Property Rights and Local Public Goods: Toward a Better Future for Urban Communities

Amnon Lehavi*

Contents

*Assistant Professor, Interdisciplinary Center Herzliya. J.S.D., LL.M., Yale University; LL.B., B.A., Tel Aviv University. This article is based on my J.S.D. dissertation at the Yale Law School. I am extremely grateful to Robert Ellickson for his invaluable inspiration and guidance, to Carol Rose and Susan Rose-Ackerman for their immense support, and to many other members of the Yale Law School community. I am also very much indebted to Raymond Aronson, Hanoch Dagan, Daphna Lewinsohn-Zamir, Uriel Procaccia, and to the participants of the faculty workshops at the Interdisciplinary Center Herzliya, Hebrew University of Jerusalem, and Tel Aviv University, for their thoughtful insights and comments.

Electronic copy available at: http://ssrn.com/abstract=694063

I. Introduction

THIS ARTICLE EXPLORES THE ISSUE OF property rights in local public goods, focusing attention on local public goods that are established by governmental bodies and are aimed at serving a relatively local group of residents on a regular basis, especially in the urban setting. These goods may be as diverse as open-access public spaces (such as local

Electronic copy available at: http://ssrn.com/abstract=694063

parks or playgrounds), governmental services (such as municipal cleanup or policing services), or local transportation routes.

At first glance, this investigation of rights may seem somewhat trivial, given the fact that these local public goods are formally owned by a governmental entity (city, state, or federal agency) and therefore do not entitle their regular beneficiaries to exclude others or to have formal rights to them. Yet this article argues that the social and economic realities that characterize the ways in which these resources are allocated and are regularly operated and maintained create a much more complicated framework. Specifically, these observations may justify recognizing the local user group, which is not otherwise formally organized as a sub-group of the constituency's "general public," as a potential bearer of distinctive entitlements to these resources, such rights being distinguished from the formal ownership of the government and the general public that acts through it.

The following news report may demonstrate the implications of the potential tension between the formal rights of the governmental body and the distinctive interests and currently informal entitlements of the sub-group of regular users of the local public good. According to the *New York Times*,[1] residents of Flatbush and other surrounding areas in Brooklyn opposed a $3 million plan to turn a local playing field in Parade Grounds (near Prospect Park) into a minor league baseball field that would have served a New York Mets' farm team. According to the original plan, at least two playing fields used by neighborhood youth for soccer, lacrosse, and other field games would have been "lost to general use" and a third would have been "taken over for parking." The residents expressed the fear that their children would be squeezed out in favor of the Mets and their "unruly fans."[2] While the local group did not (and could not under current law) phrase its objection in "property" terms, it nevertheless seems to have materially seen the project as an informal "taking" of the local resource, in view of the planned physical invasion and the setting aside of the local group's interests in favor of those of the city's general public (and the Mets' in particular).[3]

This article argues that the key to re-conceptualizing the issue of rights to local public goods may lie in the identification of a wide-scale phenomenon in current urban settings, which seems especially significant for local public spaces such as parks, playgrounds, and public

1. Kit R. Roane, *In Brooklyn, Neighbors Balk at a Baseball Plan*, N.Y. TIMES, Nov. 1, 1999, at B3.
2. *See id.*
3. For an account of the way this story later developed, see *infra* note 188.

squares. According to this phenomenon, the otherwise unorganized users of local public goods often engage in grassroots, informal coordination and cooperation in the ongoing operation, maintenance, and improvement of the formally government-owned resource. Usually this activity is started spontaneously by a limited number of individuals who undertake preliminary value-enhancing activities and, in the process, create a basic set of informal norms that govern the use of the resource. These cooperation patterns may include investment of time, labor, or actual funds, grassroots coordination of simultaneous or rotational uses in the local public good in order to avoid congestion, informal monitoring against vandalism or other value-reducing activities, and other forms of informal stewardship of the resource. Such initiatives may provide a critical "tipping point" for the creation of a viable and sustainable coordination and cooperation mechanism in the local public good. If this is successful, expectations are that more people would join in, and that the self-management of the local public good would become more stable, fixed, and somewhat more formalistic in nature, so as to make the formally government-owned local public good a resource that resembles, at least in some respects, a genuine "commons," namely a group-owned property. Accordingly, this article terms this type of hybrid in-fact resources as "Local Public Commons."

Why, if at all, is such a phenomenon important? Briefly stated, the informal cluster of users may, in many cases, determine the value of the local public good: local user coordination that starts out spontaneously and stabilizes into a long-enduring cooperative mode makes the public resource successful, endowing significant direct benefits as well as positive spillover effects. On the contrary, under-investment and apathy by the local users often make these resources of negative value, becoming a sheer nuisance to their surroundings and creating a major deadweight loss.

As far as the formal government owners are concerned, the systematic budgetary and administrative constraints that local governments face force them, following the establishment stage of the local public good (T_0), to increasingly rely on alternative forms of organization and contribution throughout the allegedly infinite implementation stage of the public resource (T_1).[4] As a result, the governmental bodies, by either act or omission, often "pass the buck" during this later stage to private

4. Obviously, the stage of implementation is not a single point in time. The term (T_1) is used only for illustration purposes, to distinguish the stage of implementation from the stage of establishment (T_0), on the one hand, and the stage of termination (T_2), on the other.

or semi-public entities, and when these are not available, to the otherwise unorganized local community. This implicit new allocation of roles between the formal provider of the local public good and the informal and not-accurately-defined cluster of users, regarding at least some types of local public goods, may be metaphorically seen as a type of implicit "social contract" that can be stretched back to the point of establishment. Therefore, when the government body initially provides a local public good that serves the local cluster of users, this informal sub-group, to the extent that it wishes to validate and perpetuate such a potential distinct allocation, should respectively invest its own unique and distinct resources in the local public good during the implementation stage. This means that if the local cluster of users is interested in a reciprocal materialization of the "social contract," it should act as if it were the collective holder of a distinctive common property, notwithstanding its lack of explicit property rights, and contrary to the rational choice of "free-riding."

What is currently missing to facilitate the normatively desirable potential for grassroots collective action and societal efficiency in previously unorganized settings is the matching of the prevailing legal rules to this social and economic evolving reality. More specifically, this article suggests resorting to the familiar economic-based rationale of legally protecting property rights, namely creation of incentives to use resources efficiently and the encouragement of entitlement owners to invest in resources to maximize overall utility, and examines how we can apply this rationale to the local public goods context.

Why is it necessary to introduce new legal rules to ensure the potential societal efficiency of grassroots cooperation and contribution? As this article explains, this intervention may become crucial especially when the government owner decides at some later stage (T_2) to either terminate or otherwise adversely change the local public good, by either diverting the public resource to a new use that will serve the general public or a *different* sub-group (as the Parade Grounds example shows), or simply when the government wishes to "cash in" on the public resource, such as by its sale to a private developer, with diversion of the revenues to the government's general budget.

Since these cases are not considered as "takings" under present doctrine, the government can formally disregard the actual level of allocative efficiency present in the local public good, that is whether the resource was a "successful" local public good in which local users exercised efficient modes of informal cooperation and coordination that endowed positive spillover effects on private and public interests, or

whether the resource was a neglected public "nuisance" waiting to be re-designated (or somewhere in-between). When the government disregards these considerations in situations where the informal "taking" is one of a successful local public good and when the "taking" causes a significant loss yet affords no remedy to the local group, an imbalance is created, which might discourage this and similarly situated groups, who have the potential for successful cooperation, from efficiently investing in similar resources in the future.[5] This is especially the case when the local group of users is "singled out" and cannot expect distinct reciprocal benefits from the new plan or when the group's political or economic power is disproportionately low, so that the group is unable to employ political mechanisms such as "voice" and "exit" (namely, moving to another jurisdiction) to discipline the local government and to deter it from undertaking public projects without *ex ante* reviewing the full range of private and public costs involved.[6]

In contrast, this article argues that a legal regime that is more sensitive to the societal significance of cooperation and coordination between members of otherwise unorganized groups during the stage of implementation of local public goods, and that accordingly better accounts for the public and private costs involved in the termination or adverse alteration of local public goods, can encourage these important-but-unorganized local groups to invest in public resources, without their having to constantly fear suffering disproportionate losses at the government's will.

While such a reform can take several modes, applicable to one or more of the different stages in the life of the resource, this article focuses its attention on designing a legal reform that would apply to the adverse conversion/termination stage of the local public good (T_2). This should be done through a carefully tailored expansion of current takings doctrine to scenarios of informal "takings" of local public goods. Generally speaking, in such cases, the reviewing court should focus first on identifying the more general traits of the local public good and second, the extent to which its value may be principally influenced by grassroots cooperation and coordination. If, following that, the affected local group is able to factually demonstrate that the specific local public

5. The future-looking negative effects of such discouragement are similar to Frank Michelman's "demoralization costs" with respect to private property appropriated by the government without compensation. Demoralization costs are suffered by "uncompensated losers, their sympathizers, and other observers disturbed by the thought that they themselves may be subjected to similar treatment." Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1214 (1967). *See infra* Part V.A.1.

6. *See infra* notes 206–11 and accompanying text.

good at question was endowed with grassroots "social capital" that facilitated its efficient operation,[7] and that the group would incur a substantial loss that could not be otherwise mitigated without "due compensation," the court should work to design a remedy that can be effectively passed on to the group as such, and that would, more broadly, send the essential "signals" to this and other important-but-unorganized local groups to engage in the socially benefiting behavior of cooperation and coordination.

Obviously, as demonstrated in this article, any such idea for legal change may be challenged at the outset by a variety of normative and administrative concerns. There are three main concerns. First, the general adverse consequences of awarding rights *ex post facto* during the conversion/termination stage (T_2) and of subjecting new kinds of public projects to the judicial *ad hocery* of the takings jurisprudence. This includes the related fear of "retributive" strategic behavior by the government through future under-establishment or under-allocation of local public goods in the first place (at T_0) or of reluctance to contribute, both financially and administratively, to the local public good (during T_1), so as not to face the increased costs of compensation for a "taking." Adversely, there may be a fear of inefficient over-allocation and hence "endowment" of local public goods to the government's politically preferred groups. A second type of concern relates to the costs of identifying the affected informal group and of authorizing a representative on its behalf for litigation purposes, in light of the inherent difficulties in decision-making in the otherwise unorganized group. The third type of constraint concerns the various administrative costs of litigation as well as the post-litigation additional public funds that are required to implement a remedy when awarded in favor of the local group.

Accordingly, the goal of this article is to delineate the contours of a property-like compensation regime for "takings" of local public goods. This regime would aim at both improving societal efficiency and mitigating the various types of costs and concerns resulting from such reform. Briefly stated, it focuses on two basic principles for such a reform: the first being that the substantive remedy would be a *group nonpecuniary* one (such as the provision of a "substitute facility," where feasible); and the second principle would be that any such collective remedy should be based on a *liability rule regime,* meaning that the local group of users would not be entitled to a pre-conversion injunction, but would rather have to pursue a post-conversion remedy.[8] As

7. *See infra* note 175 and accompanying text.

8. Under a liability rule regime, a person's entitlement to a resource may be non-consensually destroyed or transferred to another person, subject to the payment of

explained in the article, these principles aim at focusing on the incentives and the respective rewards for the group as such, while also mitigating the transaction costs involved in voluntary dealing with an informally organized and often undefined group.

This initial analysis demonstrates an innovative approach to the issue of property rights to local public goods, since the question of conflicting rights to local public goods established by the government has not yet been discussed in current legal literature. While Charles Reich's "new property" theory deals with the individual's property rights claims *vis-à-vis* the government,[9] and Joseph Singer's "reliance interest" theory centers on a defined group's claims to property in others' private resources,[10] this article focuses on the relationship between the rights of the informal local group of users and between the formal rights of the general public (acting through its government) in local public goods. Moreover, unlike Reich and Singer, this analysis focuses on efficiency considerations, asking when it would be socially efficient to award *ex post facto* rights to otherwise undefined local groups and, accordingly, when should judicial intervention with the political decision to "take" a local public good occur.

The rest of the article is structured as follows: Part II sets out to generally identify the economic and functional characteristics of local public goods, focusing on "Discrete Local Public Goods," i.e., resources, such as parks or playgrounds, whose positive and negative effects outside their geographically proximate area are relatively modest, falling mainly on the informal and not accurately defined adjacent sub-group of constituents (to be distinguished from "Network Based Local Public Goods," these being local portions of a larger network of resources, such as roads or utilities). This article discusses both the theoretical justifications and the current realities of public and private forms of the provision of Discrete Local Public Goods, arguing that

compensation for the entitlement holder's damages. In contrast, an entitlement is protected by a property rule regime when its transfer must be made in a voluntary transaction, in which the value of the entitlement is agreed upon by the seller. "An entitlement is inalienable to the extent that its transfer is not permitted between a willing buyer and a willing seller." Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1092–93 (1972).

9. Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 783–85 (1964) (arguing that in modern society, much of the individual's wealth results from government largess. Hence, when the law awards governmental benefits, such as Social Security, to qualified individuals, such individuals should be seen as having property rights to such benefits, and should accordingly be awarded a procedural protection similar to that characterizing property rights to "classic" resources, such as land.

10. Joseph W. Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611 (1988) [hereinafter Singer, *Reliance Interest*]. *See infra* Part V.A.2.

private provision, while generally superior, cannot serve as a panacea for obviating traditional full-scale public provision, especially in existing urban neighborhoods.

Part III explores actual patterns of informal group coordination and cooperation in Discrete Local Public Goods, mostly in public spaces, and explains how such an alternative, informal form of cooperation and coordination in "Local Public Commons" can, at least partially, enjoy the efficiencies of smaller-scale governance typical of more genuine commons. Part III starts with a brief look at the ancient English doctrine of "customary use" of lands by otherwise unorganized publics. It then moves on to analyze test cases of current informal cooperation and coordination patterns in pre-designated public spaces, i.e., resources that are formally established *ex ante* as public spaces by the government. It argues that such *ex ante* designation enables the government both to hold an *ex ante* cost-benefit analysis during the establishment stage (T_0), and also to weigh the possible benefits of grassroots cooperation versus the costs of possibly restricting the government's future liberty to "confiscate," or re-designate, the local public good at (T_2), should it be decided to formally recognize local group entitlements.

Part IV presents the tension between the mutually desirable reality of grassroots action and the general reluctance of the current legal regime to recognize and validate the interests of the local group, when these interests come into conflict with the interests of the general public. It starts by showing what cases of informal "takings" of Local Public Commons may typically look like; why local government may be motivated, at the later stage, to overlook the "social contract" and the various costs that the local group may incur because of such a "taking;" and why it cannot generally be relied on the political process mechanisms of "voice" and "exit" to protect otherwise unorganized local groups. It then shows why specific pieces of legislation and current judicial doctrines, such as the law of private dedications, the public trust doctrine, environmental impact statutes, and the intergovernmental takings doctrine, cannot serve as sufficient "bypasses" in order to discipline governments against uncompensated "takings," without the need to overtly upset current law.

Part V makes the normative case for applying the takings doctrine to those "confiscated" Local Public Commons in which local groups have demonstrated sustainable value-enhancing cooperation and coordination, and explains why constitutional protection (either state or federal) is generally superior to statutory protection in this context. It then sets out in Part VI to design the substantive remedy for "takings" of such Local Public Commons, focusing on the provision of a "substitute

facility" as an efficient and feasible collective, nonpecuniary remedy. In formulating such remedies, this article aims at striking an efficient balance between validating and reinforcing existing potential for grassroots coordination and cooperation and between ensuring that governments are able to maintain their powers to provide new public projects and respond to social and economic changes. The article concludes by looking at the possible implications of proposed reform for the wider range of local public goods, and at the broader potential embedded in this innovative framework for readdressing a variety of current urban problems.

II. Local Public Goods: Public and Private Provision

A. *The Different Facets of Local Public Goods*

Traditionally defined "local public goods" can be identified and analyzed along two different axes.[11] The first is the axis of the *functional characteristics* of a local public good, mainly the geographical/personal scope of its effects (both positive and negative) and the patterns of rivalry and exclusion in its consumption. The second axis concerns the *identity of the provider* of the local public good, ranging from public providers such as governmental bodies or public utilities at one pole, private providers such as firms or member-owned private clubs at the other pole, and hybrid forms of "public-private" providers located in-between.

As for their functional characteristics, local public goods are generally defined as public goods whose effects involve a relatively limited geographical area, such as roads, streets, parks, recreational facilities, schools, libraries, and police or fire protection, these being only part of this huge array of resources. A local public good can either possess the traits of a *pure public good*, meaning that it is nonrivalrous[12] and non-

11. For recent definitions of local public goods, see, e.g., ARTHUR O'SULLIVAN, URBAN ECONOMICS 460–62 (3d ed. 1996), and NEIL BRUCE, PUBLIC FINANCE AND THE AMERICAN ECONOMY 80–81, 138 (1998). This article focuses on tangible, "physical" local public goods. Hence, it does not directly discuss second-order local public goods, such as local government regulatory regimes that intervene with markets for private goods or with otherwise private actions. *See* ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION 42–43 (1990) (characterizing the setting up of enforceable operational rules for a resource as a second-order collective action dilemma). For example, a governmentally enforced legal regime that awards rights in private law areas can be seen as a "public good" in itself. *Cf.* Carol M. Rose, *Property as Storytelling: Perspectives from Game Theory, Narrative Theory, Feminist Theory*, 2 YALE J.L. & HUMAN. 37 (1990) (portraying a property regime as "common property").

12. A nonrivalrous resource can be consumed by all persons in the relevant community at the same time, at no greater cost than that of providing the resource for one

excludable[13] within the relevant area. More typically, however, a local public good would be *impure* or *mixed* in nature. This means that as far as rival consumption is concerned, resources such as parks, schools, or roads are subject to congestion. Hence, while the good is nonrival when there are not too many simultaneous users, the marginal cost of an extra consumer rises when the number of consumers is too large, resulting in longer waits and delays, frequent interruptions of service, etc.[14] Rivalry of consumption can take place between contemporary users due to either crowding,[15] conflicting simultaneous uses,[16] or on an intergenerational basis. The latter problem is one of inter-temporal depreciation and physical erosion due to periodical utilization of resources, such as roads and parks, beyond their carrying capacity.[17]

Impure or mixed local public goods might otherwise be more feasibly excludable. While schools or recreational facilities are traditionally considered as resources that can be quite easily fenced out to nonpayers, in recent times we also experience exclusion patterns in resources that were once provided as "nonexcludable," such as roads and highways.[18] Excludable local public goods that are restricted to paying customers or members only are often termed "club goods."[19]

person. National defense and clean air are often cited as nonrivalrous national public goods. In the local context, a broadcast TV signal is a pure local public good if all consumers within a certain distance of the transmitting station can enjoy its benefits at the same time, so that the marginal cost of an additional consumer in the area is zero. BRUCE, *supra* note 11, at 66.

13. A nonexcludable resource is one that there is no feasible way of stopping people from consuming, even if they refuse to pay for it. Again, national defense and clean air are examples of nonexcludable public goods in the national or regional level, while in more local settings, TV broadcast signals (as opposed to cable TV networks) are very difficult—although not impossible—to make excludable. *See* BRUCE, *supra* note 11, at 66.

14. *See* O'SULLIVAN, *supra* note 11, at 461.

15. While over-use in local public goods usually creates multilateral costs between different users, in some cases a certain level of crowding may have positive spillover effects. For example, a significant number of park users at nighttime contribute to create a mutual sense of security. This is, of course, only one pattern of implicit user cooperation that may significantly increase the use-value of a local public good, a point touched on extensively throughout the article.

16. A simple, almost trivial example illustrates this point: parents of young children are often deterred from using public parks that are extensively used by owners of large dogs. However, as demonstrated in Part III.D.2, such "rivalry" can be remedied by user coordination that facilitates these simultaneous uses.

17. *See* RICHARD CORNES & TODD SANDLER, THE THEORY OF EXTERNALITIES, PUBLIC GOODS AND CLUB GOODS 461–63 (2d ed. 1996).

18. *See infra* notes 21–25 and accompanying text.

19. The first systematic discussion of "club goods" is attributed to James M. Buchanan, *An Economic Theory of Clubs*, 32 ECONOMICA 1–14 (1965). Since then, "club goods" have received voluminous attention. A comprehensive current discussion can be found in CORNES & SANDLER, *supra* note 17, at 347–479.

In contemporary governmental structures, the geographical dimension of the effect of local public goods roughly translates into the jurisdictions of local governments, cities, towns, etc. However, a perfect match between political borders and the effect span of the local public goods is quite rare, so that the provision of such goods usually involves some degree of jurisdictional spillover effects.[20]

B. *Private Provision of Discrete Local Public Goods*

It is useful at this point to make a broad distinction between two major categories of local public goods, according to the nature and scope of their spillover effects, the first being "Discrete Local Public Goods" and the second being "Network Based Local Public Goods."

The latter category applies to resources such as roads, streets or utilities. While portions of Network Based Local Public Goods may be set up as local public goods and are hence provided at the local government level and are respectively consumed mainly by local constituents, these local resources are nevertheless part of a larger network of such resources, and hence have significant cross-spillover effects. Accordingly, while such resources are mixed in nature regarding rivalry and excludability, the fact that they are more valuable as part of a larger network of similar resources is the prominent reason for their traditional public provision. The case of roads serves as a clear example: as Robert Ellickson notes, private lands are nearly useless without access corridors.[21] In calculating the costs and benefits of providing them as publicly regulated resources rather than through the private market, it seems clear enough that a system of private easements is cost effective only when the negotiations and coordination involve a relatively small number of persons.[22] In contrast, since the users of general circulation routes are far more numerous, the transaction and coordination costs for such routes would become prohibitive if we were to use a system

20. These externalities create a difficulty from a social efficiency standpoint whenever the local public good is provided by a local government whose jurisdiction is under-inclusive of the full scope of benefits and costs of the resource. For example, when local government police catch a criminal, potential victims in neighboring jurisdictions enjoy a positive spillover effect. This means that the social benefits of local police expenditures usually exceed the purely local benefits. However, since "outsiders" do not pay for the benefits or are not otherwise involved in the local government's decision-making, the local government will take into account only its "internal" costs and benefits and would hence provide a socially sub-optimal level of police services. *See* O'SULLIVAN, *supra* note 11, at 464–65.

21. Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315, 1381 (1993) [hereinafter Ellickson, *Property in Land*].

22. For the various ways in which an easement (in our case, a negotiated right of way in another person's tract) can be created, see JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 782–823 (5th ed. 2002).

of voluntary transactions.[23] This market failure has traditionally justified governmental intervention through public ownership, whenever the need for the "access corridor" is shared by a large number of persons who are unable to effectively coordinate between themselves.[24] Accordingly, while in recent times some highways and roads are operated by private entities and are financed (at least partly) through user fees rather than general taxation, such "privatization" should not be mistaken for complete decentralization.[25] Awarding a private body regulated "quasi-governmental powers" for the provision and operation of a portion of the network is not materially different from the traditional contracting-out for the provision of "classic" pure public goods.[26]

23. Ellickson, *Property in Land*, *supra* note 21, at 1381. This situation can be seen as an example of what Michael Heller calls an "anti-commons" scenario, in the sense that each traveler would have to negotiate with a voluminous number of servient holders. Since any reluctant landowner would be able to block others from traveling through his section, and would be equally exposed to a similar "veto" on passage by owners of other portions, such over-fragmentation of rights might result in the overall paralysis of transportation. Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621, 622–25 (1998).

24. The problem of high negotiation costs as mandating the provision of public roads also helps to explain the logic behind the doctrine developed by U.S. courts in the nineteenth century, which deprived a private owner of the right to exclude the public from a traveled way. Carol M. Rose, *The Comedy of Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 720–21 (1986), *reprinted in* CAROL M. ROSE, PROPERTY AND PERSUASION: ESSAYS ON THE HISTORY, THEORY, AND RHETORIC OF OWNERSHIP 105 (1994). While the explicit legal framework used by the courts is that long public usage implies that the owner had "dedicated" or granted the right of way to the public or that the public has acquired property rights through adverse possession, the specific line-drawing of the doctrine implies a different rationale. *Id.* at 724. As Carol Rose observes, traditional roadway doctrines drew distinctions that effectively limited public prescription to properties that were subject to high settlement or negotiation costs. Hence, according to one doctrine, a road could be claimed "public" only if its users made up an indefinite and open-ended class of persons. *Id.* at 762. *See, e.g.*, Rung v. Shoneberger, 2 Watts 23, 25–26 (Pa. 1833). The "network" concept can be further inferred from an additional refinement added by some of U.S. courts, according to which roads could be acquired by public prescription only if they ended at some other transportation terminal, such as a port. *Id.* at 763. Similarly, with respect to navigable waters, only waters suitable for commerce, that are potentially open to indefinite numbers of "strangers," count as navigable and are therefore subject to a public right of way under traditional doctrine. *Id.* at 766.

25. Toll highways have been in use for several decades now, for example in some sections of the U.S. interstate highway system. The traditional use of tollbooths at entrances to such highways, as an exclusionary device, is gradually giving way to more efficient toll collection techniques. For example, California's Orange County Route 91 express lanes project and Toronto's Highway 407 (407 ETR) use electronic transporder systems to collect tolls. The tolls at Route 91 and at Highway 407 vary according to the time of day and the days of the week, hence implementing "congestion pricing" principles long advocated to make car users more fully internalize the social costs of congestion. *See* James A. Dunn, *Transportation: Policy-Level Partnerships and Project Based Partnerships*, *in* PUBLIC-PRIVATE POLICY PARTNERSHIPS 77, 78–81 (Pauline Vaillancourt Rosneau ed., 2000).

26. One such example is the provision of lighthouses. As David Van-Zandt argues, private lighthouses always involved at least governmental provision of monopoly rights

In contrast, this article defines "Discrete Local Public Goods" as local public goods whose general effects outside their geographically proximate areas are relatively modest, for example parks, playgrounds, libraries, swimming pools, or golf courses.[27] Moreover, in many cases these local public goods serve a group that is even significantly *narrower* than the body of constituents of the local government in which the public good is provided, so that their effects are on a smaller, sub-constituency scale. Hence, unlike Network Based Local Public Goods, whose effects typically run *beyond* the local government's jurisdiction, a Discrete Local Public Good often affects an informal and inaccurately defined sub-group of the local government's constituency, which is typically proximate to the resource and therefore, uses it more extensively than other constituents.

Moreover, since Discrete Local Public Goods are also both feasibly exclusive and swiftly congestible, they are more clearly adequate for private provision. Indeed, such goods are commonly provided by private firms (working on a sub-constituency scale) that charge users either through membership fees, visitation fees, or a combination of both.[28] Even more interesting is the increasing provision of such resources by member-owned clubs that are managed through various forms of "Limited Common Property" regimes (making these resources formally commons in relation to the members but exclusive property related to outsiders).[29] These regimes engage in either the joint provision of private goods that are later individually allocated between the group's

and fixing of rates, as well as governmental active enforcement of contract and property rights. David E. Van-Zandt, *The Lessons of the Lighthouse: "Government" or "Private" Provision of Goods*, 22 J. LEGAL STUD. 47, 56 (1993). Van-Zandt's findings undermine Ronald Coase's argument that private entities have been historically able to produce this "pure public good" in a decentralized manner. Ronald H. Coase, *The Lighthouse in Economics*, 17 J.L. & ECON. 357 (1974).

27. True, a "green" recreational site may have some wider-scale positive effects such as reducing air and water pollution, and a tennis club, for example, may have some negative effects on nonmember neighbors due to increasing congestion or noise. But such externalities can be otherwise remedied or at least mitigated through private law mechanisms (such as nuisance law) or through public hearings and other planning procedures, and hence, do not necessitate an overall retreat from private market provision.

28. *See* CORNES & SANDLER, *supra* note 17, at 347–51. For example, around 10% of all elementary and secondary schools in the United States, as well as most club goods such as fitness clubs or golf courses, are provided and managed by private firms or similar institutions. *See* Charles Fried, Comment, *Five to Four: Reflections on the School Voucher Case*, 116 HARV. L. REV. 163, 164 n.4 (2002); BRUCE, *supra* note 11, at 356. For an explanation why 90% of schools are still provided by governments, see *infra* notes 39–43 and accompanying text.

29. Carol M. Rose, *The Several Futures of Property: Of Cyberspace and Folk Tales, Emission Trades and Ecosystems*, 83 MINN. L. REV. 129, 139 (1998).

members, or in the production of local public goods that are consumed simultaneously by the members.[30]

Of special interest here are Common Interest Communities.[31] In these communities the provision of various local public goods for the simultaneous use of the members is usually undertaken by a Residential Community Association (RCA), in which owners of private units in a residential complex manage and maintain common areas within the complex's territory.[32] Since the internal system of governance of an RCA is already implemented by the developer of the project, including initial voting and burden-sharing formulas, and since the governance system is legally binding on all members, the RCA is able to efficiently overcome the collective action problem in providing and maintaining local public goods.[33] Such RCAs are therefore able to enjoy both the

30. In recent years, we witnessed an explosion of academic interest in such common property regimes. Prominent works include OSTROM, *supra* note 11, at 29 (offering a path-breaking institutional analysis of the basic question of the commons: "how a group of principals who are in an interdependent situation can organize and govern themselves to obtain continuing joint benefits when all face temptations to free-ride, shirk, or otherwise act opportunistically"); Ellickson, *Property in Land*, *supra* note 21, at 1332–44 (arguing that group ownership of large parcels may be preferable to individual ownership of smaller ones due to increasing returns of scale and risk-spreading among its members); Rose, *supra* note 29, at 132 (arguing that new developments in cyberspace and environmentalism may demonstrate the economic and cultural benefits of "limited common property" regimes); Henry E. Smith, *Semicommon Property Rights and Scattering in the Open Fields*, 29 J. LEGAL STUD. 131 (2000) (analyzing the mixed nature of the medieval open-field system in northern Europe, in which peasants owned scattered strips of land for grain growing but used the land collectively for grazing). *Id.* at 132; Hanoch Dagan & Michael A. Heller, *The Liberal Commons*, 110 YALE L.J. 549 (2001) (introducing a property regime of "liberal commons," aimed at enabling a "limited group of owners to capture the economic and social benefits from cooperative use of a scarce resource, while also ensuring autonomy to individual members who retain a secure right to exit"). *Id.* at 553.

31. *See generally* COMMON INTEREST COMMUNITIES: PRIVATE GOVERNMENTS AND THE COMMON INTEREST (Stephen E. Barton & Carol J. Silverman, eds. 1994); Wayne S. Hyatt, *Common Interest Communities: Evolution and Reinvention*, 31 J. MARSHALL L. REV. 303 (1998).

32. The extent of goods provided and maintained by RCAs is substantial: according to a 1990 survey, most RCAs maintain lawns, trees and common areas, and many of them maintain inner streets, sidewalks, or recreational facilities. ROBERT JAY DILGER, NEIGHBORHOOD POLITICS: RESIDENTIAL COMMUNITY ASSOCIATIONS OF HOMEOWNERS ASSOCIATIONS 20 (1992). While these "private governments" usually include single condominiums or RCAs of several dozen dwelling units, in some cases these "governments" may encompass an entire newly established town that successfully provides and maintains local public goods on a larger scale through a federal-like governance structure. For a detailed analysis of these private towns (the most prominent of which in the United States is probably Reston, Virginia), see FRED FOULVARY, PUBLIC GOODS AND PRIVATE COMMUNITIES 166–89 (1994).

33. The community's governing body, acting as a "residential private government," is awarded a legally enforceable power to solve any free-rider problems with the provision and maintenance of the RCA's public goods. *See* Uriel Reichman, *Residential*

benefits of economies of scale in producing and sharing the costs of a larger number of local club goods, as well as the benefits of smaller-scale governance. Moreover, many of these "private governments" tend to be homogeneous and are endowed with a thick layer of social interactions, so that informal norms of reciprocity and enforcement are employed, hence further contributing to the adequate provision and maintenance of the local public goods.[34]

All of this means that such group members are initially better motivated to invest in the local public good at T_1, since they know that the already-established coordination and contribution mechanisms diminish the risk of free riding and of the "tragedy of the commons" of over-exploitation and under-investment.[35] In addition, such groups are more responsive to changing preferences. Because of existing participation and voting mechanisms, the RCAs setting ensures that only resources with a genuine, contemporary demand will continue to be provided, while no-longer desirable club goods will be terminated or materially altered at T_2.

C. *The Residual Need for Governmental Provision*

In spite of the proliferation of the private provision of Discrete Local Public Goods, most resources such as schools, recreational facilities, public spaces, or zoos are still established by different levels of government. In general, this article divides the prevailing justifications for public provision into three groups: the first group concerns market efficiency; the second includes socio-egalitarian arguments; and the third focuses on institutional characteristics of the group affected by the Discrete Local Public Goods. A brief analysis of these justifications is crucial if we are to understand how to facilitate cooperation and coordination between users during the ongoing implementation stage that follows the governmental establishment stage.

Private Governments: An Introductory Survey, 43 U. CHI. L. REV. 253, 279 (1976). For a discussion of the scope of contractual enforceability of RCAs' decisions on individual members, see ROBERT C. ELLICKSON & VICKI L. BEEN, LAND USE CONTROLS 700–06 (2d ed. 2000).

34. Ellickson defines a close-knit group as a "social network whose members have credible and reciprocal prospects for the application of power against one another and a good supply of information on past and present internal events." *Id.* at 177–78. As Ellickson observes, when group members are engaged in long-term relationships as "repeat players," they are able to engage in a complex network of informal norms, which overrides the formal legal framework in many cases. ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 280–84 (1991).

35. Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243, 1244 (1968).

1. THE EFFICIENCY JUSTIFICATION

According to the market efficiency argument, some types of club goods are either too large or too distinctive in nature to be provided through competition in the private market (e.g., a large park established within a unique natural surrounding). In such case, the impracticability, or even outright impossibility, of a multi-production of such a unique resource is matched by the economies of scale argument to justify its public provision, even though this entails the traditional inefficiencies of monopolistic provision.[36] A somewhat related argument is that while natural resources, historic sites, or similar public goods may be "discrete" in the sense that they are extensively visited only by a relatively limited number of users, these resources may nevertheless possess significant "non-use values" (such as "existence value," "bequest value," or "option value") that may affect a much larger, dispersed group.[37] A private provider would find it difficult to take these dispersed values and preferences into account, and accordingly, she would not be able to charge such non-users or nonmembers the proper fees to cover the costs of such values or preferences. Governmental provision of such local public goods may therefore prove more efficient.

2. THE DISTRIBUTIVE JUSTIFICATION

A different argument for the provision of governmental local public goods is the promotion of equity between citizens of different socio-economic classes. A prominent example is the public provision of primary and secondary education. While there are several "market failure" explanations as to why the private market will tend to provide a sub-optimal level of education in spite of the societal benefits of having more educated people,[38] these alone cannot explain the way public edu-

36. Obviously, when the governmental provider does not have to compete against alternative forms of provision, such as private forms or member-owned clubs, it may not be motivated enough to manage the resource efficiently. *See* CORNES & SANDLER, *supra* note 17, at 404.

37. "Existence value" usually represents value derived by a person from the mere knowledge that a certain property of natural, aesthetic or historic importance exists. "Bequest value" is the altruistic value derived by a person from her wish to furnish future generations with the chance to enjoy such a resource. "Option value" is the value of guaranteeing the possibility of using goods in the future in the face of risks such as changes in public taste, income, or supply, especially when any future change will irreversibly destroy the current use (as is the case with historic buildings or natural resources). *See* Daphna Lewinsohn-Zamir, *The "Conservation Game:" The Possibility of Voluntary Cooperation in Preserving Buildings of Cultural Importance*, 20 HARV. J.L. & PUB. POL'Y 733, 747–49 (1997); KIRSTIN M. JAKOBSSON & ANDREW K. DRAGUN, CONTINGENT VALUATION AND ENDANGERED SPECIES 52–56 (1996).

38. Two possible explanations are, first, that since the external benefits of education are those that accrue to society at large, rather than to the student or the family, then if the private gains to the family are lower than its opportunity cost, its children may

cation is currently structured.[39] The more dominant argument is one of distributive justice or vertical equity. According to this argument, certain types of social goods such as education are part of a "base line" of benefits that every individual should enjoy as a matter of social policy, aimed at ensuring what James Tobin calls "specific egalitarianism" for such goods.[40] It should be emphasized that such specific egalitarianism in itself does not necessarily mandate public provision of local public goods, such as education. The same egalitarian effect can theoretically be achieved by awarding government vouchers to "buy" education at competing, privately owned schools.[41] The extremely limited application of such ideas (whether as a result of interest group politics,[42] or of the prevalence of a social philosophy according to which certain characteristics of public provision are *themselves* valuable)[43] perpetuates the common association of social egalitarianism with public provision of club goods.

3. THE ORGANIZATIONAL JUSTIFICATION

As mentioned, the private provision of smaller-scale Discrete Local Public Goods depends on the ability to charge membership or user fees,

not be educated enough. Second, people cannot easily borrow against the value of their human capital, in spite of the evidence that there are high returns to education. BRUCE, *supra* note 11, at 353–55.

39. As mentioned above, "[n]early 90 percent of U.S. students attend public schools." *See* Fried, *supra* note 28, at 164 n.4.

40. James Tobin, *On Limiting the Domain of Inequality*, 13 J.L. & ECON. 263, 264 (1970). Tobin argues that we, as a society, are more likely to believe that persons should have equal access to some types of resources such as health care or education (as compared to, for example, cars). *Id.* at 265.

41. The idea of educational vouchers was first articulated in MILTON FRIEDMAN, CAPITALISM AND FREEDOM 85–107 (1962). For a current assessment of educational vouchers, see Michael J. Trebilcock, Ron Daniels & Malcolm Thorburn, *Government by Voucher*, 80 B.U. L. REV. 205, 208–14, 218–24 (2000). *See also* Fried, *supra* note 28 (discussing voucher programs as part of the larger debate over privatization and deregulation of governmental services). Recently, the U.S. Supreme Court gave a boost to educational vouchers in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (holding that a Ohio school voucher program, enacted for valid secular purpose of providing educational assistance to poor children in a demonstrably failing public school system, did not violate the First Amendment's Establishment Clause, even though majority of participating students had enrolled in religiously affiliated schools). More broadly speaking, Richard Posner has argued that even if we believe that the public should finance such resources for egalitarian purposes, this does not necessarily mean these resources should be fully produced and managed by the government, since the government can achieve the same result by providing subsidies to private providers. RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 95 (5th ed. 1998).

42. *See, e.g.*, MILTON & ROSE FRIEDMAN, FREE TO CHOOSE 157 (1980) (describing how the interests of teachers and administrators are served by consolidating control of the educational system in the hands of the government).

43. This unique value of "publicness" is achieved, presumably, by embodying a procedure that is not reflected in privatized decision-making. Clayton P. Gillette, *Public Service: Opting Out of Public Provision*, 73 DENV. U. L. REV. 1185, 1190–91 (1996).

while at the same time excluding nonpayers. For resources such as recreational facilities, public spaces, security, or cleanup services, this provision can be readily achieved when a neighborhood or residential complex is initially established under a contractual mechanism such as an RCA. But, as shown below, it is generally more complicated to create membership mechanisms with coercive powers in existing neighborhoods or blocks so as to facilitate nongovernmental provision of public resources. In such cases, therefore, although in theory the Discrete Local Public Good is adequate for public provision, in practice it still has to be established mainly by the government.

a. The Difficulties in Restructuring Neighborhoods

One prominent way to solve the collective action problem in the provision of Discrete Local Public Goods in existing neighborhoods is to establish a mandatory membership association that has coercive assessment powers, as is the case with Business Improvement Districts (BIDs). BIDs have generally been highly efficient in both the establishment and the maintenance or physical improvements of local public goods at the district level.[44] While a BID does have some public characteristics,[45] its members nevertheless enjoy the benefits of smaller-scale governance and the better supply-demand responsiveness that characterizes private provision. In similar fashion, several commentators have suggested expanding such forms of "privatization" to existing *residential* neighborhoods. Robert Ellickson has suggested to experiment with Block/Neighborhood Improvement Districts that would be set up as mandatory-membership organizations of property owners,[46] and Robert Nelson has suggested creating RCA-like common property regimes in existing residential neighborhoods.[47]

Yet the expansion of such special assessment zones into a universal restructuring of existing urban neighborhoods is problematic at the outset. This is mainly because such a restructure requires generally appli-

44. BIDs establish a territorial subdivision of a city in which property owners or businesses are subject to additional "district-specific taxes [that] are reserved to funding services and improvements within the district." Richard Briffault, *A Government for Our Time? Business Improvement Districts and Urban Governance*, 99 COLUM. L. REV. 365, 368–69 (1999).

45. This is mainly in the sense that the consent of the relevant local government is required for the BID's establishment and that the government is represented on the BID's board and maintains general supervision powers over its activities. *See id.* at 371.

46. Robert C. Ellickson, *New Institutions for Old Neighborhoods*, 48 DUKE L.J. 75, 102–04 (1998) [hereinafter Ellickson, *New Institutions*].

47. Robert H. Nelson, *Privatizing the Neighborhood: A Proposal to Replace Zoning with Private Collective Property Rights to Existing Neighborhoods*, 7 GEO. MASON L. REV. 827 (1999).

cable legislation or, at the least, district-specific legislation as well as the consent of property owners involved.[48] Yet, in order to gain constitutional muster, and to avoid a "tyranny of the majority over the few" in the initial decision to establish such territorial sub-division and in the implementation stage that follows,[49] such consent would probably have to be a "super-majority" one,[50] or maybe even one that is just short of full-scale unanimity. It is highly doubtful whether such consent could be achieved on a universal scale so as to systemize mandatory-membership associations in the urban residential setting. First, people may object to being subordinated to a neighborhood government because of individual liberty considerations. People who originally chose to live in more loose-knit urban settings may be reluctant to live under such a regime, especially when they have grounds to believe that they would have a minority role in the association's decision-making.[51] Second, people may have individual cost-benefit preferences which favor continuing with a city general tax arrangement (e.g., residents in a relatively low-income neighborhood who currently "free ride" on the higher tax bases of other neighborhoods in the city).[52] Third, there is a growing body of evidence that people sometimes do not act rationally and are biased toward maintaining a situation perceived by them as a "status quo."[53] These factors therefore cast serious doubt on the feasibility of systematically switching to contract-based neighborhoods that would be able to provide most of their local public goods.

b. The Limits of "Public-Private Partnerships"

A different, smaller-scale solution for the provision of local public goods is the formal contractual transference of management powers in specific resources to nonprofit organizations. While such organizations, as well as private for-profit corporations, are also increasingly involved, both financially and administratively, in the establishment stages of local public goods,[54] there seems to be special appeal in private-public

48. *See id.* at 833.

49. Steven J. Eagle, *Privatizing Urban Land Use Regulation: The Problem of Consent*, 7 GEO. MASON L. REV. 905 (1999).

50. Ellickson, *New Institutions, supra* note 46, at 102–04.

51. This is true especially since the experience of RCAs teaches that "private governments" tend also to try and regulate aspects of the members' *private property*, such as building aesthetics or pet ownership. Eagle, *supra* note 49, at 912–13.

52. *See* Robert P. Inman & Daniel L. Rubinfeld, *The Judicial Pursuit of Local Fiscal Equity*, 92 HARV. L. REV. 1662, 1723–24 (1979).

53. *See generally* William Samuelson & Richard Zeckhauser, *Status Quo Bias in Decision Making*, 1 J. RISK & UNCERTAINTY 7 (1988); *see also* Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051, 1111–13 (2000).

54. For example, the largest U.S. nonprofit organization involved in the establishment of public spaces is the Trust for Public Land (TPL). TPL acquires privately owned

partnerships as a way of overcoming governmental inefficiency in the resource's allegedly infinite implementation stage.[55] Unlike full-scale privatization, public-private policy partnerships do not involve turning over policymaking responsibility entirely to the private sector.[56] This means that the city usually retains policy responsibility for the local public good, ensuring that it formally remains accessible to the public and continues to function consistently along with other city goods.[57] Such stipulations exist, for example, in the Central Park management contract between New York City and the nonprofit Central Park Conservancy.[58] The contractual preservation of the "public" nature of the local public good holds valid even when nonprofit organizations take over almost all policy and maintenance functions as "sole managers," as is the case with the Maymont Foundation in Virginia.[59]

The nonprofit organizations resort to various methods of financing the costs of local public goods maintenance and improvement. Such methods may include shifting some of the local good's amenities (such as a museum or a zoo) to a user-fee basis;[60] charging fees for

lands and puts them "on hold" until the relevant public agency raises the funds to buy the land from TPL, typically at or below fair market prices. Landowners who sell to TPL may deduct the difference between fair market value and the selling price as a charitable contribution. TPL's "profits" are applied to finance future land purchases and interim operating costs. Similarly, private corporate contributions for public space establishment are usually rewarded by governmental tax deductions and financial concessions. *See* ALEXANDER GARVIN ET AL., URBAN PARKS AND OPEN SPACE 211–15 (1997).

55. For a survey of the literature about the general disenchantment with public sector management and the enthusiasm for private sector involvement in the policy sector, see Stephen H. Linder & Pauline Vaillancourt Rosneau, *Mapping the Terrain of the Public-Private Policy Partnership*, *in* PUBLIC-PRIVATE POLICY PARTNERSHIPS, *supra* note 25, at 1–5.

56. *See* Linder & Vaillancourt Rosneau, *supra* note 55, at 6.

57. *See* PROJECT FOR PUBLIC SPACES, PUBLIC PARKS, PRIVATE PARTNERS (2000).

58. According to the eight-year agreement signed in 1998 (following a series of agreements since 1980), the City of New York retains responsibility for Central Park, and the Central Park Conservancy is committed to keeping the park open and free to the public. See the Conservancy's website, *available at* http://www.centralparknyc.org/cpc/contractnyc.html.

59. *See* PUBLIC PARKS, PRIVATE PARTNERS, *supra* note 57. The Maymont Foundation provides primary care for Maymont, a Victorian house and estate that are now a public park in Richmond, Virginia. The city is not involved in determining policy for the park as long as the foundation continues to keep the park open and free to visitors.

60. For example, in Roger Williams Park in Providence, Rhode Island (home to a zoo and a museum), two nonprofit organizations, the Zoological Society and the Friends of the Museum, took over the management of these two formerly free amenities during the late 1980s and started to charge entry fees. After a first difficult year, the public has learned to accept this change in view of the apparent improvement in the park's maintenance and expenditure level on capital projects. For a survey of this project, see The Urban Parks Institute's website, *available at* http://www.pps.org/urbanparks/bp_roger.htm.

parking;[61] charging concessions to businesses operating within the good's territory, such as cafés or restaurants in a park;[62] levying BID assessments on businesses;[63] or engaging in extensive fundraising from public and private sources.[64]

Can public-private partnerships offer a full-scale solution to governmental provision, at least during the implementation stage of local public goods? Can such solutions accordingly make unnecessary the need for a legal reform that would validate informal forms of user groups cooperation and coordination that are not currently imbedded in formal contractual or proprietary rights?

This is not the case. Formal public-private partnerships are generally established around relatively larger-scale resources that have a potential for substantial ongoing income, or around local public goods in otherwise commercially successful areas. The businesses around Bryant Park in New York, for example, are able to meet the financial burdens of the park's maintenance and physical improvements and to solve quite feasibly coordination problems between them.[65] But urban local public goods are spread throughout the different areas of cities, and many of them are smaller-scale resources that can generate only limited revenues, if any, and it is doubtful whether the private market can offer any systematic solution to the latter.

The case of "privately owned public spaces" in New York City may help to illustrate the problem: this is because being physically interwoven within commercial projects these spaces are densely concentrated in commercial hubs, while almost non-existent in other areas.[66]

61. Post Office Square Park in Boston is supported, both physically and financially, by a 500,000 square foot parking garage, the largest in Boston. The parking lot's profits, nearly $9 million per year, cover the $76 million development costs of the park and the parking lot, its $2.9 million annual operation cost, and its $1 million local tax bill. *See* GARVIN ET AL., *supra* note 54, at 147.

62. For example, the Downtown Partnership that manages Plaza Park in Sacramento, California, is paid concession fees by the café located in the park as well as by food vendors and bakeries participating in the weekly farmers' market. *See* the Urban Parks Institute's website, *available at* http://www.pps.org/urbanparks/ bp_plaza.html.

63. Bryant Park in New York City is financed chiefly (more than 60% of its total revenues) by assessments levied on the businesses included in the Bryant Park Restoration Corporation (BPRC), a BID formed in the 1980s. As with any other BID in New York City, BPRC's establishment was initially approved by the city council, as well as by the majority of property owners in the designated BID. *See* GARVIN ET AL., *supra* note 54, at 35.

64. For example, Louisville Olmsted Park Conservancy, founded in 1989, raised more than $6 million of public and private money between 1993 and 1996 for improvements to reverse the decline of the 2,400-acre park system, originally designed by Frederic Law Olmsted. *See* the Urban Parks Institute's website, *available at* http://www.pps.org/urbanparks/bp_lville.html.

65. *See* GARVIN ET AL., *supra* note 54, at 35.

66. Generally speaking, privately owned public spaces are public amenities that are required from a developer in return for floor area ratio (FAR) bonuses or for other

As of the year 2000, out of the 503 privately owned public spaces in New York City (NYC), 496 are located in Manhattan and only seven are located in the other four boroughs.[67] This obvious allocative efficiency problem also teaches us, that at least within the current constitutional framework of "essential nexus" that physically connects the private provision of amenities for the benefit of the public with the actual commercial development,[68] the market cannot offer an overall solution to the establishment and maintenance of local public goods, especially in residential blocks or neighborhoods.

Hence, Discrete Local Public goods without any unique "magnet" continue to face the paradox according to which people are generally interested in the provision of local public goods, but are often unable to organize themselves in order to provide such resources under private regimes.[69] In order to solve the collective action problem for unorgan-

zoning variances. The 1961 Zoning Resolution in New York City, which regulates the provision of privately owned public spaces, determines that, although these spaces are privately owned, the developer is formally committed to keeping them open to the public. *See* JEROLD S. KAYDEN ET AL., PRIVATELY OWNED PUBLIC SPACE: THE NEW YORK CITY EXPERIENCE 38 (2000).

67. *See id.* at 297.

68. The "essential nexus" test, first developed by the U.S. Supreme Court in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), in the context of development exactions, means, inter alia, that the "private contribution to the public" has to be both geographically and thematically connected to the social costs specifically caused by the development project. While there is no explicit doctrine that similarly restricts, in the context of privately owned public spaces, the physical location of the public amenity to that of the building which is the subject of the FAR bonus (or of any other variance), such a requirement seems to represent in effect the current judicial trend. *See, e.g.*, Mun. Art Soc'y v. City of New York, 522 N.Y.S.2d 800 (1987), in which the court invalidated a contract for the sale of the Coliseum site in New York City because of the inclusion of a provision for a $57 million reduction in the purchase price in the event the developer is denied a bonus permitting an increase in the FAR for the project, and in view of the fact that the estimated costs of local improvements to be made by the purchaser to the adjoining Columbus Circle subway station, if granted the bonus, would have been at the most between $35 and $40 million. The court reasoned: "increasing the bulk of a project imposes a certain burden on the local community. The Zoning Resolution provides a means by which, in return for the imposition of that burden, a benefit is granted to the community. Here, the major portion of the benefit which the purchaser is willing to pay . . . is to be paid to the City to be employed for purposes other than local improvements." *Id.* at 803–04.

69. Besides the collective action problem analysis, a different type of explanation for this apparent paradox is that people may be interested in the provision of these goods as public, but not as private resources, since there is a difference between the preferences of people as citizens (namely, in the public sphere) and as market participants (namely, in the private sphere). *See* Cass R. Sunstein, *Endogenous Preferences, Environmental Law*, 22 J. LEGAL STUD. 217, 242–43 (1993); MARK SAGOFF, THE ECONOMY OF THE EARTH: PHILOSOPHY, LAW, AND THE ENVIRONMENT 7–14 (1988). Daphna Lewinsohn-Zamir argues that people's preferences regarding public goods are less self-centered than their preferences for private goods, and that they fail to express these other-regarding preferences in their daily lives, primarily because they are aware of the implausibility of attaining them in the private sphere. Daphna Lewinsohn-Zamir,

ized urban settings during the initial stage of the establishment (T_0) and also, at least to some extent, during the implementation stage (T_1), many local public goods would continue to be provided by the government, or more accurately, by the specific level of government that is most suitable to do so.[70]

III. Cooperation in Governmental Local Public Goods

The above text demonstrated why some public establishment of Discrete Local Public Goods at T_0 is still necessary in unorganized urban settings. Yet, as shown in detail in this part, the public-private distinction becomes much more blurred during T_1, the allegedly infinite implementation and ongoing provision stage, even if *some degree* of governmental involvement is almost always required then. However, because the grassroots coordination and cooperation, discussed below, are not based on full-scale formal contractual or proprietary relationship between the local users and the governmental owners, the legal system is currently reluctant to recognize and validate these unique and indispensable patterns, thereby perpetuating potential inefficiencies.

A. *Insights from the Custom Doctrine*

Before examining cooperation and coordination patterns in current Discrete Local Public Goods, a brief look at the past provides some inspiration—specifically, to the proven potential of informal user groups' activity to endow local public goods with high and sustainable value, as is demonstrated by the issue of "customary use."

According to old English doctrine, residents of given localities could claim rights to use otherwise private lands in which group activities had customarily existed without dispute for generations.[71] Although many of these common rights had vanished by the nineteenth century, some claims to use lands persisted beyond that. Most prominently, customary claims survived for recreational uses, such as cricket matches or horse races, on what was otherwise private property.[72] U.S. courts, for their part, were reluctant to broadly embrace this doctrine. A rare application of it was made in *Thornton v. Hay*,[73] in which the Oregon

Consumer Preferences, Citizen Preferences, and Provision of Public Goods, 108 YALE L.J. 377, 402–03 (1998).

70. This argument is based on the economic theory of federalism, better known as "fiscal federalism," which describes how the different economic functions of government are matched with the level of government best equipped to carry them out efficiently. *See* BRUCE, *supra* note 11, at 147–53.

71. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (1979, reproduction of 1765–69 ed.), at 74–75.

72. Rose, *Comedy of the Commons*, *supra* note 24, at 123.

73. 462 P.2d 671 (Or. 1969).

Supreme Court held that "the public" had acquired rights in a privately owned dry-sand area along the Pacific Ocean through customary use of this land for public recreational land "running back in time as long as the land has been inhabited."[74] Yet the Oregon court later significantly narrowed even this unique decision,[75] and the custom doctrine has not been applied since then.

The reluctance to apply the custom doctrine is attributed to the fact that it deals with claims made by members of specific communities whose overall precise identity was unknown and indefinite.[76] But, as Carol Rose suggests, this is exactly why such customs should be upheld: the otherwise "unorganized" public demonstrates through the custom that it is capable of self-management. A group, even if indefinite and informal, capable of generating its own customs ought to be if anything a less objectionable holder of property rights than the unorganized public at large which is viewed as holding rights in some types of resources under the public trust doctrine,[77] because a customary public comes closer to the management capacities of a governmentally organized "public."[78] Moreover, at least within the limits of the community, the increasing participation enhances the value of the activity

74. *Id.* at 676–77. The court first mentions that, generally speaking, the custom doctrine enjoys a relative advantage over a prescription claim, since prescription applies only to the specific tract of land before the court, while an established custom, on the other hand, can be proven with reference to a larger region. In this specific case, the court held that this public use has met all of the custom doctrine's requirements as set out by Blackstone, namely that: (1) the custom "must be ancient;" (2) the right was exercised without interruption; (3) the use was peaceful and "free from dispute;" (4) the use was reasonable, "in a manner appropriate to the land and to the usages of the community;" (5) the boundaries of the area in use were visible; (6) the custom was obligatory, in the sense that it was not left for each landowner to separately decide whether or not he would recognize the public's right; and (7) the custom was "not repugnant, or inconsistent, with other customs or with other law." *Id.* at 677–78.

75. McDonald v. Halvorson, 780 P.2d 714, 724 (Or. 1989) (holding that the rule in *Hay* applies only to the dry-sand area or to other "similarly-situated" areas that must physically abut the ocean, and that for every specific tract in question, the claimants have to distinctively show that the public use had been consistent with the custom doctrine as explained in *Hay*).

76. Delaplane v. Crenshaw & Fisher, 56 Va. 457 (1860). In the context of a claimed customary right of a public inspector to appropriate for his own use flour drawn by him from the barrel in the process of inspection, the Virginia court expressed the fear that recognizing a claim based on custom would allow "few individuals" to make a law binding on the public in general, contrary to the rights of the people to be bound only by laws passed by their own "proper representatives." *Id.*

77. Under the public trust doctrine, first developed by the U.S. Supreme Court in Illinois Central Railroad v. Illinois, 146 U.S. 387 (1892), a government cannot permanently alienate resources such as submerged lands, except for service of trust purposes for which they were held. *See generally* DAVID C. SLADE ET AL., PUTTING THE PUBLIC TRUST DOCTRINE TO WORK 6–8, 230–38 (2d ed. 1997).

78. Rose, *Comedy of the Commons*, *supra* note 24, at 124.

rather than diminishing it: the larger the "investment" by the group, the higher the rate of return per unit invested.[79]

This line of argument, while originally focusing on potential rights of the unorganized public in formally, privately owned properties, is also highly applicable to local group cooperation and coordination in governmentally owned Discrete Local Public Goods, as is vividly demonstrated in the contemporary test cases presented shortly. In similar fashion to "customary use," there is a better chance for high value and efficiency in a Discrete Local Public Good when used by a local group of users, limited in scope and number, even if it is otherwise unorganized. This is especially the case when at least some of the activities in the resource must be carried out at the grassroots level, due to either governmental ill-management, budgetary constraints, or outright disregard for the needs of the local users.

For example, very often the extensive use of such typically urban resources mandates a coordination mechanism for rotational use in order to avoid prohibitive congestion (e.g., rotational use of a sports facility such as a baseball field). When such coordination has to be carried out, at least partially, on a decentralized basis, we can expect the coordination costs, including information costs and monitoring costs, to increase, in a steep shape curve, as we move up the acreage of the local public good and/or the respective number of competing users.[80] While this is clearly the case for a close-knit group,[81] or an otherwise organized group,[82] it may also be true, at least to some extent, of otherwise unorganized local groups in urban areas. Hence smaller-scale groups, on a sub-constituency level, have a better chance for effective self-management.

B. *Focusing on Pre-Designated Public Spaces*

The focus now moves to contemporary patterns of group coordination and cooperation in various types of local public spaces such as parks, neighborhood playgrounds, and public squares, chiefly in the urban setting. This article shifts attention to pre-designated public spaces, namely physical resources that are formally owned by a governmental

79. According to Rose, this also explains why we should refuse to place these sites in private hands: private owners might try to engage in "rent capture" and take advantage of the value created by the very open-ended publicness of the recreational use. Rose, *Comedy of the Commons*, *supra* note 24, at 130.

80. *See, e.g.*, OSTROM, *supra* note 11, at 188–205; Robert Cooter, *The Cost of Coase*, 11 J. LEGAL STUD. 1, 17–20 (1982); Ellickson, *Property in Land*, *supra* note 21, at 1330.

81. ELLICKSON, ORDER WITHOUT LAW, *supra* note 34, at 177–82.

82. OSTROM, *supra* note 11, at 182–92.

body and are established with the *a priori* intention of providing residents in the relevant constituency with the benefits of a public space and its amenities.

Such designation can take place in any number of ways. Most prominently it involves the combination of both a formal planning decision together with an overt proprietary or administrative act. Hence, a park, open space, or public square would be usually marked as such in the local government's comprehensive plan or specific plan,[83] its zoning ordinance,[84] or in any other official document.[85] In most cases, such designation or establishment is followed by a governmental decision that awards the administrative powers, alongside the respective budgetary responsibilities for the public space, to the agency that is generally empowered to deal with such resources according to the local government's charter: usually a Parks Department.[86] Such formal procedures are followed by overt acts "on the ground" that clarify and communicate this designation to all parties concerned.[87] While there could be many variations of such procedures and acts, in most cases it should not be too difficult to determine that a certain tract of land was "designated" or "established" as a public space by the relevant governmental body.

Using the time of the establishment of the public space (T_O) as the starting point, this article studies whether the two parties, namely the

83. For a survey of "comprehensive plans" that usually apply to the entire area of the local government versus the more detailed "specific plans" that apply to portions of it, see ELLICKSON & BEEN, *supra* note 33, at 67–76. In England, such two-tier planning is typically divided between "structure plans" and "local plans." *See* MALCOLM GRANT, URBAN PLANNING LAW 75 (1982).

84. A zoning ordinance is usually combined of a map that classifies the city land into zoning districts and a text that spells out the uses permitted in each zone and the details of building restrictions. ELLICKSON & BEEN, *supra* note 33, at 100–07.

85. Such designation can also be marked in a map that has no formal statutory status but which is generally considered by the local government and its residents alike as officially representing governmental decision-making about allocation of its properties. An interesting example is Map 1, discussed *infra* note 99. While this map of New York City's Parks, Open Spaces, and "Greenstreets" is not a product of a complete formal planning process, its posting at the city's official website can be nevertheless seen as representing a governmental "pre-designation" of such spaces in New York City.

86. Obviously, if the local government already owns the designated land, the land would only have to be "internally" transferred to the appropriate agency, if at all. If the land were owned by a private owner or by a different level of government, such designation would usually require the local government to exercise its power of eminent domain.

87. Hence, a governmental signage at a tract of land naming it as a "park," or the initial provision of amenities that are characteristic of such public space would usually constitute a clear enough picture of an overt governmental act of public space designation.

governmental body and the residents, indeed maintain the expected dichotomy of roles in the ongoing operation and use of the resource; or, to put it in "property" terms, whether they allocate between them the respective rights and duties in the overall "bundle" in a way that conforms to the formal entitlements in the public space.[88] It would be expected that the governmental body act as the "gracious landowner" that not only grants the unorganized public physical access to the resource but also takes upon itself the financial and administrative duties of maintaining and nurturing the resource. It would also be expected that the governmental body actively regulate and monitor the use of the resource by the unorganized public, so that the formally open access space does not fall into chaos and ultimately to ruin.[89]

At the same time, it would be expected that the residents enjoy, at their own will and subject to the governmental regulation, the benefits of the public space such as recreation, enjoyment of pastoral scenery, use of amenities, etc. The right of every individual member of the public to a "right to use" might be analogized in the narrow sense of personal use and enjoyment of the thing and distinguished from a broader right of use that also includes the right to manage and the right to the income from the resource.[90] This right might otherwise be analogized to some sort of affirmative easement, which includes the right to enter the resource on a temporary basis and to enjoy its benefits during this time, but does not include a right to possess or to exclude

88. The current conventional concept of property rights as a "bundle" of legal relations between persons with respect to a resource, as opposed to the Blackstonian notion of absolute rights, is generally attributed to the legal realists of the 1920s and 1930s. These scholars have followed up on Wesley Hohfeld's "deconstruction" of in rem rights into clusters of rights, duties, privileges, liabilities, etc., that are constitutive of in personam relations. *See* Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics*?, 111 YALE L.J. 357, 364–65 (2001). For a general survey of the "bundle" concept, see J.E. Penner, *The "Bundle of Rights" Picture of Property*, 43 UCLA L. REV. 711, 733–38 (1996).

89. The "tragic" dynamics of over-exploitation and under-investment in an unregulated open access resource is most famously articulated in Hardin, *supra* note 35. However, as Elinor Ostrom correctly argues, the use of the term "commons" in order to portray situations that are typical of an "open access resource" is misleading, since each one of these models—a commonly owned property on the one hand, and an open access resource on the other—is governed by a different property regime that necessarily leads to very different dynamics. OSTROM, *supra* note 11, at 23; Carol M. Rose, *Left Brain, Right Brain and History in the New Law and Economics of Property*, 79 OR. L. REV. 479, 480–81 (2000). Discussion of this important taxonomy is included in the text accompanying *infra* notes 165–66, when the article defines and portrays the unique hybrid regime "Local Public Commons," formed in practice as a result of continuous group coordination in formally open access public goods.

90. *See* Tony Honore, *Ownership*, *in* MAKING LAW BIND: ESSAYS LEGAL AND PHILOSOPHICAL 161, 168 (1987).

others.[91] Somewhat similarly to a public easement across a privately owned land,[92] in the case of a public space, it might be said that the "public as government" grants each one of the members of the "unorganized public" an individual easement on the public property.[93]

However, such a formal portrayal disregards a consistent social and economic reality that characterizes the genuine role allocation between governmental owners and local users in at least some public spaces, which are highly influenced by informal patterns of coordination, cooperation, and stewardship or lack thereof. The positive analysis offered in this part leads to the normative argument in Part V, according to which, if interested in creating incentives for users to cooperate and to invest in those types of public spaces whose value depends on the active contribution of their users, there is necessity for a legal reform that is more context-sensitive to the special characteristics of such resources.

C. *The Current State of Public Spaces*

The need for an incentive-based reform in urban public spaces is stronger nowadays than ever before. On the one hand, U.S. cities are increasingly recognizing the need to initially provide many small- and medium-scale public spaces that are readily available to geographically adjacent users. For example, the NYC Department of Parks prides itself on operating 614 ball fields, 991 playgrounds, 550 tennis courts, forty-three swimming pools, and thirty-five recreation centers, in addition to more than 250 parks.[94] The Chicago Park District manages 552 parks.[95] The Washington, D.C. Department of Parks and Recreation provides 354 parks, seventy-one playgrounds, 140 recre-

91. *See generally* DUKEMINIER & KRIER, *supra* note 22, at 783–822.

92. A public easement may be purchased from the private owner in a number of ways: it can be acquired voluntarily through agreement; under coercion, through exercise of the power of eminent domain; or judicially, through a claim for obtaining a public prescriptive easement, following an uncontested long continuous use by the public, etc. For a discussion of public easements, see, e.g., ELLICKSON & BEEN, *supra* note 33, at 688–90, and DUKEMINIER & KRIER, *supra* note 22, at 814–15.

93. For the distinction between the "public as government" and the "unorganized public," see Rose, *Comedy of the Commons*, *supra* note 24, at 116–28.

94. See the New York City Department of Parks and Recreation's website, *available at* http://www.nycgovparks.org/sub_faqs/park_faqs.html. The total acreage of public open space in New York City (52,938) is the largest of all U.S. cities, both in absolute numbers and as percent of city acreage (26.8%). PETER HARNIK, INSIDE CITY PARKS 126 (2000).

95. See the Chicago Park District website, *available at* http://www.chicagoparkdistrict.com/press/62.cfm.

ation facilities, 150 basketball and tennis courts, and forty-two swimming pools.[96] The Los Angeles Department of Recreation and Parks operates 382 parks, 123 recreation centers, and fifty-two pools.[97] Boston's open space is comprised of 215 parks, playgrounds, and squares.[98]

Moreover, these cities not only celebrate numbers, but also aim at presenting an "all over the city" picture of public space allocation. As demonstrated by Map 1, the NYC Parks Department map of City Parks, Open Spaces and "Greenstreets,"[99] a major part of urban public spaces are small-scale resources that are clearly associated with their immediately surrounding areas. This geographically based association also finds expression in the way cities call on their residents to "find a park near you."[100] These graphic illustrations might remind us of Robert Sugden's "pure coordination game," aimed at showing physical proximity as a prominent feature in allocating rights of possession in physical resources.[101] In this respect, the spontaneous "possession" of these public spaces by an adjacently located group of users conforms to the geographically based association invoked by governmental bodies.[102]

96. See the Washington D.C. Parks and Recreation Department's website, *available at* http://dpr.dc.gov/information/rec_center/index.shtm.

97. See the City of Los Angeles Department of Parks and Recreation's website, *available at* http://www.laparks.orf/dept/who.htm.

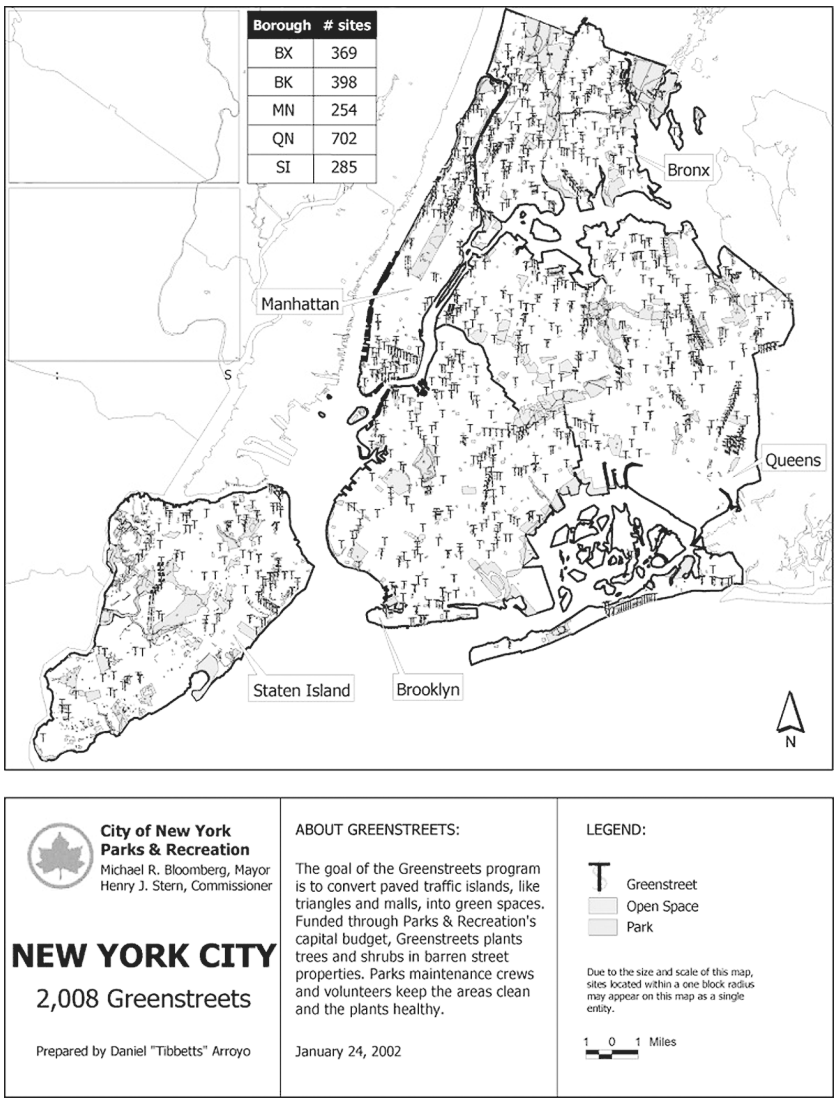
98. See the City of Boston Parks and Recreation Department's website, *available at* http://www.cityofboston.gov/parks/aboutparks.asp.

99. See website, *available at* http://www.nycgovparks.org/sub_your_park/trees_greenstreets.html. "Greenstreets" is an interesting example of a governmentally initiated conversion of barren concrete triangles and traffic islands into green spaces (though they usually serve only for aesthetic purposes, as most of them are too small for physical recreation). As of January 2002, New York City has converted more than 2000 such mini-spaces. *Id.*

100. See New York City's "interactive park maps" in the NYC Parks Department's website, *available at* http://www.nycgovparks.org/sub_your_park/interactive_maps/park_map.php.

101. ROBERT SUGDEN, THE ECONOMICS OF RIGHTS, COOPERATION AND WELFARE 91–97 (1986). In this game, two participants that are not allowed to communicate are each shown a diagram of a pattern of circles. This pattern consists of one black circle and a dozen white circles that are randomly spread around it. Each participant is asked to draw a line joining the black circle to any one white circle. If both hit on the same white circle, each one gets $10; otherwise, they get nothing. Sugden believes that most people would choose the white circle closest to the black one. This is because, according to Sugden, it is natural to look for some other relation, already in the diagram, by which one and only one white circle can be linked to the black one, and "the most prominent such relation, surely, is that of being closest." *Id.* at 93–94.

102. For a discussion of the efficiency of possession as a determining factor in allocating rights to physical resources, see Richard A. Epstein, *Possession as the Root of Title*, 13 GA. L. REV. 1221 (1979), and Carol M. Rose, *Possession as the Origin of Property*, 52 U. CHI. L. REV. 73 (1985).



Map courtesy of City of New York Parks & Recreation. Used with permission.

While there is almost no controversy about the dominant role governmental entities play at the establishment stage, T_0,[103] there is mounting evidence that the same governmental bodies are often financially

103. Between 1970 and 2000, the acreage of city space devoted to parks has grown by 17% in Chicago, 46% in Dallas, and nearly 300% in San Diego. *See* Paul Van Slambrouck, *A Renaissance Among America's Urban Parks*, CHRISTIAN SCI. MONITOR., June 26, 2002, at 3.

and administratively unable to play a similar steady role during the implementation stage, T_1, which has no *ex ante* determined finite ending point. In the United States, since the mid-1970s, cities have experienced a sharp decline in budgets for public space maintenance and capital improvement.[104] For example, New York City's maintenance staff was cut almost in half during the late 1970s and early 1990s.[105] Between 1994 and 2001, its Parks Department's operating budget has decreased nearly 30 percent.[106] The phenomenon of cities increasing park acreage (or at the least maintaining their current level), while at the same time, dramatically cutting their maintenance and capital improvement budgets can be identified in other places throughout the United States.[107] This is also the case with Britain, where members of the Parliament have urged the government to stop planning more urban public places, and instead work to maintain and improve existing parks, play areas and civic squares, reported to be "in an appalling state."[108] While this phenomenon obviously has numerous exceptions,[109] the gap between the establishment stage and the implementation stage seems universal.

104. *See, e.g.*, Tridib Banerjee, *The Future of Public Spaces: Beyond Invented Streets and Reinvented Places*, 67 J. AM. PLAN. ASS'N 9, 12 (2001).

105. Approximately 1,100 park workers were laid off during this period. *See* F. Siegel, *Reclaiming Our Public Spaces*, METROPOLIS: CENTER AND SYMBOL OF OUR TIMES 369 (Philip Kasinitz et al. eds., 1994).

106. This is adjusted for inflation. The department's share of the city budget currently stands at only 0.48%. *See* Joanne Wasserman, *Parks Go to Seed for Lack of Green; Many Suffer from Fund Cuts, Neglect*, DAILY NEWS (New York), Aug. 13, 2001, at 4.

107. For example, the City of Madison, Wisconsin, has increased park acres by 91 percent between 1975 and 2000, but slashed 45,000 hours of park maintenance from the budget during that time. Dean Mosiman, *City Faces Mounting Park Problems; Private Foundation Help in Works?*, WIS. STATE J., Dec. 14, 2000, at D1. *See also* Dionne Searcey, *Nassau's Battered Parks County System Languishing after a Decade of Neglect*, NEWSDAY (New York, N.Y.), May 27, 2001, at A4 (reporting a two-thirds cut in Nassau County's Parks personnel between 1986 and 2001).

108. *See* Patrick Wintour, *MPs Demand Action on Decline of Urban Parks*, THE GUARDIAN (London), Feb. 20, 2002, at 11.

109. For an optimistic view of parks departments' spending patterns, see HARNIK, *supra* note 94, at 5. According to Harnik, America's twenty-five major cities spend collectively about $1.2 billion each year on daily operations and programs, and over $500 million on capital construction and reconstruction, an "impressive development." HARNIK, *supra* note 94, at 5. Between 2000 and 2002, California voters approved two major legislative measures for the maintenance of urban parks. In 2000, California voters approved a $2.1 billion bond measure (the largest in state history) for better parks and the preservation of the state's coast, mountains, and deserts. *See* Rene Sanchez, *The Battle for California; A Greener Attitude Takes Hold; Protecting Open Space Is Suddenly a Priority*, WASH. POST, Jul. 3, 2000, at A1. In March 2002, voters passed the California Clean Air, Clean Water, Safe Neighborhood Parks, and Coastal Protection Act of 2002, commonly known as Proposition 40. Out of the $2.6 billion in bonds to be raised for environmental protection and parks, $832 million will be dedicated to the maintenance and construction of urban parks. *See Californians Invest in Open Space*

As a result, these governments look by either act or omission to private entities,[110] and when these are not around, to the unorganized local users. This latter approach was vividly demonstrated by then New York City Mayor Rudy Giuliani's challenge to New Yorkers to fix seedy city park conditions themselves: "anyplace where a park isn't what the community wants it to be, they can volunteer to make it better . . . I would use that as a challenge . . . [that] we don't have to rely on the Big Brother to do everything."[111] And beyond such anecdotal statements, the systematic gap between the large number of governmentally established public spaces and the unstable modes of maintenance and capital improvement of these spaces further demonstrates the crucial importance of the stage of implementation and the role that the otherwise unorganized urban community may play during this stage in determining the genuine value of the public resource.

D. *Grassroots Coordination in Local Public Commons*

1. INTRODUCING THE SCOPE OF COORDINATION

Two examples, out of many reported by the Urban Parks Institute,[112] may help to illustrate the dynamics of grassroots coordination and cooperation in local public spaces, making them into hybrid in-fact "Local Public Commons."[113]

Meridian Hill Park, in Washington, D.C., was by the early 1980s a virtual den of thieves, called by the police "a supermarket of drug-dealing."[114] A 1989 study called the park the "most murderous" in that section of the city. A local group of residents decided to fight back. They organized a park patrol, with members that wore orange hats and carried no weapons, but said "hello" to everyone they met in the park.[115] Later, when this group organized a cleanup, over 100 people came out in the rain and filled nearly 400 garbage bags with trash. Highlights of the cleanup included a local band and a visit by the Secretary of the

Funding; Prop. 40 One of the Nation's Largest Conservation Measures Ever, ASCRIBE NEWSWIRE, Mar. 6, 2002.

110. *See supra* Part II.C.3.b.

111. Joanne Wasserman, *Let Volunteers Fix Parks, Rudy Says*, DAILY NEWS (New York), Aug. 14, 2001, at 4.

112. The Urban Parks Institute has collected "success stories" of grassroots transformation of neglected and underused public spaces into viable community places. The stories were reported at http://www.pps.org/urbanparks/Success_Stories_List.htm (site no longer online; hardcopy on file with author).

113. Thank you to Robert Ellickson for this useful term.

114. *See* Urban Parks Institute, *Neighborhood Reclaims a Neglected Park*, Spring 1998 (on file with author).

115. "It's a simple thing and it sounds corny, but it really works," said Steve Coleman, the chief organizer of the patrols. *Id.*

Interior who donated an office to the project. After the initial success of the cleanup, many other events followed, including a sculpture preservation program, arts events, and twilight concerts, linking the park and the neighborhood together. Between 1990 and 1998, park attendance has tripled and crime has dropped 95 percent. The park has become a true center of community activity.[116]

In Toronto, The Friends of Dufferin Grove Park, a loose, unincorporated group established in 1993, have transformed a forlorn space into one that neighborhood residents actively use and take care of. During the 1980s, the park's indoor skating rink and other facilities were dominated by young local "toughs" from the adjacent high schools and, hence, informally inaccessible to other residents. A spontaneously organized renovation of the rink by the group, together with the installment of low-cost facilities such as a wood stove, a sand pit, and a wading pool have helped convert the place into a multi-use, multi-user community place.[117]

Throughout the United States, there are hundreds of examples of group cooperation that has brought back public spaces from dereliction, after these spaces had lost most or all of their public operating funds.[118] For some types of public spaces, such as botanical gardens, public agencies seem to rely routinely on friends, groups, or individuals to provide the labor for many garden projects.[119] In New York City alone, there are over 200 "friends groups," which are informal groups of volunteers that support and maintain neighborhood parks, filling the void left by the city's Parks Department budget cuts.[120] With time, some of these groups have become more organized, creating membership rosters, electing boards of directors, writing bylaws, and applying for non-profit status.

While being as diverse as Local Public Commons themselves, these groups and their coordination mechanisms can be divided into three broad organizational categories, as follows:

116. *See id.*

117. *See* Urban Parks Institute, *The Big Backyard: Neighborhood Park Becomes Center of Community Activity*, Summer 1998 (on file with author).

118. For an account of such efforts by urban groups in the United States, see e.g., Adrian Higgins, *The Wildflower Brigade; Volunteers Sow Beauty on Neglected Public Lands*, WASH. POST, Aug. 6, 1996, at A1.

119. A notable example is in Bellevue, Washington, where a group of local residents has planted a demonstration border of perennials in the city's botanical garden. *Id.*

120. The parks maintained by friends groups, in collaboration with the Parks Department, range from hundred-acre meadows to plots no larger than a traffic island. *See* Urban Parks Institute, *Local Friends Groups Improve Neighborhood Parks*, Mar. 1996 (on file with author).

a. The Wholly Informal Version: Brooklyn Park Moms

The first type may be characterized as a wholly informal and non-institutionalized group. An example is a "Park Moms" group that works in a playground located within McCarren Park in Brooklyn, New York.[121]

Susie Monagan founded the informal Park Moms in 1996.[122] She was first motivated into action when her eldest child demanded playing space outside their rented apartment. At the time, the playground was badly neglected; most swings were missing, the sprinkler pool stood idle and in disrepair, and the garden was weeded over. Together with two neighbors she had met at the local maternity center, Monagan started to establish an informal network of neighbors, most of them young parents who lacked sufficient home playing space. This informal process was carried out through telephone calls, notices posted on-site, and at a later stage, through a newsletter and an e-mail list.[123] Park Moms does not have regular meetings, and the casual communication between the group members is usually initiated in case of a "crisis" or for a special project. Nevertheless, one can always expect a "critical mass" of a few dozen to show up for a regular project (such as a cleanup) or even a few hundred in case of a high-stake event (such as a demonstration that was held against Con-Edison's plan to build an adjacent factory). These dynamics may also help to explain the group's decision-making process. While there are neither official managers nor a formal voting system, the initiator of a certain project will often gain a wide consensus for his or her proposed action, mainly because of the appreciation that other members feel for someone who is willing to dedicate time and labor. Beyond sporadic activities such as an Easter egg hunt, holiday story telling or a children's performance series, the

121. The playground, located at the corner of Lorimer Street and Driggs Avenue, is part of a cluster of public spaces. To the north is the local Vincent Abate Playground. To the east is the currently closed regional public swimming pool built in the 1950s during the Robert Moses era. To the south is a running track that is part of McCarren Park, the second largest regional park in Brooklyn. To the southeast is a dirt hill, converted by a local resident into a small flower garden. To the south are McCarren Park's baseball fields that serve amateur teams from all over the region. To the west is a traffic island, converted by a local resident into a fenced flower garden in memory of a Polish clergyman.

122. The information in the following paragraphs is based on an interview with Susie Monagan (Nov. 3, 2000).

123. As of November 2000, Susie had a mailing list of 300 people for the Park Moms Newsletter, "A newsletter for neighbors interested in the Vincent Abate Playground and McCarren Park" and 40 to 50 addressees on her regular mailing list. Interestingly, the newsletter's headline had originally read: "A newsletter for parents and others interested in the Vincent Abate Playground and McCarren Park," but it was later rephrased, probably to reflect a looser definition of interested persons.

group initiates maintenance and improvement projects, such as planting bushes in the garden or undertaking structural improvements to the playground.[124] Such projects are usually financed through group-advocated donations and grants from private and public bodies.

Since Park Moms is an informal group, it acts through a fiscal agent, the Parks Council, a nonprofit park advocacy group, in order to receive donations and grants using the Parks Council's nonprofit status. These grants and donations are usually of small and medium scale. The group's annual "budget" is approximately $4,500 (about 60 percent of which comes from private entities), while special projects mandate a different process of either applying for project-specific public grants or lobbying (separately or as a group) for private donations. One major donation came from the Exxon Mobile Foundation to finance the bush plantings project. Exxon was probably motivated to contribute to the group as an informal measure of "compensation" to the residents for the pollution caused by its adjacent facility. The group's significant political clout has shown itself to be useful in getting donations and grants from other industries, as well as from some governmental bodies at city and state levels.

Park Moms is also involved in activities elsewhere in McCarren Park and is accordingly a part of an informal "thread" created between different informal groups of users. This had found useful expression in the grassroots organization of a children's soccer league in the park. Parents of approximately 160 children (some of whom are activists in Park Moms), having organized the children into twenty groups of eight each, self-coordinate Saturday league games.[125] This informal inter-group thread has also been helpful in coordinating a re-demarcation of the soccer field, which had previously overlapped with an informal touch-football field used by an amateur group of police officers. The touch-football players have accepted the soccer field's demarcation and "in return" use the Park Moms newsletter as a platform to organize themselves and to advocate for city financing of lighting equipment in their newly informally designated field. Inter-group coordination mechanisms have also been utilized by Park Moms *vis-à-vis* an informal group of dog owners who organize periodical dog shows in the park.[126]

124. These may include amenities such as a weather-protected notice board, a covered sandbox in the garden area, a small trickle pool for toddler water play, trash barrels, and an emergency telephone.

125. The parents acquired a general sports permit from the city and were also aided by the American Youth Soccer Organization (AYSO) that guided them as to how to organize such a league.

126. Park Moms also coordinates with other, more organized local groups, such as the nonprofit Neighbors Against Garbage (NAG) with whom Park Moms launched a 1996 campaign to prevent the city from cutting down beetle-infested park trees.

Again, while there is no formal inter-group decision-making mechanism, the different groups usually succeed in coordinating differing uses of the playground and the park.

b. The Semi-formal Version: Friends of Meridian Hill

The second type of a public space group is the formally organized nonprofit group that holds regular meetings, elects officers, files bylaws, etc.[127] However, it should be emphasized at the outset that such nonprofit groups have no formal property rights to the public space and therefore cannot formally exclude nonmembers from it.[128]

A prominent example of such a group is the Friends of Meridian Hill (FOMH), which works in the above-portrayed Meridian Hill Park, and which as of the year 2000 had approximately 1,500 members who paid annual membership fees of $25, as well as untold additional volunteers.[129] Steve Coleman, the founder of FOMH, and a handful of neighbors were first motivated into action in February 1990, following a story in the *Washington Post*, describing the deterioration of the park due to the National Park Service's lack of staff or budget to protect it from vandals.[130] Coleman, together with about sixty neighbors, who shared the uneasy feeling that a former source of civic pride had turned into one of shame, signed up to restore the vandalized park. In March 1990, they convinced the National Park Service to reopen an abandoned police substation in the park and to use the office space as a coordination center for the volunteers.[131] The first activity, an Earth Day cleanup in April 1990, attracted over 100 residents. From that point on, the enthusiasm for reaching the "turning point" of retaking the park has involved more and more residents. By June 1990, more than 400 neighbors had declared themselves fans of the park and raised $5,000 to

127. This also means that the group enjoys the benefits of a nonprofit corporate status. For a survey of the benefits of incorporating as a nonprofit organization, including wider-scale eligibility to apply for governmental grants, see, e.g., BRUCE R. HOPKINS, A GUIDE TO STARTING AND MANAGING A NONPROFIT ORGANIZATION 12–14 (2d ed. 1993).

128. This means that regardless of the group's organizational mechanisms that may solve free riding problems *within* the group, there always exists a potential for external free riding on the group's efforts. The article touches on this point in detail in *infra* Part III.E.2.

129. *See* The Urban Parks Institute, *Neighborhood Reclaims a Neglected Park*, *supra* note 114. The presence of informal volunteers teaches us that the unorganized portion of the public space's users should not always be presumed to be motivated to free ride the efforts of others, but rather that nonmembers may also be willing to pay the marginal costs of their use, but they choose to do so on a more sporadic basis.

130. Linda Wheeler, *Washington's Jewel of a Park Losing Its Luster to Vandalism*, WASH. POST, Feb. 24, 1990, at B1.

131. Linda Wheeler, *Reclaiming Park's Lost Glamor*, WASH. POST, Mar. 29, 1990, at D7.

sponsor a Fourth of July concert.[132] The 1992 robbery–murder of a group member in the park did not deter the group, but rather inspired its members to continue to fight for the park.[133] By March 1993, the membership stood at 900 residents, businesses, and organizations.[134] The group has also formalized its relationship with the Park Service: it requested permission to volunteer cleanup crews, sponsor events, and staff the small office in the park.[135] By April 1994, when President Clinton chose the park for an Earth Day address in which he lavished praise on the community-led rescue of the public space, the group had a mailing list of about 1,800 persons.[136] While the group has become better organized with time, most of the activities that take place in the park are informal, generally aimed at reaching many local residents at a relatively low cost.[137] The informal network formed in the park has proved to be useful in informally coordinating between the different groups of users. Dog owners who gather in the evenings to show off their animals keep them leashed so as not to harass other users who may be playing soccer or watching goldfish in the fountain.[138]

The success of FOMH encouraged similar patterns of group coordination in other Washington, D.C., parks, such as Rock Creek Park[139] and the park in Adams-Morgan.[140] This significant spillover effect of the Meridian Hill Park cooperation effort has also led the group to initiate a new coalition in 1995: the "Potomac Basin Parks Network,"

132. Linda Wheeler, *Friends Help Meridian Hill Park*, WASH. POST, June 4, 1990, at D5.

133. "This is all about how you win," said Steve Coleman in a 1993 interview with the *Washington Post*. "People thought we were nuts when we started this effort. They said, 'You're crazy, it's too dangerous, you're all going to be killed.'" *See* Linda Wheeler, *Meridian Hill Taken Back from the Criminals*, WASH. POST, Apr. 23, 1993, at B1.

134. Linda Wheeler, *Meridian Hill Park Wrestled Away from D.C. Drug Dealers*, WASH. POST, Mar. 15, 1993, at B6.

135. Linda Wheeler, *Wrested from the Jaws of Crime; Historic Park's Transformation Is the Work of Good Neighbors*, WASH. POST, Aug. 5, 1993, at A1.

136. *See* Sean Piccoli, *Urban Renewal Jewel; Meridian Park Gets Presidential Salute*, WASH. TIMES, Apr. 22, 1994, at C4.

137. *See* Lena H. Sun, *Hill with a View, a Tradition*, WASH. POST, July 5, 1995, at B1. The group sometimes engages in special fundraising projects, such as the 1996 campaign to restore the decorative lighting in the park for the first time since World War II, at a cost of $6,500. *See* Linda Wheeler, *Adding Bursts of Color to Meridian Hill Park*, WASH. POST, Sept. 28, 1995, at J1.

138. *See* Thomas D. Sullivan, *An Urban Sanctum; Meridian Hill Park Is Returning to Splendor*, WASH. TIMES, Aug. 4, 1995, at C12.

139. Friends of Pierce Mill have worked to revive the historic Pierce Mill built in 1830. The group was founded to raise the $1 million needed to restore the mill's machinery, after realizing that the Park Service did not have the funds to do so. Linda Wheeler, *Private Group Pitches in for Pierce Mill*, WASH. POST, Nov. 20, 1998, at C3.

140. *See* Linda Wheeler, *In New Park, a Monument to Cooperation*, WASH. POST, Mar. 6, 1997, at J1.

aimed at bringing the "loosely knit, ninety-plus park preservation groups across the region under one organization to coordinate the efficient cleanup of the area's 500 parks."[141]

Yet, ironically, FOMH's success might prove to be a double-edged sword. In 2000, the National Park Service issued a Cultural Landscape Report for the federally owned, now revived park, calling to restore the park to its 1936 appearance (typifying early twentieth century neoclassical design), which had led to the park being designated a National Historic Landmark in 1994. The preservationist emphasis on creating a national historic artifact is in direct conflict with the interests of the current local users.[142] Accordingly, as of 1995, the Park Service had not renewed the shared responsibilities agreement with FOMH and had put on hold all the group's suggested new projects, such as a year-round concert stage or equipment for children's play areas. Accordingly, Part IV analyzes this situation as an example of a "taking" of the resource from the local group in favor of the general public (in this case, the national-level general public).

c. Institutionalizing the Role of Users: ComCom

In many other public spaces, even where a governmental body or a private-public partnership formally manages the space, such bodies rely heavily on the ability of spontaneously organized informal groups to efficiently coordinate daily use and the grassroots investment in the park. This is also the case with large-scale public spaces, where coordination between different categories of users is necessary to efficiently arrange the often-overlapping uses. A good example for the third type of grassroots coordination, one that is formally institutionalized and utilized within the public management, is the work of Community Committee in Prospect Park, New York.[143] Prospect Park serves over 6 million visitors a year and is formally managed by Prospect Park Alliance, a public-private partnership.[144] In 1995, Prospect Park Alli-

141. *See* Greg Siegle, *Making Parks Places of Pride; Meridian Hill Work Leads to Broad Plan*, WASH. TIMES, Apr. 21, 1995, at C8.

142. *See* Linda Wheeler, *Meridian Hill's Great Divide; Park Service, Community Group Differ on Park's Future*, WASH. POST, Feb. 3, 2000, at J1.

143. The information in the following paragraphs is based on interviews with Ms. Pam Fishman, Director of Volunteers at Prospect Park Alliance (Nov. 3, 2000); Ms. Carol Ann-Church, Manager of the Community Outreach Program (Nov. 3, 2000); and several ComCom members that attended one of ComCom's regular meetings (Nov. 30, 2000).

144. PROSPECT PARK ALLIANCE ANN. REP. 1 (2000) (on file with author). As of 2000, the Prospect Park Alliance had an annual budget of over $4.6 million, most of it coming from public and private foundations (46% combined) and concessions (16%). *Id.* at 19.

ance formed the Community Committee, made up of community organizations and interest groups that actively use the park, and is aimed at serving "as a conduit for information and feedback."[145] As of 2000, the Community Committee (informally known as ComCom) included over eighty groups of park users and other interest holders (such as local businesses and elected officials), with representatives of about twenty to forty of these groups usually participating in ComCom's regular meetings.[146] This inter-group coordination and cooperation is necessary not only to reach consensus, where possible, on future plans and projects, although these groups' opinions have only advisory power, but is also essential in resolving potential conflicts between different types of users.[147]

How do such user groups initially organize? Some groups, such as the Prospect Park Running Club, were already organized before the establishment of ComCom. Other user groups evolved spontaneously, usually following conflicts about their specific uses. For example, following recurring complaints about dogs that had dug holes in the ground causing people to trip, the park's management handed out leaflets to dog owners in the park and summoned them to an open meeting. The result was the spontaneous establishment of FIDO, an interest group representing dog owners in the park. A similar process motivated the establishment of ANGLERS, an interest group of amateur fishermen, which was organized following complaints from preservationist users about the fishermen's noncompliance with the informal sport-fishing norm requiring the caught fish to be returned to the pond. In this respect also, the framework of ComCom proved itself as extremely successful in facilitating informal coordination between different groups about such overlapping or "competing" uses.[148]

145. Prospect Park Alliance, Prospect Park News, Dec. 1999-Feb. 2000, at 3 (on file with author).

146. During ComCom's meetings, the members informally divide into one of the following working groups: Advocacy; Education/Programming; Editorial Committee; Special Events/Membership; Business Working Groups; Operations Working Groups.

147. One example is the conflict between bird watchers and dog owners, as the dogs' presence often frightens off the birds. In a way, this conflict is a microcosm of the larger ideological conflict between preservationists and those who see public spaces mainly as user-oriented resources.

148. Interestingly, some user groups in Prospect Park have been able to informally "take control" of discrete portions of the park, so as to make them somewhat like a Local Public Commons. This is the case, for example, with the Garfield Playground located on the park's west wing. The playground stood idle and neglected due to budget constraints until a group of parents of toddlers became interested in building a sandpit in the playground (the toddlers were being harassed by older children on the other park playgrounds). The group raised $75,000 from private and public donations to build the sandpit and have cooperated to organize various activities for the toddlers. While this breakdown of large-scale resource into informal sub-spaces may obviously entail the

2. BRIDGING BETWEEN DIFFERENT USERS AND DIFFERENT USES

Before moving to explore the question why such informal coordination succeeds in Local Public Commons (and what we may learn from it in the legal context), there is one point about the above case studies that requires further elaboration. These cases share a common trait that is essential for the success of a Local Public Common, especially in the unorganized and often heterogeneous urban setting, in that all of these groups generally succeed to strike a fair and sustainable balance between different sub-groups and/or between competing (and often conflicting) uses in the Local Public Common.[149]

Such successful bridging between the different sub-groups of users is especially important in view of my basic position that we should not, as a matter of public policy, advance certain types of activities as "preferable" and privileged over others. It is obvious enough that to make such a top-down paternalistic closed list of "desirable" users or uses in public spaces, and to accordingly award legal protection only to those listed, would be at odds with the concept of "grassroots" allocative efficiency that is the basis of my work.

Hence, while we can easily rule out certain types of uses or users that are considered to be illegal or totally repugnant according to the generally applicable norms of the broader public (such as prostitution, drug-dealing, etc.), the balance between different uses and/or different users should be achieved as part of the grassroots, contextual design of the local public space. This means that while the local initiators should not be expected to work with the chisel-like precision, the "group" should however employ its informal social tools to create a genuine dialogue between the resource's different users, rather than simply imposing the will of the politically powerful within the group, while ignoring others. What seems to characterize most if not all of the "successful" public spaces is the cooperators' ability to realize that congestion and rivalry are not only about numbers, but are also about differing tastes, and that accordingly, it is necessary to allocate the resource, both space-wise and time-wise, in a pluralistic and sustainable manner.

---

desirable efficiency of group coordination, this article focuses attention, both descriptively and prescriptively, on the more clear examples of Local Public Commons.

149. As we witness from the above observations, some of the frequent conflicts in local public spaces include: preservationists versus advocates of user-oriented parks; dog-owners versus parents of young children; teams performing different sports who have to rotationally share the same physical space; youngsters who wish to organize music performances versus older residents who may seek quiet; and so on.

E. *What Makes This Informal Coordination Work?*

1. COMPROMISING RATIONALITY WITH RECIPROCITY

While "rational actors"[150] are expected to invest time, labor, and money in privately owned resources, if we assume that they can exclude others and internalize most or all of the benefits of such investment,[151] the willingness to do so in publicly owned resources seems more puzzling. This means that we would expect urban public spaces that are officially free-access resources to suffer from the collective action problem.[152] The fear of reaching a noncooperative equilibrium between the users of the public space is not restricted only to the establishment stage of the physical resource, which mandates its initial public provision, but applies in equal measure to the implementation stage.[153] These problems seem especially acute in urban public spaces where the governmental body has stepped back from most of its regulatory and financial roles during the implementation stage, and where the users of the space are an unorganized cluster of residents rather than a close-knit group.

If this is the case, then grassroots cooperation in local public spaces mandates a substantial number of the resident-users to behave like the "Good Citizen" or "Mom," as Carol Rose has termed it, meaning that such persons prioritize the enlargement of the group's cooperation surplus over the self-regarding maximization of individual utility.[154]

150. Rational choice theory, the mainstay of modern microeconomic theory, is basically the exploration of "the implications of assuming that man is a rational maximizer of his ends in life." POSNER, *supra* note 41, at 3.

151. This assumption stands at the basis of the standard economic justification for protecting private property rights in resources that do not possess the traits of pure public goods. *See, e.g.*, ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 100–02 (2d ed. 1997).

152. The collective action problem is traditionally attributed to the (full-scale or partial) nonexcludability trait of local public goods, discussed *infra* Part II.A. Since a potential private provider or up-keeper of the local public good is unable to force others to pay as a pre-condition for consumption of the good, everyone would try to enjoy the benefits without having to pay their share, hoping that there will be enough others who contribute. The provider would eventually have to finance alone the good that benefits everybody. If the private costs to the provider exceed her private gains, she will be reluctant to produce the good. This result is generally inefficient both from a societal viewpoint as well as from each individual consumer's viewpoint. MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION 20 (2d ed. 1971).

153. *See* Carol M. Rose, *Property as Storytelling: Perspectives from Game Theory, Narrative Theory, Feminist Theory*, *in* PROPERTY & PERSUASION 9, 37 (1994) [hereinafter Rose, *Property as Storytelling*] (arguing that since a property regime, taken as an entire system, has the same structure as a common property, then even after a property regime is in place, people have to respect each other's individual entitlements out of cooperative impulses, since it is impossible to have a continuous system of retaliation for cheating. This means that all participants, or at least a substantial number of them, must cooperate on an ongoing basis during the regime's implementation stage to make the property regime work).

154. The "Good Citizen" or "Mom" has therefore a different preference ordering

Although these metaphoric labels might portray such actors as idiosyncratic, there is significant empirical evidence in current research that persons are generally willing to contribute to the provision of public goods beyond the predictions of rational choice theory, even in otherwise unorganized social settings.[155] These findings are based *inter alia* on public goods experiments, such as "group-exchange,"[156] which identify a systematic deviation from rational choice assumptions.[157] While researchers seem to agree that pure altruism cannot explain the exper-

than that of the "rational actor" (or as Rose terms the latter: "John Doe"). *See id.* at 30–35.

155. In 1979, Gerald Marwell and Ruth Ames initiated the first systematic experimental research on the voluntary provision of public goods. The fundamental question at the basis of their research was "when will a collectivity act to maximize its collective interest even though such behavior conflicts with a course of action that would maximize the short-term interests of each individual separately." The findings of the research showed lack of support for the rational choice "strong free rider hypothesis" (namely, that everyone contributes zero to the public good). Rather, the findings supported only a very weak free rider hypothesis, meaning that while approximately 57% of the available resources were invested in the public good. This was still a sub-optimal level, because of the existence of free riders that enjoyed the premiums of group contribution without giving their individual share. Gerald Marwell & Ruth Ames, *Experiments on the Provision of Public Goods I: Resources, Interest, Group Size, and the Free Rider Problem*, 84(6) AM. J. SOC. 926 (1979). For a review of the major experiments that have studied behavior in public goods environments, see John O. Ledyard, *Public Goods: A Survey of Experimental Research*, *in* THE HANDBOOK OF EXPERIMENTAL ECONOMICS 111 (John H. Kagel & Alvin E. Roth eds., 1995).

156. Richard Thaler describes a typical "group-exchange" experiment as follows: A group of subjects (usually between four and ten) is brought into a laboratory. Each is given a sum of money, for example, $5. The money can either be kept (and taken home) or some or all of it can be invested in a public good, the "group exchange." Money invested in the group exchange for the "n" participants is multiplied by some factor "k," where "k" is greater than 1 but less than "n." The money invested, with its returns, is distributed equally among all group members. Thus, while the entire group's monetary resources are increased by each contribution (because "k" is greater than 1), each individual's share of one such contribution is less than the amount she invests (because "k" is smaller than "n"). While the pareto-optimal solution is for everyone to contribute, the rational selfish strategy is to contribute nothing and hope that the other players decide to invest their money in the "group exchange." RICHARD H. THALER, THE WINNER'S CURSE 9–10 (1992).

157. Subjects in these experiments have been willing to contribute between 40 to 60% of the collective optimal contribution level, even when they are strangers to each other and are engaged in single-play environments without the ability for future reciprocity against noncontributors. Marwell & Ames, *supra* note 155; Ledyard, *supra* note 155, at 140–41. This research has largely influenced not only the maxims of social sciences, but also has inspired the current literature on "behavioral law and economics," which seeks to explore the legal implications of *actual* human behavior, said to be characterized by bounded self-interest (alongside bounded rationality and bounded willpower). Bounded self-interest means that people care, or act as if they care, about the utility of others, at least in some circumstances. *See* Christine Jolls et al., *A Behavioral Approach to Law and Economics*, *in* BEHAVIORAL LAW & ECONOMICS 13, 14–16 (Cass R. Sunstein ed., 2000). For a discussion of these and other deviations from the rational choice assumptions (such as the existence of biases), see also Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051 (2000).

iment data,[158] some stress the importance of the "group identity" that emerges when its members are allowed to communicate with each other,[159] while others focus on ideas of "reciprocal fairness."[160]

This latter idea, most famously articulated by Robert Axelrod,[161] is based on the observation that people tend to reciprocate: cooperation for cooperation, defection for defection. The most dominant reciprocal strategy for a multi-round environment is "tit-for-tat," where a person begins by cooperating and then chooses the same response the other person has made on the previous round.[162] In the local public spaces context, this strategy may help to explain James Andreoni's observation of the "restart effect" in group-exchange experiments.[163] While local users demand reciprocal cooperation from their peers to motivate them to continue to make their own contributions to the public good, they are often optimistically willing to assume that others will reciprocate in the future, even when they have encountered adverse past experience.[164]

2. PRIVATE GAINS, LOW DISCOUNT RATES, INFORMAL SANCTIONS

What can be learned from recent research and from the above-portrayed test cases about why people are willing to invest in public spaces although the fruits of the investment are uncertain and the cooperators cannot formally exclude free riders?

At the outset, it should be kept in mind that the organizational framework of the "group-exchange" is somewhat different from that of typ-

158. *See, e.g.*, Ledyard, *supra* note 155, at 172 (explaining that players generally respond to selfish incentives, and that experience, repetition, better knowledge about payoffs, and information about heterogeneity reduce the contribution rate of most subjects); Jolls et al., *supra* note 157, at 24; Korobkin & Ulen, *supra* note 157, at 1141.

159. Several experiments have shown that intra-group discussions dramatically increase the rate of individual contributions, when the subjects believe that the money is going to members of their own group. One possible explanation is that such discussions trigger ethical concerns that yield a utility for doing the "right thing" for other group members. *See* THALER, *supra* note 156, at 17–18. Yet, most scholars seem to admit that they cannot fully capture the "essence of communication," namely what exactly it is about these discussions that causes subjects to alter their behavior. Ledyard, *supra* note 155, at 156–58.

160. Matthew Rabin, *Incorporating Fairness into Game Theory and Economics*, 83 AM. ECON. REV. 1281 (1993); *See also* Jolls et al., *supra* note 157, at 24. This idea is otherwise termed "reciprocal altruism." THALER, *supra* note 156, at 12–15.

161. ROBERT AXELROD, THE EVOLUTION OF COOPERATION (1984).

162. "Tit-for-tat" proved the dominant strategy in several computer tournaments of pair-wise encounters with repeated plays. As Axelrod has shown, this strategy is generally effective for games with an infinite or at least an uncertain number of plays, where a person can never be sure that he makes the last move, following which he cannot be "punished" for defection. *See id.*

163. James Andreoni, *Why Free Ride? Strategies and Learning in Public Goods Experiments*, 37 J. PUB. ECON. 291, 298 (1988).

164. *Id; see also* Korobkin & Ulen, *supra* note 157, at 1141–42.

ical public spaces, since all actors in the "group-exchange" setting (including the free riders) are specifically and accurately identified. Such groups are also not subject to external formal ownership, so that their members' cost-benefit calculus is not discounted by the possibility of an exogenously caused loss of the public good. These differences also hold valid when we try to evaluate local public spaces in the light of studies on genuine Common Property Regimes (CPRs),[165] since at least some of the attributes that are common to "successful" long enduring, self-governing CPRs—such as clearly defined boundaries—simply do not exist, *by definition*, in Local Public Commons.[166]

Yet, there are also helpful similarities between the mechanisms (especially informal ones) of group-exchange or CPRs and those of Local Public Commons. Hence, while this article does not aim at proposing a "grand theory" about what makes Local Public Commons work, it does wish to make the following observations about coordination and cooperation mechanisms that seem to be shared by successful Local Public Commons.

First, the initiators of group cooperation in Local Public Commons are usually motivated into action by an event that significantly shifts their personal cost-benefit calculus. Susie Monagan was motivated into action in the playground in McCarren Park by her urgent need for outdoor play space for her first child. Susie expected this high-stake need to last a substantial period of time (bearing in mind the probability of similar needs of future children). Hence she was willing to undertake

165. CPRs are most comprehensively surveyed and analyzed in OSTROM, *supra* note 11. Ostrom surveys successful cases of communal tenure in meadows and forests, as well as irrigation institutions and communities. Interestingly, most of the institutional failures surveyed by Ostrom concern fisheries. Ostrom attributes a large part of the failure of these latter institutions to the fact that their internal rule systems are not recognized and validated by the respective governments. This is especially the case where governments insist on maintaining natural resources as open access resources or rather on regulating these resources through a firm-specific quota/permit system. A unique example of governmental recognition in such informal commons concerns the now famous "lobster gangs of Maine." In 1998, the State of Maine enacted a measure restricting lobster fishing in the grounds surrounding Monhegan Island to the islanders only, in return for the islanders' consent to give up their rights to fish outside the specified bounds around the island. *See Maine Limits Fishing for Island's Lobster*, N.Y. TIMES, Mar. 1, 1998, at A25.

166. Ostrom lists the existence of the following "design principles" as indicative of successful commons: (1) clearly defined boundaries, both geographical and personal; (2) congruence between appropriation rules and between local conditions and provision rules requiring time, labor, and/or money; (3) wide-scale participation in determining and modifying the resource's operational rules; (4) active monitoring, with monitors held accountable to the appropriators; (5) graduated sanctions for violations of the rules; (6) low-cost local arenas for conflict resolution; and (7) sufficient level of governmental recognition of the group's institutions. OSTROM, *supra* note 11, at 90.

actions that were not only far from "a safe bet"—since she was dependent on achieving a critical mass of aggregate neighbor action to get things moving in the playground—but which were also likely to yield benefits mainly in the medium- and long-term. Interestingly, Susie is a renter. While we would normally expect renters to invest relatively little time and labor in the upkeep of the fixtures of their provisional dwellings, this is not necessarily the case with similar amenities in neighborhood public spaces. This is because a renter is not restricted to a single apartment in order to keep enjoying the benefits of the same public space. Even if she has to leave her rented apartment (willingly or not) at some later stage, she would still have a range of options to rent apartments in the same neighborhood and hence keep her "investment" intact.[167]

This example bears out that initiators of group cooperation in Local Public Commons often have a relatively low discount rate for their activities.[168] While these initiators do expect others to join in and follow their cooperative behavior, this is not so much for the sake of reciprocity, but rather to achieve the "critical mass" of cooperation that would facilitate the success of the Local Public Common.[169] In other words, these initiators are willing to contribute more than others and are even willing to tolerate some amount of free riding, as long as their expected medium- and long-term private gains outweigh their private costs, and hence are willing to take the opening cooperative step of the "tit-for-tat" strategy. Since they have enough "breathing space" to take primary action and then inspire others to follow, these initiators' private low discount rate spills over and allows them to strategically signal a low discount rate to other potential cooperators.[170]

167. There are numerous other reasons why people are driven to initiate such informal cooperation. For instance, some homeowners might become specifically concerned about the spillover effects of the public space on the value of their property. Or sometimes, initiators may be motivated to action when their "civic shame" (instead of civic pride) becomes public knowledge. The 1990 *Washington Post* story about the deterioration of Meridian Hill Park seems to have been instrumental in breaking down at least some of the residents' "code of silence" by forcing them to confront their collective "public bad."

168. This means "that they value the future sufficiently . . . to forego the immediate benefits" of noncooperation in favor of "the deferred benefits of a sustained cooperative relationship." Richard H. McAdams, *Signaling Discount Rates: Law, Norms, and Economic Methodology*, 110 YALE L.J. 625, 627 (2001) (book review).

169. The idea of the "critical mass" required to achieve a desired social phenomena is prominently articulated in THOMAS C. SCHELLING, MICROMOTIVES AND MACROBEHAVIOR 91–110 (1978). Other scholars later applied this idea to the collective action context. *See, e.g.*, Pamela Oliver et al., *A Theory of the Critical Mass. I. Interdependence, Group Heterogeneity, and the Production of Collective Action*, 91 AM. J. SOC. 522 (1985).

170. Eric Posner argues that since part of the attempt to find cooperative partners is an effort to find individuals with low discount rates, then accordingly, part of the

Second, groups of cooperators working in Local Public Commons are able to employ various informal methods to alleviate the free rider problem up to a tolerable level. This is possible first because in practice, the number of frequent users is generally (though not definitely) limited to residents within a certain vicinity of the public space, mainly because of "cost efficiency" considerations involved in commuting to the Local Public Common (especially if similar resources are available elsewhere). This more "intimate" nature of the Local Public Commons means that the frequent users are acquainted with each other to some extent and are therefore involved in a continuing relationship, so as to facilitate a limited level of reciprocal norms of "contribution in return for use." One way to do so is for organizers of "friends' groups" to charge relatively low membership fees (e.g., $25 per year in Meridian Hill Park). Most persons who frequently use the Local Public Common will find it in their best interest to bear this relatively low financial cost rather then suffer the cost of low-level hostility on the part of contributing users. Similarly, once a person finds himself on the group's mailing list of one of the initiators, he might find it in his best interest to occasionally join in a project, even if the informal social sanction for his not doing so is relatively low-level. This might also explain the phenomenon whereby Susie Monagan always seems to find a "critical mass," consisting of a different cluster of persons every time, to show up for a specific cooperative effort. This limited level of reciprocal informal norms seems therefore to facilitate a sustainable, tolerable ratio of cooperators versus free riders.[171]

Third, the sustainable and continuous nature of grassroots cooperation in Local Public Commons can be attributed to the creation of a significant level of "social capital" between the users. The term "social capital," articulated by writers such as Jane Jacobs[172] and James Cole-

campaign to attract cooperative partners is to convince others that one has a low discount rate. ERIC A. POSNER, LAW AND SOCIAL NORMS (2000). While Posner's main thesis that all behavioral regularities we call social norms are merely the equilibrium outcomes of various signaling games seems somewhat overreaching, there is no doubt that the signaling created by initiators in public spaces plays a crucial role in demonstrating the prospects of cooperation.

171. The ability of cooperators to tolerate some level of free riding also stems from the fact that the governmental body formally responsible for the Local Public Common continues to play some sort of "background role." While the level of service provision naturally depends on the severity of its budgetary duress, the mere "background presence" of the formal public owner might be useful in informally enforcing and validating norms of cooperation, hence mitigating the group's monitoring costs. As Ostrom explains, the ability of a local group to sustain a rule-governed resource depends on a basic recognition of the legitimacy of such rules. OSTROM, *supra* note 11, at 101.

172. JANE JACOBS, THE DEATH AND LIFE OF GREAT AMERICAN CITIES 90–91 (1961).

man,[173] generally refers to features of social organization, such as trust, norms, and networks that can improve the efficiency of society by facilitating coordinated actions. Robert Putnam believes that as is the case with conventional capital, those who have social capital tend to accumulate more, with the result that success in starting small-scale initial institutions enables a group of individuals to build on social capital thereby created to solve larger problems with more extensive and more complicated institutional arrangements.[174] While I do not share Putnam's overreaching enthusiasm about the alleged infinite potential of social capital,[175] I find his observation that social capital is dynamic to be of great importance. This means that most forms of social capital are resources the supply of which increases rather than decreases through use, and which becomes depleted if not used. Accordingly, the effects of social capital or lack thereof tend to be iterative. The strategy of "cooperate" is a stable equilibrium with high levels of trust, reciprocity and collective well being. Adversely, the absence of these traits in unorganized urban local groups might create a vicious cycle, by bringing about more defection, distrust, and exploitation, creating a "never cooperate" equilibrium.[176]

IV. "Takings" of Local Public Commons

A. *Introducing "Takings" Cases*

This article discussed the process in which pre-designated local public goods evolve into informal Local Public Commons. Yet when the government owner decides to either change or divert the designation of the public resource, it can formally disregard both the actual level of allocative efficiency present in it, as well as the fear that such change may adversely affect future-looking incentives to maximize utility in other public resources. Generally speaking, the cases that are focused on are ones in which the informal Local Public Common is terminated to make room for a new use aimed at serving the constituency's general

173. JAMES S. COLEMAN, FOUNDATIONS OF SOCIAL THEORY 300–21 (1990).

174. ROBERT D. PUTNAM, BOWLING ALONE 19 (2000) [hereinafter PUTNAM, BOWLING ALONE].

175. For an argument that Putnam's definition of "social capital" is overbroad and therefore inefficient, see John Wilson, *Dr. Putnam's Social Lubricant*, 30 CONTEMP. SOC. 225 (2001). Putnam fails to fully address the adverse effects of "confrontational" social capital as perpetuating conflict and segregation. While Putnam makes the conceptual distinction between bridging (or inclusive) and bonding (or exclusive) social capital, he does not seem to carefully apply it to his case studies. *See* PUTNAM, BOWLING ALONE, *supra* note 174, at 352.

176. ROBERT D. PUTNAM, MAKING DEMOCRACY WORK 167–69 (1993) [hereinafter PUTNAM, MAKING DEMOCRACY WORK].

public at-large or a different sub-group of it. While there is no formal change of ownership or other property rights, no formal "taking" has occurred so the informal local group of users in fact loses the Local Public Common in favor of the constituency's general public or one of its other sub-groups.

What do such takings-in-practice cases look like? The introduction presented the example of the Parade Grounds in Brooklyn, where the city planned to build a baseball stadium for a New York Mets' farm team, which would have taken away playing space from local youth groups that until then had extensively used the fields.[177] Part III briefly portrayed the federal government's intention to "restore" the currently local user-oriented Meridian Hill Park by changing it into an historical artifact that would reflect its 1994 designation as a National Historic Landmark.[178]

There are numerous other examples of such informal "taking" cases of local, pre-designated public spaces. Some early cases include the building of Boston's High School of Commerce on Back Bay Fens' public park,[179] and the construction of a municipal public library on a block-size park in Los Angeles.[180] A later case concerns an Australian state government's plan to build a museum and a hospital on two parks in Melbourne.[181] Just recently, the Massachusetts Legislature approved dozens of conversion plans for local public spaces, re-designating them for diverse public uses such as schools, public buildings, and sewage systems.[182] There are even more "destructive" categories of informal takings of Local Public Commons, including governmental plans to build a highway through a local public park or to re-designate a local park for commercial development. The first category can be demonstrated by the famous legal and political struggle over the plan to have a section of Interstate 40 pass through Overton Park in Memphis.[183]

177. *See supra* notes 1–3 and accompanying text.

178. *See supra* note 142 and accompanying text.

179. *See* Higginson v. Treasurer and Sch. House Comm'rs of Boston, 212 Mass. 583 (1912). For a review of the court's opinion, *see infra* note 217.

180. *See* Spires v. City of Los Angeles, 87 P. 1026 (Cal. 1906).

181. Enrica Longo, *"They Are, In Effect, Just Selling Parkland,"* THE AGE (Melbourne), Feb. 25, 1997, at 3.

182. *See* Robert H. Levin, *When Forever Proves Fleeting: The Condemnation and Conversion of Conservation Lands*, 9 N.Y.U. ENVTL. L.J. 592, 605–07 (2001). The Massachusetts conversions are obviously not an isolated phenomenon in U.S. urban areas: high-density cities are especially prone to such conversions because of these cities' acute shortage of land. *Id.* at 607–08.

183. As explained in *infra* Part IV.B., the plan was effectively blocked by the U.S. Supreme Court's decision in *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971). Interestingly, the Memphis area is currently the scene of a similar dispute over the State of Tennessee's plan to build a stretch of Kirby Parkway through the Shelby Farms Forest. *See* Wayne Risher, *Extension of Kirby Sparks Up a Familiar Old Debate*,

Even more abundant are governmental plans to re-designate local public spaces for commercial development (either public or private). In the United States, there are dozens of informal "takings" of local public spaces for such uses every year.[184] A recent case in Britain involves the struggle of a local urban community to prevent property development in Cheltenham's Pittville Park.[185]

The common denominator in all these cases is the setting aside of the interests of the informal cluster of users in the Local Public Common in favor of the interests of the general public or a different subgroup of it, in the form of either the diversion of the public resource into a new use or of "cashing in" on the resource. Since these cases are not formally considered as takings under present doctrine, and since "public dedications" are generally not subject to rules that restrict conversion of public use,[186] governments do not employ any regular formal mechanisms to measure the loss of a Local Public Common in appropriate cases. Governmental owners therefore have no formal incentives to examine whether the public space has functioned as a successful Local Public Common or whether it was a neglected public "nuisance" waiting to be re-designated (or somewhere in-between). Nor are they obligated to examine whether the loss of a Local Public Common would have any adverse effects on the members of the informal cluster of users, or whether it would have any other significant derivative consequences for other similarly situated groups. In this respect, the decision whether to proceed with a new public plan that entails such an informal "taking" is left to governmental discretion, which is controlled by the mechanisms of political process.

B. *Why Do Inefficient "Takings" Take Place?*

Before dealing with current doctrine and with policy considerations about whether it should be changed, there first has to be inquiry as to why political decision-makers do not systematically take into consid-

THE COMMERCIAL APPEAL (Memphis, Tenn.), Jun. 28, 1998, at A17. As of April 2001, the entire $25 million project was not under way because of the public controversy over the Shelby Farms' segment. *See* Jody Callahan, *Widening Planned for I-240 Stretch*, THE COMMERCIAL APPEAL (Memphis, Tenn.), Apr. 26, 2001, at EM1.

184. Levin, *supra* note 182, at 605–08.

185. *See Residents Dig Hills in to Save Favourite Park*, GLOUCESTERSHIRE ECHO, May 23, 2000, at 3.

186. "Public dedications" are resources in which the governmental body is formally considered the absolute owner of the resource. In contrast, in "private dedications," the government is merely a trustee of land dedicated to specific purposes by its owner and is accordingly subject to a nondiversion rule. For an analysis of the differences between "public dedications" and "private dedications" in the context of diversion or change, see *infra* Parts IV.C.1.–2.

eration these aspects of the costs of a public plan. In some cases, especially in constituencies dominated by neighborhood opposition groups,[187] the users of a Local Public Common are able to exert enough political pressure to reach a consensual compromise[188] or even block the plan altogether.[189] Yet, in many other cases, typically where the users are unorganized, such plans go ahead, even when a more complete evaluation of the costs and benefits of the plan might have mandated either its abolition or, at the least, the taking of measures to mitigate its "informal taking" costs.

The Public Choice theoretical framework is useful in explaining such political decisions,[190] as these later cases typically involve both interest

187. As Daniel Mandelker and Dan Tarlock explain, in such a community there may be a long-standing policy of "ward courtesy," meaning that the legislative body votes on site-specific land use matters as directed by the member from the ward in which the issue arises. If this member defers regularly to neighborhood opposition, the entire council follows and the local group dominates the constituency's decision-making process. Daniel R. Mandelker & A. Dan Tarlock, *Shifting the Presumption of Constitutionality in Land-Use Law*, 24 URB. LAW. 1, 38 (1992).

188. This was the case with the Parade Grounds in Brooklyn. The coalition of community groups that opposed the city's original plan, and also filed a suit, reached a deal in which the city agreed to repair the Parade Grounds and to build a stadium smaller than that which was originally planned. However, local political forces later blocked the agreed plan altogether. Brooklyn Borough President Howard Golden filed a lawsuit against the city that exerted enough pressure to derail the project. Golden argued that city officials were misleading Brooklyn residents by contending that the only way to fix Parade Grounds was to bring in the farm team. This position, probably aimed at promoting his wider political agenda in the borough, has left many local community members frustrated. "It's so aggravating," said Howard Helene, the father of a soccer player. "This seemed like the best way in our lifetime to get those fields fixed." Julian E. Barnes, *City Drops Plan to Build Stadium in Parade Grounds*, N.Y. TIMES, Jan. 19, 2000, at B3. Interestingly, the later relocation of the stadium to Steeplechase Park in Coney Island raised similar concerns by local residents, although milder in scope, due also to the fact that the location had been a "shabby ghost" for many years. Yet, local residents have also expressed a preference similar to that of the Parade Grounds' residents. "Baseball's cool," said teenager Richard LeBlanc. "But I'd like to see soccer fields here, you know, stuff for kids." Josh Getlin, *In Brooklyn, Plan for Minor League Baseball on Coney Island Assailed; Many Opponents Feel that the Run-Down Area Should have more Youth Activities instead of a Lowly Single A-Mets Farm Team*, L.A. TIMES, Aug. 18, 2000, at A1, p. 19.

189. This was the case with Overton Park in Memphis. Following the political echoes of the citizens' group interim success in the Supreme Court (surveyed *infra* Part IV.C.3.), state and local officials dropped their plan to build a section of Interstate 40 through the park altogether. *See* Wayne Risher, *These Roots Run Deep; Overton Park Marks 100 Years*, THE COMMERCIAL APPEAL (Memphis, Tenn.), Nov. 15, 2001, at B1.

190. The Public Choice literature explores political institutions and outcomes from an economics-based assumption of selfish and rational actors. For a comprehensive survey of the law and economics interface in public choice theory, see DANIEL A. FARBER & PHILLIP F. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION (1991). For a taxonomy of the work on various branches of public choice (self-interested individual actors; organized interest groups; aggregation problem; and the impact of various constitutional and institutional arrangements), see Saul Levmore, *The*

group diversions and the problem of "fiscal illusion." First, according to the interest group theory of politics, small concentrated interest groups, in which each member has a high stake in the political outcome in question, have substantially greater political influence than groups larger in number but with smaller *per capita* stakes, even though the total stakes for the larger group may significantly exceed that for the smaller, thus facilitating socially inefficient public projects.[191] In the Local Public Commons context, such a diversion might explain inefficient conversions of local public spaces for commercial development.[192] This is also because well-organized groups (either public or private) are able to forcefully convince the public authority of the precise benefits of the project, while the important-but-unorganized local group is often unable to similarly translate its aggregate loss, both present and future, into clear, "orthodox" dollars and cents.[193] Hence whether a site-specific project is approved through a local land-use regulation procedure,[194] an initiative or referendum,[195] or otherwise, un-

Public Choice Threat, 67 U. CHI. L. REV. 941, 942 (2000) [hereinafter Levmore, *Public Choice*].

191. Interest group theory can be traced back to Mancur Olson's work on collective action. OLSON, *supra* note 152. For a review of the current state of interest group literature, see Levmore, *Public Choice*, *supra* note 190, at 953–58. NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS AND PUBLIC POLICY 55 (1994). This "political market failure" therefore facilitates, when the genuine social costs outweigh the benefits that are mainly composed of the "rent" captured by the interest group. *See* Saul Levmore, *Just Compensation and Just Politics*, 22 CONN. L. REV. 285, 298–305 (1990) [hereinafter Levmore, *Just Compensation*]. For a comprehensive analysis of "rent-seeking" behavior, namely the tendency of individuals and groups to increase their utility while decreasing that of the rest of society, see TOWARD A THEORY OF THE RENT-SEEKING SOCIETY (James Buchanan et al. eds., 1980).

192. Since these projects do not entail any formal transference of property rights, such rent seeking is obtained within what Thomas Merrill terms the current "rules of the game." This type of rent seeking is distinguished from either rent seeking obtained by changing the rules of the game (such as advocating for new legislation) or one obtained outside the rules of the game (such as bribing public officials). Thomas W. Merrill, *Rent Seeking and the Compensation Principle*, 80 NW. U. L. REV. 1561, 1586 (1986).

193. The disparity of political power is closely intertwined with the relative ease of presenting market value figures for a single, commercial project over aggregating use values and other costs (present and future) borne by the unorganized cluster of users of a Local Public Common. For a discussion of these types of costs and their evaluation, see *infra* Part V.B.

194. For an analysis of capture by "redevelopment coalitions" in zoning procedures, see Mandelker & Tarlock, *supra* note 187, at 38–39.

195. *See, e.g.*, Anthony S. Alperin & Kathline J. King, *Ballot Box Planning: Land Use Planning Through the Initiative Process in California*, 21 SW. U. L. REV. 1, 28 (1992) (arguing that since self-interested persons generally sponsor most land use initiatives, it is not likely that measures "will reflect a balancing of competing policy concerns"). For a more sympathetic approach towards "general public" voters' willingness and ability to properly balance the costs and benefits of a land use project, see Daniel P. Selmi, *Reconsidering the Use of Direct Democracy in Making Land Use Decisions*, 19 UCLA J. ENVTL. L. & POL'Y 293, 354 (2001–02) (Selmi concedes

organized users of a local public good often find themselves politically underrepresented.

In order to explain a different type of "informal taking," in which a Local Public Common is taken from an unorganized local group for another, larger in scope public use (such as an interstate highway), aimed at serving the constituency's unorganized general public, there needs to be adjustment of interest-group politics to the principle of majoritarian influence, or more accurately, to the scenario of the "tyranny of the majority over the few."[196] Here, Neil Komesar's "Two-Force Model of Politics" may explain the terms under which the general public will be proportionately over-represented compared to the unorganized local group, when a public project such as an inter-city highway vis-à-vis a local public space are at stake.[197] What this means is that unorganized local groups are liable to find themselves politically inferior in both categories of cases. When the decision-making is made on a very local, "sub-constituency" level, they might lose to a small, organized interest group. When the decision is taken on a citywide or statewide level, the local group is liable to be underrepresented vis-à-vis larger interest groups.

This political imbalance is further enhanced by the relative ease with which governmental decision-makers can engage in "fiscal illusion" in such projects.[198] Usually, government officials must resort to political

that the weakest case for use of direct democracy occurs when the initiative is used to make decisions on single pieces of property).

196. KOMESAR, *supra* note 191, at 27.

197. First, the higher the average per capita stakes of the larger group, the more likely its members will incur basic expenses for political participation. Second, the greater the heterogeneity of the distribution of the benefits of the new public project, the greater the likelihood of collective action because of the existence of small, high per capita stakes subgroups (such as day commuters, contractors, gas station owners, etc). Third, size counts: larger numbers of people simply translate to political power via voting. KOMESAR, *supra* note 191, at 67–70; *see also* Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review*, 101 YALE L.J. 31, 39–40 (1991) (arguing that while large, diffuse interest groups will tend to be underrepresented, enlarging the size of a group does have some advantages that offset the disadvantages: more votes, some economies of scale, and perhaps more total resources).

198. "Fiscal illusion" is the systematic under-evaluation of costs by governmental decision-makers whenever the government is not obligated to compensate for private losses, especially when such costs are borne by members of a different constituency for whom the decision-makers are not politically accountable. This "illusion" diverts the decision-makers' cost-benefit analysis into carrying out too many public projects, including socially inefficient ones. Laurence E. Blume, Daniel L. Rubinfeld & Perry Shapiro, *The Taking of Land: When Should Compensation be Paid?*, 99 Q. J. ECON. 71 (1984). Louis Kaplow has criticized this assumption, arguing that since government decision-makers will undervalue the widely dispersed benefits rather than the concentrated costs, fiscal illusion could rather induce too few public projects. Louis Kaplow, *An Economic Analysis of Legal Transactions*, 99 HARV. L. REV. 509, 587 (1986). For a criticism of this criticism, see WILLIAM A. FISCHEL, REGULATORY TAKINGS: LAW, ECONOMICS AND POLITICS 206–07 (1995) (arguing that the overreaching of majoritar-

maneuvering (or enjoy extremely solid popular support) in order to present a project as either publicly free or low-cost, even though a small, "occasional" cluster of unorganized property owners,[199] a smaller-scale government within the jurisdiction,[200] or members of a different jurisdiction altogether[201] carry the genuine burdens. In public projects involving informal takings of Local Public Commons, however, "fiscal illusion" might seem at first sight like "fiscal reality." Since the relevant governmental body is the formal owner of the local public good, it seems easy enough to present the conversion of the public resource as "free" and to dismiss losses to the local group as merely "sentimental" or non-existent altogether. Miles Lewis, who led the community groups' campaign in the Melbourne cases,[202] expressed the typical frustration over such "fiscal illusion": "If you build a museum on parkland it's cheaper as you don't pay for the land. Take the (Royal) Women's Hospital, they're selling that and building a hospital in a park. They are, in effect, just selling parkland."[203]

This is not to say that interest-group politics is inherently "evil"[204] or that it is always destined to produce inefficient outcomes whenever a project involves a "taking" of a local public good.[205] All it means in our context is that since site-specific projects that involve informal takings of Local Public Commons are decided at a fixed governmental level (according to the formal ownership), the unorganized local group's inferior political "voice" cannot be channeled through "forum-

ian government is the inevitable result of maximizing behavior, not just another assumption that might be as valid as its opposite).

199. *See* Hanoch Dagan, *Just Compensation, Incentives, and Social Meanings*, 99 MICH. L. REV. 134, 138 (2000) [hereinafter Dagan, *Just Compensation*] (arguing that fiscal illusion is almost always likely to occur when the occasional group's members have little political influence).

200. *See* Michael H. Schill, *Intergovernmental Takings and Just Compensation: A Question of Federalism*, 137 U. PA. L. REV. 829, 880–85 (1989) (arguing that uncompensated intergovernmental takings, politically facilitated by fiscal illusion, could "disrupt the ability of states and localities to function as governmental bodies," since "groups of states or regions could coalesce and utilize this ability to disrupt state and local governments to oppress citizens from other states and regions").

201. *See* ROBERT D. COOTER, THE STRATEGIC CONSTITUTION 106 (2000) (arguing that inter-jurisdictional negative spillovers in some types of projects mandate that these projects be provided by a higher-level government, such as a special district).

202. *See Longo*, *supra* note 181 and accompanying text.

203. Longo, *supra* note 181, at 3.

204. *See, e.g.*, Elhauge, *supra* note 197, at 66–67 (arguing that since the litigation process is also influenced by interest group dynamics, it does not have any clear comparative advantage over the political process in avoiding inefficient or unjust results).

205. *See* Deril J. Levinson, *Making Governments Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345 (2000) (arguing that interest group politics may, under some circumstances, produce less socially undesirable takings than would be the case with a compensation regime).

shifting" into a different political arena that might be more favorable to it.[206] Therefore the political process itself cannot remedy the problem of inadequate "voice" of the unorganized group; a voice that should be heard if only for efficiency considerations.

In addition, cases of "takings" of Local Public Commons usually demonstrate why the option of "exit" is also not available to the unorganized local group.[207] First, it seems obvious enough that a Tieboutian collective "voting with their feet," to redress a specific government's unresponsiveness to the needs of an unorganized sub-group, is highly unrealistic in the urban context.[208] While the individual stakes in preserving Local Public Commons are high enough to deserve legal recognition, it seems clear that they alone do not decide the extremely complex individual balance of considerations involved in urban living.[209] Alternatively, we should inquire whether the "threat of exit,"[210] rather than exit itself, could serve as a political "signaling" mechanism to deter governments from "taking" Local Public Commons. But in order to create a critical mass of residents undertaking "credible threats" to influence government decision-making,[211] one needs a tight internal organization and significant financial means as well as extremely high individual stakes, the lack of which is usually what perpetuates losses

206. For examples of forum shifting cases in which interest holders prevailed at the state or national level when they could not do so at the local level, see FISCHEL, *supra* note 198, at 320–22. (arguing that judicial intervention might be justified when forum shifting cannot be used to cure inherent political imbalance at a given government level).

207. The exit-voice framework is famously developed in ALBERT HIRSCHMAN, EXIT, VOICE AND LOYALTY (1970). For a recent discussion of the importance of "exit" as a background instrument to avoid political abuse of occasional minorities, see Dagan & Heller, *supra* note 30, at 567–70.

208. According to this model, a household "shops" for a local government and chooses the jurisdiction that provides its preferred mix of taxes and local public goods. If there were enough jurisdictions, each offering a different mix, and if citizens had full information and moving was costless, then citizens would relocate to a different locality if they were dissatisfied, for whatever reason, with their current one. Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956).

209. *Cf.* FISCHEL, *supra* note 198, at 254–55 (arguing that even in the suburban context, only when people have to move anyway (e.g., for a new job) will they engage in substantial comparison of governmental services between a realistically limited number of different communities); *see also* Stewart E. Stark, *Competition Among Municipalities as a Constraint on Land Use Exactions*, 45 VAND. L. REV. 831, 859 (1992) (arguing that residents and businesses in highly developed localities may lack the opportunity to exit because the specific locations at issue may provide opportunities, especially commercial ones, that do not exist in other localities).

210. FISCHEL, *supra* note 198, at 289.

211. A threat of exit will be considered "credible" and effective to influence governmental behavior only when the persons who make the threat would actually carry it out if called upon to do so. *See* DOUGLAS G. BAIRD ET AL., GAME THEORY AND THE LAW 65–66 (1994).

of Local Public Commons by unorganized cluster of users. In other words, while grassroots cooperation in Local Public Commons is strong enough to keep it sustainable when government plays its administrative and financial "background role," it is not so invincible as to overcome governmental open hostility to the group's interests.

C. *Current "Bypasses" Cannot Save Local Public Commons*

Since "takings" of Local Public Commons involve no formal transfer of property rights, these cases are currently litigated under the general doctrinal framework of the scope of governmental powers to convert or divert public property for a different use. Hence current legal rules are oblivious to the specific contexts of local public goods and to the implications that a judicial demarcation of the scope of governmental liberty would have for the future-looking incentives of the parties involved. Moreover, specific pieces of legislation and judicial doctrines, such as the law of private dedications, the Public Trust Doctrine, environmental impact statutes, and the "intergovernmental takings" doctrine cannot serve as sufficient "bypasses" to discipline uncompensated "takings" of Local Public Commons, without the need to overtly upset current doctrine.

1. GOVERNMENT IS AT LIBERTY TO CONVERT PUBLIC PROPERTY

In *Reichelderfer v. Quinn*,[212] the U.S. Supreme Court established the rule that when lands are acquired by a governmental body in fee and dedicated for a certain public use, it is within its power to change the use at will or to "make other disposition of the land."[213] This rule is generally valid to all "public dedications" where the government body is the absolute owner through eminent domain, voluntary purchase, or unconditional grant and it designates the land for a certain public use.[214] While the neighboring owners that filed the suit in *Reichelderfer* had enjoyed special benefits by the presence of Rock Creek Park, such increase in value did not generate constitutionally protected interests against diminution by the government, even when their properties had

212. 287 U.S. 315 (1932).

213. *Id.* at 320. The diversion of the land in this case involved erection of a fire engine house in Rock Creek Park in the District of Columbia. This decision followed several state court rulings. *See, e.g.*, Clarke v. City of Providence, 15 A. 763 (R.I. 1888) (holding that a property owner whose lands were in the vicinity of a park had no vested interest entitling him to enjoin the city from discontinuing the park and selling the land).

214. For a review of case law on diversion of "public dedications," see 26 AM. JUR. 2d. *Eminent Domain* § 256 (1996) and 59 AM. JUR. 2d. *Parks, Squares, and Playgrounds* § 22 (2000).

been previously assessed for these benefits.[215] In its decision, the Court focused on its concern over a "chilling effect" on the government: "if the enjoyment of a benefit thus derived from the public acts of government were a source of legal rights to have it perpetuated, the powers of government would be exhausted by their exercise."[216] Other courts have emphasized that the beneficiary of the public resource is the entire general public of the governmental owner's constituency (state, city, etc.), so that a sub-group (such as the residents of a certain locality) could not exclude others or veto a conversion of the public space.[217] Generally speaking, unless there is specific statutory authorization that limits the power of conversion,[218] or a nuisance cause of action to restrain the new use,[219] the governmental owner is at liberty to "take" a publicly dedicated local public space, including for uses that may be outright detrimental to it, such as a highway.[220]

Potential litigation to protect Local Public Commons is further thwarted by the issue of standing,[221] as is demonstrated in the recent "community gardens" cases in New York City.[222] Federal and state courts have held that neither the founders of organizations that created community gardens,[223] nor advocacy groups such as the NYC Environmental Justice Alliance[224] or the NYC Coalition for the Preservation of

215. The Court reasoned that the possibility that the government "might, at some later time, rightfully exercise its power to change the use of the park lands, so far as it affected present value, was a proper subject for consideration in valuing the benefits conferred." *Reichelderfer*, 287 U.S. at 323.

216. *Id.* at 319.

217. *See, e.g.*, Higginson v. Treasurer and Sch. House Comm'rs of Boston, 212 Mass. 583 (1912). "The use of the park is in kind analogous to those confessedly public. These are open to general public travel without reference to the residence of the traveler. The enjoyment of public parks can hardly be restricted to residents of a particular city or town. . . . It follows that the State has the power to appropriate it for another use without the consent of the city." *Id.* at 589–91.

218. *See, e.g.*, Commonwealth v. City of Corbin, 264 S.W.2d 263 (Ky. 1954); McCollough v. Bd. of Educ. of San Francisco, 51 Cal. 418 (1876).

219. For a review of such case law, see 59 AM. JUR. 2d. *Parks, Squares, and Playgrounds* § 57 (2000).

220. *See* Ferdinand S. Tinio, Annotation, *Construction of Highway Through Park as Violation of Use for Which Park Property May Be Devoted*, 60 A.L.R. 3d 581 (1974).

221. Naturally, the extremely complicated issue of the law of standing in citizen suits is outside the scope of this article. *See generally* Symposium, *Citizens Suits and the Future of Standing in the 21st Century: From Lujan to Laidlaw and Beyond*, 11 DUKE ENVTL. L. & POL'Y F. 1 (2001).

222. It is important to note that most of these spaces were not officially designated as public spaces, but the question of neighbors' standing was not directly linked to the issue of these spaces' pre-designation.

223. Worley v. Giuliani, 8 Fed. Appx. 131 (2d Cir. 2001).

224. New York Envtl. Justice Alliance v. Giuliani, 50 F. Supp. 2d 250, 254 (S.D.N.Y. 1999), *aff'd on other grounds*, New York Envtl. Justice Alliance v. Giuliani, 214 F.3d. 65 (2d. Cir. 2000).

Gardens,[225] had standing to sue the city for its plans to clear the gardens to construct housing units,[226] as these claimants "failed to allege any legally protected interest in the property at issue."[227]

In this sense, the "procedural" issue of standing is not isolated from the general skeptical approach towards "substantive" rights to unorganized urban communities.[228] Courts tend to see the role of the informal "community" as merely sentimental,[229] often coupling local group's losses with subjective damages of nontransferable value, which do not qualify for compensation under the Fifth Amendment Just Compensation Clause.[230]

While it is not intended to engage in detailed criticism of every aspect of current doctrine regarding "public dedications," its general unresponsiveness to allocative efficiency considerations in the context of Local Public Commons can be quite clearly demonstrated by confront-

225. New York City Coalition for the Pres. of Gardens v. Giuliani, 666 N.Y.S.2d 918 (App. Div. 1998).

226. These claims were generally brought under the State Environmental Quality Review Act (SEQRA), ch. 612, 1975 N.Y. Laws 895 (1975) (codified as amended at N.Y. ENVTL. CONSERV. L. §§ 8–0101 to 8–0117 (McKinney 1997)). For a discussion of whether SEQRA is effective to protect Local Public Commons, see *infra* Part IV.C.3. The claimants in these cases have also unsuccessfully argued for violations of either the "disparate impact" clause of Title VI of the Civil Rights Act of 1964 or of the domestic violence clause of Article VI (U.S. CONST. art. VI, § 4). The latter argument was similarly rejected for lack of standing.

227. *Worley*, 8 Fed. Appx. at 133. While New York's doctrine of standing is comparatively restrictive, it is not exceptional with respect to public dedications. *See, e.g.*, Prince v. Crocker, 166 Mass. 347, 362–63 (1896) ("The plaintiffs, in their capacity of taxpaying citizens of Boston, or as voters, or as a constituted part of the public at large, can assert no right to the continued use of the Common or of the Public Gardens as public parks, or to have compensation paid for the surrender of such use. . . .")

228. The clause reads: "Nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V, cl. 4. Each one of the state constitutions contains its own separate takings clause. *See* ELLICKSON & BEEN, *supra* note 33, at 1011.

229. *See, e.g.*, Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455 (Mich. 1981) (reasoning that social and cultural environments are not matters within purview of statute governing environmental protection and are outside its legislative intent).

230. *See* United States v. 564.54 Acres of Land, 441 U.S. 506, 516 (1979) (reasoning that "to make the measure of compensation depend on a jury's subjective estimation of whether a particular use 'benefits' the community would conflict with this Court's efforts to develop relatively objective valuation standards"); *see also* Kimball Laundry Co. v. U.S., 338 U.S. 1, 5 (1948) (reasoning that "the value compensable under the Fifth Amendment, therefore, is only the value which is capable of transfer from owner to owner and thus the exchange for some equivalent"). While this approach has invoked criticism by several scholars, such criticism focuses only on social and cultural aspects, rather than on the wider value-establishing role that a local group may actually play regarding at least some types of local public resources; *see, e.g.*, Joseph L. Sax, *Do Communities have Rights? The National Parks as a Laboratory of New Ideas*, 45 U. PITT. L. REV. 499 (1984); Frank I. Michelman, *Property as a Constitutional Right*, 38 WASH. & LEE L. REV. 1097 (1981).

ing it with the opposite overreaching of the nonconversion rule for "privately dedicated" local public goods.

2. THE ODDITY OF OVER-PROTECTION FOR PRIVATE DEDICATIONS

"Private dedications" are properties granted to the governmental body by a private party for the benefit of the public, e.g., private land granted for a public space.[231] The power of the governmental body to divert the "public dedication" for other uses has traditionally depended on the nature of the estate conveyed by the grantor. A fee simple absolute generally allowed the municipality to do as it wished, while the conveyance of defeasible fees or the existence of restrictive covenants would have forbidden any deviation from the original terms of the dedication.[232] Gradually, most state courts have come to prefer to interpret "park grants" as governed by restrictive covenants,[233] or even to treat all dedications as trusts, regardless of the specific nature of estate conveyed.[234] The effect of applying the principles of charitable trusts to "private dedications" is overwhelming: not only is a municipality regularly prohibited from diverting such public space for a different use, but even state legislation expressly authorizing it was held as either ineffective or outright unconstitutional.[235] The "charitable trust" construction also overrides the judicially developed "public policy" and "conforming use" exceptions to the nonconversion rule.[236]

Even more reaching in scope than the substantive rule of noncon-

231. *See* 23 AM. JUR. 2d *Dedication* §§1–10 (2001); 59 AM. JUR. 2d., *Parks, Squares, and Playgrounds* § 19 (2000).

232. For a review of the different conversion rules for "private dedications" based on the nature of the estate conveyed, see Kevin A. Bowman, *The Short Term Versus the Dead Hand: Litigating our Dedicated Public Parks*, 65 U. CIN. L. REV. 585, 601–11 (1997).

233. *Id.* at 607–08.

234. *Id.* at 608–11.

235. In 1975, the Massachusetts Senate addressed the State's Supreme Court about the constitutionality of a pending bill authorizing the city of Revere to use certain parkland for school purposes. Interpreting the terms of the granting deed as creating a trust "by the city for public use and enjoyment," the court ruled that the enactment of the bill would infringe enforceable contractual rights in violation of the Federal Constitution's Contract Clause. Opinion of the Justices to the Senate, 369 Mass. 979, 988–89 (1975).

236. Bowman, *supra* note 232, at 614. The "public policy" exception allows courts not to enforce restrictions that have become either unreasonable or against public policy. *See, e.g.*, Unknown Heirs of Devou v. City of Covington, 815 S.W. 2d. 406, 414–15 (Ky. Ct. App. 1991). The "conforming use" exception aims at adapting the restriction to make it consistent with the times. *See, e.g.*, Angel v. City of Newport, 288 A.2d 498 (R.I. 1972) (holding that use of a small portion of a parkland for the Newport County Chapter for Retarded Children was consistent with a change in circumstances, while adopting a "more liberal approach to the question of what changes in use would be compatible with the intent of the grantor." *Id.* at 562).

version for "private dedications" is the gradual judicial expansion of standing to enforce it. Courts have developed third party beneficiary theory for standing to enforce restricting covenants, and have followed a similar path with respect to trusts.[237] While some state courts recognized the standing of neighboring landowners apart from the general public, other courts have simply recognized taxpayer standing to enforce such "charitable trusts."[238]

This broad disparity between "public dedications" and "private dedications," based on the focus on the establishment stage (T_0) while almost ignoring the implementation stage (T_1), seems troubling from an allocative efficiency point of view. In contrast to public dedications that offer no remedy to the local group of users, private dedications establish a rigid property rule regime, which is in many respects an inalienability rule regime.[239] This is both because of the substantive protection for private dedications "intended to create trusts in perpetuity for the public benefit"[240] as well as the broad standing to enforce their terms "eternally." It therefore follows that, hypothetically, even if the local government, the neighboring residents, and the heirs of the grantor were unanimous about the need to replace a neglected and obsolete local public space with a new public use, a preservationist "outsider" could veto such a highly efficient public project as a matter of right.[241] This scenario for "private dedications" is as oblivious to the genuine cost-benefit calculus of the proposed public project as is the opposite case of no protection to the "taking" of a highly efficient Local Public Common that is formally owned by the government as a "public dedication."[242]

237. Bowman, *supra* note 232, at 627.

238. By in fact recognizing every member of the general public as having a special interest in the private dedication, standing requirements in these cases are less strict than for those that concern "regular" charitable trusts. *See* Bowman, *supra* note 232, at 629–30; Tinio, *supra* note 220, § 2(b) (for a list of states recognizing broad public standing to enforce public space dedications).

239. As Calabresi and Melamed explain, rules that forbid a transfer altogether might approximate an efficient result when the injury expected from the transfer is likely to be so high and dispersed so that neither a voluntary transaction nor a compensation requirement is feasible. Calabresi & Melamed, *supra* note 8, at 1111. While such a rule seems overall efficient with respect to the resources that fall under the Public Trust Doctrine (*see supra* note 77 and accompanying text), establishing such a general rule for conversions of all kinds of public uses that serve an indefinite number of users will effectively block all public projects.

240. Opinion of the Justices to the Senate, 369 Mass. 979, 984 (1975).

241. Since each member of the general public has a right to veto such a project, this situation resembles the "anticommons" example that Robert Ellickson gives, in which "any person" has standing to enforce a wilderness preserve and hence exclude others. Ellickson, *Property in Land*, *supra* note 21, at 1322 n.22.

242. This article does not necessarily offer to disregard all differences between public and private dedications. For example, awarding the grantor a property rule entitle-

3. ENVIRONMENTAL LEGISLATION'S INEFFICIENT PROTECTION

The past few decades have seen a proliferation of legislation aimed at disciplining public projects liable to have adverse effects on the environment. Most notably, more than fifteen states in the Union have followed the Federal National Environmental Policy Act of 1969 (NEPA)[243] and have enacted environmental policy acts.[244] The mainstay of these statutes, the environmental impact statement, is intended to ensure that the government's calculus includes the elements of diffuse environmental costs and benefits.[245] How may these statutes influence public actions that entail an informal taking of Local Public Commons, especially in the urban context?

First, the judicial approach on standing is highly indicative of this legislation's overall ineffectiveness to protect against such "takings." As mentioned, the New York courts' recent rulings state that residents do not have standing to file claims in cases where they cannot allege legally protected interests in public spaces.[246] Similarly, the local resident interest in the implications of the State Environmental Quality Review Act (SEQRA)[247] for these spaces was not recognized as materially different from that of the general public.[248] This means that besides the currently narrow construction of the term "environment" in SEQRA by the

ment to enforce the defeasibility of a fee conveyed to the government seems efficient, since it encourages would-be grantors to dedicate land, and at the same time, the existence of only two parties dramatically lowers transaction costs so as to enable re-designation.

243. 42 U.S.C. §§ 4321–4370d (West Supp. 1998).

244. For a list and synopsis of these state statutes, generally known as the "Little NEPA's," see DANIEL R. MANDELKER, NEPA LAW AND LITIGATION § 12.02[1] (2d ed. 1998). For a survey of the NEPAs' procedural and substantive "teeth" to control environmental harms, see David Sive & Mark A. Chertok, *"Little NEPA's" and their Environmental Impact Assessment Procedures*, SG026 ALI-ABA 197 (2001).

245. *See* ELLICKSON & BEEN, *supra* note 33, at 424.

246. *See supra* notes 221–27 and accompanying text.

247. Ch. 612, 1975 N.Y. Laws 895 (1975) (codified as amended at N.Y. ENVTL. CONSERV. L. §§ 8–0101 to 8–0117 (McKinney 1997)).

248. This distinction is based on the New York Court of Appeals principal ruling in *The Society of the Plastics Industry, Inc. v. County of Suffolk*, 570 N.Y.S.2d 778, 785–86 (1991) ("In land use matters especially, we have long imposed the limitation that the plaintiff, for standing purposes, must show that it would suffer direct harm, injury that is in some way different from that of the public at large . . . This requirement applies whether the challenge to the governmental action is based on a SEQRA violation, or other grounds"). Moreover, the Second Circuit reasoned that since these claims "are based on the effect the absence of the garden will have on the area community," they present "an 'abstract question of wide public significance' amounting to a 'generalized grievance' which courts should refrain from adjudicating." Worley v. Giuliani, 8 Fed. Appx. 131, 133–34 (2d Cir. 2001). This means, at least implicitly, that where an informal taking of a local public space is concerned, the lack of legal remedy does not stem from the fact that there might be "a better plaintiff," but rather from the assumption that the environmental assessment should not explicitly investigate the allocative efficiency in the specific public space.

courts,[249] even the procedural aspect of weighing the entire set of costs and benefits of a Local Public Common is not guaranteed.[250]

Second, this legislation's inadequate regard for highly efficient and "successful" urban public spaces that lack any special aesthetic, historic or "natural" significance is, unfortunately, the common rule. Most of the effective federal and state legislation aimed at protecting public spaces from conversion focuses on preservation of wildlife and plant habitat, agricultural areas, or scenic spots.[251] For example, the restrictions on land conversions of the various State Natural Areas Programs (SNAPs) usually apply to unique wildlife habitat, plant communities, or geologic formations.[252] This is also the case with the "twin" provisions of section 4(f) of the Department of Transportation Act,[253] and section 138 of the Federal-Aid Highway Act,[254] according to which, the Secretary of Transportation may not approve federally funded highway construction through certain types of public lands, unless he finds that there is no prudent or feasible alternative.[255] While the celebrated

249. "Environment" is defined in SEQRA as "the physical conditions that will be affected by a proposed action, including land, air, water, minerals, flora, fauna, noise, objects of historic or aesthetic significance, existing patterns of population concentration, distribution, or growth, and existing community or neighborhood character." N.Y. ENVTL. CONSERV. L. § 8–0105(6) (McKinney 1997). An exceptional example for a judicial intervention regarding the social and economic aspects of the "environment" definition is *Chinese Staff and Workers Ass'n v. City of New York*, 502 N.E.2d 176 (N.Y.1986) (holding that the displacement of moderate-income urban residents by a luxury development must be weighed within the environmental impact statement).

250. For a review of the judicial deference currently awarded to agencies' substantive decisions, see Philip Weinberg, *SEQRA: Effective Weapon—If Used as Directed*, 65 ALB. L. REV. 315, 316–18 (2001); Michael B. Gerard, *Judicial Review under SEQRA: A Statistical Study*, 65 ALB. L. REV. 365, 367–68 (2001) (noting that between 1990 and 2000, plaintiffs won only one SEQRA case in New York's Court of Appeals).

251. Levin, *supra* note 182, at 594–95.

252. Levin, *supra* note 182, at 613–15.

253. 49 U.S.C. § 303 (c)(1) (1994).

254. 23 U.S.C.S. §138 (1968).

255. For an evaluation of the effectiveness of environmental litigation to protect against the adverse effects of highway construction in the urban setting, see Roger Nober, *Federal Highway and Environmental Litigation: Toward a Theory of Public Choice and Administrative Reaction*, 27 HARV. J. ON LEGIS. 229, 247 (1990). Another problem is that these provisions leave major loopholes for state and local government "bypasses," mainly because these restrictions apply only to federally funded projects. *See* D.J. Gerken, *Loopholes You Could Drive a Truck through: Systematic Circumvention of Section 4(F) Protection of Parklands and Historic Resources*, 32 URB. LAW. 121, 127 (2000). Moreover, Gerken explains that states and local governments often engage in "bookkeeping shifts" that allow them to enjoy federal funding without facing the prohibitions of § 4(f). Since states do not have to decide *ex ante* whether to request federal funds for a particular project, they can proceed through the stages of highway route selection and design, obtain all federal approvals necessary to remain eligible for funding, and then wait to see whether § 4(f) will pose a barrier. If it appears that § 4(f) will delay or stop the project, the state simply announces that it will complete the project solely with state funds, and then uses the federal-aid funds for some other eligible project. *Id.* at 131–33.

Overton Park case has given "teeth" to this deliberative process,[256] enough to stop that specific project altogether,[257] these statutory provisions offer only negligible redress to urban local Public Commons, since they focus on "natural" or "historic" resources. The national policy declared in section 138 is to "preserve the *natural beauty* of the public parks and recreational lands, wildlife and waterfowl refuges, and historic sites."[258] In this respect, it seems that a neglected but "aesthetic" resource would be granted more protection than a highly efficient and successful urban Local Public Common, that usually has little significant aesthetic value. Although the process-based remedy of section 4(f) and section 138 may be otherwise highly effective to ensure a more complete cost-benefit calculus of a "taking" of Local Public Common, it is of little practical value in the urban context.[259]

4. THE INTERGOVERNMENTAL TAKINGS DOCTRINE'S CHANGING FOCUS

The informal taking of a local public good that serves a local group, in favor of another public use for the benefit of a larger public, is most

256. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971). Although the Court concluded that the Secretary need not make any formal findings, it nevertheless held that the judicial review of his decision "is to be based on the full administrative record" that was before him. Moreover, "since the bare record may not disclose the factors that were considered by the Secretary's construction of the evidence, it may be necessary . . . to require some explanation in order to determine if the Secretary acted within the scope of his authority and if the Secretary's action was justifiable under the applicable standard." *Id.* at 420.

257. *See* Risher, *supra* note 189.

258. These "twin" statutory provisions apply to a project "which requires the use of a publicly owned land from a public park, recreation area, or wildlife and waterfowl refuge of national, State or local significance as determined by the Federal, State or local officials having jurisdiction thereof, or any land from an historic site of national, State, or local significance as so determined by such officials. . . ." 49 U.S.C. § 303 (c)(1). *See also* 23 U.S.C.S. § 138.

259. This disparity is also highly relevant to other federal and state measures aimed at restricting the conversion of public open space, such as the New Jersey "Green Acres" program. For a comprehensive survey of "Green Acres," see Bowman, *supra* note 232, at 618–22. Another prominent example is the Federal Land and Water Conservation Fund (LWCF) program. The statement of purposes of the Land and Water Conservation Fund Act is "to assist in preserving, developing, and assuring accessibility to . . . such quality and quantity of outdoor recreation resources as may be available and desirable for individual active participation in such recreation and to strengthen the health and vitality of the citizens. . . ." 16 U.S.C.A. § 4601–4 (2002). Among their many procedural and substantive provisions, each one of these programs mandates an especially effective requirement: replacement land for the converted one. LWCF also effectively eliminates fiscal incentives to convert public spaces—which might be otherwise considered a "free" alternative—by specifying what criterions the replacement land should meet. In the case of land funded through LWCF, the Secretary of Interior must "assure the substitution of other recreation properties of at least equal fair market value and of reasonably equivalent usefulness and location. 16 U.S.C.A. § 4601–4 (f)(3). Under "Green Acres," the replacement property must be of at least equal market value and of reasonably equivalent size, quality, location, and usefulness for conservation and recreation purposes. N.J. ADMIN. CODE, tit. 7, § 7:36–21.1(c)(3) (2000).

closely conceptualized in current law in the "intergovernmental takings" doctrine and in the closely related concept of "substitute facility." While courts have only implicitly touched on the issue of informal takings, a careful analysis of current doctrine may teach us that courts have gradually come to ignore the interests of informal clusters of users in determining the proper remedy for cases of conversion or termination of public resources.

The dilemma concerning intergovernmental takings is originally derived from the federal structure of the United States, as is the case with other federal regimes throughout the world, such as Canada,[260] Germany[261] and Russia.[262] In the United States, courts have held from early on that when the federal government exercises power of eminent domain over property owned by state or local governments, it is required to pay compensation according to the Takings Clause,[263] although this clause does not make any reference to publicly owned property. In *United States v. 50 Acres of Land*,[264] the Supreme Court reasoned that "when the United States condemns a local public facility, the loss to the public entity, to the persons served by it, and to the local taxpayers may be no less acute than the loss in a taking of private property."[265]

260. Canada is currently experiencing a political and legal battle over the first "hostile" intergovernmental taking in its history. In 1999, the federal government expropriated the Nanoose Bay (west of Vancouver Island) from the government of British Columbia and offered $1.88 million in compensation. Canada uses the bay as a torpedo testing range and allows the U.S. navy to use the facilities. The expropriation, pursuant to the Expropriation Act, R.S.C. 1985 c. E-21, came after negotiations to renew the federal government's lease on the seabed failed due to the two governments' clash over the Canada-U.S. salmon fishing treaty. In March 2002, a federal court struck down the expropriation order due to several flaws in the public hearing procedure. Soc'y Promoting Envtl. Conservation v. Canada (Attorney General) (2002), 217 F.T.R. 279, 2002 FCT 236 (Fed. T.D.). In May 2003, the Federal Court of Appeal reversed this decision, paving the way for the expropriation. Soc'y Promoting Envtl. Conservation v. Canada (Attorney General), 2003 FCA 239 (decided May 29, 2003).

261. In view of the relatively distinct division of planning power between the federal government, the federal states and the local governments in Germany, the issue of intergovernmental takings is relevant only to a limited number of "national" projects such as major highways or railroads. *See* FEDERAL MINISTRY FOR REGIONAL PLANNING, BUILDING AND URBAN DEVELOPMENT, LAW AND PRACTICE OF URBAN DEVELOPMENT IN THE FEDERAL REPUBLIC OF GERMANY 19–21 (1993).

262. The question of compensation for "intergovernmental takings" is currently a matter of fierce debate between the different levels of government in Russia, yet to be comprehensively legally settled. Heller, *supra* note 23, at 641 n.101. Interestingly, during the period of transition in Russia in the early 1990s, the national government transferred land "for free" to the local governments, as was the case with other nations in transition in Central and Eastern Europe. Olga Kaganova & Ritu Nayyar-Stone, *Municipal Real Asset Management: An Overview of the World Experience, Trends and Financial Implications*, 6 J. REAL ESTATE PORTFOLIO MANAGEMENT 307, 314 (2000).

263. U.S. CONST. amend. V, cl. 4.

264. 469 U.S. 24 (1984).

265. *Id.* at 31.

Yet, since the "harmony of interests" of these various groups changes into a conflict in case of an informal taking of a Local Public Common, it is critical to try to discern which interests federal courts are actually looking to promote first and foremost: the "public entity" (the local government), the "persons served" by the facility (the local cluster of users), or the "local taxpayers" (the local government's "general public").[266] If current doctrine is more concerned with the loss to the public entity (the government) or to the relevant taxpayers (the relevant general public), current doctrine cannot effectively discipline governments that informally take Local Public Commons. But if the focus is on the loss to the "persons served" by the facility, a remedy might be justifiable, if it can be passed through to the actual cluster of users as such. We can infer an implicit shift in the federal courts' focus from the "persons served" to the "public entity," by examining the way compensation for intergovernmental takings is currently determined: by "fair market value" and not a "substitute facility."[267]

In the *Borough of Manhattan* case,[268] the Second Circuit held that when the public condemnee proves that there is a duty to replace a condemned facility, it is entitled to compensation equal to the cost of constructing a functionally equivalent substitute, whether that cost is more or less than the market value of the facility taken. Interestingly, the court also held that there should be no difference if the duty is legally compelled or arises from necessity: "if application of the 'substitute facility' theory depended on finding a statutory requirement, innumerable non-legal obligations to service the community would be ignored. If the structure is reasonably necessary for the public welfare, compensation is measured not in terms of 'value' but by the loss to the

266. For a different evaluation of the Court's approach in *50 Acres of Land*, see Schill, *supra* note 200. Schill rejects the presumption that the loss caused to a public entity is the same as the one caused to a private party. Reviewing the central justifications for compensation to private owners: preventing unfair burdens, risk minimization, avoiding fiscal illusion, and protection from political exploitation, Schill concludes that only the latter two, basically political process claims, are relevant to intergovernmental takings. In his view, "uncompensated intergovernmental takings could disrupt the ability of states and localities to function as governmental bodies," since "groups of states or regions could coalesce and utilize this ability to disrupt state and local governments to oppress citizens from other states and regions." Schill, *supra* note 200, at 880–85. Schill argues for a compensation based on the substitute facility doctrine whenever the local government shows that the facility taken provided a benefit that would not be fully provided after the taking. Schill, *supra* note 200, at 898.

267. This issue is generally important when the loss incurred by the taking of the public facility is not equal to the fair market value, or, in other words, when establishing a substitute facility is more costly than the market value of the facility taken.

268. United States v. Certain Prop. Located in the Borough of Manhattan, City, County and State of N.Y., 403 F.2d 800 (2d Cir. 1968).

community occasioned by the condemnation."[269] This earlier opinion can support the case for Local Public Commons in two respects. First, it focuses on the "rational need" of the cluster of users. By using the term "rational," the court seems to realize that the actual use pattern of the local group reflects a context-specific *objective* element that should be considered. Second, the opinion shows support, in appropriate cases, by moving away from the rigid formality of "ownership" and "duty" and looking to the actual loss to the "persons served" when the local public facility is no longer available.

However, later Supreme Court cases seem to undermine this approach. First, the Court held in *564.54 Acres of Land*,[270] that when the government condemns property owned by a private nonprofit organization and operated for public purpose (recreational camps), the Takings Clause does not require payment of the replacement cost rather than fair market value.[271] This approach, which concentrates on formal ownership and legal duties rather than on context-specific uses, has been taken further in *50 Acres of Land*,[272] in which the Court argued that even if a city has a legal responsibility to arrange for a suitable replacement facility, this "does not justify a distinction between public and private condemnees."[273] This is also demonstrated in a related doctrine, according to which, if the governmental entity does not have a formal legal duty to provide its constituents with substitutes for the property taken, then it has suffered no financial loss and therefore is not entitled to substantial damages. In fact, the taking of property in these cases relieves the government of the "burden of maintaining" the facilities taken.[274]

269. *Id.* at 804.

270. U.S. v. 564.54 Acres of Land, 441 U.S. 506 (1979).

271. The Court reasoned that it is not "relevant whether respondent's camps were reasonably necessary to the public welfare, since respondent is under no legal or factual obligation to replace the camps regardless of their social worth . . . . [T]he community benefit which the camps conferred might provide an indication of the public's loss upon condemnation of the property. But we cannot accept the Court of Appeals conclusion that this loss is relevant to assessing the compensation due a private entity." *Id.* at 515–16.

272. United States v. 50 Acres of Land, 469 U.S. 24 (1984).

273. *Id.* at 34. The Court therefore held that a "substitute facility" remedy is considered adequate only in cases that "for the most part, involve properties that are seldom, if ever, sold in the open market." *Id.* at 30. In a footnote, the Court refers to a quote from the *564.54 Acres of Land* case, according to which "this might be the case, for example, with respect to public facilities such as roads or sewers." *Id.* at 30, n.12.

274. *See, e.g.*, United States v. New York, 168 F.2d 387, 390 (2d. Cir. 1948). However, some courts have interpreted the term "duty" liberally so as to include actual "necessity." *See, e.g.*, United States v. Des Moines County, 148 F.2d 448, 449 (8th. Cir. 1945). For a more strict approach, see, e.g., Union Free School Dist. v. State, 230 N.Y.S. 2d 416 (N.Y. Ct. Cl. 1962).

The intergovernmental taking doctrine therefore fails to protect Local Public Commons precisely when the "taking" is an informal one, and its focus on formal ownership and duties makes it oblivious to context-specific efficiency concerns.[275]

V. Applying the Takings Doctrine to Local Public Commons

A. *Validating Cooperation in Unorganized Communities*

1. THE FOCUS ON EFFICIENCY

The successful model of a Local Public Common is far from self-evident. As Jane Jacobs observes: "let us . . . consider city parks deprived places that need the boon of life and appreciation conferred on *them.* This is more in accord with reality, for people do confer use on parks and make them successes—or else withhold use and doom parks to rejection and failure." [Emphasis in original.][276] This comment relates to Carol Rose's argument about recreational activities in public

275. This formalistic approach is somewhat modified in doctrines that deal with state-based intergovernmental takings, namely where a state or state agency condemns property of a state subdivision. On the one hand, state courts generally recognize that the state as sovereign has general power to condemn for public purposes property located within its boundaries (often without compensation) despite the fact that the property is already devoted to a public use by a subdivision of that state. For a list of state cases affirming this principle, see A.S. Klein, Annotation, *Power of Eminent Domain as Between State and Subdivision or Agency Thereof, or as Between Different Subdivisions or Agencies Themselves*, 35 A.L.R.3d 1293, pt. II, § 3 (1971). The question of compensation is decided based on the construction of the applicable state constitutional and statutory provisions in view of the particular circumstances. *Id.* at pt. II, § 2(b). On the other hand, a number of related doctrines somewhat reduce the extent of such takings. First, a governmental subdivision of a state (county, municipality, etc.) does not have inherent power to condemn, but has to be expressly authorized to do so. For a general survey of this doctrine, see *Id.* at pt. III, § 8; 26 AM. JUR. 2d, *Eminent Domain* § 74 (2003). Some jurisdictions require the governmental condemnor to demonstrate that the new public use is "more necessary" or constitutes a "higher use" than the current one. *See* Linda A. Sharp, Annotation, *Construction and Application of Rule Requiring Public Use for Which Property Is Condemned to Be "More Necessary" or "Higher Use" Than Public Use to Which Property Is Already Appropriated—State Takings*, 49 A.L.R.5th 769 (1997). Second, some jurisdictions hold that even when the state itself is the condemnor, full compensation is required whenever the property was originally purchased by the city or town for various municipal functions specifically designated to benefit the city inhabitants rather than the safety or convenience of the public at large. *See, e.g.*, Winchester v. Cox, 26 A.2d 592 (Conn. 1942); State *ex rel.* Geake v. Fox, 63 N.E. 19 (Ind. 1902). However, state doctrines are also still generally hostile to arguments of local groups of beneficiaries whenever their interests diverge from those of the relevant governmental body. This basic approach is implicit in the prevailing rule that when a local government has formally acquired ownership as an agency of the state (namely, on behalf of a larger general public), the property may be later devoted to other public purposes without the local government's consent. Klein, pt. I, § 2(b).

276. JANE JACOBS, THE DEATH AND LIFE OF GREAT AMERICAN CITIES 89 (1961).

spaces: "[i]ndeed, the real danger is that individuals may under-invest in such activities, particularly at the outset."[277]

As demonstrated in Part III, the informal cluster of users often determines the value of a Discrete Local Public Good: coordination that starts out spontaneously and stabilizes into a long-enduring cooperative mode makes the resource a successful Local Public Common, endowing significant direct benefits as well as positive spillover effects. Similarly, under-investment and apathy are liable to make these resources of negative value. Due to systematic constraints, local governments, following the establishment stage of the public resource (T_0), increasingly rely on such grassroots informal patterns throughout the allegedly infinite implementation stage (T_1). Yet when such governments consider an adverse conversion of the Local Public Common (at T_2), they are free to ignore these very considerations under current doctrine, and unfortunately, they cannot be otherwise disciplined through political and market-like measures taken by those affected.

In considering possible reforms for this uneasy state of affairs, there are several ways in which the government can promote and vindicate group cooperation in local public goods during the implementation stage (T_1). For example, awarding the local users with a limited right to exclude the general public by fencing the space and locking it at night to prevent vandalism, overnight sleeping, etc. A local group might be also allowed to craft reasonable rules of conduct for members of the general public, as is the case with privately owned public spaces in New York City.[278] Perhaps imposing an affirmative duty on the government to subsidize, fully or partially, a certain capital project that is extremely necessary to preserve and improve the Local Public Common, hence maintain the government's essential "background role."[279] Obviously, any such governmental vindication during T_1 must pay close consideration to the formal open access trait of the public resource.

277. Rose, *Comedy of the Commons*, *supra* note 24, at 141.

278. The 1961 Zoning Resolution in New York City that regulates the provision of privately owned public spaces, articulates in detail the design standards for such spaces, but is silent when it comes to the owner's "management" of the space's use by members of the public. The Department of City Planning has taken the position that an owner may prescribe "reasonable" rules of conduct. For example, the department has considered a dog leash requirement, a ban on the consumption of alcohol, or a prohibition on sleeping in an indoor space to be reasonable. On the other hand, attempts by owners to exclude "undesirable" persons on some basis other than improper conduct, or to set limits on the amount of time a member of the public may sit in or otherwise use a space, have been considered unreasonable. KAYDEN ET AL., *supra* note 66, at 38.

279. One example is installing lighting facilities in a public space to allow the residents to undertake evening and night time activities such as self-organized music performances, outdoor theatre plays, etc.

While the local group of users should be recognized as an efficient designer of the rules of the Local Public Common, based on its intimate acquaintance with it, it should not be allowed to abuse such power simply to exclude the general public or any other group. Simply put, the local group may establish generally applicable rules of use, but may not establish the identity of the users.

That said, a reform that applies to the conversion or termination stage of a Local Public Common (T_2) will have a more substantial effect on the vindication of cooperation by members of an otherwise unorganized urban community. The application of the takings doctrine to Local Public Commons presents a unique opportunity for the legal system to send the right signals to such important but unorganized local groups. Recent research shows that judicial opinions on takings issues have a substantial future-looking effect not only on governmental decision-makers, but also on prevailing public perceptions and hence may translate into actual decisions by individuals and groups.[280] Beyond the operative result that influences the directly affected group, and the general "expressive" function of the judicial opinion,[281] the signals created by the takings discourse about Local Public Commons are to be carefully picked up by similarly situated groups and used to influence their present and future decisions. As Hanoch Dagan and Michael Heller note about genuine commons, while formal legal rules are not in themselves sufficient to ensure trust, cooperation, and operational success of the commons, the law may serve as a "safety net" that rewards cooperation already existing in a specific common.[282] The fact that formal law is not frequently deployed or that commoners are not aware of every doctrinal detail does not diminish the importance of background signals created by the legal system.[283]

280. Ann E. Carlson & Daniel Pollak, *Takings on the Ground: How the Supreme Court's Takings Jurisprudence Affects Local Land Use Decisions*, 35 U.C. DAVIS L. REV. 103, 143–46 (2001) (surveying case studies in California that demonstrate that Supreme Court takings decisions affect public opinions about who should be compensated under the Takings Clause. More specifically, if the court protects the interests of certain property owners, similarly-situated property owners in the future may think they should be compensated and act accordingly in making decisions about investment in the resource).

281. As Cass Sunstein explains, this "expressive function" can be understood in two different ways. First, the law's statement about a certain issue may be designed to affect social norms and ultimately to affect both judgments and behavior. Second, the expressive function can also be grounded in the individual interest in personal integrity, commitment and the individual and social meaning of personal conduct. Cass R. Sunstein, *On the Expressive Function of the Law*, 144 U. PA. L. REV. 2021, 2025–28 (1996).

282. Dagan & Heller, *supra* note 30, at 578.

283. Dagan & Heller, *supra* note 30, at 578–79.

The relevant incentives for Local Public Commons are somewhat different from these of genuine commons. The main obstacle for long enduring cooperation in Local Public Commons is not so much the fear of exploitation by other members, but rather it is the need to establish an infinite, or at least long enough horizon for cooperation, so as to decrease the individual discount rate during the crucial period of reaching an aggregate critical mass of cooperation.[284] While in the long run, each cooperative player may expect her private gains to exceed her private costs, her initial contribution to the public resource is more fragile since it would translate into individual and group benefits only in the longer term. While her discount rate may be low enough to allow her to tolerate the postponing of the benefits, her willingness to contribute still depends on her belief that this later point in time will indeed come. The Local Public Common still has to be there in the foreseeable future as such to enable the residents to reap the benefits.

An informal taking of a successful Local Public Common, which causes a significant loss yet affords no remedy to the local group, will discourage this group and other similar groups, possessing the potential for successful cooperation, from investing in such resources in the future.[285] This is especially the case when the local group of users is "singled out" and cannot expect distinct reciprocal benefits from the new plan, or when the group's political or economic power is disproportionately low.[286] This puts the unorganized local group under the constant threat that the Local Public Common will be informally taken at any stage, including during the delicate interim stage between the initial investment and the materialization of the private and group benefits.

This fear is further intensified by the local group's inability to insure itself against an uncompensated loss.[287] While it seems almost self-

284. *See supra* notes 168–70 and accompanying text.

285. The future-looking negative effects of such discouragement are very similar to Frank Michelman's "demoralization costs" with respect to private property appropriated by the government without compensation. "Demoralization costs" are suffered by "uncompensated losers, their sympathizers, and other observers disturbed by the thought that they themselves may be subjected to similar treatment." Michelman, *supra* note 5, at 1214. This article discusses this concept in greater detail *infra* Part V.B., when it aims at identifying the full range of costs involved in a loss of a Local Public Common.

286. Hanoch Dagan, *Takings and Distributive Justice*, 85 VA. L. REV. 741, 762–65 (1999) [hereinafter Dagan, *Takings*]. Dagan argues that "the fear of the public officials' under-responsiveness to private costs is justified especially in circumstances in which "the injured party is part of the no organized public . . . or of a marginal group with minor political clout." *Id.* at 752.

287. The issue of private insurance as an alternative to compensation for private property takings is widely discussed in current literature. Lawrence Blume and Daniel Rubinfeld argue that with full information and competitive markets, efficiency requires

evident why private insurance would be hampered by the free riding problem, such a local group is also generally incapable of engaging in any type of self-insurance. This is because risk diversification is simply irrelevant in the case of the often-single Local Public Common.[288] Consequently, this pending doubt will shorten the "cooperation horizon" for such a group of users and will discourage any sort of investment that does not pay off fully and immediately. Such signaling therefore stands in obvious tension with the increasing *ex ante* dependence of governmental owners on enduring cooperation patterns of otherwise unorganized urban groups of users to establish the value of Discrete Local Public Goods.

In contrast, a legal regime that generally subjects the conversion of a Local Public Common to a right of remedy in favor of the local group, if the remedy can be effectively passed on to the group as such, will encourage the affected group to invest in the public resource. The passing on of the remedy, primarily through the establishment of a substitute facility (to be defined in Part VI), also ensures the passing on of the efficient use pattern of the alternate resource. This is because otherwise unorganized groups that demonstrate the ability to cooperate in one Local Public Common are endowed with enough relevant "social capital" so as to have a better chance of successfully cooperating again, if awarded such a group remedy.[289]

---

that risk-averse property owners purchase full insurance against all substantial uncertainties, including future losses resulting from government action. Lawrence Blume & Daniel L. Rubinfeld, *Compensation for Takings: An Economic Analysis*, 72 CAL. L. REV. 569, 591–92 (1984). At the same time, they recognize that the private insurance market cannot generally supply such takings insurance. This is first because of the problem of moral hazard, meaning that insured property owners will not have any incentive to oppose an inefficient regulatory change that affects a taking. Second is the problem of adverse selection. Since private property owners typically have better information than insurance companies about the prospects of a future taking of their land, insurers would not be able to set appropriate differential insurance premiums that allow them both not to deter relatively low risk owners from purchasing insurance as well as to financially break even over the long run. *Id.* at 593. Blume and Rubinfeld conclude that compensation should be paid only where private property owners would have purchased takings insurance, namely, when people are risk averse and their losses are large. *Id.* at 606. *But see* William A. Fischel & Perry Shapiro, *Takings, Insurance, and Michelman: Comments on the Economic Interpretations of "Just Compensation" Law*, 17 J. LEGAL STUD. 269, 279 (1988) (arguing that insurance models for takings fail to take demoralization costs into account, since these costs arise when landowners realize that their wealth is reduced, and not when the legal taking occurs. Hence, even if such landowners were risk neutral so that they had no demand for insurance, they would still be demoralized by the uncompensated reduction in wealth, a sentiment not disposed of by the existence of insurance).

288. *Cf.* Dagan, *Takings*, *supra* note 286, at 751 (arguing that self insurance through risk diversification is impossible when a property owner has only a single major asset).

289. *See supra* notes 172–76 and accompanying text.

Efficiency-oriented rationales also indicate that this compensation rule should be applied only to "successful" Local Public Commons, and not to Discrete Local Public Goods that are either an outright nuisance or of little current use-value. This distinction not only seems obviously reasonable (since it provides a remedy when the loss is substantial), but it also helps to "fine tune" the signaling to other informal groups in a way that resembles the rationale of the selective, criteria-based compensation regime for private property condemnees.[290] Just as a "never compensate" regime entails a deadweight loss, so does an "always remedy" regime leads to inefficiency,[291] since it equally rewards all types of informal groups regardless of their future ability to efficiently use public resources, thus undermining the purpose of inducing future investment.

This also explains why any type of *ex ante* statutory protection (such as section 138 of the Federal-Aid Highway Act),[292] even if it were more specifically designated to serve the interests of local groups in the urban context, may be systematically inferior to constitutional protection (either state or federal) that is based on a takings-like *ad hoc* analysis. While *ex ante* "environmental" legislation could, hypothetically, explicitly take into account the dispersed interests of otherwise unorganized groups, it would still have to resort to broad generalizations in defining in advance the value of the different types of Discrete Local

290. In extreme essence, current doctrine treats the entire category of physical invasions, including trivial ones, as takings that mandate compensation. Loretto v. Teleprompter Manhattan CATV Corp. 458 U.S. 419, 426 (1982). For regulatory, nonphysical takings, the rule mandates compensation when the government action permanently extinguishes "all economically beneficial use" of the land. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1027 (1992). When the loss is not absolute, in order to determine whether the regulation affects a taking, current doctrine adopts an *ad hoc* test based mostly on the following parameters: the plaintiff's reasonable investment-backed expectations; the nature of the government action; and the degree of diminution in property value. Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978). Temporary regulatory restrictions (including a moratorium on *all* development during the process of devising a comprehensive land use plan) are not considered per se takings, but are rather governed by the ad hoc test. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302 (2002). The rules for regulatory takings generally apply also where the plaintiff purchases his or her property rights *after* the regulatory action takes place. Palazzolo v. Rhode Island, 533 U.S. 606 (2001). For a taxonomy of current doctrine, see Abraham Bell & Gideon Parchomovsky, *Givings*, 111 YALE L.J. 547, 558–63 (2001) [hereinafter Bell & Parchamovsky, *Givings*].

291. In the private property context, Richard Epstein is the most prominent advocate of "always compensate" whenever a government action reduces property value. RICHARD A. EPSTEIN, TAKINGS (1985). For a distributive-based criticism of Epstein, see Dagan, *Takings*, *supra* note 286, at 771–73 (arguing that a progressive regime of compensation, rather than an "always compensate" one, promotes "social responsibility" and equality within communities, in addition to efficiency).

292. *See supra* notes 251–59 and accompanying text.

Public Goods, in a way that greatly reduces the importance of the implementation stage. This would both over-deter governments from establishing local public goods in the first place, while at the same time it would send uniform signals to "cooperative" and "uncooperative" local groups alike, regardless of how they actually act during T_1. In contrast, the takings-like ad hoc analysis, with all its deficiencies, could take into account the dynamic aspect of user cooperation and coordination during T_1, hence refining the "signals" sent to urban local groups.

2. WHY EFFICIENCY DIFFERS FROM THE "RELIANCE INTEREST"

This emphasis on future-looking incentives for investment in public resources distinguishes my normative argument in favor of compensation for "takings" of Local Public Commons from possible *ex post* justifications, most prominently derived from Joseph Singer's discussion of the "reliance interest in property."[293] Singer contends that entitlements in resources should not be allocated between parties strictly according to formal rights, whenever the nature of the social relations that have evolved between the parties justifies an *ex post* imposition of social obligations on the formal owner in favor of the other, more vulnerable party.[294] Accordingly, property rights to resources are viewed as always subject to potential social obligations to others, obligations that often materialize not during the clearly defined starting point, but rather at a later stage, consequent on the actual dynamics of the relationship over time.[295]

Although Singer focuses on entitlements to privately owned resources, it seems easy enough to phrase a "reliance interest" argument for compensating informal groups for losses of Local Public Commons. Since the politically inferior and vulnerable residents tend to rely heavily on the local public good and expect to enjoy it in the future, especially when such dependence is mutual, the governmental owner becomes subject over time to a social obligation toward the residents, and should not be at liberty to dispose of the resource at will without offering the residents an adequate remedy.[296]

293. *See* Singer, *Reliance Interest*, *supra* note 10.

294. This idea is based on a moral view of social life as chiefly governed by relationships between people, rather than on the consecration of the distinct preferences of each autonomous agent. Singer, *Reliance Interest*, *supra* note 10, at 652–58. Singer sees social relationships as comprising a spectrum "from relations among strangers, to relations among neighbors, to continuing relations in the market, to intimate relations in the family," so that every point along this spectrum offers a different balance of interests regarding allocation of entitlements. Singer, *Reliance Interest*, *supra* note 10, at 653–54.

295. Singer, *Reliance Interest*, *supra* note 10, at 658–59.

296. Such a hypothetical argument finds implicit origin in Singer's statement that

While such an argument seems at first glance very similar to my line of argument, the two differ materially, and the reliance interest framework is inadequate to resolve the issue of rights to public resources. First, especially in the context of noncontracting parties, reliance is often a subjective and unilateral concept. Even though Singer has in later writings modified the "reliance interest" and focused on "protection of justified expectations,"[297] the evaluation of the latter concept still heavily relies on the *ex post* analysis of the relying party's subjective viewpoint, regardless of actual allocative efficiency considerations. Moreover, the lack of a readily identifiable criterion for "justified expectations" that can be principally traced back to the establishment stage (T_0) allows the formal owner to act strategically to prevent any such subjective reliance, e.g., by posting signs in public spaces stating that the current use is "only temporary and may be replaced at any time."[298] Such "rhetorical" strategic behavior is less effective when the criterion for compensation for a "taking" of a Local Public Common depends on an objective evaluation of coordination and cooperation patterns rather than on a "battle" of words or of states of mind.

Second, the argument about the need for legal intervention is premised on the existence of a two-phase market failure. The first phase is the market failure during the establishment stage (T_0) of local public goods in the unorganized urban context.[299] The second phase is the failure of the "political market" during the conversion or termination stage (T_2) that prevents the obtainment of present and future-looking allocative efficiency.[300] In contrast, Singer rejects outright the free market model as an unworthy basis to design property rights.[301] This means,

"owners of valuable social assets hold them partly for their own benefit and partly in trust for the community and for others with whom they establish continuing relationships." Singer, *Reliance Interest*, *supra* note 10, at 659.

297. *See* JOSEPH W. SINGER, ENTITLEMENT: THE PARDOXES OF PROPERTY 211–13 (2000). Singer uses the term "justified expectations" interchangeably to describe both the expectations of the formal owners as well as those of the affected parties. For example, he claims that "an expectation cannot be justified, no matter how strong it is, if protecting it would leave others unduly vulnerable. One expectation we are entitled to have is that we may obtain the means necessary for a dignified human life." *Id.*

298. A standard sign currently used by the New York City Parks Department reads, "Keep the park clean, it's yours." Since such signs might allegedly enhance a subjective sense of reliance, accepting sheer reliance claims will lead to the removal of such signs and to the loss of their important expressive function in promoting group stewardship of public resources.

299. *See supra* Part II.B.3.

300. *See supra* Part IV.B.

301. Singer asserts that the main flaws of the free market model are that first, it encourages regarding people as autonomous individuals, and second, that it limits the types of social relationships that are relevant to legal relationships by focusing on

inter alia, that Singer's justification for awarding *ex post facto* rights to public resources "infected" with a market failure is actually the same argument that applies to clear private market goods. This makes Singer's argument clearly detached from questions of allocative efficiency, and focused rather on questions of redistribution of wealth. In other words, Singer's entire conceptualization of the "reliance interest in property" is clearly oriented toward protecting the interests of the economically more vulnerable party at the termination stage of the relationship. An *ex post* affirmative device, the "reliance interest" serves as a "trump" in favor of the otherwise unprotected party against a system of rules generally aimed at maximizing overall societal utility.[302]

While the distributive concern is obviously a central feature when a Local Public Common is being taken from a small, unorganized group in favor of the general public, a legal reform is justified only when such change is necessary to correct systematic market and government failures that disrupt present and future efficiency.[303] The identification of the full range of costs involved in a taking of a Local Public Common, together with the creation of crucial signals for efficient cooperation and coordination, should serve as two sufficiently stable pillars of this new legal regime.

---

voluntary agreements and on entitlements defined *a priori* by the state. Singer, *Reliance Interest*, *supra* note 10, at 654–55.

302. *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 232 (1978).

303. One more comment about distribution is in order here. Compensation is justified when the specific adverse distributive outcomes of a "taking" can be clearly identified as sending negative signals about desirable future investments in similar local public goods. The adverse effect of such signaling for other local public goods remains intact even if at some later stage in the life of those resources, the general public through the government will regard such investment as no longer desirable since overall efficiency calls for conversion or termination. In this sense, the alleged disparity between efficiency and distribution during this later stage (T_2) should not be seen as depriving the justification for compensation, since current distribution concerns translate to future efficiency ones. It is in this light that Michael Heller and James Krier's argument in favor of uncoupling the term "taking" from the term "compensation" is read. Michael A. Heller & James E. Krier, *Deterrence and Distribution in the Law of Takings*, 112 HARV. L. REV. 997, 997–98 (1999). They see this uncoupling as essential when the two prominent concerns of the takings jurisprudence, efficiency and justice, come into conflict, so that justifications for payment by the government do not correlate with specific distribution to aggrieved parties. The relevant category of mismatch that can be analogized to the Local Public Commons context is the "No Takings/Compensation" one, in which distributive notions justify compensation, but we have no reason to fear that the new public project *in itself* is inefficient. Heller and Krier's prominent example here is the "nuisance exception" in current takings doctrine, according to which diminution in property value caused by nuisance-control measures never requires compensation. While such measures seem efficient because "nuisance" by definition reduces the aggregate value of all the land it affects, this doctrine does not always promote a fair result, especially since in most cases what is now nuisance was once considered an operation that benefited the community. *Id.* at 1010.

3. IDENTIFYING THE IMPLIED "SOCIAL CONTRACT"

There is an inherent *ex ante* dependency of the governmental body on the actual patterns of behavior of the local residents in pre-designated Discrete Local Public Goods, and this positive observation mandates the creation of legally backed incentives that would catch up with the social and economic reality. But obviously, that argument for such a reform is also normative in nature. This means in essence that it supports a more universal case for the vindication of cooperation and coordination of otherwise informal and unorganized local groups of users in the urban local public goods setting, a support that is not limited only to specific and often temporary circumstances such as a transient budgetary crisis in a specific local government.

It is in this more complete light that this article offers to analogize the social and economic setting for Local Public Commons to an implied "social contract," i.e., an *ex ante* implicit understanding between the general public acting through the government and between the otherwise informal local groups of users.[304] Under this understanding, the provision at T_0 of a Discrete Local Public Good that serves in effect a cluster of users creates a potential distinct allocation of a public resource to the user group. The other side of the coin is that this otherwise informal group is *ex ante* relied upon to establish the ongoing value of the resource during the infinite stage of implementation. This is not only because the local government may chronically lack financial resources to do so, but also because there is an implicit *quid pro quo*, to which those who have been distinctly allocated the resource should respectively invest their own unique and distinct resources in the local public good. The local group of users is expected to undertake a credible commitment on its part to validate this distinctive allocation.[305] What should such a credible or irrevocable commitment look like? In essence, such a commitment should take the form of group coordination and cooperation, which includes different forms of individual contri-

304. The basic concept of the "social contract" is of a multilateral irrevocable commitment by separate identities to create a new entity (typically a state) that inherits and aggregates into the new whole the autonomies they have surrendered. The irrevocability of commitment, whether implied or explicit, and the creation of the new identity underlie the idea of the social contract as a "contract of society." *See, e.g.*, ANTHONY DE JASAY, SOCIAL CONTRACT, FREE RIDE: A STUDY OF THE PUBLIC GOODS PROBLEM 70 (1989). For a general criticism of the relevance of "consent" to establish legitimate political or legal authority, see Joseph Raz, *On the Authority and Interpretations of Constitutions*, *in* CONSTITUTIONALISM 152, 162–64 (Larry Alexander ed., 1998).

305. A commitment is considered credible when the recipient of the commitment observes the foreclosing of an opportunity by its maker, in a way that should convince the recipient about the seriousness and irreversibility of the commitment. *See, e.g.*, COOTER & ULEN, *supra* note 151, at 70–71.

bution and investment to overcome the collective action problems during the stage of implementation. This should occur even though each individual could formally free ride on the efforts of others, and even though the cluster of users as a group could fully free ride on the general public's contribution through the latter's payment of general taxes. Such an irrevocable commitment to act contrary to the lack of formal property rights and to the rational choice of free riding, but rather to act more as if the cluster of users were the collective holder of a distinctive common property resource, materializes this implicit "social contract." What is currently conceptually missing to complete the "social contract" structure, in appropriate cases, is the legal enforcement of a reciprocal commitment on the part of the local government not to terminate the contract unilaterally at will by reverting back to the formal property regime while disregarding the implicit terms of the "social contract."[306]

We need not go into further detail with the "social contract" analogy at this stage. All that needs to be clear in this context is that while the argument traces the urgent need for reform to a particular set of circumstances that characterizes current Discrete Local Public Goods, it obviously aims at a broader-based prescriptive and normative agenda of redefining and realigning rights and duties in the local government setting.[307]

306. These characteristics posit my portrayal of the implied consent about local public goods as an analogy to the idea of a "social contract" in a way that draws upon various classic views about such "contract." On the one hand, the normative and prescriptive facets of my argument in favor of validating local group rights in Local Public Commons present the analogy as closer to the concept of the social contract as a hypothetical contract that would have been signed by rational players in order to end the undesirable "state of nature" or to achieve a pareto optimal result—according to the traditions of Thomas Hobbes and moreover of John Rawls. *See* THOMAS HOBBES, LEVIATHAN 149–52 (Richard Tuck ed., Cambridge Univ. Press 1996) (1651); *See also* JOHN RAWLS, A THEORY OF JUSTICE (rev. ed. 1999). On the other hand, the positive analysis that offered about the evolution of urban local public goods and about the exogenous reasons that motivate the parties to enter such an agreement (such as a continuous urban budgetary crisis) follows the more evolutionary tradition of Jean-Jacques Rousseau. JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT (Susan Dunn ed., Yale Univ. Press 2002) (1762).

307. Another note is in order here. In view of the unique nature of the public goods context, the "social contract" should not be seen as "irrevocable" in the Hobbesian tradition, but rather more similar to John Locke's implicit view of the commitments of the parties as being mutually contingent. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT (C.B. MacPherson ed., Hackett Publ. Co. 1989) (1690). Locke portrays the legitimacy of the sovereign as based on a type of limited "trust" rather than a "contract." A breach of the fiduciary terms—intended primarily to protect private property—on the part of the sovereign-trustee revokes the trust and legitimizes a revolution against the sovereign. *Id.* at 77–78. This means, first, that if the local group does not fulfill its part on a continuous basis, the government should be allowed to terminate or convert the local public good, as this lack of investment signals the current allocative inefficiency of the resource. On a different level, the argument for liability rule protection

4. ALLEVIATING THE FEAR OF STRATEGIC GOVERNMENT BEHAVIOR

The creation of new rights to local groups and respective new limits on the formal owners of local public goods may cause government to respond by inefficient strategic behavior aimed at frustrating the new legal regime. This means that the public may fear that following such a reform, governments might act strategically both to under-allocate local public goods in the first place (at T_0) and also to refrain from contributing, both financially and administratively, to the local public good (during T_1), so as not to face the increased costs of compensation for a "taking." Or adversely, the public may fear inefficient over-allocation and hence "endowment" of local public goods to the government's politically preferred groups regardless of the actual level of allocative efficiency of such measures. This fear is also closely connected to concerns about governmental tendency to inefficient conservatism, when faced with the uncertainty of *ex post* judicial *ad hoc* tests about whether there was a compensable "taking" in a specific instance.[308]

This article offers two types of answers to this obviously substantial difficulty. First, this deterrent effect, as well as the additional costs involved in reforming the legal regime,[309] should not be prohibitive if the incentive-based mechanism conforms to two basic principles: (1) such new rules should apply to *pre-designated* local public goods, so that the cost-benefit analysis that includes this possible future cost can be taken *ex ante* into account by the government at (T_0);[310] and

for local groups rather than a property rule one, as set out in Part VI, enables the government to exit the contract at a certain "price," unlike the Hobbesian concept of "social contract" that does not allow one party to do so.

308. Susan Rose-Ackerman, *Against Ad Hocery: A Comment on Michelman*, 88 COLUM. L. REV. 1697, 1701 (1988). Moreover, the concern about uncertainty, almost randomly, in *ad hoc* takings determinations by appellate level courts is further increased by these courts' institutional inability to engage in context-sensitive fact-finding. *See* Gideon Kanner, *Hunting the Snark, Not the Quark: Has the U.S. Supreme Court Been Competent in Its Effort to Formulate Coherent Regulatory Takings Law*, 30 URB. LAW. 307, 313–14 (1998).

309. For a discussion of these various costs in the context of applying the takings doctrine to the termination or conversion of Local Public Commons, see *infra* Part VI.

310. An important note is in order here. Modes of long-lasting cooperation and coordination can also start spontaneously in resources that are not initially designated by the governmental owner for local public activity such as a public space. A prominent example for such "*ex post facto*" local public goods is that of deserted lots, junkyards, unused rail tracks, etc. that are spontaneously transformed by the local residents into "community gardens," as was the case with the community gardens in New York City, discussed in *supra* notes 222–27 and accompanying text. However, the issue of "establishing" a local public good out of a differently designated, or altogether idle resource, poses a significant conceptual problem of an inherent conflict of interests between the governmental body and the local group, similar to the one present in cases of adverse possession of privately owned properties, an issue which is outside the scope of this article.

(2) as already implied above, the future restriction or cost that falls on the government through the enforcement of a legal right in favor of current users should be exercised only where the users clearly meet the objective, during T_1, of creating a high and sustainable value for the pre-designated local public good. These two criterions mean that during the establishment stage of a local public good, the government can compare the potential extra cost imbedded in the new legal regime (namely, the expected cost multiplied by the probability that the residents will indeed seek remedy against a potential "taking" and get it) vis-à-vis the added value that the local public good would enjoy because of cooperation and contribution of local users who perform their share of the "social contract." While obviously such a calculus made at T_0 cannot be very accurate at the initial point of establishing a resource, it is not materially different from any other cost-benefit analysis that includes probabilistic values of future costs and benefits.[311] Moreover, the qualitative criterion of protection to successful Local Public Commons sends the right signals about efficient investment both to local groups and governments also at T_2. It forces the government to take full account of the costs and benefits upon making the conversion/termination decision, in similar fashion to the more in-depth analysis it would carry during the establishment stage.

Second, the fear of inefficient strategic government behavior in allocating and/or investing in local public goods, as a result of the new rule, is to some extent alleviated if we recognize the fact that the government is generally guided by interest-group politics, regardless of the prevailing formal rule.[312] This means that even at the current doctrinal state of affairs, the government cannot be presumed to allocate public resources under a genuine, objective, allocative efficiency criterion. Politically superior groups currently enjoy both over-allocation of local public goods as well as under-conversion of inefficient resources, as long as the group wishes to maintain its private status quo, even in the absence of required compensation.[313] A compensation regime would

311. For example, any proposed U.S. federal regulation to promote public health (for example, a new automobile emissions standard) has to take into account, in its cost benefit analysis, all of the probabilistic complexities involving the number of people that will get sick with or without the regulation, and the respective amount of resulting damage. *See, e.g.*, COST BENEFIT ANALYSIS: OFFICE OF THE MANAGEMENT AND BUDGET, ECONOMIC ANALYSIS OF FEDERAL REGULATIONS UNDER FEDERAL EXECUTIVE ORDER 12866, January 1996. Accordingly, it seems that almost any type of cost-benefit analysis reveals "legions of uncertainties and gaps in knowledge." Lester B. Lave, *Benefit-Cost Analysis: Do the Benefits Exceed the Costs?*, *in* RISKS, COSTS AND LIVES SAVED 104, 120 (Robert W. Hahn ed., 1996).

312. *See supra* Part IV.B.

313. *See* MARGARET JANE RADIN, *Diagnosing the Takings Problem*, *in* REINTER-

neither dramatically change the pressure on the government on the part of the general public and its various sub-groups to provide and maintain local public goods nor would it change the government's inter-group preferences. The allocative change would be felt rather at the termination/conversion stage. Since all types of political groups would be able to act through the judicial system to substantively protect only highly efficient, successful Local Public Commons, the government would face coherent signaling that would influence its allocation decisions at this later stage. Accordingly, over-allocation of local public goods to any privileged group (at T_0) will lead to inefficient Local Public Commons, since the marginal utility of additional local public goods for such a group may eventually fall to zero. Hence, such local public good in excess would not award judicially recognized rights (at T_2) to such a group should it file a claim in addition to its political campaign.

B. *Recognizing the Compensable Costs of a "Taking"*

Before setting out in Part VI to delineate the contours of the substantive compensation regime for "takings" of Local Public Commons, it is necessary to more accurately define the three major types of the potentially compensable costs of a "taking."

1. ADVERSE EFFECTS OF A ''NO REMEDY'' SIGNALING

The first type of cost includes the societal deadweight losses that result from the adverse effects of a "no remedy signaling" sent to "uncompensated losers, their sympathizers and other observers disturbed by the thought that they themselves might by subjected to similar treatment," to borrow Michelman's definition of "demoralization costs."[314] In the private property context, this demoralization translates, *inter alia*, to the "dollar value of lost future production (reflecting either impaired incentives or social unrest)."[315] In the local public goods context, the discouragement experienced by the otherwise unorganized local group and other similarly situated groups following from the realization that a successful Local Public Common could be taken at any point may significantly shorten the "cooperation horizon." It encourages local res-

PRETING PROPERTY 146, 157–59 (1993); Levmore, *Just Compensation*, *supra* note 191, at 308–11; Dagan, *Takings*, *supra* note 286, at 752–53.

314. Michelman, *supra* note 5, at 1214.

315. Michelman, *supra* note 5, at 1214. In addition to the lost future production, Michelman's demoralization costs also include "the dollar value necessary to offset disutilities which accrue to losers and the sympathizers specifically from the realization that no compensation is offered." Michelman, *supra* note 5, at 1214.

idents to undertake only short-term investments, the private fruits of which can be immediately reaped. At the same time, it sabotages any real chance for long-term actions that might not seem worthwhile in the immediate term.[316] This deterrence is especially effective since local groups do not necessarily possess good information about which Local Public Commons are at relatively greater risk to be "taken." As a result, cooperation and coordination would gradually collapse in *all* similar goods, including in those resources where both the government and the local group actually have a joint interest in long-term "infinite" cooperation and coordination. This adverse dynamic will therefore result in significant societal deadweight losses, both in the present and in the foreseeable future.

2. LOSS OF DIRECT BENEFITS

The second type includes the private costs incurred to the local group's members when they are no longer able to enjoy the direct benefits of the public resource for an allegedly infinite period. This loss can be roughly quantified as the aggregate sum of the lost direct use values (present and future) attributed to the current resource by its beneficiaries.[317] This article focuses attention on urban Local Public Commons that do not necessarily possess unique aesthetic or historic traits. Thus, this article does not address the various non-use values that may characterize publicly owned natural resources or historic buildings, such as "existence value," "bequest value" or "option value,"[318] but rather use benefits such as enjoyment of recreational activities, improved personal health or child skill development, etc.[319] The use value of a Local Public

316. Somewhat paradoxically, local groups might even be deterred altogether from undertaking any activities that would tend to significantly increase the value of the resource and the surrounding area. Local groups may fear that such success might create attention and encourage the government to quickly capitalize on the now bettered resource (e.g., by selling the property to a private developer for a premium price).

317. Richard Bishop identifies three types of actual uses for natural resources: consumptive uses (which really consume resources, such as fishing or hunting); nonconsumptive uses (such as hiking, bird watching, etc.); and indirect uses (such as reading a book about the natural resource). Richard C. Bishop, *Economic Values Defined*, *in* VALUING WILDLIFE: ECONOMIC AND SOCIAL PERSPECTIVES 24, 26–27 (Daniel J. Decker & Gary R. Goff eds., 1987). Obviously, for urban local public goods, such as a park or a playground, we focus more on direct uses, both consumptive and nonconsumptive.

318. See Lewinsohn-Zamir, *supra* note 37, for definitions of "existence value," "bequest value," and "option value."

319. See National Center for Chronic Disease Prevention and Health Promotion, ACES: Active Community Environments Initiative, *available at* http://www.cdc.gov/nccddphp/dnpa/aces.htm for a list of studies of the links between public health, physical activity and urban space design. Beverly D. Ulrich, *Perceptions of Physical Competence, Motor Competence and Participation in Organized Sport: Their Relationship in Young Children*, 58 RES. Q. FOR EXERCISE AND SPORT 57–67 (1987) (study of the links between public spaces and improved child skills).

Common can be generally evaluated by any one of a number of prevailing methods developed by economists, such as travel-cost analysis,[320] or the more prominent survey-based contingent valuation.[321] Leaving aside skepticism about the accuracy of these methods or their ability to mimic market conditions,[322] people clearly attribute some "use value" to a local public good. In any case, the loss of these direct benefits must be measured as a "cost" when government holds a cost-benefit analysis for a termination or conversion plan.[323]

In addition, our methodology for such "use value" estimation can benefit from the discussion about the "public benefit" of privately owned recreational facilities. In the *Ehrlich* case,[324] the California Supreme Court recognized in principle the City of Culver's authority to impose a "mitigation fee" on an owner of a private sports club, whose land had been rezoned for residential development, in order to recapture the "public value" lost as the result of the rezoning.[325] The nature of

320. According to this method, the private demand for the use of a site-specific public resource can be inferred from the person's cost of traveling to the site. *See* ROBERT C. MITCHELL & RICHARD T. CARSON, USING SURVEYS TO VALUE PUBLIC GOODS: THE CONTINGENT VALUATION METHOD 78–79 (1989). The additional costs created from a loss of a local public good can be measured by the increased aggregate travel costs required to arrive at a similar alternative resource. In the Local Public Commons' context, these additional costs may sometimes be extremely high, almost prohibitive, when the distance between the lost resource and an existing alternative simply proves too far and/or too costly, at least for certain types of users, such as elderly people or children.

321. This method aims at identifying the relevant public members' total willingness to pay for the marginal provision of a public resource through taxation or increased user fees, by presenting each surveyed "consumer" with a hypothetical market in which he has the opportunity to "buy" the good in question. For a partial list of public goods that have been valued in contingent valuation studies, see *id.* at 309–15.

322. The contingent valuation method is often criticized as speculative and unreliable. *See, e.g.*, Note, *"Ask a Silly Question . . ." Contingent Valuation of Natural Resource Damages*, 105 HARV. L. REV. 1981 (1992).

323. *See* Richard J. Roddewig & Gary R. Papke, *Market Value and Public Value: An Explanatory Essay*, 61 APPRAISAL J. 52, 62 (1993) (arguing that while "public value" concepts cannot represent a substitute for the market when setting up levels of acceptable exchange among the private individuals who make up the real estate market, the valuation of public resources is still helpful in making informed public decisions.).

324. Ehrlich v. City of Culver City, 911 P.2d 429 (Cal. 1996).

325. *Id.* at 446 ("It is well accepted in both the case and statutory law that the discontinuance of a private land use can have a significant [public] impact justifying a monetary exaction to alleviate it. We perceive no reason why the same cannot be said of the loss of land devoted to private recreational use through its withdrawal from such a use as a result of being 'up zoned' to accommodate incompatible uses"). For a criticism of this decision, see Donald C. Guy & James E. Holloway, *The Recapture of Public Value on the Termination of the Use of Commercial Land Under Takings Jurisprudence and Economic Analysis*, 15 BYU J. PUB. L. 183, 213–20 (2001) (arguing that the court's justification for the mitigation fee is inconsistent with takings jurisprudential principles that prohibit the singling-out of a private property owner, as well as with economic considerations that regard such an "exit fee" as hindering otherwise efficient reallocations of property).

the economic cost of this regulatory change to the public users of the recreation facility can be inferred from the court's analysis that "[w]ithout such a facility, residents would have to travel farther, wait longer, and put up with other inconveniences and restricted choices in their recreational pursuits."[326] Hence, while in *Ehrlich* the court struggles to translate the public users' loss into the currency of "increased government expenses" to determine the proper mitigation fee to be levied on the private owner,[327] the court's initial focus on the residents' perspective is helpful in identifying the loss of direct benefits of Local Public Commons.

3. LOSS OF POSITIVE SPILLOVER EFFECTS

The third type of cost is the loss of the positive spillover effects of the Local Public Common on the geographically proximate residents. These costs include individual losses, most prominently diminution in the formerly increased adjacent real estate values;[328] collective losses, such as decrease in "social capital,"[329] damage to the commercial or

326. *Ehrlich*, 911 P.2d at 445–46. The "public value" element in privately owned resources is usually defined as the additional value attached to a private resource as a result of special interests (both use and non-use) that the public has in the resource, and which translates to a premium on its market price. Alternatively, "public value" might refer to a hypothetical contribution made by public authorities or by neighboring property owners, rather than by the individual owner, to the market value of the property. *See* Roddewig & Papke, *supra* note 323, at 52–53. While the first definition is similar to the "public impact" in *Ehrlich*, the second definition can be analogized to the Local Public Common's situation, in which the local group of users contributes a special value to the resource that would not have otherwise been created by the government.

327. The court first rules out the city's formula, according to which the public should receive the entire worth of the alternative "recreational facilities the cost of which would otherwise have to be financed through membership fees." *Ehrlich*, 911 P.2d at 449. It explains that "[t]he city may not constitutionally measure the magnitude of its loss, or of the recreational exaction, by the value of facilities it had no right to appropriate without payment." *Id.* The court sees one possibility for assessing the impact fee based on "the additional administrative expenses incurred in re-designating other property within Culver City for recreational use." *Id.* Another possibility weighed is to assess the greater costs incurred to the government "to attract a developer of suitable recreational facilities because plaintiff's parcel is no longer reserved for such a recreational use." *Id.* The court also offers a "compensation in-kind" measure, wherein the private owner would reinstate the "status quo" by reserving a similar vacant land within the city for private recreation. *Id.*

328. In 1967, Boulder, Colorado, adopted the first U.S. municipal dedicated sales tax to fund the establishment of open spaces. In one neighborhood, total property values increased by $5.4 million after the greenbelt was built. This has generated an additional $500,000 per annum in property tax—recouping the greenway's $1.5 million establishment cost within three years. Mark D. Correll, Jane Lillydahl & Larry D. Singell, *The Effects of Greenbelts on Residential Property Values*, 54 LAND ECON. 205–17 (1978). In a number of surveys, homebuyers have identified natural open space and walking and biking paths as among the top determining features in assessing real estate property. GARVIN ET AL., *supra* note 54, at 27–29.

329. See *supra* Part III.E.2 for a discussion of "social capital" and its positive spillover effects.

tourist attractiveness of the area,[330] or loss of other collective benefits of Local Public Commons, such as reduced crime and violence rate.[331] These consequential costs can be analogized to what has been termed "derivative takings" in the private property context. Derivative takings include most prominently the diminution in value of surrounding property as an indirect result of a physical or regulatory taking.[332]

The valuation of such negative externalities is obviously difficult to make. Quantifying the diminution in surrounding property values makes necessary an exact identification of the entire harmed group members and the magnitude of each member's harm,[333] while an estimation of the collective losses seems even more challenging. Not only does the valuation of decreased "social capital" seem speculative, but also the allocation of these costs between the various residents seems an almost impossible mission. This latter facet of the collective taking therefore resembles the mirror-case situation of a collective "giving,"

330. *See* The Trust for Public Land, *Benefits of Urban Open Space*, *available at* http://www.tpl.org/tier3_cdl.cfm?content_item_id=1242&folder_id=905 ("Portland, Oregon, which has implemented the strictest anti-sprawl regulations in the country and invested in an extensive park system, has attracted many new companies, including Hewlett-Packard, Intel and Hyundai, which picked the city because of its quality of life").

331. There is growing evidence that access to resources such as open space and recreational facilities can significantly reduce street crime. This is both because would-be delinquents (especially juvenile ones) may find alternative channels for private and group activity, and also because the establishment of such a resource may help to bring residents out of their homes and to interact so as to informally monitor and maintain public order. According to a report by the Trust of Public Lands, "police [in Fort Myers] have documented a 28 percent drop in juvenile arrests since 1990, following the construction of a recreation center in the heart of a low-income community." *Id.* A large-scale study conducted in Chicago has shown that lower rates of violence occur in urban neighborhoods characterized by collective efficacy (including informal monitoring of behavior in public spaces). Robert J. Sampson, Stephen W. Raudenbush & Felton Earls, *Neighborhoods and Violent Crime: A Multilevel Study of Collective Efficacy*, SCI., Aug. 15, 1997, at 918–24. These findings conform to an earlier study held in Harlem, New York, that compared crime rates in two adjacent projects. In the first project, a seventeen-story high-rise building, criminals freely roamed and ruled the common areas. OSCAR NEWMAN, DEFENSIBLE SPACE: CRIME PREVENTION THROUGH URBAN DESIGN 11–12 (1972). In the second project, "composed of three-to-six story buildings in which two to three families share a hallway and six to twelve an entrance actually accommodating people at the same densities" as the first project, the common areas were a "defensible space" which the residents could better control and from which they could informally exclude criminals. *Id.* at 12. The collective efficacy in using the common areas in the latter project dramatically brought down the crime rate, compared to the former.

332. Abraham Bell & Gideon Parchomovsky, *Takings Reassessed*, 87 VA. L. REV. 277, 280 (2001) [hereinafter Bell & Parchamovsky, *Takings*].

333. *Id.* Bell and Parchomovsky cite this problem as a major concern in recognizing compensation for derivative takings, alongside the "fear that the judicial system will collapse if a large number of new takings cases are admitted for consideration." *Id.* To overcome the problem of credibly identifying the diminution in property values, they suggest designing an income tax style mechanism of self-assessment. *Id.* at 280–83.

in which collective benefits are conferred on a group as a result of a governmental action.[334] Just as the costs of imposing charges on individuals or organized sub-groups would prove prohibitive without a clear individual allocation of a governmental "giving" between the group's identifiable members,[335] so would individual compensation for such collective losses be outright impracticable. It follows that an application of the takings doctrine to Local Public Commons must therefore be designed around a collective remedy so as to be able to confront, and redress, the full scope of costs in case of a taking. With this basic insight in mind, this article sets out to delineate the contours of a new legal regime for informal takings of Local Public Commons.

VI. The "Substitute Facility" as a Substantive Remedy

An expansion of current takings doctrine to local public goods is a major legal change that can be challenged at the outset by a variety of normative and administrative concerns. First, any type of legal change involves "legal transition costs," which include the costs of formulating the new legal directives, the costs of learning the directives, uncertainty costs that result from the loss of accumulated knowledge of the old law and from contending with the new, and private adjustment costs.[336]

Second and more specifically, the re-formulation of property rights allocation in publicly owned resources, followed by new rules of distribution between the general public and its local sub-groups, also involves additional significant costs during both the conflict resolution stage and the implementation stage of this newly created remedy. Such costs may be divided at the outset into three main categories. First, the general adverse consequences of awarding rights ex post facto during the conversion/termination stage (T_2) and of subjecting new kinds of public projects to the judicial *ad hocery* of the takings jurisprudence. The second category concerns the costs of identifying the affected informal group and of authorizing a representative on its behalf for litigation purposes, given the inherent difficulties of decision-making in

334. *See* Bell & Parchomovsky, *Givings*, *supra* note 290, at 549–50 (A "giving" is the opposite case of a "takings," namely where a governmental action confers a specific benefit on a person or group of persons).

335. Bell and Parchomovsky argue that the extent to which the recipients of the giving constitute a readily identifiable group and the degree to which the giving is available to the public at large, is one of four relevant criteria to determine whether a "giving" has occurred and whether it must be accompanied by a charge to a recipient. Bell & Parchomovsky, *Givings*, *supra* note 290, at 555.

336. *See* Michael P. Van Alstine, *The Costs of Legal Change*, 49 UCLA L. REV. 789, 816–40 (2002).

an otherwise unorganized group. The third category involves the various administrative costs of litigation,[337] as well as the post-litigation additional public funds that are required to implement the substantive remedy if, and when, it is awarded in favor of the local group.

In order to address these concerns in their proper context, this article first delineates the basic principles for the proposed substantive remedy for "takings" of Local Public Commons. These principles are analyzed by the relevant scope of each of the three types of concerns, and to what extent they can be alleviated through a careful design of the suggested compensation regime.

In essence, the following four principles are suggested for compensation. First, the only possibly efficient substantive remedy for a "taking" of a Local Public Common is a group nonpecuniary remedy, based primarily on the "substitute facility" principle, namely the public provision of an as similar as possible alternative local public good that would serve the informal group for similar purposes.

Second, such a remedy should be based only on a liability rule principle, namely that the local group will not be entitled to block an efficient plan until the remedy is assured, but will rather litigate the case to ensure proper *ex post* in-kind compensation.

Third, such a remedy should be awarded only if the affected local group is able to factually demonstrate to the court that the Local Public Common was efficient and successful, and that the group would incur a substantial loss that could not be otherwise mitigated without due compensation.

Fourth, the costs of the public provision of the remedy should not exceed either the various aggregate social costs of the loss of the Local Public Common, or the new public project's estimated surplus. If the proposed remedy proves too expensive, the court should subject the provision of a "substitute facility" to an adequate private financial contribution by the local group. Alternatively, it can offer the local group a different sort of facility, which is less costly, but which is able both to promote the "signaling" policy of encouraging investment in Discrete Local Public Goods as well as to recapture some of the group's loss of private value.

337. Empirical data confirms the enormous burden of administrative costs in takings cases. According to a study about litigation involving eminent domain procedures carried out for highway projects, for every dollar paid in compensation, an additional 23 cents were expended in administrative costs. Joseph J. Cordes & Button A. Weisbrod, *When Government Programs Create Inequities: A Guide to Compensation Policies*, 4 J. POL'Y ANALYSIS & MGMT. 178, 190 (1985).

A. *Focusing on a Collective, Nonpecuniary Remedy*

A Local Public Common, by nature, is an informal collective resource, in which the boundaries of individual allocation of costs and benefits are indeterminate and ever-changing. This is both because the identity of the users is neither formally nor practically fully clarified and also because the distinction between the private benefits (e.g., enjoyment value of a walk in the park) and between the collective benefits (e.g., the creation of "social capital") cannot be exactly made. Moreover, normatively speaking, the need to encourage investment in Local Public Commons stems from the very fact that individuals cannot fully internalize their private costs and benefits in such resources.[338]

Any remedy that aims at exclusively allocating compensation between affected individuals, e.g., through cash payments, is not only subject to prohibitive administrative costs of accurately identifying the members of the group and their individual "share" in the Local Public Common, but also undermines the very justifications for awarding a remedy. Moreover, the prospects of individual cash gains would obviously divert the motivations of the group members and would encourage them to behave in a strategic manner that promotes suspicion and mistrust rather than cooperation. Specifically, at the pre-litigation stage, users (or smaller-scale coalitions of users) may be motivated to exclude other members so as to increase their individual share of the "compensation pie."

Collective compensation is infrequent in the property law context. Most class actions that are based on causes of action in property, tort, or contract focus on individual compensation for the group's members.[339] This is the case both for cash payments as well as for individually allocated nonpecuniary or in-kind compensation.[340] Accordingly,

338. *See supra* Part II.B.3.

339. Current literature on individual compensation distributed through the collective mechanism of a class action is obviously too voluminous to be included in a footnote. For a rather extensive list of references, see David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 NOTRE DAME L. REV. 913, 914–15 n.2 (1998). For a recent analysis of the inherent tension between the collective and the individual in class actions, see David Rosenberg, *Mandatory-Litigation Class Action: The Only Option for Mass Tort Cases*, 115 HARV. L. REV. 831 (2002).

340. *See* Geoffrey P. Miller & Lori S. Singer, *Nonpecuniary Class Action Settlements*, 60 LAW & CONTEMP. PROBS. 97 (1997). Such remedies may include coupon settlements (in which the defendant creates a right for group members to obtain a discount on future purchases), a monitoring settlement (in which the defendant endows a fund which is used to identify and compensate for future harm arising out of the defendant's conduct), etc. *Id.* at 102–05. *See also* Note, *In-Kind Class Action Settlements*, 109 HARV. L. REV. 810, 819–23 (1996) (identifying the problem of manipulative over-estimation of the in-kind remedy's genuine value on the part of either the defendant, looking to cut down its actual costs, or of the plaintiffs' attorney, looking to increase its relative share in the overall fixed "pie").

the main challenge in these collective suits, at the remedy stage, is to ensure that they are fairly "translated" into individual shares, both qualitatively and quantitatively.[341]

In contrast, injunctive-based collective remedies are more characteristic of civil rights claims, where a group (either organized or otherwise unorganized) seeks judicial intervention to maintain or obtain a collective good provided by the government.[342] Moreover, since collective remedies in civil rights issues are usually not predetermined by current legal rules (unlike remedies in private law), the group may also play an active role in designing the often-innovative collective remedy.[343] The virtues of a collective remedy have been recently advocated in the context of reparations for African-Americans in the United States.[344] Group compensation such as funds for community-based organizations or training and education programs not only avoids the costs of identifying successors of individual perpetrators and victims, by focusing on the relationships between the general public and its disadvantaged sub-groups, but also increases the legitimacy of a public action aimed at addressing past wrongs and creating future-looking incentives.[345]

Somewhat similarly, a design of a remedy for a "taking" of a Local Public Common aimed both at redressing the private costs of the local group and at sending general "signals" that encourage efficient investment must revolve around a collective, nonpecuniary remedy. The most natural solution, for both these *ex post* and *ex ante* concerns, is the provision of a "substitute facility," of which remedy two versions were shaped in the context of the takings jurisprudence,[346] and in the statutory protection of conservation lands.[347] Simply put, where the provision of

341. This means first, that the nature of the remedy (e.g., cash payment or in-kind compensation) is generally considered as appropriate by class members, and second, that the allocation of the general fund will genuinely reflect the proportional value of each individual's damage. *See, e.g.*, Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 SUP. CT. REV. 337, 384–86 (1999); Susanna M. Kim, *Conflicting Ideologies of Group Litigation: Who May Challenge Settlements in Class Actions and Derivative Suits*, 66 TENN. L. REV. 81, 122 (1998).

342. Such a remedy can take the form of an institutional reform dealing with, for example, services to disadvantaged citizens, school segregation, employment discrimination, prison reform, enforcement (or abolishment) of affirmative action programs, etc. *See, e.g.*, Ann Southworth, *Collective Representation for the Disadvantaged: Variations in Problems of Accountability*, 67 FORDHAM L. REV. 2449 (1999) (discussing the distinct characteristics of collective remedies in the poverty law areas).

343. Deborah L. Rhode, *Class Conflicts in Class Actions*, 34 STAN. L. REV. 1183, 1199 (1982).

344. *See* Note, *Bridging the Color Line: The Power of African-American Reparations to Redirect America's Future*, 115 HARV. L. REV. 1689 (2002).

345. *Id.* at 1693–94.

346. *See supra* Part IV.C.4.

347. *See supra* Part IV.C.3., n.259.

an alternative resource is financially feasible (according to the parameters set out below), the government should provide the local group with an alternate local public good that is both geographically proximate enough so as to serve more or less the same undefined group of users, and is also basically suitable for the same functions carried out at the current Local Public Common. Obviously, a perfect match is utopian, and rarely will there be one spatial solution that would seem self-evident to all parties concerned. Both the plaintiff group and the court, each in its own turn, would have to look at different options and choose between them.

In addition, the designation of the "substitute facility" as a chief collective, nonpecuniary remedy for "takings" of Local Public Commons may help to alleviate some of the concerns over the ability of a typically undefined and otherwise unorganized group to cheaply authorize an agent to act on its own behalf, as well as over the competence of such an agent to design a suitable remedy that also strikes a fair and equitable balance between possible different voices within the group.[348]

First, at the pre-litigation stage of authorizing an agent to act for the group, the focus on such a relatively "transparent" and straight-forward solution, to be provided somewhere within a geographically limited area, diminishes the number of possible candidates to represent the group, and alleviates ulterior, self-serving interests they might have. Moreover, where the group of users possesses some type of formal or informal decision-making mechanism that it utilizes to cooperate in the Local Public Common, it can at relatively cheap cost authorize an agent

348. The agency problem is pertinent to all types of class actions, both those in which a representative for a group or class seeks an aggregate cash payment or nonpecuniary remedy to be later individually allocated, as well as in those cases where a collective remedy is sought. The first type usually involves either the fear of opportunistic or self serving behavior by the agent (to increase its individual fees) or the question of the legitimate "governance" of the action, given the possibility of the agent's bias in favor of certain individuals or sub-groups in reaching a settlement that better serves them at the expense of other group members. *See* Issacharoff, *supra* note 341, at 358–66; Kim, *supra* note 341, at 119–27. The second type of actions, especially in the civil rights context, places the agent in the role of a social planner that has to design a unitary remedy that best serves the entire class or group as such, especially since the possibility for individual "opting out" is impracticable. The agent not only has to decide between ideologically different or even often outright opposite concepts of present class members about the appropriate social remedying for past violations, but must also take to mind the interests of future generations. *See* Rhode, *supra* note 343, at 1243–46. Hence the agent must balance between respecting individual members' concerns, on the one hand (fostering, to the extent possible, democratic participation and majority-based decision-making within the group), and exercising his expertise based on which he claims to be an adequate representative, on the other. William B. Rubenstein, *Divided We Litigate: Addressing Disputes Among Class Members and Lawyers in Civil Rights Campaigns*, 106 YALE L.J. 1623, 1668–80 (1997).

to act on its behalf. Such an agent can be an official public advocate or ombudsman,[349] a nonprofit organization that has both the expertise and specific interest in the area,[350] an *ad hoc* "coalition,"[351] or a private attorney. The group or any of its members can also at low cost post signs in the Local Public Common, or use its mailing list, both to provide advance notice of the litigation to other users (so that any user could publicly or legally object to what he deems as inadequate representation),[352] but also to exert enough informal pressure on users to contribute to funding the litigation, where such funds are not externally provided.

Second, the focus on a collective remedy would bring to the forefront, during the litigation itself, the dilemma over adequate representation of different preferences within the group. If we require the agent to provide the court with sufficient evidentiary material about every major aspect of the activities in the Local Public Common to establish the resource's overall "value," the court would have a clearer idea about the variety of uses and the variety of users. To the extent that such evidence is provided through users' affidavits or testimonies, this process might ensure some type of democratic "public participation" that would help the court in choosing an appropriate remedy, both spatially and functionally, when there is no obvious solution or when the court encounters different sub-group preferences.[353] Although the court

349. *See, e.g.*, Mark Green & Laurel W. Eisner, *The Public Advocate for New York City: An Analysis of the Country's Only Elected Ombudsman*, 42 N.Y.L. SCH. L. REV. 1093 (1998).

350. *See, e.g.*, Susan D. Daggett, *NGOs as Lawmakers, Watchdogs, Whistle-blowers and Private Attorneys General*, 13 COLO. J. INT'L ENVTL. L. & POL'Y 99, 108 (2002). Nonprofit organizations have gained considerable experience in representing undefined groups of users in environmental litigation, even when grassroots public involvement somewhat lags behind. *See, e.g.*, Nancy Perkins Spyke, *Public Participation in Environmental Decisionmaking at the New Millennium: Structuring New Spheres of Public Influence*, 26 B.C. ENVTL. AFF. L. REV. 263, 292–96 (1999).

351. An example is the New York City Coalition for the Preservation of Gardens that led the "community gardens" litigation in New York. *See* N.Y. City Coalition, *supra* note 225.

352. *Cf.* Rhode, *supra* note 343, at 1247–48 (arguing that some type of advance notice is required in class actions for structural reforms at the initial certification stage as well, and not only at the later settlement stage, so as to allow opposing members of the group a fair and adequate chance to object *in advance* to what they see as improper representation).

353. This means that the local group must factually demonstrate to the court that its grassroots use patterns played a unique and distinctive role in establishing the "successful" and efficient status of the Local Public Common. However, if the court were instead to be apprised that an apparent schism existed between the different types of users, so that the overall cluster of users would be generally unable to internally agree on its desirable wishes for the future, the court would have to weigh this against the claimants' argument, and could, in appropriate cases, simply defer to the original governmental decision about the termination and/or adverse conversion of the local public space. While the court should not come to such a conclusion about a schism based

would be forced to engage in some sort of social choice between competing values and interests, it would not have to rely for that purpose strictly on the remedy originally sought by the agent.

While the above principles are obviously not a panacea to ensure adequate representation and to keep everyone in the group happy, the initial focus on a relatively small-scale, collective remedy designed around a "substitute facility" should aid in providing the court with a genuine and fair evaluation of the social costs and benefits.

B. *Applying a Uniform Liability Rule Regime*

The proposed new allocation of entitlements in Local Public Commons between the formal governmental owner and the local group of users raises the question regarding which type of property regime should be adopted to protect the group's entitlements. Ever since Calabresi and Melamed's seminal work, such protections are generally divided into property rule, liability rule, and inalienability rule regimes.[354] In the area of physical takings of privately owned properties by the government, the public can witness examples of all three types of regimes. When a governmental body exercises its eminent domain power for "public use,"[355] it may nonconsensually acquire all rights from the owner subject to the payment of just compensation so the liability rule applies. In the very few cases in which the "public use" requirement is not met,[356] the private owners' entitlement vis-à-vis the government is generally governed by a property rule. Finally, entitlements in some specifically protected types of properties, such as "private dedications," are governed by an inalienability rule in the sense that the government may not convert such properties for other uses, even with the consent of the dedicator's heirs.[357] Yet, overall, physical takings are generally

only on the claims of a single dissenter or "holdouter," it should nevertheless consider the extent to which the grassroots "self government" has been able to reasonably balance between the different interests involved, as an essential part of the group's "success."

354. *See* Calabresi & Melamed, *supra* note 8.

355. The "public use" requirement for the exercise of the power of eminent domain appears in the federal Takings Clause and in most U.S. state constitutions. The standard economic analysis justifies such a liability rule regime to enable the government, especially when it acts as a land assembler for large scale, multi-tract public projects, to overcome possible "holdouts" by various property owners. *See* ELLICKSON & BEEN, *supra* note 33, at 1011. For a criticism of judicial-wide deference to governments in construing what purposes may serve as "public use," see Jed Rubenfeld, *Usings*, 102 YALE L.J. 1077, 1079 (1993).

356. The affected owner would usually have to show that the government acted in bad faith so that the claimed "public use" is merely a sham. ELLICKSON & BEEN, *supra* note 33, at 1021–22; Michael Rikon, *Notice—We Don't Give No Stinking Notice: The Importance of the Notice Requirement in Eminent Domain*, SG059 ALI-ABA 259, 266–67 (2002).

357. *See supra* Part IV.C.2.

governed by a liability rule regime, so that the private owner's substantive remedy is not enforced during the pre-taking, procedurally oriented public hearing or advance notice stage,[358] but only during the post-taking claim for compensation.

In the context of Local Public Commons, we should apply a uniform as possible standard of a liability rule regime, meaning that the local group of users would not be entitled to a pre-conversion injunction, but would rather have to pursue a post-conversion collective remedy of provision of an alternative local public good. First, it is rather obvious that the transaction costs involved in voluntary dealing with an informally organized and undefined group are prohibitive, so that all public projects aimed at serving the general public would be outright blocked even if they were highly efficient.[359] Second, since we designate a more or less fixed remedy for such a taking (mainly a "substitute facility") the government would not enjoy special leverage over the local group under a liability rule regime, or be otherwise motivated to inefficiently over-convert resources. The government would still have to take into account the possible remedial costs of a new public project following the post-conversion litigation.[360] Hence, both parties would be encouraged, at the initial stage when the government considers the new plan, to reveal and receive genuine information from the other party about the value of the Local Public Common and about the estimated surplus of the new project.[361]

358. In *Schroeder v. City of New York*, 371 U.S. 208 (1962), the Supreme Court held that, based on the due process clause of the fourteenth amendment, an owner of property about to be condemned is entitled to notice of the commencement of the proceedings. Accordingly, most eminent domain statutes require a public hearing prior to acquisition, following which the condemnor has to make "determination and finding" that justify the decision to condemn. Attempts to substantively challenge these determinations usually, however, encounter wide judicial deference to the government. Rikon, *supra* note 356, at 264–69; 27 AM. JUR. 2d *Eminent Domain* § 536 (2003). This clearly demonstrates why "procedural" protection in itself is insufficient.

359. Current law and economics literature adopts, almost unanimously, the transaction costs criterion as a determining factor in choosing between property rules and liability rules. *See, e.g.*, Carol M. Rose, *The Shadow of The Cathedral*, 106 YALE L.J. 2175, 2178 (1997); Susan Rose-Ackerman, *I'd Rather Be Liable Than You: A Note on Property Rules and Liability Rules*, 6 INT'L REV. L. & ECON. 255, 257 (1986).

360. Obviously, if we care more about *ex ante* encouraging the local group to make efficient investment in the resource than about maintaining the government's liberty to convert the resource at-will, the liability rule protection should be awarded to the local group and not to the government, given the local group's difficulty to organize and "buy out" the government's entitlement. *See* Lucian A. Bebchuk, *Property Rights and Liability Rules: The Ex Ante View of the Cathedral*, 100 MICH. L. REV. 601, 634–35 (2001).

361. *Cf.* Ian Ayres & Eric Talley, *Solomonic Bargaining: Dividing Legal Entitlement to Facilitate Coasean Trade*, 104 YALE L.J. 1027 (1995). Ayres and Talley argue that in the private market context, under a liability rule regime, when neither party can be sure during the negotiations stage whether he would end up as the "seller" or the

The application of a liability rule regime alleviates the fear of socially inefficient strategic behavior by both parties in other respects as well. For example, local groups would incur the expenses of litigation only when they have a factual basis to believe that they can prevail in the specific instance.[362] The liability rule remedy also makes sure that the group will incur the costs of litigation only when it is genuinely interested in the specifically available remedy—usually a substitute facility. Also, unlike the case of a property rule regime, the local group will not be able to effectively use litigation solely to obtain political leverage over the government for other unrelated matters.

As far as the government is concerned, while the government is not *ex ante* restricted in taking action since it does not physically invade another's formally protected boundaries, it acts under liability of possibly having to fully internalize the costs of its actions through compensation, if the specific circumstances justify it. But at the same time, the application of a liability rule to Local Public Commons should also work to release the government from having to show in some cases that the conversion will serve a "higher public use" under current intergovernmental takings jurisprudence,[363] or from the current inalienable trait of "private dedications."[364] To the extent that a "substitute facility" remedy is provided, hence ensuring that the governmental decision-making takes into account the full scope of costs and benefits, there is no genuine basis to subject the otherwise efficient project to unnecessary judicial social planning such as setting up a hierarchy of "low" and "high" public uses.

It therefore follows that although the public should not disregard the fear of inefficient strategic behavior by either of the parties as a result of the new regime, a careful design of the remedy will effectively lessen the prospects for such behavior during T_2, similar to the way that the focus on objective efficiency considerations may prove useful in discouraging wholly politically biased governmental decisions during T_0.[365]

"buyer," each would have an incentive to reveal his genuine valuations to the other party. *Id.* at 1032. *But see* Daphna Lewinsohn-Zamir, *The Choice Between Property Rules and Liability Rules Revisited: Critical Observations from Behavioral Studies*, 80 TEX. L. REV. 219, 243–44 (2001) (arguing that since potential takers do not face the risk of rejection from owners under a liability rule, "they have little incentive to offer owners an acceptable compromise in the bargaining stage" (or to undertake expenses to receive private information from the other party, for that matter)).

362. This also alleviates the concern over the "flooding of the gates," which arises whenever the takings jurisprudence is judicially expanded to include new categories. KOMESAR, *supra* note 191, at 234–45.

363. *See* Klein, *supra* note 275.

364. *See supra* Part IV.C.2.

365. *See supra* Part V.A.4.

C. *Settling for an Essential and Non-Excessive Remedy*

The third principle for compensation requires that the affected local group factually demonstrate to the court that the Local Public Common was highly efficient because of the local group's long enduring patterns of cooperation and coordination between its members. It is not suggested that tort-like tests for causality, such as the "but for" criterion, be fully applied.[366] But the group should definitely have to prove, through conventional evidentiary tools that its use patterns offered a unique and distinct role in establishing the successful and efficient status of the Local Public Common. Moreover, the group would have to lay sufficient evidentiary foundation about the nature and extent of the losses it would incur and about the lack of alternative mechanisms, political, institutional or financial, to otherwise offset its private costs because of the "taking."[367]

This article analyzes this third principle together with the fourth one, according to which a remedy should be provided only if its social costs do not exceed either the aggregate costs of the "taking" of Local Public Common, or the new public project's estimated surplus. This requirement generally follows Michelman's utilitarian calculus about the proper balance between "efficiency gains," "demoralization costs," and "settlement costs,"[368] but several modifications are in place.

First, since this article suggests a uniform liability rule regime, a court should not block a plan even if its reported estimated surplus (the "efficiency gains") is smaller than either the proven costs of the "taking" (comprised of the costs of adverse signaling together with the aggregate direct and indirect losses to the users)[369] or the costs of an identical "substitute facility" (the "settlement costs"). While this may

366. For a highly influential analysis of the causation requirement in tort law, see Richard W. Wright, *Causation in Tort Law*, 73 CAL. L. REV. 1735 (1985).

367. *See* discussion *supra* Part IV.B. and *supra* Part V.A.1.

368. Michelman defines "efficiency gains" as the "excess of benefits produced by a measure over losses inflicted by it." Michelman, *supra* note 5, at 1214. For a definition of "demoralization costs," see Michelman, *supra* note 285. "Settlements costs" are "measured by the dollar value of the time, effort and resources which would be required in order to reach compensation settlements adequate to avoid demoralization costs." Michelman, *supra* note 285, at 1214. Under Michelman's calculus, "when pursuit of efficiency gains entails capricious distribution, either demoralization costs or settlement costs must be incurred. It follows that if, for any measure, both demoralization costs and settlement costs (which ever were chosen) would exceed efficiency gains, the measure is to be rejected; but that otherwise, since either demoralization costs or settlement costs must be paid, it is the lower of these two costs that should be paid. The compensation rule which then clearly emerges . . . is that compensation is due whenever demoralization costs exceed settlement costs, and not otherwise." Michelman, *supra* note 285, at 1215.

369. *See supra* Part V.B.

seem contrary to efficiency considerations, the risk of such isolated inefficiency as superseded by the general concern regarding the need to maintain the government's power to carry out public projects which would be otherwise unfeasible due to either holdout or collective action problems. As a matter of general policy, there is no reason to award a local group stronger protection (and hence greater leverage over the government) than a private owner would have in an eminent domain or regulatory taking case. In each specific instance, the government would be disciplined to act efficiently both by the "hanging sword" of *ex post* compensation as well as by the public criticism it would face, should a court make a finding that the project's social costs actually outweigh its benefits. The "expressive function" of such judicial findings would thus preserve the coherence of "signaling" about the need for efficient grassroots investment in local public goods,[370] while at the same time it would prevent an overall collapse of the government's coercive power, which is essential for the provision of the different types of public goods.[371]

Second, when the costs of an identical or nearly identical substitute facility ("settlement costs") outweigh the proven costs of the "taking" ("demoralization costs"), the court should not simply make do with denying compensation to the local group, unlike in Michelman's calculus. In such a case, the court could subject the provision of such "substitute facility" to an adequate private financial contribution by the local group. Hence the group would be required to formally organize (as a nonprofit organization) and to obligate to a make a steady *pro-rata* contribution, as would be set up by the court, accompanied by institutional and financial mechanisms that typically characterize public-private partnerships.[372] Hence, from both efficiency and distrib-

370. *See* Sunstein, *supra* note 281. For the judicial "expressive" role in disciplining state action, see, e.g., Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1520–27 (2000).

371. This also explains why we should generally not resort to arguments of "unjust enrichment" to justify or to design compensation for "takings" of Local Public Commons. In the private property context, there may be sense in applying this doctrine to prevent a party from unjustly enjoying a benefit that could have otherwise belonged to the resource's owner. *See, e.g.*, Thomas W. Merrill, *Incomplete Compensation for Takings*, 11 N.Y.U. ENVTL. L. J. 110, 117–18 (2002). But in the case of local public goods, at least when the government undertakes a new socially efficient project that aims at serving the "general public," it creates a value that could not have been theoretically formed by the local group at the original resource. Hence, it is the government that creates (and not only exploits) the "societal surplus." It follows that the appropriate doctrinal balance for these two sets of incentives is to compensate the group for its losses, and at the same time allow the government to enjoy the residual benefits. This also helps to explain why the compensation should never *exceed* the overall (gross) societal benefits expected from the new project.

372. *See supra* Part II.C.3.b.

utive viewpoints, such a judicially mandated, ongoing contribution may be seen as a "proxy" for assessment and collection of charges for the "giving" endowed to the local group.[373]

Alternatively, the court can order the provision of a different sort of facility, which is less costly, but once established, is able both to promote the signaling policy of encouraging investment in local public goods as well as to recapture some of the group's loss of private value. For example, when a local playground is "taken" for a new public project, and no other vacant land is available at a feasible cost, the local government may be ordered to designate a space within an adjacent public building for child-oriented recreational or educational activity. In any case, the burden of offering such alternative remedies should lie with the plaintiffs and such options should be presented, at least generally, as early as possible in the litigation. This requirement is aimed both at alleviating the administrative costs of litigation (since the local group usually has better information about its own needs),[374] and also at taking advantage of the liability rule regime's better ability to promote "truth revealing" in exposing the group's private information about its losses.[375] If a local group might anticipate being exposed at the end of the day to either pro-rata contribution requirement or to outright rejection, if it fails to offer feasible alternative remedies at the outset, it would be discouraged from inflating its losses or from demanding overly priced remedies.

The possibility of joint contribution or of providing alternative remedies also limits the government's motivation to overestimate the costs of a specific suggested facility. As the government might be held responsible for its estimation of costs (taking into account the creation of a commitment on its part if the court decided, for example, to award a joint-contribution "expensive" substitute facility), the government would have to tread a path between not underestimating the costs so as to volunteer to inefficiently provide too many remedies, and between not overestimating costs simply to reject claims.

At the end of the day, a careful mechanism for awarding a collective, nonpecuniary liability rule remedy, when a factually proven successful Local Public Common is "taken," incorporates a significant potential

373. *See* Bell & Parchomovsky, *supra* note 290, at 605–08.

374. While this increases the scope of the private administrative costs that the group will bear, such extra burden is socially useful, since it serves as a "proxy" for distinguishing between claims involving a substantial loss and those involving negligible damages to the group. Accordingly, groups would be deterred from bearing such costs unless there is genuine damage and true interest in a substitute facility.

375. *See* Ayres & Talley, *supra* note 361.

to achieve both *ex ante* and *ex post* efficiency and fairness. The local group would be motivated to cooperate and coordinate in the resource, knowing that it would be redressed for its genuine losses in appropriate cases, but that it would not be granted power to strategically hold out against the government. The government would maintain its power to provide new public projects at its discretion, but at the same time it would have to engage in a more comprehensive cost-benefit analysis, whenever there is danger it would place a disproportionate burden on an unorganized-yet-important group in order to serve the constituency's general public.

VII. Conclusion

This article started with identifying the socially desirable phenomenon of local group coordination and cooperation in formally governmental properties and its mismatch to the current legal regime, and ended with my proposed guidelines for a legal reform aimed at bridging this gap, at least to some extent.

There is room for future research to more accurately delineate and define such a reform. It should be clear, in any case, that it is not feasible to design a universal formula that would equally apply to *all* types of local public goods. Thus, for new legal rules and remedies to be readily implemented, they must be constructed narrowly and precisely for different categories of local public goods.

Beyond that, this author hopes to have offered an innovative framework that may be more broadly applied in reconsidering a wide array of dilemmas concerning the borders between "public" and "private," especially in the urban setting.

This should especially apply, if the public views the issue of distinctive rights to public property not only along the local group/general public axis, but also in the larger, more familiar framework of intra-jurisdictional equity between the constituency's different sub-groups regarding the provision of governmental goods and services.[376] This

376. The inequity problem generally stems from the impure or mixed nature of most types of governmentally provided local public goods. This means that different groups within the jurisdiction, usually the residents of a certain neighborhood, may enjoy better levels of service and provision than other groups, examples being street maintenance or sanitation services. The same applies with almost equal measure to police or fire protection, where speed of service is of the essence, so that adjacent residents enjoy a better level of service. In a milder sense, recreational facilities, libraries, or even educational facilities are location-specific, even if formally open to the residents of the entire constituency, because of travel costs and other considerations that make their location an issue of paramount importance. Empirical studies of intra-jurisdictional disparity in the provision of goods and services include: MARTIN T. KATZMAN, THE POLITICAL ECONOMY OF URBAN SCHOOLS (1971); JONATHAN KOZOL, SAVAGE IN-

means that claims for distinctive rights in a certain publicly owned property can be more generally seen as a struggle by a sub-group to ensure an adequate level of governmental provision of goods and services as compared to other sub-groups in the constituency, an issue which up until now has been addressed mainly through the "equal protection" framework.[377] In this sense, this article can be seen as laying the foundation for a new approach to "rules of competition" for the strictly limited resources of government, aimed both at fairness and at validating efficient grassroots cooperation and investment.

EQUALITIES: CHILDREN IN AMERICA'S SCHOOLS (1991); FRANK LEVY, ARNOLD J. MELTSNER & AARON WILDAVSKY, URBAN OUTCOMES: SCHOOLS, STREETS AND LIBRARIES (1974); John C. Weicher, *The Allocation of Police Protection by Income Class*, 8 URB. STUD. 207 (1971).

377. Generally, the only cause of action against intra-jurisdictional disparity in the provision of local public goods is one that is based on the fourteenth amendment equal protection clause (U.S. CONST. amend. 14, § 1) and more specifically on Title VI of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000d). For a critical review of current constitutional law as inadequate to protect against inequalities in the provision of public services and goods, see, e.g., Kenneth W. Bond, *Toward Equal Delivery of Municipal Services in the Central Cities*, 4 FORDHAM URB. L. J. 263, 274–78 (1976); Inman & Rubinfeld, *supra* note 52, at 1675; CHARLES M. HAAR & DANIEL W. FESSLER, THE WRONG SIDE OF THE TRACKS: REVOLUTIONARY REDISCOVERY OF THE COMMON LAW TRADITION OF FAIRNESS IN THE STRUGGLE AGAINST INEQUALITY (1986); Clayton P. Gillette, *Equality and Variety in the Delivery of Municipal Services*, 100 HARV. L. REV. 946, 962–65 (1987) (book review).