vivid illustration of a land assembly holdouter, whose motives remain unclear, is depicted in a recent report in The Washington Post. Austin Spriggs and his wife Gladys own a 116-year-old townhouse in Washington D.C., which they bought in 1980 for $135,000 and they now use as an office for the family's small architecture firm. When developers began purchasing property along this area of Massachusetts Avenue near the Convention Center and Union Center in 2003, Spriggs refused to sell. While all his neighbors eventually sold their homes and businesses, Spriggs could not be persuaded, although he was offered payment of $2 to $3 million for his house, which was assessed for just under $200,000. The developers finally determined they would build around the townhouse a 12-story office building and an upscale condominium that will wrap the Spriggs house and tower above it. Meanwhile, the house has been secured at the developers' expense (adding about $600,000 in costs) and is monitored daily to make sure it does not slip off its tenuous base. The end of this holdout's story is not yet known, but according to the president of a Maryland-based pizza chain, Spriggs intends to open a pizza franchise just in time for the condominium dwellers and office workers who will move into the neighborhood during 2007. Lyndsey Layton, *A Solitary Stand at the Precipice*, THE WASH. POST, May 3, 2006, at A01.

[li] *See, e.g.*, POSNER, *supra* note xix, at 56 (viewing landowners as "subsidizing" their subjective values). *But see* Garnett, *supra* note xxxix, at 121-26 (arguing that this problem is largely overstated because actual compensation, given also relocation assistance laws, often exceeds formal "fair market value").

[lii] Fennell, *supra* note xlviii, at 962-67.

[liii] We do not address broader questions of "distributive justice" or "vertical equity" concerning the relevant society as a whole, and we doubt whether takings in general is an appropriate arena for addressing such policy issues. For a contrary view, see Hanoch Dagan, *Takings and Distributive Justice*, 85 VA. L. REV. 742, 767-78 (1999) (calling to incorporate an explicit component of "social responsibility" in defining the scope of landowners' rights in takings cases).

[liv] Merrill, *supra* note xviii, at 88-89 (depicting deliberate market bypasses through eminent domain).

[lv] *See, e.g.*, Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L. J. 385, 485 (1977); (viewing compensation as a pricing mechanism); Lawrenece Blume et al., *The Taking of Land: When Should Compensation be Paid?*, 99 Q. J. ECON. 71, 88 (1984) (describing the "fiscal illusion" by which an uncompensated project is presented as costless).

[lvi] William A. Fischel & Perry Shapiro, *Takings, Insurance, and Michelman: Comments on Economic Interpretation of 'Just Compensation' Law*, 17 J. LEGAL. STUD. 269, 287-88 (1988).

[lvii] *See, e.g.*, Deryl J. Levinson, *Making Governments Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 348-51 (2000); Garnett, *supra* note xxxix, at 138-43.

[lviii] *See, e.g.*, Daniel A. Farber, *Public Choice and Just Compensation*, 9 CONST. COMMENT. 279, 282, 289 (1992) (noting that somewhat ironically, the payment of compensation serves to buy-off the burdened property owners, which is the only other concentrated group that could have effectively resisted the plan); Daniel J. Kochan, *"Public Use" and*

the Independent Judiciary: Condemnation in an Interest-Group Perspective, 3 TEX. REV. L. & POL. 49, 80-82 (1998).

[lix] Kelly, *supra* note xxxvii, at 34-41. *But see* Christopher Serkin, *Big Differences for Small Governments: Local Governments and the Takings Clause*, 81 N.Y.U. L. REV. 1624, 1664-65 (2006) (calling to differentiate between various levels of government in testing these propositions, and arguing that small local governments, which are majoritarian homeowner-dominated in nature, do respond more clearly to the economic incentives of legal compensation requirements).

[lx] 348 U.S. 26 (1954) (upholding the use of eminent domain as part of the District of Columbia Redevelopment Act of 1945, which targeted "blighted" areas in southwest Washington D.C.).

[lxi] 304 N.W. 2d 455 (Mich. 1981) (per curiam) (validating the use of eminent domain by the City of Detroit of an entire neighborhood for the construction of a new General Motors plant). This decision was reversed by the Michigan Supreme Court in County of Wayne v. Hathcock, 684 N.W. 2d 765 (Mich. 2004) (holding that the condemnation of 1,300 acres for a private business park is invalid as a matter of state constitution).

[lxii] *See supra* note i.

[lxiii] For a fifty-state survey of such alleged abuses, see Dana Berliner, Public Power, Private Gain: A Five-Year, State-By-State Report Examining the Abuse of Eminent Domain (April 2003), available at http://www.castlecoalition.org/pdf/report/ED_report.pdf. One should recall, however, that some of the high-profile eminent domain legal controversies revolved around public plans that had different distributive goals. Thus, in Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984), the Supreme court validated the Hawaii Land Reform Act of 1967, which permitted residents of the small number of oligopolistic landowners in Hawaii to request for governmental condemnations of the property, and then to purchase the property for a nominal fee.

[lxiv] 304 N.W. 2d., at 469.

[lxv] *See, e.g.*, Amnon Lehavi, *Intergovernmental Liability Rules*, 92 VA. L. REV. 929, 948-52 (2006); Jonathan Schwartz, *Prisoners on Proposition 13: Sales Taxes, Property Taxes, and the Fiscalization of Land Use Decisions*, 71 S. CAL. L. REV. 183, 209-13 (1997-98).

[lxvi] For TIFs, see generally TAX INCREMENT FINANCING: USES, STRUCTURES, AND IMPACT (Craig L. Johnston & Joyce Y. Man eds., 2001).

[lxvii] *See* Rachel Weber, *Tax Increment Financing in Theory and Practice, in* FINANCING ECONOMIC DEVELOPMENT IN THE 21ST CENTURY 53, 54-57 (Sammis B. White et al. eds., 2003). For the legal validity of TIFs, see, e.g., In Re Request for Advisory Opinion on Constitutionality of 1986 PA 281, 422 N.W.2d 186, 191-96 (Mich. 1988) (rejecting the argument that TIF is a constitutionally impermissible diversion of school districts' tax funds). Some states do, however, limit the ability of redevelopment agencies to receive all tax increments generates from the project's area. *See, e.g.*, DAVID F. BEATTY ET AL., REDEVELOPMENT IN CALIFORNIA 212-18 (3d ed. 2004) (describing such mitigating constitutional and statutory provisions in California).

[lxviii] *See id.* at 175.

[lxix] *See* Michael Dardia, Subsidizing Redevelopment in California (Jan. 1998), available at http://www.ppic.org/content/pubs/R_298MDR.pdf; Richard Dye & David Merriman,

Does Tax Increment Financing Discourage Economic Development?, 47 J. URB. ECON. 306 (1999); Weber, *supra* note lxvii, at 63-65.

[lxx] 483 U.S. 825 (1987) (requiring an "essential nexus" between the exaction and the development's expected harm to its surroundings).

[lxxi] 512 U.S. 374 (1994) (imposing a "rough proportionality" requirement both in nature and in scope between the exaction and the anticipated impacts of the proposed development).

[lxxii] For a critique of the Court's exactions jurisprudence, see Mark Fenster, *Takings Formalism and Regulatory Formulas: Exactions and the Consequences of Clarity*, 92 CAL. L. REV. 609 (2004) (arguing that the Court's insistence on formalistic rules fails to address real-life land use needs).

[lxxiii] *See* Abraham Bell & Gideon Parchomovsky, *Givings*, 111 YALE L. J. 547, 590-608 (2001) (criticizing this reality and calling to impose a tax on certain types of land use regulatory benefits).

[lxxiv] [2005] ALL ER (D) 112 (Jan); [2005] EWHC 18 (admin).

[lxxv] Beyond the 60,000 capacity stadium, the mixed-use scheme included uses such as learning centers, new and furbished houses, general business space, shops, and leisure spaces. *Id.* at para. 5.

[lxxvi] *Id.* at paras. 19-20.

[lxxvii] Town and Country Planning Act 1990 s226(1) (s226(1) amended, s226(1a) added, and s226(2) repealed, by the Planning Purchase Act 2004 ss 99(1)-(4), 120 Sch. 9).

[lxxviii] In addition, Section 226(4) regards as "immaterial by whom the local authority propose that any activity… should be undertaken or achieved…," thus explicitly validating the plan's private implementation. For an elaborate discussion of these recent changes, see Richard Clayton, *New Directions in Compulsory Purchase*, J. PLAN. & ENVTL. L. 133 (Feb. 2006).

[lxxix] Other recent cases seem to express a similar deferential approach to compulsory purchase for land assembly. *See, e.g.*, R. (on the application of Hall) v First Secretary of State Potter v Hillington LBC, [2006] EWHC 2393 (QBD (admin)) (upholding a compulsory purchase order of lands to secure the completion of a public park by British Airways, and rejecting the landowner's contention that the order had a collateral purpose, in that BA has sought to escape an expensive option agreement it had previously signed with the landowner and acquire the land more cheaply).

[lxxx] For the warped history of the Canary Wharf project, see David L. A. Gordon, *The Resurrection of Canary Wharf*, 2(2) PLANNING THEORY & PRACTICE 149 (2001).

[lxxxi] *See* David Adams et al., Land Policy and Urban Renaissance: *The Impact of Ownership Constraints in Four British Cities*, 3(2) PLANNING THEORY & PRACTICE 195 (2002).

[lxxxii] Randy Gragg, *London's Large-scale Regeneration Projects Offer Community Benefits*, 18(4) LAND LINES 2, 5 (2006).

[lxxxiii] In another recent case, Pascoe v. First Secretary of State [2006] 4 All ER 1240, [2006] EWHC 2356 (Admin), the court held, in obiter, that the proportionality requirement, developed by the European Court of Human Rights and by English courts according to the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, and the Human Rights Act 1998, respectively, does not in

itself mandate a government to employ the “less intrusive means” for achieving urban regeneration, even if such means are practical but may adversely affect the implementation of the regeneration project in the public interest. *Id.* at paras. 50-86.

[lxxxiv] Gideon Kanner, *Making Laws and Sausages: A Quarter-Century Retrospective on Penn Central Transportation Co. v. City of New York*, 13 WM. & MARY BILL RTS. L. 653, 675-76 (2005).

[lxxxv] OWEN CONNELLAN, LAND VALUE TAXATION IN BRITAIN: EXPERIENCE AND OPPORTUNITIES 86 (2004).

[lxxxvi] Kate Barker, Review of Housing Supply – Delivering Stability: Securing Our Future Housing Needs, Final Report – Recommendations (Mar. 17, 2004), available at http://www.hm-treasury.gov.uk/media/0F2/D4/barker_review_report_494.pdf.

[lxxxvii] *Id.* at 65-66.

[lxxxviii] *Id.* at 65-67, 84-87.

[lxxxix] HM Treasury, Planning Gain Supplement: A Consultation (Dec. 2005), at treasury.gov.uk/media/F59/D3/pbr05_planninggain_449.pdf.

[xc] *Id.* at 10.

[xci] HM Treasury, Planning Gain Supplement: A Summary of Consultation Responses (Dec. 2006), at http://www.hm-treasury.gov.uk/media/53E/39/pbr06_pgs_summaryofresponses_220.pdf.

[xcii] HM Treasury, Pre-Budget Rep., Investing in Britain’s Potential: Building our Long-term Future (Dec. 2006), at http://www.hm-treasury.gov.uk/media/5CC/43/pbr06_completereport_1439.pdf.

[xciii] *See* HM Revenue & Customs, Valuing Planning Gain: A Planning-gain Supplement Consultation (Dec. 2006), at www.hmrc.gov.uk/consultations/value-planning-gain.pdf; HM Revenue & Customs, Paying PGS: A Planning-gain Supplement Technical Consultation (Dec. 2006), at www.hmrc.gov.uk/consultations/paying-pgs.pdf; Dept. for Communities & Local Gov’t, Changes to Planning Obligations: A Planning-gain Supplement Consultation (Dec. 2006), at http://www.communities.gov.uk/pub/926/ChangestoPlanningObligationsaPlanninggainSupplementconsultation_id1504926.pdf.

[xciv] HM Revenue & Customs, Valuing Planning Gain, *supra* note xciii, at 3.

[xcv] CONNELLAN, *supra* note lxxxv, at 79-90.

[xcvi] *See supra* notes iii-vii and accompanying text.

[xcvii] *See Generally* LAND READJUSTMENT: A DIFFERENT APPROACH TO FINANCING URBANIZATION (William A. Doebele ed., 1993).

[xcviii] Rainer Müller-Jökel, Land Readjustment - A Win-Win Strategy for Sustainable Urban Development (May 2004), available at www.fig.net/pub/athens/papers/ts14/TS14_3_MullerJokel.
pdf.

[xcix] *Id.* at 2-5.

[c] William Doebele, Introductory Remarks, Symposium, Tools for Land Management and Development: Land Readjustment 1 (Lincoln Institute of Land Policy, Mar. 21-22, 2002) (hereinafter Symposium, Land Readjustment), available at http://www.lincolninst.edu/pubs/dl/636
_doebele.pdf.

[ci] *Id.* at 2.

[cii] Andre Sorenson, Consensus, Persuasion, and Opposition: Land Readjustment Organizing in Japan, 3-8, Symposium, Land Readjustment, *supra* note c, available at http://www.lincolninst.edu/pubs/dl/645_sorensen.pdf.

[ciii] *Id.* at 18-19.

[civ] *See, e.g.*, Luciano Minerbu, Efforts Toward Land Readjustment Legislation in Hawaii, Symposium, Land Readjustment, *supra* note c, available at http://www.lincolninst.edu/pubs/dl/642_minerbi.pdf; Florida Legislative Committee on Intergovernmental Relations, Platted Lands 36 (Feb. 2003), available at http://www.floridalcir.gov/reports/plattedlands03.pdf.

[cv] *See* Michael M. Schultz & Frank Schnidman, *The Potential of Land Readjustment in the United States*, 22 URB. LAW. 197 (1990).

[cvi] William Shakespeare, Hamlet, act III, sc. 1, p. 50, ln. 1 (New York: Gramercy, 1991 [c. 1602]).

[cvii] In an unpublished paper, Michael Heller and Rick Hills suggest to establish a Land Assembly District (LAD), which would have the power, by a majority vote, to approve or disapprove the sale of the district's area to a developer or municipality seeking to consolidate the land into a single parcel, while also granting landowners a right to opt-out and receive current "fair market value" compensation. This proposed mechanism holds potential for overcoming the veto power problem resulting from over-fragmentation. Numerous crucial details are nonetheless missing from this proposal, among them are how the overall price would be divided between the different landowners, and whether the opt-out mechanism would exist even in case of a group refusal. In any case, the LAD model seems to be lacking the time-dynamic, market-driven components that we believe are present in our suggested model. Michael A. Heller & Roderick M. Hills, Jr., *The Art of Land Assembly* (unpublished manuscript, dated Jan. 28, 2004, on file with authors).

[cviii] Merrill, *supra* note xvi, at 90-93.

[cix] For a critical review of similar suggestions, see Garnett, *supra* note xxxix, at 146-48.

[cx] Saul Levmore, *Self-Assessed Valuation Systems for Tort and other Law*, 68 VA. L. REV. 771 (1982).

[cxi] *Id.* at 778-79.

[cxii] Fennell, *supra* note lii, at 995-96.

[cxiii] *Id.* at 997-98.

[cxiv] Abraham Bell & Gideon Parchomovsky, *Taking Compensation Private*, 59 STAN. L. REV. 809 (2007).

[cxv] *Id.* at 823-25.

[cxvi] For example, to prevent governmental abuse of their model, Bell and Parchomovsky suggest that the additional increment of property tax based on the self-assessment in case of governmental withdrawal from the plan can be paid not to the government, but can rather be donated to a charity of the owner's choice. *Id.* at 831-34. Such an option would necessitate, however, instating a new governmental monitoring mechanism to prevent "self-donation" or other acts of collusion.

[cxvii] This type of discrimination, resulting also from differences in political influence, is already present in many current eminent domain cases. In a study of governmental land acquisitions in the City of Chicago from 1962 to 1970, Patricia Munch found that owners

of low-value lands were systematically under-compensated, whereas owners of high-value properties were over-compensated compared to assessed market values. Patricia Munch, *An Economic Analysis of Eminent Domain*, 84 J. POL. ECON. 473, 485-88 (1976). *See also* Garnett, supra note xxxix, at 115-21.

[cxviii] *See also* James E. Krier & Christopher Serkin, *Public Ruses*, 2004 MICH. ST. L. REV. 859, 865-73 (suggesting to adjust the "fair market value" standard upwards to make up for an absence of implicit in-kind benefits for landowners, or to base the compensation on restitutionary principles deriving from the expected land value to the developer, as estimated ex ante by the court); Paul Niemann & Perry Shapiro, Efficiency and Fairness: Compensation for Takings (unpublished manuscript, dated Dec. 5, 2005, on file with authors) (calling for basing compensation to landowners on post-project values of non-taken lands in the surrounding community).

[cxix] *See supra* text to notes li-lii. More generally, Matthias Benz and Bruno Frey argue that people's well-being is affected by whether they can act independently, which is more highly valued, or are subject to decisions made by others – what the authors dub "market" versus "hierarchy" decision-making procedures. *See* Matthias Benz & Bruno S. Frey, *Being Independent is a Great Thing: Subjective Evaluations of Self-Employment and Hierarchy,* ECONOMICA (forthcoming 2007).

[cxx] *Cf.* Michael A. Heller & James E. Krier, *Deterrence and Distribution in the Law of Takings*, 112 HARV. L. REV. 997 (1999) (offering a four-way taxonomy of (no) taking / (no) compensation scenarios, based on the uncoupling of the normative principles of deterrence and distribution).

[cxxi] Ronald H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386, 388 (1937), reprinted in RONALD H. COASE, THE FIRM, THE MARKET, AND THE LAW 33 (1988).

[cxxii] *Id*. at 388 ([firms are seen as] "islands of conscious power in [an] ocean of unconscious co-operation like lumps of butter coagulating in a pail of buttermilk" (quoting D.H. ROBERTSON & STANLEY DENNISON, CONTROL OF INDUSTRY 85 (1923)).

[cxxiii] OLIVER E. WILLIAMSON, THE MECHANISMS OF GOVERNANCE 378 (1996); OLIVER E. WILLIAMSON, THE ECONOMIC INSTITUTIONS OF CAPITALISM 47 (1985) (same); *see* also OLIVER E. WILLIAMSON, MARKETS AND HIERARCHIES: ANALYSIS AND ANTITRUST IMPLICATIONS 6, 255 (1975) (same).

[cxxiv] *See* Henry Hansmann & Reinier Kraakman, *The Essential Role of Organizational Law*, 110 YALE L. J. 387 (2000) (arguing that the essential role of organizational law is to provide a mechanism for partitioning assets from the assets of managers and investors such that creditors would be willing to finance the firm); Edward B. Rock & Michael L. Wachter, *Islands of Conscious Power: Law, Norms, and the Self-Governing Corporation*, 149 U. PA. L. REV. 1619 (2001) (arguing that the raison d'etre of firms is to replace legal/contractual governance of relations with non-legal norms); Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247 (1999) (arguing that firms provide internal governance structures, dubbed the "mediating hierarchy," allowing individuals to profit from team production); *see* also Robert B. Thompson & D. Gordon Smith, *Toward a New Theory of the Shareholder Role: "Sacred Space" in Corporate Takeovers*, 80 TEX. L. REV. 261 (2001); D. Gordon Smith, *The Critical Resource Theory of Fiduciary Duty*, 55 VAND. L. REV. 1399 (2002).

[cxxv] To make clear, we use "securities" and "shares" interchangeably throughout this Essay.

[cxxvi] Not coincidentally, dispersed shareholders of a public corporation who face a hostile takeover bid may similarly benefit from legal mechanisms that reconstruct the position of a sole owner of the corporation. *See* Lucian A. Bebchuk, *The Sole Owner Standard for Takeover Policy*, 17 J. LEGAL STUD. 197 (1988).

[cxxvii] For a lucid discussion of these advantages of the corporate form, *see* ROBERT C. CLARK, CORPORATE LAW 1-24 (1986).

[cxxviii] Michael C. Jensen & William H. Meckling, *Managerial Behavior, Agency Costs, and Ownership Structure*, 3 J. FIN. ECON. 305 (1976).

[cxxix] *See* below, sub-section D.2, for a detailed discussion.

[cxxx] *See* below, sub-section D.3.

[cxxxi] Stated otherwise, we assume that the Efficient Capital Market Hypothesis will hold for SPDC securities – that is, that market professionals will impound all publicly available information about the company into the price of its securities. *See*, generally, Ronald J. Gilson & Reinier Kraakman, *The Mechanisms of Market Efficiency*, 70 VA. L. REV. 549 (1984); Ronald J. Gilson & Reinier Kraakman, *The Mechanisms of Market Efficiency Twenty Years Later: The Hindsight Bias*, 28 J. CORP. L. 715 (2003). This assumption became a legal presumption following the Supreme Court's seminal decision in Basic v. Levinson 485 U.S. 224, 247 (1988) ("Because most publicly available information is reflected in market price, an investor's reliance on any public material misrepresentations, therefore, may be presumed for purposes of a Rule 10b-5 action.")

[cxxxii] The text draws on Steven L. Schwarcz, *The Alchemy of Asset Securitization*, 1 STAN. J.L. BUS. & FIN. 133, 134-43 (1994); *see*, generally, STEVEN L. SCHWARCZ, STRUCTURED FINANCE, A GUIDE TO THE PRINCIPLES OF ASSET SECURITIZATION (3d ed. 2002).

[cxxxiii] *See, e.g.*, Clean Air Act of 1990, 42 USC §§ 7401-7671q, P.L. 101-549, 104 Stat. 2399.

[cxxxiv] For the relative advantages (and disadvantages) of such schemes over traditional command-and-control regulation and other types of environmental regulation, see DANIEL H. COLE, POLLUTION AND PROPERTY: COMPARING OWNERSHIP INSTITUTIONS FOR ENVIRONMENTAL PROTECTION (2002); Daniel C. Esty, *Toward Optimal Environmental Governance*, 74 N.Y.U. L. REV. 1495 (1999); Carol M. Rose, *Common Property, Regulatory Property, and Environmental Protection: Comparing Community-Based Management to Tradable Environmental Allowances*, *in* THE DRAMA OF THE COMMONS 233 (Elinor Ostrom et al. eds., 2002).

[cxxxv] *See supra* notes lxvi-lxix and accompanying text.

[cxxxvi] *See* Symposium, *Contractual Freedom in Corporate Law*, 89 COLUM. L. REV. 395 (1989).

[cxxxvii] Consequently, the common metaphor of the corporation as a nexus of contracts may need to be replaced with a metaphor of a nexus of power relations. Amir N. Licht, *The Maximands of Corporate Governance: A Theory of Values and Cognitive Style*, 29 DEL. J. CORP. L. 649, 653 (2004).

[cxxxviii] The classic work is ADOLPH A. BERLE, JR. & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (rev. ed. 1933).

[cxxxix] *See*, e.g., Section 303A(1) of the New York Stock Exchange's Listed Company Manual ("Listed companies must have a majority of independent directors."), available at http://www.nyse.com/pdfs/finalcorpgovrules.pdf.

[cxl] In the Atlantic Yards project mentioned above, developer Bruce Ratner had actually gained rights in a majority of the land intended for the project. *See supra* text to note xliv.

[cxli] For Delaware law, *see* Delaware General Corporations Code § 144(a) (2007); Fliegler v. Lawrence, 361 A.2d 218, 221 (Del. Supr.1976) (interpreting § 144(a) as requiring an approval of affiliated party transactions by disinterested directors). The Revised Business Corporation Model Act § 8.31 sets forth a more elaborate regime also based on full disclosure and disinterested approval.

[cxlii] There is no good reason to allow the SPDC to engage in any other business, which, in case of failure, will cause shareholder to lose the value of their land. Condemnees who wish to invest in business – including, for that matter, in the development project itself – will be free to do so outside of the SPDC.

[cxliii] Under Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del.Supr.1985), when the board determines that the company faces an inevitable change of control, directors have a duty to obtain the best price reasonably available for the shareholders, including by auctioning the company off. By analogy, directors of the SPDC, which has a limited life span, have a similar a duty.

[cxliv] For more details, *see* SCHWARCZ, *supra* note cxxxii.

[cxlv] *See supra* Part IVD1.

[cxlvi] Having the government as a dominant shareholder in the SPDC and/or having government officials on its management raises an additional set of prickly issues. Until recently, the received wisdom on these issues has been that governments should stay out of business, among other things, because government officials do not face the right incentives for maximizing corporate value, while at the same time such corporate positions may be conducive to corruption. Privatization and outsourcing thus became standard policy recommendations. *See* Oliver Hart, Andrei Shleifer & Robert Vishny, *The Proper Scope of Government: Theory and an Application to Prisons*, 112 Q. J. ECON. 1127 (1997); Andrei Shleifer, *State versus Private Ownership*, 12 J. ECON. PERSP. (1998) 133; William L. Megginson & Jeffry M. Netter, *From State to Market: A Survey of Empirical Studies on Privatization*, 39 J. ECON. LIT. 321 (2001). More recently, however, there is some rethinking of delegating public functions to private parties as it becomes clear that such functions often involve central tasks that are impossible to monitor due to information incompleteness and ambiguity. For economic analyses, *see*, e.g., Oliver Hart, *Incomplete Contracts and Public Ownership: Remarks, and an Application to Public-Private Partnerships*, 113 ECON. J. C69 (2003); Timothy Besley & Maitreesh Ghatak, *Competition and Incentives with Motivated Agents*, 95 AM. ECON. REV. 616 (2005). For policy analyses, *see*, e.g., Stephen H. Linder and Pauline Vaillancourt Rosenau, *Mapping the Terrain of the Public-Private Policy Partnership*, *in* PUBLIC-PRIVATE POLICY PARTNERSHIPS 1 (Pauline Vaillancourt Rosenau ed., 2000); Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1377-94 (2003).

[cxlvii] Argueably, condemnees who chose to receive SPDC share based on this criterion may not raise an objection on this ground because their choice was not coerced. We

nevertheless believe that a compensation mechanism that on its face may appear unjust will not be welcome and will not be used.

[cxlviii] Section 4(2) of the Securities Act of 1933 (the Act), 15 U.S.C.S. § 77d(2) provides that the registration requirements in § 5 of the Act shall not apply to transactions by an issuer not involving any public offering. Courts have sidestepped the question what is the numerical threshold beyond which a group of offerees should be deemed "public," leading the Securities and Exchange Commission (SEC) to promulgate a safe-harbor bright-line rule in Rule 505 of Regulation D under the Securities Act, 17 C.F.R. 230.505. The exemption under Rule 505 applies to offers and sales to no more than 35 purchasers (rather than offerees), thus suggesting a yardstick for the definition of "public." The exemption under Rule 505 is contingent on additional conditions, however.

[cxlix] *See* SEC v. Ralston Purina Co., 346 U.S. 119, 124 (1953) ("the applicability of [§ 4(2)] should turn on whether the particular class of persons affected need the protection of the Act. An offering to those who are shown to be able to fend for themselves is a transaction not involving any public offering."); Doran v. Petroleum Management Corp., 545 F.2d 893, 900 (5th Cir.1977) (same). To enjoy the § 4(2) exemption, one need to show that "all offerees were actually furnished the information a registration statement would have provided." Doran, 545 F.2d 904.

[cl] To be excluded from the group of offerees that may constitute a public one must satisfy a series of conditions that qualify one as an Accredited investor under Rule 501 of Regulation D, 17 C.F.R. 230.501.

[cli] The exemption under Rule 147 requires that all offerees and purchasers must be residents of the state in which the issuer is a resident and doing business. Rule 147, 17 C.F.R. § 230.147 (2007), was enacted under Section 3(a)(11) of the Act. 15 U.S.C. § 77c(a)(11) (2007). While the latter condition likely will hold for the SPDC, some landowners may be out-of-state residents.

[clii] Intended to allow non-public corporations to implement employee stock ownership plans (ESOPs), Rule 701 under the Act, 17 C.F.R. § 230.701 (2007), exempts from registration the offering and selling of securities to employees and consultants under compensatory benefit plans. This exemption is limited, however, to issuances of no more than $5 million in stock options over a 12-month period. Issuers exceeding this threshold must provide detailed financial statements and other disclosures to the recipients. The $5 million ceiling ensures that the Rule 701 issuances are not used for raising capital from employees. This rationale does not hold in the case of SPDCs.

[cliii] 11 U.S.C. (2007).

[cliv] *See* Douglas G. Baird & Edward R. Morrison, *Serial Entrepreneurs and Small Business Bankruptcies*, 105 COLUM. L. REV. 2310 (2005) (finding that large-scale reorganizations are the exception; the vast majority of Chapter 11 cases deal with small business entrepreneurs trying to extend the life of their business).

[clv] For a basic overview, *see* Lucian A. Bebchuk, *Chapter 11*, in 1 PETER NEWMAN, ED. THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 219 (1998).

[clvi] *See*, most recently, Douglas G. Baird & Donald S. Bernstein, *Absolute Priority, Valuation Uncertainty, and the Reorganization Bargain*, 115 YALE L.J. 1930 (2006).

[clvii] This proposal arguably forces junior claimants to "put their money were their mouth is" since a junior claimant could buy out all the claims superior to hers, on the

assumption that the reorganized firm would be worth more than all these claims (on a pro rata basis). A junior claimant who didn't exercise this option could not complain that she was short-changed. *See* Lucian Arye Bebchuk, *A New Approach to Corporate Reorganizations*, 101 HARV. L. REV. 775 (1988); Lucian Arye Bebchuk, *Using Options to Divide Value in Corporate Bankruptcy*, 44 EUR. ECON. REV. 829 (2000) (presenting a formal version); Lucian Arye Bebchuk & Jesse M. Fried, *A New Approach to Valuing Secured Claims in Bankruptcy*, 114 HARV. L. REV. 2386 (2001) (advancing a more elaborate proposal); *see* also Barry E. Adler & Ian Ayres, *A Dilution Mechanism for Valuing Corporations in Bankruptcy*, 111 YALE L.J. 83 (2001) (proposing an alternative options-based mechanism for bankruptcy reorganizations).

[clviii] Philippe Aghion *et al.*, *The Economics of Bankruptcy Reform*, 8 J. L. ECON. & ORG. 523 (1991).

[clix] Oliver Hart *et al.*, *A New Bankruptcy Procedure that Uses Multiple Auctions*, 41 EUR. ECON. REV. 461 (1997).

[clx] *Compare* Adler & Ayres, *supra* note clvii, at 90 (noting that "even unbiased judges make mistakes that a market process would not permit.")