

1-1-2022

Confronting the Local Land Checkerboard

Daniel B. Rosenbaum

University of Detroit Mercy School of Law

Follow this and additional works at: <https://scholarship.richmond.edu/lawreview>



Part of the [Courts Commons](#), [Judges Commons](#), [Property Law and Real Estate Commons](#), [State and Local Government Law Commons](#), and the [Supreme Court of the United States Commons](#)

Recommended Citation

Daniel B. Rosenbaum, *Confronting the Local Land Checkerboard*, 56 U. Rich. L. Rev. 665 (2022).

Available at: <https://scholarship.richmond.edu/lawreview/vol56/iss2/8>

This Article is brought to you for free and open access by the Law School Journals at UR Scholarship Repository. It has been accepted for inclusion in University of Richmond Law Review by an authorized editor of UR Scholarship Repository. For more information, please contact scholarshiprepository@richmond.edu.

CONFRONTING THE LOCAL LAND CHECKERBOARD

Daniel B. Rosenbaum *

INTRODUCTION

Fractured public land is hidden in plain sight. In communities across the country, a patchwork assortment of local governments share splintered ownership over surplus public properties, which can be found scattered in residential neighborhoods and alongside highways, in the shadows of development projects and in the scars of urban renewal. The ripple effect of this fragmentation extends across the spectrum of local governance. It creates needless costs and bureaucratic headaches at a time of acute fiscal distress for cities and counties. It contributes to an inequitable imbalance of local power between formal and informal landowners in a community. And curiously, the operative legal regime enables the problem while simultaneously muddying pragmatic ways to confront it. This Article seeks to shed light upon the local land checkerboard—and in doing so, the cluttered and opaque world of local government law that it inhabits.

Our journey begins in Mechanicsville, a historic, largely residential neighborhood located just south of Atlanta's downtown core. Settled in the late nineteenth century, the neighborhood welcomed waves of ethnically diverse residents over the following decades, drawn by nearby railroad jobs and proximity to the downtown business district.¹ Beginning around World War II, Mechanicsville experienced the familiar scourges of divestment, white flight, and urban renewal.² Interstate highways pierced the neighborhood along

* Visiting Assistant Professor, University of Detroit Mercy School of Law. J.D., 2015 Harvard Law School. This Article benefitted immensely from its presentation at the AALS New Voices in Property Law Program. The author is grateful to the program participants for invaluable comments and suggestions and to Professors Cara Cunningham Warren, Gerald E. Frug, Richard Broughton, and Jacqueline Hand for their time, feedback, and support.

1. *History*, MECHANICSVILLE CIVIC ASS'N, <https://mechanicsvilleatl.org/history/> [<https://perma.cc/4ASS-4XF9>].

2. *Id.*

its northern and western borders, while urban renewal projects destroyed its built fabric and accelerated a population decline that left Mechanicsville with only 2,300 residents in 1990, less than 25% of its 1960 level.³ In recent years another familiar trend came to the neighborhood: gentrification. Today, bungalow and shotgun homes sit alongside modern townhouse and condominium developments.⁴

As a legacy of its history, the landscape of Mechanicsville is scarred by vacant land. Concentrated in the north of the neighborhood near Burney Park, this vacant land takes a variety of physical forms: some is fenced off and well maintained; other land is hilly and covered with brush and debris. Some sections of vacancy cover entire city blocks; other sections are scattered between homes and businesses. Less apparent to the casual observer is the ownership status of these properties: the vacant land in Mechanicsville is predominantly owned by a variety of public entities. On Copper Street, several lots on the east side of the road are owned by Fulton County, which also owns several office and court buildings nearby.⁵ On the west side of the road, a large vacant parcel is owned by the Atlanta Board of Education, a vestige of the segregated school for local African-American children, Formwalt Elementary, that once stood on the site.⁶ And just a half block south, a long vacant parcel is owned by the City of Atlanta.⁷

The list of governmental owners in Mechanicsville only grows as a hypothetical visitor continues walking south. Along with additional lots owned by the City of Atlanta and Fulton County, the

3. *Id.*

4. See Josh Green, *First Look: South of Downtown, Row of 11 Townhomes Planned with Gold Dome Views*, CURBED ATLANTA (Apr. 7, 2020), <https://atlanta.curbed.com/2020/4/7/21210337/atlanta-townhome-for-sale-downtown-mechanicsville> [<https://perma.cc/GP52-L8AP>].

5. See, e.g., Search for Numbered Parcel Owned by Fulton County, CITY OF ATLANTA PROP. INFO., <https://gis.atlantaga.gov/propinfo/> [<https://perma.cc/4Z9V-YVRG>] (search “14 00760004154”); *id.* [<https://perma.cc/Y9ST-XLMD>] (search “14 00760004029”).

6. See *id.* [<https://perma.cc/8276-JSFQ>] (search “14 00760004143”). Regarding Formwalt School, see *Traces of the Past: Neighborhood Schools and the Power of Place*, BURNAWAY MAG., <https://burnaway.org/feature/neighborhood-schools-power-place/> [<https://perma.cc/2STN-Q4VK>].

7. CITY OF ATLANTA PROP. INFO., *supra* note 5 [<https://perma.cc/34U9-7HZW>] (search “1400760004051”). A search of historical satellite imagery indicates that a residential home on the lot was demolished between 1968 and 1972. See Nationwide Environmental Title Research, HISTORIC AERIALS, <https://www.historicaerials.com/location/33.70254602695358/-84.39188718795776/1955/17> [<https://perma.cc/U6JN-9ZFJ>] (search “445 Cooper Street SW, Atlanta, Georgia,” select “compare,” select “slide,” and pick “1968” and “1972”).

visitor will also come across vacant or underutilized land owned by two regional authorities, the Atlanta Land Bank Authority and the Metropolitan Atlanta Rapid Transit Authority (“MARTA”).⁸ As fractured as vacant land may appear to the neighborhood’s urban fabric at street level, and as much as residents may expect fractured *private* ownership of vacant property, the fragmentation of publicly owned land demands attention when assessing the state of property in Mechanicsville today.

The case of Mechanicsville is hardly unique. In Chicago’s East Garfield Park, another neighborhood scarred by white flight and urban renewal,⁹ fractured public ownership can be found on a block-by-block and parcel-by-parcel level. In one block of South Whipple Street, for example, the City of Chicago owns seven vacant lots intermingled among five lots owned by the Cook County Land Bank.¹⁰ What appears to the visitor as one large vacant property on the east side of South Whipple is in fact a checkered hodgepodge of city and land bank ownership.¹¹

Fractured public land ownership is not merely the domain of neighborhoods challenged by racial turnover and deindustrialization. Indeed, urban planning scholarship has demonstrated that fragmented vacant property is a product of both population decline *and* population growth.¹² Los Angeles stands as a case in point. Despite experiencing uninterrupted population growth over the past century, almost 14,000 public properties are owned between

8. See, e.g., CITY OF ATLANTA PROP. INFO., *supra* note 5 [https://perma.cc/GA23-2DW8] (search “14 01760005027”); *id.* [https://perma.cc/BFM6-KTKD] (search “14 00860002079”).

9. See Amanda Seligman, *East Garfield Park*, ELEC. ENCYC. OF CHI., https://www.encyclopedia.chicagohistory.org/pages/404.html [https://perma.cc/EU 9J-7B7Q].

10. See COOK CNTY. LAND BANK AUTH., https://public-ccelba.epropertyplus.com/land mgmtpub/app/base/landing [https://perma.cc/GM7N-QMTQ] (conducting searches for 17, 27, 33, 35, and 38 South Whipple Street); *City-Owned Land Inventory*, CHI. DATA PORTAL, https://data.cityofchicago.org/Community-Economic-Development/City-Owned-Land-Inventary-Map/y5ck-7s96 [https://perma.cc/9EZQ-UNP4] (listing properties owned by the City of Chicago, including 15, 18, 21, 22, 23, 25, and 26 South Whipple Street).

11. Comparable examples can be found elsewhere in East Garfield Park. The 3400 block of West Walnut Street boasts two land bank properties scattered among nine city-owned lots. See COOK CNTY. LAND BANK AUTH., *supra* note 10 [https://perma.cc/8H78-PMU7] (searching for 3439 and 3453 West Walnut Street); CHICAGO DATA PORTAL, *supra* note 10 [https://perma.cc/M5CN-N935] (listing properties owned by the City of Chicago, including 3400, 3402, 3407, 3409, 3416, 3423, 3431, 3443, and 3451 West Walnut Street).

12. See Boah Kim & Galen Newman, *The Spatial Effect of Civic Expansion on Vacant Land Distribution in Fort Worth, Texas* (Jan. 2014), in ASSOCIATION OF COLLEGIATE SCHOOLS OF PLANNING; Boah Kim & Galen Newman, *Factors Influencing Urban Regeneration: An Analysis of Conversion of Non-Vacant Land Uses to Vacant* (Oct. 2015), in ASSOCIATION OF COLLEGIATE SCHOOLS OF PLANNING.

six main governmental entities in Los Angeles, and many of these properties are vacant or underutilized.¹³ Just as in Mechanicsville and East Garfield Park, examples exist in Los Angeles, too, where vacant land in a given neighborhood has its ownership divided and intermingled between multiple public owners.¹⁴

These examples underscore two rarely examined realities.¹⁵ First, local governments own vast amounts of land. While there are no national-level studies of local public ownership,¹⁶ and few city-

13. Los Angeles is the only major American city that has attempted to comprehensively identify and map all publicly owned property. See Los Angeles Office of the Controller, *Data Stories and Maps: Property Panel*, <https://lacontroller.org/data-stories-and-maps/property-panel/> [<https://perma.cc/LJV4-XLXP>]. While this report does not indicate vacant or underutilized properties, it estimates that the city owns about 10% of all vacant lots in Los Angeles, see Alissa Walker, *This Interactive Map Shows LA's Publicly Owned Properties*, CURBED LOS ANGELES (July 3, 2019), <https://la.curbed.com/2019/7/3/20681291/map-public-property-los-angeles> [<https://perma.cc/LMU4-GFGX>] (noting that there are 22,000 vacant lots in Los Angeles), it suggests that about 2,200 out of 7,508 total properties owned by the city are vacant—or about 30%. See also Michael H. Kelly, Opinion, *Why Does So Much City-Owned Land Sit Idle in Los Angeles?*, L.A. TIMES (June 17, 2018), <https://www.latimes.com/opinion/op-ed/la-oe-kelly-los-angeles-city-owned-land-20180617-story.html> [<https://perma.cc/82YJ-PV9P>] (criticizing the “vast real estate portfolio” of underutilized lots owned by the city and other public entities).

14. See, e.g., Los Angeles Office of the Controller, *supra* note 13 (selecting parcels AIN 5168017902 and AIN 5168017900). These are adjacent vacant parcels on the east side of the Los Angeles River. The former is owned by the City of Los Angeles, while the latter is owned by Los Angeles County.

15. The academic literature’s engagement with fragmented public land has occurred almost exclusively at the federal level, where fragmented federal landholdings in the American West have attracted considerable scholarship. See *infra* Part IV. This imbalance mirrors larger trends in the field of public land management, where scholarship focuses overwhelmingly on federal public land. See Steven M. Davis, *The Politics of Urban Natural Areas Management at the Local Level: A Case Study*, 2 KY. J. EQUINE, AGRIC., & NAT. RES. L. 127, 127 (2010) (“The centrality of local conservation lands in peoples’ everyday lives is certainly not mirrored in public lands literature, which is disproportionately focused on federal lands.”). But see Gabriel Eidelman, *Failure When Fragmented: Public Land Ownership and Waterfront Redevelopment in Chicago, Vancouver, and Toronto*, 54 URB. AFF. REV. 697 (2018). Eidelman’s comparative account of waterfront development in Toronto, Vancouver, and Chicago appears to be the only academic study in North America that directly examines the effect of intergovernmental public land fragmentation. *Id.* According to Eidelman, Toronto’s failure to successfully develop its waterfront, when contrasted with the other two cities, can be traced to the fragmented nature of its public land ownership. *Id.*

16. See Eidelman, *supra* note 15, at 701. Regrid (formerly Loveland Technologies), a parcel mapping company, is attempting to map and collect data on all parcels in the United States. See REGRID, <https://landgrid.com/company> [<https://perma.cc/B3CR-NEY4>]. See generally Earl F. Epstein & Bernard J. Niemann, MODERNIZING AMERICAN LAND RECORDS: ORDER UPON CHAOS (2014). It appears that most of Regrid’s data is not managed in real-time and therefore cannot serve as an accurate inventory of land ownership. Even so, for purposes of this Article, it provides a representative snapshot of local public land holdings. In fact, Regrid likely paints a conservative picture of public ownership because in many jurisdictions, including all those cited below, a large number of properties lack ownership data altogether.

level efforts to distill public property holdings,¹⁷ a review of public parcel data indicates that local governments are significant landowners, particularly in legacy industrial cities.¹⁸ Public ownership is lower in southern and western regions that boomed after World War II and have suffered less from deindustrialization, but government entities still own large numbers of properties in these localities, as well.¹⁹ To an extent, of course, there is nothing remarkable about local governments owning land. Property is required for city halls, courts, parks, schools, transit centers, and convention facilities. It serves as the locus where government business is conducted and where members of the public congregate. Yet much of the land owned by public entities does not fulfill these functions, and instead can be considered surplus property—parcels that are vacant or underutilized and are not being put to active use.²⁰

17. A number of cities and counties release parcel maps of all properties within their jurisdictions. See, e.g., Miami-Dade County Land Information Viewer, MIA.-DADE CNTY., <https://gisweb.miamidade.gov/landinformation/> [<https://perma.cc/ZBJ6-5NBS>]. Yet these maps generally do not distinguish between public and private ownership. Los Angeles is a rare example of a large local government specifically identifying and mapping all publicly owned properties. See *supra* note 13 and accompanying text.

18. In Baltimore, Regrid identifies 238,298 total parcels, of which a local public entity (most notably the City of Baltimore and Housing Authority of Baltimore) owns 12,901 properties—over 5% of the city's total. See *United States Parcel Data*, REGRID, <https://app.regrid.com/us/#b=admin> [<https://perma.cc/P8ND-ZVQ5>] (searching for “Baltimore, MD”). The percentage is even higher in Youngstown, Ohio (7%), see *id.* [<https://perma.cc/DBH9-87T7>] (searching for “Youngstown, OH”); St. Louis (10%), see *id.* [<https://perma.cc/X9JC-XB2Z>] (searching for “St. Louis, MO”); and in Flint, Michigan, where a staggering 28% of parcels are owned by local public entities, see *id.* [<https://perma.cc/AJ9A-VE8D>] (searching for “Flint, MI”). In Birmingham, public entities—led by the City of Birmingham, the Birmingham Land Bank, the Housing Authority of Birmingham, and the Jefferson County—together own 7,500 parcels. See *id.* [<https://perma.cc/9QJG-EMGP>] (searching for “Birmingham, AL”).

19. In Miami-Dade County, Regrid identifies 579,551 total parcels, of which a local public entity (notably Miami-Dade County, the South Florida Water Management District, the School Board of Miami-Dade County, and the City of Miami Beach) owns 9,521 parcels—an appreciable amount of land, yet under 2% of the county's total. See *id.* [<https://perma.cc/X5DF-MXLR>] (searching for “Miami-Dade County, FL”). Local governments own at least 10,481 properties in Phoenix, see *id.* [<https://perma.cc/X8ER-4WGE>] (searching for “Phoenix, AZ”), 16,639 properties in Houston, see *id.* [<https://perma.cc/8Z4V-D2NX>] (searching for “Houston, TX”), and at least 7,214 in San Diego, see *id.* [<https://perma.cc/2JR3-N22N>] (searching for “San Diego, CA”).

20. As with public ownership more broadly, data is lacking with respect to vacant public land. A study from 2000 estimated that 15% of city land was vacant in the United States. See Michael A. Pagano & Ann O'M. Bowman, *Vacant Land in Cities: An Urban Resource*, CTR. ON URB. & METRO. POLY (Dec. 2000), <https://www.brookings.edu/wp-content/uploads/2016/06/paganofinal.pdf> [<https://perma.cc/5VVK-V2LC>]. The study expressly included city-owned vacant land in its survey but did not delineate between public and private property in the final analysis. See *id.* at 2. A review of parcel data suggests significant overlap between public ownership and areas of a city that suffer from vacancy. In Houston, for

Second, local public land is highly fragmented between a constellation of local governmental entities.²¹ This fragmentation is purposeful and perhaps practical when considering nonsurplus land: we expect that a school district owns the local public school, while a park district owns the land used for a local park.²² When considering surplus property, however, these presumptions dissipate, along with the statutory mandates that may underpin them.²³ An unused parcel of land might ideally be owned and managed by a local land bank or redevelopment authority.²⁴ Yet in practice, surplus parcels can be found scattered and fractured amongst a number of local government owners.²⁵

example, the Settegast neighborhood is plagued with vacant land. Luis Guajardo, *Settegast: A Case Study in Endemic Racism Within Houston's Housing System*, KINDER INST. FOR URB. RSCH. (July 2, 2020), <https://kinder.rice.edu/urbanedge/2020/07/02/housing-inequality-settegast-racism-within-houston-redlining> [https://perma.cc/8Z7K-EUM3]. It is also pocketed by dozens of publicly owned lots, split primarily between the City of Houston and the Houston Land Bank. See *United States Parcel Data*, *supra* note 18 [https://perma.cc/8Z4V-D2NX] (searching for "Houston, TX"). In Chicago, city-owned properties are concentrated in Englewood, North Lawndale, East Garfield Park, and Grand Boulevard, all neighborhoods severely affected by vacancy. See CHI. DATA PORTAL, *supra* note 11. The city does not distinguish the number of vacant parcels it owns, but it has offered over 4,000 vacant lots for sale in these same neighborhoods in recent years. See Jay Koziarz, *City of Chicago to Expand \$1 Lot Program to 4,000 Vacant Properties*, CURBED CHICAGO (Nov. 29, 2016), <https://chicago.curbed.com/2016/11/29/13776394/chicago-real-estate-news-city-expands-dollar-lot-program-west-south-side> [https://perma.cc/X6CU-SHS4].

21. See *supra* notes 18–19 (listing various public owners in Birmingham and Miami-Dade). In San Diego, local public owners include the City of San Diego, the County of San Diego, the San Diego Metropolitan Transit Development Board, the San Diego Unified School District, the San Diego Unified Port District, the San Diego Housing Commission, the San Diego County Water Authority, and a number of other water districts, school districts, and municipalities. See *United States Parcel Data*, *supra* note 18 [https://perma.cc/2JR3-N22N] (searching for "San Diego, CA").

22. But see Nadav Shoked, *An American Oddity: The Law, History, and Toll of the School District*, 111 NW. U. L. REV. 945 (2017) (advocating abolition of school districts).

23. In some jurisdictions, "surplus property" is a technical term: property is designated surplus by administrators or policymakers, a process subject to criticism for politicized decision making. See Katie Wells, *Policyfailing: The Case of Public Property Disposal in Washington, D.C.*, 13 ACME: INT'L J. FOR CRITICAL GEOGRAPHIES 473, 483 (2014). For purposes of this Article, the term "surplus property" is not used to track any technical definition or application, but is rather used as a purely descriptive term for public property, often vacant, that is unused or underutilized and in either case is not being committed to an active purpose. But see *infra* note 85 and accompanying text (discussing community gardens and critiquing articulations of "surplus" or "vacant" land).

24. See Anne E. Kline, *A Case for Connecticut Land Banks*, 88 CONN. B.J. 210, 215 (2015) (advocating for land bank legislation and noting that "[a]cquisition of properties is a fundamental function of a land bank").

25. See *supra* note 20 and accompanying text. In Chicago, for example, the City is not the only local entity to implement a program for selling vacant lots. See Corilyn Shropshire, *Cook County Selling Nearly 3,200 Vacant Lots to Encourage Redevelopment*, CHI. TRIB. (May 1, 2018), <https://www.chicagotribune.com/business/ct-cook-county-land-bank-offers-vacant->

Taken together, these facts yield an inescapable conclusion: public land fragmentation between local government owners is a widespread phenomenon, not limited only to Mechanicsville and East Garfield Park but a facet of the public landscape in communities across the United States. This Article aims to illuminate the local land checkerboard. It first explores why fragmented public land is problematic, both for the governments that own these parcels and for the communities that have stewarded them. It then draws upon federal law to offer a pragmatic solution: using land exchanges between local entities to consolidate public property holdings. A specific type of federal land exchange—the “assembled exchange,” which involves more than two parties and may occur over a period of time—offers an especially dynamic model for tackling fragmentation while also promoting property law values of efficiency, sharing, and collaboration. The Article thus advocates for assembled exchanges as a form of adaptive governance.

In advocating for local land exchanges, however, the Article must confront and navigate the muddled legal framework that governs a local government’s authority to exchange property, and in particular its authority to engage in interlocal land exchanges with other government entities. This framework counterintuitively and irrationally creates a shakier legal basis for interlocal land exchanges when compared with exchanges made between a government owner and a private party. Addressing the legality of local exchanges provides an opportunity to explore the broader issue of opaque local government power. What observers might perceive or assume as a far-reaching local mandate may, in reality, reflect a grant drawn opaquely by state law and ultimately limited in its interpretation by courts.²⁶ As a consequence, a chasm forms between the power a local government was intended to hold—and arguably should or *might* hold—and the locality’s ability to act in that space, yielding a model of governance that is more expansive

lots-20180501-story.html [https://perma.cc/KYW8-KZRQ].

26. See Daniel B. Rodriguez & Nadav Shoked, *Comparative Local Government Law in Motion: How Different Local Government Law Regimes Affect Global Cities’ Bike Share Plans*, 42 FORDHAM URB. L.J. 123, 149 (2014) (discussing the general concept of opaque local power and the leeway given courts to limit home rule; concluding that “arguably, . . . in New York the opacity of the lines drawn by the state for the scope of city powers led to further restriction, rather than expansion, of local powers”).

in theory than it is in practice.²⁷ Land exchanges offer a striking case study of the issue.

This Article proceeds as follows. Part I addresses the question left unanswered in this Introduction: *why* is local public land so fragmented between public entities? This Part broadly describes the two overarching sources of local fragmentation, first the legal and political framework that causes property to be fragmented geographically in a given jurisdiction, and second the factors that have created a variety and redundancy of local government owners.

Part II makes the case for public land consolidation. It draws upon property theory and local government practice to assess why land fragmentation adversely affects the governance, administration, and productivity of public property. This Part illustrates how fragmentation is more often a liability than an asset. For local governments, fragmentation imperils both management and development objectives by imposing costs and inefficiencies upon financially strapped entities. For residents of the community, meanwhile, fragmentation threatens spaces of collective stewardship and fosters an inequitable imbalance of local power.

Part III turns to the Article's core prescriptive question: What can be done to remedy the fragmentation of surplus public land between governmental owners? This Part explores three possible remedies—ownership consolidation, interlocal agreements, and land exchanges—and posits that the first two face significant hurdles inherent to the structure of local government, whereas the third, land exchanges, offers a path forward less constrained by these defects. This Part then examines and advocates for assembled land exchanges, which offer an adaptive exchange model rooted in collaboration and shared governance.

Part IV looks at the approach taken by the federal government to consolidate federally owned property. Under the Federal Land and Policy Management Act ("FLPMA"), federal agencies administer a process whereby exchanges are proposed, reviewed, and effectuated in the interest of reducing public land fragmentation. Exchanges made pursuant to the FLPMA—known as "administrative

27. *See id.* (discussing the "local empowerment continuum"); *see also* Ryan B. Stoa, *Water Governance in Haiti: An Assessment of Laws and Institutional Capacities*, 29 TUL. ENV'T L.J. 243, 265 (2017) (positing that opaque legal mandates may functionally limit local action in practice).

exchanges”—reflect a proven and systematic effort, albeit an imperfect one, to address the federal land checkerboard. This Part concludes by arguing that the federal model could be instructive at the local level.

In light of the problems posed by local fragmentation and the merits of interlocal exchanges, Part V examines the operative question of local power: what legal authority do local governments hold to exchange property with each other? This Part demonstrates that state law and judicial doctrine have created a muddled legal regime stemming from an inconsistent approach to the basic concept of land exchanges. Legislatures and courts equivocate between defining exchanges as a unique mechanism for transferring property and defining them as part and parcel of the property acquisition and sale processes. In many states, as a result of this inconsistency, it is not clear that local entities are empowered to engage in interlocal exchanges, while in other states local exchange authority is unduly limited by burdensome procedural requirements. The Article concludes by proposing elements of the federal land exchange model that could be applied at the local level to clarify the legal regime of interlocal exchanges, as a consequence also facilitating and promoting exchanges as a conscious response to public land fragmentation.

I. THE FRAGMENTATION OF LOCAL PUBLIC LAND

Why is local public land so fragmented? When examining the question on a small scale, in the context of a given neighborhood, the historical record often paints a straightforward picture of fractures within public land ownership. In Mechanicsville, for example, a vacant lot on the east side of Copper Street is owned by the Board of Education because a school once sat on the site, while a lot across the street is owned by Fulton County because it is adjacent to other land that houses County courts and offices.²⁸ In both cases, the vacant properties are tied to their governmental owners by virtue of a historical use or development. When the use at issue moved elsewhere, the lot became unintentionally vacant. The aggregate effects of these unanticipated land use changes, assessed across a neighborhood or city, unsurprisingly create fractured public ownership over time.

28. See *supra* notes 5–6 and accompanying text.

Yet on a larger scale, broader structural, legal, and political factors promote these accidents of nonuse, encouraging both the existence of surplus properties and the splintering of these properties into the hands of different public owners.

A. *Fragmentation by Geography*

Land fragmentation occurs most palpably on a geographic level. The landscape of a community or neighborhood bears witness to the diverse types of property owned by local governments operating in that jurisdiction, as well as the diverse locations where public properties can be found. A couple sources of this fragmentation are readily apparent. First, fragmented land is a product of demographic change: both population growth and population decline create fractured parcels—often termed “residual parcels”—that ultimately come under local public ownership.²⁹ Second, fractured parcels are a legacy of anti-urban and racially motivated planning decisions of the twentieth century,³⁰ notably highway construction and urban renewal, that slashed through the existing urban fabric to construct large housing and infrastructure projects, in their wake leaving residual parcels that remain in local public ownership to this day.³¹

The expansive geographic diversity of local landholding is also grounded in the broad latitude given to local governments when acquiring and selling property. General purpose governments may be empowered under state law or the home rule provision of a state constitution to obtain properties for “city purposes” or “public use,” broad directives that enjoy deference in court.³² Cities also receive

29. See generally Kim & Newman, *supra* note 12.

30. See Amy Laura Cahn & Paula Z. Segal, *You Can't Common What You Can't See: Towards a Restorative Polycentrism in the Governance of Our Cities*, 43 *FORDHAM URB. L.J.* 195, 201 (2016).

31. See generally *Crumpacker v. State*, 271 N.E.2d 716, 717 (Ind. 1971) (discussing residual parcels created from the construction of a highway); Gideon Kanner, *Detroit and the Decline of Urban America*, 2013 *MICH. ST. L. REV.* 1547, 1559 (2013) (discussing urban renewal and its destruction of the traditional street grid).

32. See, e.g., VA. CODE ANN. § 15.2-1800 (Repl. Vol. 2018) (“public use”). At the same time, some statutory grants do not contain any express public purpose limitations. See, e.g., WASH. REV. CODE § 35A.11.010 (2021) (a city may “acquire real and personal property of every kind”). Similar provisions also apply to county property. See, e.g., *id.* § 36.34.130 (county power to acquire and dispose of property via intergovernmental transfer). Property acquisition is also limited by constitutional and due process requirements, for example when obtaining property via foreclosure or eminent domain. See Kellen Zale, *The Government's*

broad deference when selling public property, particularly where the property is considered surplus in nature.³³ Similarly, special purpose governments are often granted power to own and dispose of property so long they act consonant with the broad purposes of their authorizing statutes.³⁴

As a result of this latitude, local entities enjoy few constraints when making decisions about property they own or are deciding to acquire.³⁵ The lack of a regulatory framework yields instead to a model of ad hoc, politicized decision making. Legal scholars have critiqued local land use decisions as inconsistent, driven by narrow interests, and highly political.³⁶ These critiques apply as well to decisions made about publicly owned property more specifically. When a local government is acquiring property, it is susceptible to rosy economic development forecasts that regularly do not come to fruition.³⁷ When selling a property, meanwhile, a local government is prone to capture by factions of the public, notably neighbors and

Right to Destroy, 47 ARIZ. ST. L.J. 269, 274 (2015). A number of home rule grants are interpreted expansively in the local government's favor, although this liberal construction is not applied consistently by courts. See Jesse J. Richardson, Jr., Meghan Zimmerman Gough & Robert Puentes, BROOKINGS INST. CTR. ON URB. & METRO. POL'Y, IS HOME RULE THE ANSWER? CLARIFYING THE INFLUENCE OF DILLON'S RULE ON GROWTH MANAGEMENT 6, 20–21 (Jan. 2003), <https://www.brookings.edu/wp-content/uploads/2016/06/dillonsrule.pdf> [http://perma.cc/LCQ4-DTP9].

33. See, e.g., 65 ILL. COMP. STAT. 5/11-76-1, 76-4.1, 76-4.2 (2021) (all authorizing and setting forth processes for the sale of surplus municipal property in Illinois); OHIO REV. CODE ANN. § 721.01 (LexisNexis 2021) (authority for municipalities to sell property “not needed for any municipal purpose”); see also Max Schanzenbach & Nadav Shoked, *Reclaiming Fiduciary Law for the City*, 70 STAN. L. REV. 565, 569 (2018); *id.* at 592 (explaining that some courts view a city selling surplus assets as reflecting a prudent business decision).

34. See, e.g., *Southside Water & Sewer Dist. v. Murphy*, 555 P.2d 1148, 1149 (Idaho 1976) (citing IDAHO CODE § 42-3212 (2021)) (sewer district has “authority to acquire property to carry out its public purposes”); *Fitchik v. N.J. Transit Rail Operations, Inc.*, 873 F.2d 655, 663 (3d Cir. 1989) (discussing transit authority power to buy and sell property); *State ex rel. Jackson v. Dolan*, 398 S.W.3d 472, 474 (Mo. 2013) (port authority “has the authority to acquire property necessary to its purposes”); OHIO REV. CODE ANN. § 4582.31 (LexisNexis 2021) (port authority can buy, own, and sell property “in furtherance of any authorized purpose”).

35. Davis, *supra* note 15, at 147 (“Simply put, land managers at the city and county level tend to be far less constrained by legislative or regulatory guidelines and requirements than federal managers.”).

36. See David Schleicher, *City Unplanning*, 122 YALE L.J. 1670, 1709–14 (2013); Patricia E. Salkin, *Back to Kindergarten: Pay Attention, Listen, and Play Fair with Others—Skills That Translate into Ethical Conduct in Planning and Zoning Decision Making—A Summary of Recent Cases and Decisions on Ethics in Land Use Law*, 37 URB. LAW. 573 (2005).

37. Frank Schnidman, *Land Assembly by Assembling People*, SP006 ALI-ABA 1, 11 (2009) (discussing “but a few examples of municipal land speculation, underwritten by taxpayers, which were never economically sustainable”).

developers, who do not reflect the interests of the community at large.³⁸ Local entities also sell property in order to advance short-term political or fiscal goals, absent any cohesive long-term sensibility.³⁹

Land fragmentation comes as an unsurprising side-effect when decisions about property acquisition and disposition are made in an ad hoc manner.⁴⁰ Promoting cohesive and consolidated public land policies requires a government to make long-term decisions on an issue that rarely resonates in the public consciousness.⁴¹ Without meaningful legislative or judicial parameters, these long-term decisions do not occur. Instead, individual properties are acquired and sold for shifting political reasons, an approach that only coincidentally may ensure geographic consolidation of ownership.⁴²

This is especially the case where underutilized property is concerned. Acting on the belief or posture that growth policies can be implemented on underutilized land,⁴³ local governments take on

38. Michael C. Blumm, *Public Choice Theory and the Public Lands: Why "Multiple Use" Failed*, 18 HARV. ENV'T L. REV. 405, 407–08 (1994) (arguing that public choice theory, which posits that special interest groups disproportionately impact policymaking, is "particularly relevant in the case of public lands"). This hearkens to the Madisonian concept of undue factional influence in government. See Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 CALIF. L. REV. 837, 854 (1983).

39. Schanzenbach & Shoked, *supra* note 33, at 571–72. Local leaders are responsive to current voters, not future ones, and therefore are incentivized to prioritize decisions with immediate benefit that might be harmful in the future. See Clayton P. Gillette, *Can Municipal Political Structure Improve Fiscal Performance?*, 33 REV. BANKING & FIN. L. 571, 572 (2014).

40. See Scott K. Miller, *Missing the Forest and the Trees: Lost Opportunities for Federal Land Exchanges*, 38 COLUM. J. ENV'T L. 197, 208–09 (2013) (noting, in the federal land context, that disjointed acquisition and disposition approaches yielded public land fragmentation).

41. Land fragmentation at the federal level enjoyed a period of notoriety in the 1990s. See Smith Monson, Note, *Treating the Blue Rash: Win-Win Solutions and Improving the Land Exchange Process*, 2015 UTAH L. REV. 241, 259 (2015) (discussing the critiques that preceded a report by the General Accounting Office in 2009 regarding fragmented federal land). On the local level, fragmentation does boil over at times into public perception and frustration, as demonstrated recently in Philadelphia. See *infra* note 108 and accompanying text. But such examples can be considered rare in light of the widespread problem of fragmented public property more generally.

42. A possible exception is when a governmental entity embarks on a land assembly project for purposes of a development, often via use of eminent domain. These projects, however, are necessarily still short-term in nature, driven by the objective of the development rather than by the goal of long-term public land consolidation. See James J. Kelly, Jr., *A Continuum in Remedies: Reconnecting Vacant Houses to the Market*, 33 ST. LOUIS U. PUB. L. REV. 109, 111 (2013) (describing eminent domain as "usually driven by a massive new building project").

43. Robert Mark Silverman, Li Yin & Kelly L. Patterson, *Municipal Property*

these properties speculatively, acquiring them through foreclosure, eminent domain, nuisance abatement actions, and other forms of blight and vacant property enforcement.⁴⁴ Each of these acquisition vehicles carries its own legal process, which in many cases turns on the internal practices of the governmental entity itself.⁴⁵ Due to the divergent and multifaceted acquisition methods at their disposal, governments end up with fragmented land holdings as these practices and acquisition methods are variously applied and aggregated over time, fluctuating alongside shifting assessments of cost and political risk.⁴⁶

B. *Fragmentation by Ownership*

Geographic fragmentation of public land is only half the story. As illustrated by the examples of Mechanicsville and East Garfield Park, publicly owned property is not simply fragmented geographically, but it is also fragmented between local government owners. This fragmentation of ownership can be explained by the crowded playing field of modern local governance. A staggering number of local public entities operate in the United States today; in any given community, there are likely multiple local entities that share overlapping or coterminous jurisdictions and are authorized, if not empowered, to own surplus property.⁴⁷

Acquisition Patterns in a Shrinking City: Evidence for the Persistence of an Urban Growth Paradigm in Buffalo, N.Y., COGENT SOC. SCIS., Feb. 13, 2015, at 3 (discussing the sometimes false assumption held by governmental leaders that growth is a constant and shrinking neighborhoods or cities is a temporary aberration; as a result, public entities take on abandoned properties that face insurmountable challenges).

44. See Michele Steinberg & Meghan Housewright, *Addressing Vacant Property in the Wildland Urban Interface*, 55 IDAHO L. REV. 59, 68, 71–72 (2019).

45. See Lavea Brachman, *Vacant and Abandoned Property: Remedies for Acquisition and Redevelopment*, LINCOLN INST. OF LAND POL'Y (Oct. 2005), <https://www.lincolninst.edu/publications/articles/vacant-abandoned-property> [<https://perma.cc/ZC33-CDXX>] (discussing code enforcement, eminent domain, nuisance abatement, and tax foreclosure).

46. See Kelly, *supra* note 42, at 111, 115–16, 120 (examining the different types of property acquired under various acquisition approaches to underutilized land; for example, code enforcement receivership is designed for vacant buildings, whereas nuisance abatement laws are targeted at hazardous structures and eminent domain is a potentially “unnecessarily drastic” and “nuclear option” that is overinclusive of the properties and property rights it captures).

47. According to 2017 census figures, over 38,000 general purpose and 51,000 special purpose local governments exist in the United States, yielding a sum of 90,075 local entities. By way of comparison, county governments—the default form of local administration—comprise only 3,031, or about 3%, of this figure. *2017 Census of Governments*, U.S. CENSUS (Feb. 12, 2020), <https://www.census.gov/data/tables/2017/econ/gus/2017-governments.html>

Scholars have long assailed the legal conditions that give rise to a multiplicity and duplicity of local government entities.⁴⁸ Local governments are relatively easy to create yet can be difficult to abolish or dissolve, yielding on balance a one-way ratchet towards increasing numbers of public entities.⁴⁹ The ratchet is particularly prominent where surplus public land is involved.⁵⁰ Over the past half century, states have passed a rash of legislative enactments designed to tackle the causes or effects of underutilized and vacant public property.⁵¹ These acts have bred a scattered and sometimes duplicitous landscape of special purpose entities that share a general mission of repurposing distressed, vacant, or unutilized local land—while at the same time holding different powers and governance structures.⁵² Legal commentators and policymakers alike

[<https://perma.cc/3BBU-V842>].

48. See, e.g., Richard Briffault, *The Local Government Boundary Problem in Metropolitan Areas*, 48 STAN. L. REV. 1115, 1171 (1996); Laurie Reynolds, *Intergovernmental Cooperation, Metropolitan Equity, and the New Regionalism*, 78 WASH. L. REV. 93, 93–97 (2003); see also Colin Gordon, *Patchwork Metropolis: Fragmented Governance and Urban Decline in Greater St. Louis*, 34 ST. LOUIS U. PUB. L. REV. 51, 66 (2014) (“Urban historians and urban scholars generally agree that patchwork governance has been disastrous for American cities.”).

49. With respect to incorporation, see Christopher J. Tyson, *Municipal Identity as Property*, 118 PENN ST. L. REV. 647, 666 (2014) (“While incorporation standards in some states can place a high burden on those endeavoring to create a new city, in most states it is relatively easy to incorporate, and while several legal prerequisites may need to be satisfied, incorporation is generally available. . . . [I]n most states, individual property owners control municipal boundary formation and reformation.”); Gerald E. Frug, *Beyond Regional Government*, 115 HARV. L. REV. 1763, 1782–83 (2002) (regarding special purpose governments). With respect to dissolution, in many states a municipality’s population must fall below a certain threshold before it can be dissolved. See Michelle Wilde Anderson, *Dissolving Cities*, 121 YALE L.J. 1364, 1380 (2012) (arguing that these population thresholds “have effectively limited dissolution to ghost towns or rural enclaves”). Special purpose entities, meanwhile, often shirk traditional means of political accountability, giving stakeholders latitude to keep an entity alive even if its purpose has become redundant or counterproductive. See Sara C. Galvan, *Wrestling with Muds to Pin Down the Truth About Special Districts*, 75 FORDHAM L. REV. 3041, 3070 (2007).

50. A closely related issue, yet tangential to the scope of this Article, is the fragmentation of land use regulation that occurs as a consequence of local government fragmentation, yielding ad hoc, inequitable decision-making. See Kenneth A. Stahl, *Local Home Rule in the Time of Globalization*, 2016 BYU L. REV. 177, 213 (2016); Briffault, *supra* note 48, at 1133; Gordon, *supra* note 48, at 70.

51. See, e.g., Richard A. King, *The Continuing Battle to Curb Urban Blight and the Use of Economic Activity Taxes*, 51 J. MO. BAR 332 (1995) (discussing the “wide-ranging legislative enactments” passed in Missouri to address blight and divestment, including acts targeting surplus public land).

52. Peter Salsich, Rex Gradeless, Laura Schwarz & Kathleen Zahn, *Affordable Workforce Housing—An Agenda for the Show Me State: A Report from an Interactive Forum on Housing Issues in Missouri*, 27 ST. LOUIS U. PUB. L. REV. 45, 64 (2007) (“[T]he large number of separate agencies may be traceable, in part, to enabling legislation requirements . . .”).

have advocated in recent years for land banks to act as the primary entity for managing surplus land.⁵³ Where authorized by state statute,⁵⁴ land banks serve in theory as ideal repositories for consolidated public property because they are delegated express powers to obtain, manage, and dispose of tax-delinquent property, usually with corollary powers to clear title clouds from those parcels and thereby promote their redevelopment.⁵⁵ Yet in practice, land banks add another public owner and layer of local administration to the governance mix. Even in regions where a land bank has been conferred broad powers and enjoys strong political support, fragmentation of surplus public land nevertheless persists.⁵⁶

The degree to which public land is fragmented in Mechanicsville and East Garfield Park should ultimately come as little surprise. Viewed in tandem, the geographic fragmentation of land and the administrative fragmentation of ownership together create an optimal recipe for the local land checkerboard that has developed—a checkerboard that epitomizes both the splintered structure of local government and the accretion of shifting policy decisions made over time.

As the authors note, St. Louis has three local entities tasked with economic development, with one of these, the St. Louis Development Corporation, in turn serving as the umbrella organization for several additional agencies that manage surplus public land in the city more specifically. *Id.*; see also Frank S. Alexander, *Land Bank Strategies for Renewing Urban Land*, 14 J. AFFORDABLE HOUS. & CMTY. DEV. L. 140, 147 (2005).

53. See Alexander, *supra* note 52, at 146. The number of land bank in the United States has ballooned in recent years. See *National Land Bank Map*, CTR. FOR CMTY. PROGRESS, <https://communityprogress.org/resources/land-banks/national-land-bank-map> [<https://perma.cc/KD5B-5L3H>] (noting that fourteen states passed land bank enabling legislation between 2011 and 2019).

54. As creatures of the state, land banks generally require express statutory authorization, although at times land banks have been created using powers already existing at the local level. See Alexander, *supra* note 52, at 149.

55. Alexander, *supra* note 52, at 150; Kline, *supra* note 24, at 214; Stuart Pratt, *A Proposal for Land Bank Legislation in North Carolina*, 89 N.C. L. REV. 568, 591 (2011).

56. One of the most highly touted and successful land banks is the Genesee County Land Bank in Flint, Michigan. See Sorell E. Negro, *You Can Take It to the Bank: The Role of Land Banking in Dealing with Distressed Properties*, ZONING & PLAN. L. REP., Sept. 2012, at 1, 4–5; Diana A. Silva, *Land Banking as A Tool for the Economic Redevelopment of Older Industrial Cities*, 3 DREXEL L. REV. 607, 608 (2011). Even so, while the Land Bank has become the dominant public owner in Genesee County with over 14,000 parcels, data from Regrid indicates that four of the top five landowners in Genesee County are local public entities, with the City of Flint still owning over 1,500 properties. *United States Parcel Data*, *supra* note 18 [<https://perma.cc/TYD8-6SRC>] (searching for “Genesee County, MI”).

II. THE PROBLEM OF FRAGMENTED LAND

The widespread and ingrained nature of fragmented public property should not, however, obscure the adverse effects of this status quo. Once fragmented, public lands pose significant burdens on their governmental owners and local neighbors. This Part canvasses the academic literature to explore why these burdens exist. It then examines why the issue is particularly acute where local land is splintered between multiple public owners.

A. *Land Fragmentation in Theory*

In an optimal ordering of property ownership, property rights are created—and borders are drawn—such that owners can realize both the benefits and costs of holding property rights, thus incentivizing the internalization of the latter by virtue of the former.⁵⁷ Fragmented property upends this allocation. As property becomes more fragmented, its value diminishes while transaction costs rise, thereby threatening the utility of the resource.⁵⁸ Furthermore, because dividing property is easier than combining it, fragmentation can make the cost-benefit allocation of ownership difficult to correct in the future.⁵⁹

Viewed through the lens of property rights, fragmentation adversely impacts quintessential rights of property ownership, most notably the right to use a resource and the right to exclude others from it.⁶⁰ By their very geographic nature, fragment parcels are challenging to use. Many are landlocked or access-constrained.⁶¹ Those in urban areas are generally small.⁶² And by virtue of their

57. Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 356 (1967).

58. Michael A. Heller, *The Boundaries of Private Property*, 108 YALE L.J. 1163, 1165–66 (1999).

59. *See id.*

60. J.E. Penner, *The “Bundle of Rights” Picture of Property*, 43 UCLA L. REV. 711, 741 (1996) (defining the “right to use” as the first of the “bundle of rights” that comprises property); *see also* Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979) (regarding the right to exclude). *But see* Brian Sawers, *The Right to Exclude from Unimproved Land*, 83 TEMP. L. REV. 665, 672 (2011) (noting limits on the right to exclude from unimproved land).

61. Merry J. Chavez, Note, *Public Access to Landlocked Public Lands*, 39 STAN. L. REV. 1373, 1373–74, 1378, 1389 (1987) (estimating that one-third of federal lands in the West are landlocked, stemming from checkbox land development during the nineteenth century).

62. Jaime Bouvier, *How Cities Are Responding to the Urban Agriculture Movement with Micro-Livestock Ordinances*, 47 URB. LAW. 85, 92 (2015).

accidental histories, fragment parcels can be irregular in shape.⁶³ Taken together, these impediments discourage owners from pursuing most, if not all, practical uses for the land.⁶⁴ Even open space and recreational uses are difficult where the property cannot be easily entered by the owner or the public, or where space and size constraints prevent productive investment into the property.⁶⁵

Problematic geography also poses obstacles when trying to determine the exact contours of a parcel in the first place. As property and ownership become fragmented, surveys grow challenging and costly, creating more room for error with respect to basic property data.⁶⁶ The issue is a particularly acute one for local governments, many of which struggle with the preliminary task of identifying what properties they own.⁶⁷ In this manner, limitations on an owner's ability to use fragment property necessarily bleed into that owner's right of exclusion. If the property is small, difficult to access, and irregularly shaped, and if surveys and ownership data prove costly, incorrect, or unhelpful, the owner faces a daunting task when policing its boundaries and excluding others from the land. Fragmented urban properties are especially threatened by surrounding developments and use encroachments.⁶⁸

In academic literature, the rights of exclusion and use intersect in a particularly wasteful manner when a resource is fragmented between multiple owners, each of whom may hold a distinct vision for how that resource should be managed. If several owners—or indeed, the vast majority of owners—want to put the resource to a certain use, even one holdout may decide to exclude that use, effectively preventing the plan from going forward. This situation is

63. Miller, *supra* note 40, at 211 (discussing federal lands).

64. See, e.g., Finn v. Mayor of Norwood, 545 A.2d 807, 811 (N.J. Super. Ct. App. Div. 1988) (city trying to consolidate “[a] number of very small isolated lots”).

65. Chavez, *supra* note 61, at 1389 (discussing recreation use on access-constrained federal land). Regarding access challenges on federal land, see also Miller, *supra* note 40, at 213.

66. See Miller, *supra* note 40, at 214 (citing the expensive surveys required on fragmented federal land); Michelle Wilde Anderson, *The New Minimal Cities*, 123 YALE L.J. 1118, 1172 (2014) (discussing the “chronic disarray” of data in Detroit regarding property ownership in the context of small parcels of excess public land).

67. See Paula R. Latovick, *Adverse Possession of Municipal Land: It's Time to Protect This Valuable Asset*, 31 U. MICH. J.L. REFORM 475, 489 (1998); Steinberg & Housewright, *supra* note 44, at 66.

68. Davis, *supra* note 15, at 134–35.

described as the tragedy of the anticommons.⁶⁹ In the context of urban land, the resource in question might be a block or neighborhood of small, underutilized, and checkerboard parcels where any development requires unanimous collective action.⁷⁰ If one owner is attempting to assemble the parcels for development, each owner of the surrounding checkered lots can act as a holdout, wielding veto power over the project.⁷¹

The result is functional underuse of a fragmented property.⁷² Under optimal market conditions, holdout owners and other transaction costs can be overcome through bargaining, but when dealing with checkered urban parcels, the underlying value of each parcel may be too low to surmount the transaction costs entailed.⁷³ Similarly, small and underutilized lots pose outsized negative externalities on surrounding properties.⁷⁴ Blight on one lot affects the value of the lot next door, depressing market values across fragmented boundaries and giving owners less incentive to individually invest in their properties, even as transaction costs remain high.⁷⁵ In a sense, then, an urban anticommons creates a positive feedback loop of gridlock: collective action is required for development, which imperils the ability for development to occur, thereby weakening property values and diminishing the chance that traditional redevelopment can ever be viable as an initial matter.⁷⁶

69. Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621, 668 (1998). The concept of a property anticommons operates on multiple levels, including fragmented ownership rights in a given parcel or fragmented ownership in a given neighborhood. James J. Kelly, Jr., *Freeing the City to Compete*, 92 CHI.-KENT L. REV. 569, 571 (2017); see also *id.* at 578 (“The fragmented neighborhood is a spatial anticommons.”).

70. Kelly, *supra* note 69, at 572 (discussing urban anticommons operating at the neighborhood level); see also James J. Kelly, Jr., “*We Shall Not Be Moved*”: *Urban Communities, Eminent Domain and the Socioeconomics of Just Compensation*, 80 ST. JOHN’S L. REV. 923, 963–64 (2006) (“Just as individual properties with many owners can serve as exemplars of the anticommons, blighted neighborhoods also can be seen as the victims of over-fractionation.”); Michael Heller & Rick Hills, *Land Assembly Districts*, 121 HARV. L. REV. 1465, 1469 (2008).

71. Heller & Hills, *supra* note 70, at 1468.

72. *Id.* at 1469.

73. Kelly, *supra* note 69, at 572.

74. Kelly, *supra* note 42, at 119.

75. *Id.* Along these lines, urban infill development poses a number of legal, transactional, and political costs more broadly. See J. Terrence Farris, *The Barriers to Using Urban Infill Development to Achieve Smart Growth*, 12 HOUS. POL’Y DEBATE 1 (2001).

76. Farris, *supra* note 75, at 7, 11; see also Michael A. Heller, *supra* note 58, at 1165–66.

In short, in the case of checkerboard properties, it is difficult for a public owner to achieve a productive use of the land without addressing the underlying issue of fragmentation or suffering from its side effects along the way. For local governments beset by funding shortfalls,⁷⁷ maintaining surplus property already creates significant cost and liability.⁷⁸ Adding inefficiencies atop these costs only strains their maintenance capacities further.⁷⁹

B. *Land Fragmentation Between Local Governments*

The costs bred by property fragmentation are particularly acute when land is not simply fragmented in a vacuum, but more specifically has seen its ownership fracture between two or more local government entities. Public owners bring disparate policies, practices, and mandates to the lands they manage. Some local government owners are able to diligently maintain surplus land; others lack the necessary resources.⁸⁰ Various policies and processes for selling public property can be confusing, complex, and contradictory.⁸¹ Basic property data—such as which government owns a given parcel—can be faulty or nonexistent.⁸² Disparate management approaches yield disparate enforcement schemes, which in turn threaten to create confusing and potentially inconsistent

77. See Aurelia Chaudhury, Adam J. Levitin & David Schleicher, *Junk Cities: Resolving Insolvency Crises in Overlapping Municipalities*, 107 CALIF. L. REV. 459, 465 (2019) (discussing the existence and forecast of fiscal crises among local government entities).

78. See Zale, *supra* note 32, at 305. *But see* Gerald E. Frug, *Property and Power: Hartog on the Legal History of New York City*, 1984 AM. BAR FOUND. RSCH. J. 673 (1984) (book review) (discussing New York City's early success selling public property, which served as an important source of city revenue in eighteenth century New York).

79. See, e.g., Gillette, *supra* note 39, at 576 (examining the relationship between institutional redundancies and fiscal stability in local government).

80. See *2017 Vacant Property Maintenance Plan*, GENESEE CNTY. LAND BANK 1 (2017), <https://www.cityofflint.com/wp-content/uploads/Vacant-Properties-Maintenance-Plan-2017.pdf> [<https://perma.cc/886F-Y3NQ>] (indicating that mowing grass and removing debris from its vacant land would cost the Land Bank \$7 million annually; because its maintenance budget is only \$1.5 million, the Land Bank implements different policies on different properties, for instance by performing more maintenance work on parcels located next to occupied private properties).

81. Frank S. Alexander, *Louisiana Land Reform in the Storms' Aftermath*, 53 LOY. L. REV. 727, 734 (2007) (regarding New Orleans); Cahn & Segal, *supra* note 30, at 218 (regarding Philadelphia); Salsich et al., *supra* note 52, at 64 (regarding St. Louis).

82. Anderson, *supra* note 66, at 1172. Similar data issues exist at the federal level. See U.S. GOV'T ACCOUNTABILITY OFF., *FEDERAL REAL PROPERTY: NATIONAL STRATEGY AND BETTER DATA NEEDED TO IMPROVE MANAGEMENT OF EXCESS AND UNDERUTILIZED PROPERTY 1* (June 2012), <https://www.gao.gov/assets/gao-12-645.pdf> [<https://perma.cc/2L82-T6Q9>].

obligations for members of the public when entering and using government land.⁸³ While these issues can arise in a nonfragmented environment where one public entity owns all surplus land, fragmentation adds substantial transaction costs when considering a parcel's management and sale. A concerned neighbor or interested buyer must navigate multiple and potentially conflicting spheres of governmental bureaucracy to get their questions addressed or to pursue purchasing a parcel.⁸⁴

Crucially, this overlapping and indeterminate bureaucracy aggravates the cost of public land fragmentation by extending it beyond the realm of government administration and into the domain of community rights. Property deemed vacant or surplus by a public owner often serves a communal function as the site of gardens, informal parks, or social gatherings.⁸⁵ Commentators have explored how these functions—community gardens in particular—represent a form of urban commons where residents of marginalized neighborhoods can build social capital and reclaim and renew spaces scarred by racial legacies.⁸⁶ Through customary use and collective stewardship, residents cultivating a community garden acquire a right to access the space, which some scholars maintain should be considered inherently public in nature.⁸⁷ Yet the underlying governmental titleholder still plays an outsized and often decisive administrative role. Community gardens form and operate against the backdrop of local government regulation,⁸⁸ and their ability to survive, garner political support, and advocate for formal

83. See, e.g., Robert B. Keiter, *The Evolution of Federal Public Land and Resource Law in the 21st Century*, NO. 1 RMMLF-INST 1, 1–27 (2017) (discussing concurrent jurisdiction and preemption where states enforce environmental regulations on interspersed public land).

84. See *id.*; Alexander, *supra* note 81, at 734.

85. See Cahn & Segal, *supra* note 30, at 201–05 (critiquing the concept of “surplus” and “vacant” land).

86. See *id.* (positioning community gardens in the context of racial injustice and justice); Nate Ela, *Urban Commons as Property Experiment: Mapping Chicago's Farms and Gardens*, 43 FORDHAM URB. L.J. 247, 252–53 (2016) (summarizing the literature); see also Jane E. Schukoske, *Community Development Through Gardening: State and Local Policies Transforming Urban Open Space*, 3 N.Y.U. J. LEGIS. & PUB. POL'Y 351, 354–57 (2000) (surveying the benefits of community gardens); Sheila R. Foster, *Collective Action and the Urban Commons*, 87 NOTRE DAME L. REV. 57, 93–96 (2011).

87. Cahn & Segal, *supra* note 30, at 196 (discussing the “right to not be excluded”); *id.* at 199–200 (regarding stewardship); Sheila R. Foster, *The City as an Ecological Space: Social Capital and Urban Land Use*, 82 NOTRE DAME L. REV. 527, 574 (2006) (arguing for community gardens as “inherently public” property).

88. See, e.g., Ela, *supra* note 86, at 269.

recognition is complicated by some of the same issues that characterize public land fragmentation writ large—namely the lack of data, a constellation of disparate policies, and the challenge of utilizing fragmented parcels.⁸⁹

Consolidating public land under one owner helps to address the problem by reducing the number of governmental actors the community must monitor in order to protect its interests.⁹⁰ Where public land is fragmented, conversely, governmental decisions are splintered and obscured between different entities and elected officials, allowing regulatory changes or parcel sales to proceed without the community's knowledge.⁹¹ A community garden that covers multiple parcels of public land risks an existential threat when one of its component parcels is sold.⁹² Fragmentation thus has an inequitable impact on local power: while residents with informal property claims are marginalized at the whim of heterogeneous governance decisions, residents with significant *formal* property claims—i.e., large private landowners—enjoy an increased ability to affect those decisions and wield influence over local development and important land use decisions. Because fractured public land boosts the development value of consolidated private property, powerful private owners hold an outsized ability to dictate the nature and location of development projects in a checkerboarded city.⁹³ These private owners gain direct access to the cogs of local government.⁹⁴

89. See generally Schukoske, *supra* note 86, at 365 (comparing various cities' garden lot leasing policies); Cahn & Segal, *supra* note 30, at 219, 239–40 (discussing policy differentiations in and regulatory hurdles to land use in New York).

90. See Nestor M. Davidson, *Localist Administrative Law*, 126 YALE L.J. 564, 626 (2017) (“As proverbially hard as it is to ‘fight city hall,’ it is that much more challenging to contend with dozens of local agencies.”); see also Cahn & Segal, *supra* note 30, at 220 (describing the mobilization of community gardeners against unified draft policies in Philadelphia designed to replace policies previously scattered and fractured between agencies).

91. See Heller, *supra* note 58, at 1196 (discussing the “decisionmaking [sic] breakdown” that may occur with fragmented commons property); Cahn & Segal, *supra* note 30, at 213. Cahn and Segal provide a compelling account of data deficiencies and stakeholder marginalization where public entities own community garden parcels. *Id.* at 216–27.

92. See Cahn & Segal, *supra* note 30, at 240–41.

93. See Michelle Wilde Anderson, *Needing and Fearing Billionaires in Cities Abandoned by Wealth*, 35 YALE L. & POL'Y REV. 235 (2016); see also Foster, *supra* note 87, 548 (discussing the inequitable impact of fragmented land use decisions). Detroit is a glaring example of a city with vast public land holdings that are nevertheless often too fragmented for productive development. See Henry Holland, Note, *Confronting the Land-Shortage Problem in Detroit: A Proposal for Land Readjustment*, 64 WAYNE L. REV. 841, 842 (2019); see also *infra* notes 210–12 and accompanying text (discussing land assembly for a Fiat Chrysler factory in Detroit).

94. See *infra* note 211 and accompanying text.

Other residents, however, especially historically marginalized groups not versed in the workings of the bureaucracy, must jump from one government office to the next in search of basic property information.⁹⁵

Fragmented power also enters the relationship between governmental owners. Under the theoretical view of a fragmented anti-commons, although collective action requires the consent of every owner and can be stymied by the veto of one, bargaining can overcome this risk in an optimal market by offering holdouts sufficient financial incentives.⁹⁶ Yet fragmentation between governmental owners does not adhere to optimal market conditions. Rather than being compelled by economic factors, a governmental entity may be more motivated by political rivalries and administrative infighting.⁹⁷ A public owner can exercise its veto merely through delay and inertia.⁹⁸ At the same time, because public entities are not monolithic bodies, but rather may be responsive to a diverse coalition of constituents and elected officials, collective action is all the more difficult when government owns the fragmented land: it requires all stakeholders to be on the same page. More likely is the route of least resistance, whereby path dependency dictates that underutilized fragmented land remains uneasily in that status quo.⁹⁹

In sum, as much as property fragmentation poses costs and inefficiencies as a matter of theory, it takes a singular toll where land is splintered between multiple public owners. Whether the public entity is seeking to sell, develop, or merely manage the property, fragmentation exacerbates certain issues inherent to public land ownership: it deepens the fault lines and inequities of local power, brings data deficiencies to the fore, and ultimately breeds a gridlock environment poised for continued inertia and inaction. All the while, in many contexts, the land remains unproductive—

95. Interview with Collin Roach, Wayne Cnty. Land Bank Prop. Disposition Manager (Jan. 19, 2021) (notes on file with author).

96. See Kelly, *supra* note 69, at 572–73; Heller, *supra* note 69, at 673–74.

97. See Eidelman, *supra* note 15, at 715–16; see also John Travis Marshall, *Rating the Cities: Constructing a City Resilience Index for Assessing the Effect of State and Local Laws on Long-Term Recovery from Crisis and Disaster*, 90 TUL. L. REV. 35, 37–38 (2015) (discussing New Orleans in the aftermath of Hurricane Katrina).

98. Eidelman, *supra* note 15, at 715 (discussing “institutional and intergovernmental inertia”).

99. See *id.* at 702–03 (discussing path dependency in the context of fragmented public property).

siphoning revenue from local taxing jurisdictions and depressing property values nearby.¹⁰⁰

III. ASSESSING REMEDIES TO INTERLOCAL LAND FRAGMENTATION

Having explored the genus and scope of the issue, this Article now turns to its core prescriptive question: what can be done to remedy the fragmentation of surplus public land between local governmental owners? When underutilized land is fragmented between private parties, or between private and public owners, a number of legal mechanisms can be employed to promote consolidation of the properties. At the most aggressive level, local authorities can acquire a property via eminent domain to bring it under unified public ownership, or alternatively can pursue code enforcement or nuisance abatement actions to obtain title if the current owner does not take necessary remediation steps.¹⁰¹ At the more passive level, the tax foreclosure process can serve as a default vehicle for land consolidation; if and when the current owner fails to pay property taxes, the property may end up in the ownership of a local government entity, often the general purpose municipality.¹⁰²

But these tools for land consolidation are generally unavailable when property is fragmented between multiple public owners. While at times public owners can be subject to eminent domain, code enforcement, or tax foreclosure, such efforts are liable to raise legal questions and pose thorny political hurdles.¹⁰³ Reducing

100. See Kelly, *supra* note 69, at 578 (“Derelict, vacant houses can have tremendous negative impacts on the surrounding neighborhood.”); Kelly, *supra* note 42, at 114. A number of empirical studies have examined the impact of vacancy and blight on surrounding properties in a neighborhood. For a compilation of these such studies, see DYNAMO METRICS, QUANTITATIVE & QUALITATIVE IMPACT ASSESSMENT OF LAND BANK ACTIVITY IN MICHIGAN 11–19 (May 15, 2018), https://www.dynamometrics.com/s/DynamoMetrics_MALB_Digital.pdf [<https://perma.cc/PS9D-6UZZ>].

101. See Heller & Hills, *supra* note 70, at 1467 (noting that eminent domain is used to condemn inefficiently fragmented land); Kelly, *supra* note 42, at 110 (discussing code enforcement remedies); Elizabeth M. Tisher, *Re-Stitching the Urban Fabric: Municipal-Driven Rehabilitation of Vacant and Abandoned Buildings in Ohio’s Rust Belt*, 15 VT. J. ENV’T L. 173, 204 (2013) (discussing nuisance abatement); see also *supra* notes 43–46 and accompanying text.

102. Kelly, *supra* note 42, at 112, 123 (discussing tax foreclosure as a way to consolidate fragmented land).

103. 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. Fed. 3d 1293 § 2(a) (2020) (discussing and citing examples of the baseline rule that a local government entity cannot condemn the property of another local government entity

fragmentation between governmental owners demands an alternative approach.

A. *Public Ownership Consolidation*

In an optimal universe, the solution to public land fragmentation would be a straightforward one: by either interlocal agreement or legislative edict, all surplus property would be identified and consolidated under the ownership of a single entity. Such ownership consolidation has been broadly promoted as a solution to fragmented public land,¹⁰⁴ and on occasion these calls are heeded. In Philadelphia, for example, public property is severely fragmented between local governmental entities, including the Philadelphia Land Bank, the Philadelphia Housing Development Corporation, and the Philadelphia Redevelopment Authority.¹⁰⁵ Following sustained criticism of the city's inefficient and disjointed bureaucracy for selling surplus land, the Philadelphia City Council passed a bill in late 2019 to streamline this process and make the Land Bank the central agency for managing and repurposing public property.¹⁰⁶ The impact of Philadelphia's recent efforts remains to be

absent express legislative authority). Detroit provides an example of the possible legal and political impediments of intergovernmental code enforcement. While the city's code enforcement authority does not appear restricted to private parties, *see* MICH. COMP. LAWS § 117.4q (2021), the city in practice appears to only pursue actions against private parties, and not against the Detroit Land Bank, *see* Katlyn Alo, *Detroit Land Bank Oversight at Issue as Neighbors Complain of Poor Upkeep*, DETROIT NEWS (Feb. 13, 2020), <https://www.detroit-news.com/story/news/local/detroit-city/2020/02/13/detroit-land-bank-oversight-issue-amid-complaints-poor-upkeep/4592183002/> [<https://perma.cc/86TH-XKH5>] (quoting a city official saying that “[w]e would love to have a lot of this land in private hands being managed privately, so we can just do code enforcement”).

104. *See, e.g.*, BUREAU OF GOV'T RSCH., MENDING THE URBAN FABRIC: BLIGHT IN NEW ORLEANS; PROCEDURES FOR SUCCESSFUL REDEVELOPMENT 15–16 (Apr. 2008), https://www.bgr.org/wp-content/uploads/2017/07/BGR_blight_report_2.pdf [<https://perma.cc/G39L-F8QF>].

105. An examination of Philadelphia parcel data indicates block-by-block ownership fragmentation in a manner that mirrors East Garfield Park in Chicago. *See Property App.*, CITY OF PHILA., <https://property-beta.phila.gov/#/> [<https://perma.cc/7TSM-WS9H>]; *see also supra* notes 9–11 (providing examples of fragmentation in East Garfield Park). As of 2019, the Philadelphia Land Bank estimated that there were about 8,420 vacant public properties in the city, with about half owned by the city through its Department of Public Property and about one-third owned by the Land Bank. *See* Jon Hurdle, *Plot Twist: Land Bank Seeks to Repurpose Vacant Properties, But Critics Say Progress is Slow*, PHILA. WKLY. (June 27, 2019), <https://philadelphiaweekly.com/plot-twist-land-bank-seeks-to-repurpose-vacant-properties-but-critics-say-progress-is-slow/> [<https://perma.cc/V4PS-UBBJ>].

106. *See* Hurdle, *supra* note 105; Cahn & Segal, *supra* note 30, at 218–19 (discussing the splintered public ownership landscape in Philadelphia as of 2015). Regarding the reform measures passed in late 2019, *see* Michael D'Onofrio, *City Council Reforms Process for*

seen. In many instances, it appears that the title to surplus properties will remain fragmented even as management and disposal processes are consolidated; calls continue for the full title consolidation of land ownership in one single entity.¹⁰⁷

Regardless of the ultimate outcome, Philadelphia's experience underscores the rarity of these consolidation efforts. In Philadelphia, the move towards reform required a measure of political will among elected officials, which arose only after frustration with patronage in the city's disposition practices boiled into the public sphere.¹⁰⁸ It also required the City Council to hold a measure of authority over the Land Bank and Redevelopment Authority, making it possible to prescribe transformative policy and ownership changes that all three entities would adopt.¹⁰⁹ More likely these factors do not align. Absent charges of corruption or patronage, local land fragmentation is generally not a visible public issue, let alone a prominent one.¹¹⁰ In addition, where autonomous government entities are involved, a measure to consolidate ownership would require one entity to voluntarily cede its properties—and

Selling City Land, Sends Bill to Kenney, PHILA. TRIB. (Oct. 31, 2019), https://www.philly-trib.com/news/local_news/city-council-reforms-process-for-selling-city-land-sends-bill-to-kenney/article_b6969694-21c6-5f5c-83b1-2892e8fd509f.html [<https://perma.cc/7E9B-2HFW>]; Matthew Rothstein, *Philadelphia Housing Development Corp. Absorbs Redevelopment Authority, Land Bank in Department Merger*, BISNOW E. COAST (Oct. 13, 2019), <https://www.bisnow.com/philadelphia/news/economic-development/philadelphia-housing-development-corp-redevelopment-authority-land-bank-department-merger-101254> [<https://perma.cc/UWQ4-VD9C>]; Laura McCrystal, *Can Philly Fix its Slow and Complex Process for Vacant Land Sales? A Reform Bill Advances in City Council.*, PHILA. INQ. (Oct. 1, 2019), <https://www.inquirer.com/news/philadelphia-vacantproperty-land-bank-city-council-development-perogative-20191001.html> [<https://perma.cc/PNW4-TJXT>].

107. *See City Council Passes Reform to Vacant Land Sale Process*, COMM. OF SEVENTY (Oct. 31, 2019), <https://seventy.org/media/press-releases/2019/10/31/city-council-passes-reform-to-vacant-land-sale-process> [<https://perma.cc/D66E-9JRQ>] (calling for a complete transfer of surplus property to the Philadelphia Land Bank). Efforts to consolidate ownership in the Land Bank have been ongoing since shortly after the Land Bank was established in 2014. *See City Council Moves to Transfer Properties to Philadelphia Land Bank*, PHILA. CITY COUNCIL (Dec. 3, 2015), <https://phlcouncil.com/city-council-moves-to-transfer-properties-to-philadelphia-land-bank/> [<https://perma.cc/74ZR-XDNH>].

108. Much of the public outcry centered around the Vacant Property Review Committee, which was exposed as a mechanism of patronage in public land dealings. *See* Matthew Rothstein, *A New City Land Policy Could Unlock Affordable, Workforce Housing Development in Philly*, BISNOW E. COAST (Sept. 13, 2020), <https://www.bisnow.com/philadelphia/news/affordable-housing/affordable-workforce-housing-new-land-disposition-processing-105928> [<https://perma.cc/V6H4-SNQJ>].

109. *Id.*

110. *See supra* note 41 and accompanying text (noting public land fragmentation as a below-the-radar issue).

thereby, ostensibly, a degree of power as well—to the other.¹¹¹ Local governments are not always amicable partners. Rather, they are liable to compete with each other and engage in turf wars to protect real or perceived spheres of power.¹¹² A move to consolidate public land ownership can be quickly derailed if one entity simply does not want to relinquish the properties it owns, or, similarly, does not see a political value in doing so.

Detroit offers a stark case of fragmentation at the expense of consolidation, where two land bank authorities—the Detroit Land Bank and Wayne County Land Bank—both own residential property, in some places interspersed on the same city block.¹¹³ Because no single governmental entity controls both land banks, consolidation would require either one land bank to voluntarily relinquish its properties or for the Michigan Legislature to take legislative action. The first route is unlikely, considering that public agencies are motivated by self-preservation and managing public property is the core purpose of each land bank.¹¹⁴ The second route is also unlikely. When legislation to merge the two entities was introduced in 2010, it faced opposition from the land banks and their stakeholders and ultimately did not pass.¹¹⁵

Detroit's experience highlights the challenge of using land banks as a general tool for consolidation. Despite being promoted as a

111. Perhaps the most common example is fragmentation between a municipality and county. *See supra* notes 18–19 (providing examples from Birmingham, Miami, and San Diego). Cities and counties do not hold formal power regarding the land ownership decisions of the other, and indeed often compete for development and tax revenues. *See* Judith Welch Wegner, *North Carolina's Annexation Wars: Whys, Wherefores, and What Next*, 91 N.C. L. REV. 165, 184–85 (2012); Patricia E. Salkin, *Supersizing Small Town America: Using Regionalism to Right-Size Big Box Retail*, 6 VT. J. ENV'T L. 48, 55–57 (2005).

112. *See supra* note 97 and accompanying text.

113. For example, the Detroit Land Bank owns 5205 Garland Street. *See Own It Now Property Details: 5205 Garland*, DET. LAND BANK AUTH., <https://buildingdetroit.org/properties/5205-garland> [<https://perma.cc/H567-PYT9>]. The Wayne County Land Bank owns 5138 Garland, less than half a block to the south. *See Quit Claim Deed 2018064231*, WAYNE CNTY. REG. OF DEEDS, <https://waynecountymi-web.tylerhost.net/web/document/DOC572S3116?search=DOCSEARCH582S1> [<https://perma.cc/Q8UW-4UMJ>].

114. *See* MICH. COMP. LAWS § 124.752 (2021) (finding the purpose of a land bank “to acquire, assemble, dispose of, and quiet title to property”); Joy Milligan, *Plessy Preserved: Agencies and the Effective Constitution*, 129 YALE L.J. 924, 936 n.43 (2020) (“Administrators’ self-interest in the continuance of their agencies and programs is widely recognized as a source of bureaucratic motivation.”).

115. Nancy Kaffer & Amy Lane, *Wayne County Land Banks Cool to Merger Proposal*, CRAIN'S DET. BUS. (Feb. 7, 2010), <https://www.crainsdetroit.com/article/20100207/SUB01/302079967/detroit-wayne-county-land-banks-cool-to-merger-proposal> [<https://perma.cc/3Y96-DJB9>].

vehicle for consolidating and managing surplus parcels,¹¹⁶ land banks often themselves become participants in fractured governance.¹¹⁷ In part, public fragmentation persists because land banks are fundamentally designed as intermediate titleholders for distressed private property.¹¹⁸ The overriding goal of land banking—and a core feature of a land bank’s powers and funding scheme—is the disposition of delinquent or tax-foreclosed property to private owners capable of returning the land to productive use.¹¹⁹ This framework encourages land banks to focus on near-term disposition programs and economic development projects.¹²⁰ It emphasizes, and is designed for, returning property piecemeal to the private domain rather than consolidating surplus public land.

This is not to say that land banks cannot serve as loci for land assembly.¹²¹ But in practice, outside of targeted development projects and notwithstanding permissive land bank acquisition powers,¹²² local entities often hesitate to endorse title consolidation

116. Amy Laura Cahn, *On Retiring Blight as Policy and Making Eastwick Whole*, 49 HARV. C.R.-C.L. L. REV. 449, 490 (2014).

117. See *supra* note 56 and accompanying text (discussing the Genesee County Land Bank in Flint, Michigan); Benton C. Martin, *Federalism and Municipal Innovation: Lessons from the Fight Against Vacant Properties*, 46 URB. LAW. 361, 371 (2014) (discussing the role of land banks in building constituencies in a crowded governance space).

118. See Marissa Weiss, *Attack of the Zombie Properties*, 47 URB. LAW. 485, 497 (2015) (“It is clear that while land banks may be a great short-term solution, their high cost of operation precludes them from becoming a sustainable solution to the [abandoned property] problem.”); see also Zale, *supra* note 32, at 298; Shelley Cavalieri, *Linchpin Approaches to Salvaging Neighborhoods in the Legacy Cities of the Midwest*, 92 CHI.-KENT L. REV. 475, 483 (2017) (“Where property can be rehabilitated, land banks are integrally involved in transferring the land to private owners to do this work, or at times will complete the rehabilitation and sell the improved property. Where abandonment and blight have left the property unfixable, land banks will facilitate demolition, and typically transfer the vacant lot to a private owner to maintain.”). A defining feature of land bank power is the ability to clear title, which directly furthers these disposition goals. See *id.* at 482–83. Regarding funding, see also Tisher, *supra* note 101, at 199–200 (discussing how land banks favor a strategy of demolition and development, spurred by the availability of demolition funds).

119. Ron Johnson, Comment, *Putting the Heart Back in the Heartland: Regional Land Bank Initiatives for Sustainable Rural Economies*, 69 ARK. L. REV. 1055, 1093 (2017) (“[T]he central focus of land bank operations is to effectively dispose of property for positive, productive future use.”).

120. See, e.g., Cavalieri, *supra* note 118, at 483 n.37 (discussing side lot programs).

121. See Zale, *supra* note 32, at 297–98, 298 n.124 (citing Philadelphia as an example of land assembly efforts through a land bank’s ownership).

122. See, e.g., CNTY. COMM’RS ASS’N OF OHIO, COUNTY LAND REUTILIZATION CORPORATIONS: LAND BANKS 3–4 (July 2015), <https://www.ccao.org/wp-content/uploads/HBKCHAP081%207-16-15.pdf> [<https://perma.cc/4A78-7S6A>] (surveying the broad acquisition power of land banks in Ohio); MICH. COMP. LAWS § 124.755 (2021) (granting broad acquisition powers in Michigan).

under a land bank's ownership.¹²³ Property consolidation under land bank auspices is ultimately challenging for many of the same reasons why it is difficult to consolidate public entities themselves: political calculus tends to err against it.¹²⁴

B. *Interlocal Agreements*

Short of ownership consolidation, another solution to address fragmented public property could be the use of interlocal or intergovernmental agreements to create shared management schemes.¹²⁵ In theory, interlocal agreements could ameliorate many of the adverse effects of fragmented land: by agreeing to share management of their public parcels, or more likely to assign management duties to a single entity, a group of two or more local governments could standardize administrative practices, data collection, and disposition policies across their surplus lands.¹²⁶

Yet interlocal agreements can quickly run into legal and political challenges. Broadly speaking, local governments often hold statutory or constitutional authority to enter into interlocal agreements, so long as the agreement provides for the exercise of functions that each entity is authorized to perform independently.¹²⁷ In some

123. In both Ohio and Michigan, general purpose local governments are empowered to take title to certain vacant or tax-foreclosed property before it goes to a land bank. *See* CNTY. COMM'RS ASS'N OF OHIO, *supra* note 122, at 4 (regarding Ohio law); MICH. COMP. LAWS § 211.78m(6) (2021) (regarding Michigan law). Governments routinely take advantage of these opportunities, especially in upper-income areas, because they want control over public land decisions in their jurisdiction. Interview with Collin Roach, *supra* note 95.

124. *See supra* section I.B.

125. Intergovernmental agreements regarding land have a long history in American law. *See* Bridget A. Fahey, *Federalism by Contract*, 129 YALE L.J. 2326, 2348 (2020). In a similar vein, interlocal agreements have been proposed as a solution for governmental fragmentation and way to promote regionalism. *See* Craig R. Bucki, *Regionalism Revisited: The Effort to Streamline Governance in Buffalo and Erie County, New York*, 71 ALB. L. REV. 117, 125 (2008); David J. Barron, *The Community Economic Development Movement: A Metropolitan Perspective*, 56 STAN. L. REV. 701, 736 (2003) (book review). *But see* Matthew J. Parlow, *Equitable Fiscal Regionalism*, 85 TEMP. L. REV. 49, 75 (2012) ("However, studies show that municipalities do not enter into [interlocal] agreements without inducements and without measurable gains for their community."). Intergovernmental agreements have been described as a form of "functional consolidation." Ann M. Eisenberg, *Rural Blight*, 13 HARV. L. & POL'Y REV. 187, 228 (2018).

126. *See supra* Part II (examining problems caused by fragmented property). Interlocal agreements to transfer surplus public property, the focus of this Article, should be distinguished from interlocal agreements to transfer jurisdiction over an area of land—whether that land is publicly or privately owned—between local public entities. *See, e.g.*, MICH. COMP. LAWS § 124.22 (2021).

127. *See* Richard G. Flood & Molly D. Velick, *Questions and Answers About*

states, this authority likely encompasses the more specific power to contract for land management purposes.¹²⁸ In other states, however, the permitted reasons for entering into an interlocal agreement are more circumscribed, and it is equally likely that an agreement to transfer land management functions would not pass judicial muster.¹²⁹

After these legal hurdles are surmounted, interlocal agreements may be stymied by policymakers who are hesitant to relinquish power over the property they control. Unlike with consolidation, where one government would transfer its properties to another, an interlocal agreement could well prompt concerns among *both* parties to the transaction: both may fear that shared governance reduces their autonomous power, even if the language of the agreement indicates otherwise. Such concerns can quickly derail a deal because interlocal agreements typically require an affirmative vote of each governing body.¹³⁰ Where an agreement proposes to share power immediately but promises benefits that are realized only in the long term, it can be challenging to gain the support of all necessary political stakeholders, who tend to operate on shorter-term horizons and in search of policies that offer short-term benefits.¹³¹ For this reason, interlocal agreements to provide or share services—which promise concrete and immediate efficiencies and cost savings—are relatively common, while agreements regarding land

Intergovernmental Agreements, 85 ILL. B.J. 112, 114 (1997) (discussing Illinois law); George J. Cerrone, Jr., *The IGA: A Smart Approach for Local Governments*, 29 COLO. LAW. 73, 73 (2000) (discussing Colorado law). Another standard limitation is that municipalities cannot contract away their police powers. See Shelley Ross Saxer, *Local Autonomy or Regionalism?: Sharing the Benefits and Burdens of Suburban Commercial Development*, 30 IND. L. REV. 659, 673 (1997).

128. See Flood & Velick, *supra* note 127, at 114 (discussing Illinois cases; even so, some land management agreements were found invalid for constituting ultra vires leases under Illinois law).

129. See, e.g., *City of Decatur v. DeKalb Cty.*, 713 S.E.2d 846, 849 (Ga. 2011) (internal citation omitted) (striking down an interlocal agreement for failing to comply with GA. CONST. art. IX, § 3, para. I, which requires an agreement to involve “the provision of services, or . . . the joint or separate use of facilities or equipment and deal with activities, services, or facilities which the contracting parties are authorized by law to undertake or provide” if it extends beyond the current government’s term in office).

130. Kellen Zale, *Part-Time Government*, 80 OHIO ST. L.J. 987, 1032 (2019).

131. See Clayton P. Gillette, *Regionalization and Interlocal Bargains*, 76 N.Y.U. L. REV. 190, 252 (2001); Briffault, *supra* note 48, at 1122; Keith Aoki, *All the King’s Horses and All the King’s Men: Hurdles to Putting the Fragmented Metropolis Back Together Again? Statewide Land Use Planning, Portland Metro and Oregon’s Measure 37*, 21 J.L. & POL. 397, 418 (2005).

use and management are rare.¹³² Surplus land management is particularly vulnerable to government inertia because the payoffs it affords are more attenuated and indirect.¹³³

Once implemented, there is no doubt interlocal agreements can play a positive role in local governance. They can harmonize practices between public bodies while fostering collaboration and coordination, thereby promoting civic values while also acting as bulwarks against regional competition.¹³⁴ This serves an important signaling function. It indicates to the public, to other governmental entities, and to the signatory governments themselves that the purposes of the agreement reflect shared institutional priorities. But the collaboration inherent in an interlocal agreement can also stymie its long-term effectiveness. To make them palatable to stakeholders, interlocal agreements are often implemented without substantive dispute resolution mechanisms, which makes them difficult to monitor and enforce.¹³⁵ More than simply a value promoted by interlocal agreements, collaboration might also be the only mechanism for ensuring they actually operate as intended.

In the case of public land fragmentation, therefore, interlocal agreements may create only illusory value. Two governmental entities may agree to align management and disposition practices, but new development opportunities, shifting fiscal realities, and changed political circumstances all threaten to erode the agreement over time.

C. *Land Exchanges*

Land exchanges offer a third way forward. As compared with property consolidation and interlocal agreements, the exchange of property between two entities does not demand the same measure of political will. It need not threaten a public body's autonomy, but rather can resemble a like-for-like transaction: one government provides surplus property to the other, which in return transfers

132. See Saxer, *supra* note 127, at 672–73; Briffault, *supra* note 48, at 1147. *But see* James W. Spensley, *Using Intergovernmental Agreements to Manage Growth*, 15 NAT. RES. & ENV'T 240, 242 (2001) (discussing the use of interlocal agreements as a land use planning tool to manage regional growth).

133. See Eidelman, *supra* note 15, at 702–03, 715 (discussing governmental inertia and path dependency in the face of public land fragmentation).

134. Spensley, *supra* note 132, at 277.

135. *Id.*; Gillette, *supra* note 131, at 257; Briffault, *supra* note 48, at 1155.

surplus land of similar size or value. Both entities can walk away from the transaction reassured that their ultimate authority has not been compromised.

In the process, meanwhile, land fragmentation can be meaningfully reduced by an exchange. Where two governments own fragmented land and an interlocal agreement or full-borne ownership consolidation is being proposed, the aim of reducing fragmentation may not override looming political and governance concerns.¹³⁶ But where a like-for-like land exchange is being considered, reducing fragmentation may suddenly become an appealing aim for both public owners. Both owners can potentially realize increased value *and* reduced carrying costs by accounting for fragmentation in their exchange.¹³⁷ Both can thus view the exchange as a win-win opportunity as a direct consequence of its ability to ameliorate local fragmentation. Stated otherwise, where an exchange is proposed, the issue of fragmented land shifts appreciably from a marginal, under-the-radar concern to a central motivating goal.¹³⁸

Examples at the local level demonstrate how a successful exchange of surplus property goes hand-in-hand with efforts to reduce fragmented public land. In 2014, two local governments in southern Indiana—Monroe County and the City of Bloomington—proposed a mutual land swap of surplus public property: the City would receive a nearly two mile stretch of abandoned railbed from the County in exchange for approximately 2.5 miles of similarly abandoned railbed located further south.¹³⁹ While the parties did not describe their proposal in these terms, reducing fragmented landholdings was a prime motivating factor behind their effort. The stretch of property eyed by the City lay between two existing City-owned trails, the B-Line Trail and Clear Creek Trail, and

136. See *supra* sections III.A, III.B (discussing the implementation challenges posed by these approaches).

137. See *supra* Part II.

138. Federal legislation providing for the exchange of land frequently notes that the exchange will serve the interest of reducing land fragmentation. See, e.g., Minnesota Education Investment and Employment Act, H.R. 5544, 112th Cong. (2012); H.R. 1309, 105th Cong. (1998) (noting part of its purpose is “[t]o provide for an exchange of lands with the city of Greeley, Colorado, and The Water Supply and Storage Company to eliminate private inholdings in wilderness areas.”).

139. Rachel Bunn, *Bloomington-Monroe County Land Swap Could Allow Expansion of Trails*, HERALD TIMES (May 22, 2014, 12:28 AM), https://www.hoosiertimes.com/herald_times_online/news/local/bloomington-monroe-county-land-swap-could-allow-expansion-of-trails/article_b8f2ff2a-98b2-5438-9574-cf22e0a59143.html [<https://perma.cc/837V-J5ZZ>].

parallel to another one.¹⁴⁰ Acquiring this interspersed land offered the City an opportunity to better integrate its trail system. Meanwhile, the stretch of property sought by the County intersected a forty-one-acre parcel owned by the Indiana Department of Transportation, which was conducting a mitigation project on the site but had discussed transferring the parcel to the County afterwards.¹⁴¹ The land exchange offered the County an opportunity to fashion integrated recreational amenities as well.

Both parties' goals for the exchange ultimately came to fruition. The exchange was successfully implemented, the City and County began construction on the properties they obtained from each other, and plans moved forward to transfer the forty-one-acre parcel to the County for a future park.¹⁴² In effect, the result turned vacant surplus land into a win-win outcome for both entities because it promoted consolidation by its very nature, but did so without requiring overarching legislative action or threatening the political autonomy of either government body.

Bloomington's example further underscores the lasting benefits of a land exchange. As compared to interlocal agreements, which may prove unenforceable and subject to changing political winds, an exchange of property effectuates a complete transfer of title. Once complete, the exchange has long-term ramifications for land management, even as political leaders and priorities come and go. Whether an exchanged parcel of land is destined to be publicly owned for months or for generations, it will be easier on balance to maintain and administer, no matter how long the interim period lasts¹⁴³—as well as more likely to get developed or repurposed and returned to productivity.¹⁴⁴

In Bloomington, the County and City were able to realize their ultimate development goals for the surplus rail properties within

140. *Id.*

141. *Id.*

142. *Id.*; Ernest Rollins, *County Begins Work on Limestone Greenway Trail*, THE HERALD TIMES (Mar. 13, 2019, 6:00 PM), <https://www.heraldtimesonline.com/story/news/local/2019/03/13/county-begins-work-on-limestone-greenway-trail/46931203/> [<https://perma.cc/9H9C-S6G6>]; Geoff McKim, *Update on County Trail Projects*, IN53—MOCO GOV (Feb. 16, 2018), <https://in53.wpcostaging.com/2018/02/16/update-on-county-trail-projects/> [<https://perma.cc/CAT6-FEMN>].

143. *See supra* Part II (discussing the challenges of administering and maintaining fragmented land).

144. *See supra* Part II (discussing the challenges of developing fragmented land).

just a few years of completing the exchange. But even if funding sources had not materialized and development of the properties did not proceed for some time, it is still likely that the entities would have benefitted from their exchange in the interim by reducing maintenance inefficiencies, strengthening the viability of their envisioned projects when seeking grant funds, and offering less fractured ownership data for purposes of surrounding development and utility work. And perhaps, in the same manner as extolled by proponents of interlocal agreements, the exchange would have advanced intergovernmental working relations even if the trails had not come to fruition.¹⁴⁵

Land exchanges are therefore deceptively simple. They need not alter local power dynamics, force the consolidation of any local entities, entail any specific development plans, or involve the outlay of any money. Even so, in part as a virtue of their simplicity, exchanges offer a way to squarely tackle the ills of fragmentation while reducing inefficiencies and transaction costs, both with respect to the properties themselves and between the two participating governments more generally.

D. *Assembled Land Exchanges*

While swapping surplus rail parcels yielded positive outcomes for both the City of Bloomington and Monroe County, the exchange was a one-off transaction, motivated by contextual factors and not replicated between these parties on a wider scale. Bloomington's land exchange took advantage of a bilateral geographic opportunity: the County owned property that could be seamlessly consolidated under City ownership while the City likewise held property that stood to complement adjacent County land. Not all checkered public land lends itself to a bilateral exchange. Rather, in many regions or neighborhoods, public land is scattered and disjointed, reflecting more a splatter painting than a jigsaw puzzle.¹⁴⁶ Simple bilateral land exchanges can still occur in these contexts and can still advance the normative aims of consolidation. But a more dynamic and adaptive model is also needed.

145. See Bunn, *supra* note 139 (quoting a City of Bloomington official stating that "it's a good thing when city and county agencies can collaborate like this").

146. See, e.g., *supra* note 20 and accompanying text (discussing the Settegast neighborhood in Houston).

Multiparty land exchanges—which, drawing upon federal law, this Article terms “assembled exchanges”¹⁴⁷—provide a way to replicate Bloomington’s example on a wider scale. Under an assembled exchange, all public owners in a given county, city, or neighborhood would agree to pool and then redistribute their surplus properties in a manner that promotes geographic consolidation and best management practices. For example, in a neighborhood where three public entities own property—a city, a land bank, and a park district—an assembled exchange could consolidate surplus land on one block under the park district’s ownership, for purposes of creating new greenspace; surplus land on another block under city ownership, for purposes of a development project; and the remaining pooled parcels under land bank ownership for purposes of clearing title and transferring lots to neighborhood residents. The assembled exchange would be structured as a series of cascading bilateral transactions between the parties. As such, its redistribution of land would not be constricted by a given property’s original owner.¹⁴⁸

An assembled exchange therefore expands the reach of a conventional exchange: it broadens the number of parties and properties that can be involved while building temporal flexibility into the process. Creating a pool of eligible exchange properties is the key action needed to kick-start an intergovernmental conversation. While placing a property into this pool would not obligate a public owner to consummate an exchange, it would establish a starting point for negotiations that could yield subsequent transactions over a period of months or years.

To be sure, an assembled exchange by its nature involves a number of moving parts and generates its own transaction costs. Yet unlike the transaction costs created by fragmentation,¹⁴⁹ these costs would arguably promote important property and governance

147. See *infra* note 177 and accompanying text.

148. To an extent, the process would mirror land readjustment, which is an approach used in Germany, Australia, Korea, Taiwan, Japan, and Russia to assemble and then redistribute urbanizing private land. See Heller, *supra* note 69, at 641 n.103; see also Lee Anne Fennell, *Fee Simple Obsolete*, 91 N.Y.U. L. REV. 1457, 1490 (2016). As a key distinction, however, a fundamental principle of land readjustment is the replatting of property following assembly, often as part of an effort to construct infrastructure improvements. This process implicates legal questions different from assembled exchanges, which do not redraw parcel boundaries. See Henry Holland, *Confronting the Land-Shortage Problem in Detroit: A Proposal for Land Readjustment*, 64 WAYNE L. REV. 841, 845 (2019).

149. See *supra* Part II.

values. The process of assembling and dividing a common resource requires collaboration.¹⁵⁰ In pursuit of an assembled exchange, governments would not need to cede their autonomy but *would* need to work together—when identifying a pool of properties, when thinking collectively about shared land management issues, and when structuring conveyances—a form of governance that increases stakeholder engagement and mitigates against adversarial policymaking.¹⁵¹

The process could also amplify the voice of community residents. While a simple parcel-for-parcel exchange might fly below the public radar, the creation of an intergovernmental property pool would expand the geographic scope of the conversation and provide a single entry point for public participation, making the pool itself the situs of the negotiation and decision making that had previously been fractured across its component parcels.¹⁵² This reordering offers a new definition of surplus property: rather than a hodgepodge assortment of discrete parcels (to be developed piecemeal), an assembled exchange views them universally, as a commons institution to be governed interactively.¹⁵³ Stated similarly, the process of assembly and redistribution can help stakeholders reconceptualize public land from a rigid and atomized form of property, grounded in exclusion, to an adaptive form grounded in values of sharing and access.¹⁵⁴

A successful assembled exchange ultimately promotes efficiency, as was realized following the bilateral exchange in Bloomington—but now with a potentially more expansive reach.¹⁵⁵ As in

150. LEE ANNE FENNELL, *SLICES AND LUMPS: DIVISION AND AGGREGATION IN LAW AND LIFE* 5 (2019).

151. Sheila R. Foster & Christian Iaione, *The City as a Commons*, 34 *YALE L. & POL'Y REV.* 281, 329 (2016).

152. In the context of land assembly and eminent domain, a similar concept is advanced in Heller & Hills, *supra* note 70, at 1491 (advocating for “land assembly districts,” where residents of a neighborhood targeted for redevelopment have a collective voice in the process, as contrasted with the uneven and unfair outcomes that result from fractured participation in private land assembly or in eminent domain proceedings).

153. See Foster & Iaione, *supra* note 151, at 329–32 (regarding collaborative governance of commons institutions).

154. See Shelly Kreiczer-Levy, *Share, Own, Access*, 36 *YALE L. & POL'Y REV.* 155, 159, 170, 176 (2017) (advocating for “access” and “share” as alternative property forms, arising in a variety of contexts where people exchange resources); see also FENNELL, *supra* note 150, at 5 (advocating for property as a dynamic institution).

155. See Kreiczer-Levy, *supra* note 154, at 198 (discussing how access and share promote efficient use of a resource); Carol Rose, *The Comedy of the Commons: Custom, Commerce,*

Bloomington, a successful assembled exchange reconfigures scattered property that had been accidentally splintered between public owners into consolidated landholdings purposefully owned by the entity best suited to manage them.¹⁵⁶

IV. THE FEDERAL LAND EXCHANGE MODEL

Broader experience supports the value of land exchanges. A model of systematic land exchanges exists at the federal level, where the exchange process has been used for decades as an effective mechanism to reduce the fragmentation of public property. The federal model governs exchanges between the United States and private landowners; it is not limited to intergovernmental transactions.¹⁵⁷ Nevertheless, the model is worth examining. It provides support for the ability of exchanges to meaningfully reduce land fragmentation, while at the same time it offers features that could be adopted to promote the systematic use of exchanges between local governments.

A. *The History of Federal Exchanges*

The federal land exchange model is rooted in a history of widespread public land fragmentation in the Western United States. In the nineteenth century, the federal government viewed the vast public lands it held in the West as a lucrative source of revenue and a means of regulating settlement and development.¹⁵⁸

and Inherently Public Property, 53 U. CHI. L. REV. 711, 719 (1986) (discussing the role of government in creating property efficiencies).

156. See *supra* section III.C; FENNELL, *supra* note 150, at 5 (positing that assembly and division can reconfigure a resource); see also *supra* note 24 and accompanying text (regarding the public entity best suited to own a given parcel).

157. See Ryan M. Beaudoin, *Federal Ownership and Management of America's Public Lands Through Land Exchanges*, 4 GREAT PLAINS NAT. RES. J. 229, 231 (2000). While commonly used and analyzed in the context of public-private transactions, the federal exchange model does apply as well to exchanges between the federal and state governments. See Susan Culp & Joe Marlow, *A Fair Trade: Observations and Recommendations for Improving the Land Tenure Adjustment Process between State and Federal Agencies in the West*, LINCOLN INST. LAND POL'Y (2012), https://www.lincolnst.edu/sites/default/files/pubfiles/2228_1561_Culp_WP13SC1.pdf [<https://perma.cc/V573-67SC>].

158. Jeffrey Schmitt, *A Historical Reassessment of Congress's "Power to Dispose of" the Public Lands*, 42 HARV. ENV'T L. REV. 453, 470 (2018); see also Amy Stengel, *"Insider's Game" or Valuable Land Management Tool? Current Issues in the Federal Land Exchange Program*, 14 TUL. ENV'T L.J. 567, 571 (2001) ("In order to encourage citizens to move into the frontier states of the American West and utilize the vast natural resources of these lands, the federal government engaged in intensive sale of public lands to individuals.").

Congress and a succession of presidential administrations pursued a land governance policy in the West that promoted the privatization of land ownership at the expense of a long-term retention and management strategy,¹⁵⁹ most famously by disbursing piecemeal land grants to settlers under the Homestead Act of 1862 and to railroad companies with the aim of incentivizing rail expansion.¹⁶⁰ Between railroad and homestead grants alone, the federal government transferred hundreds of millions of acres into private hands during the nineteenth century.¹⁶¹ A checkerboard of private and public ownership soon emerged across the American West.¹⁶²

By the turn of the twentieth century the federal strategy had shifted, and the United States began setting aside large tracts of land for conservation.¹⁶³ Congress effectively closed the remaining frontier from disposition by World War II.¹⁶⁴ Its modern default policy of retaining federal land was reflected in the Federal Land Policy Management Act of 1976 (“FLPMA”), which gave the Bureau of Land Management authority to manage federal property holdings in the public interest.¹⁶⁵

159. Indeed, the long-term strategy was to dispose all or most of the public land, thereby rendering long-term management strategies irrelevant. See Bill Paul, *Statutory Land Exchanges that Reflect “Appropriate” Value and “Well Serve” the Public Interest*, 27 PUB. LAND & RES. L. REV. 107, 110 (2006).

160. George Cameron Coggins, *Overcoming the Unfortunate Legacies of Western Public Land Law*, 29 LAND & WATER L. REV. 381, 382 (1994); Miller, *supra* note 40, at 209; Culp & Marlow, *supra* note 157, at 1.

161. Schmitt, *supra* note 158, at 496. While the Homestead Act and railroad grants were the most notable, additional Congressional acts further contributed to fragmentation of public land in the nineteenth century. See Susan Jane M. Brown, *David and Goliath: Reformulating the Definition of “The Public Interest” and the Future of Land Swaps After the Interstate 90 Land Exchange*, 15 J. ENV'T L. & LITIG. 235, 240–41 (2000).

162. Beaudoin, *supra* note 157, at 230 (“The result of the numerous and unconnected dispositions of property across the United States was a patchwork quilt of federal government ownership.”); see also Paul, *supra* note 159, at 110; Monson, *supra* note 41, at 248; Stengel, *supra* note 158, at 568.

163. Schmitt, *supra* note 158, at 497; Miller, *supra* note 40, at 210; Paul, *supra* note 159, at 112. This “shift to retention” thesis reflects the common scholarly opinion, but it has been criticized as misleading. See Leigh Raymond & Sally K. Fairfax, *Fragmentation of Public Domain Law and Policy: An Alternative to the “Shift-to-Retention” Thesis*, 39 NAT. RES. J. 649, 651 (1999). Under either model, for purposes of this Article, commentators on both sides of the debate agree that federal property in the West is significantly fragmented in modern times. See *id.* at 751 (mentioning as one of several legitimate views “that government title is partial, fraught with caveats and compromises, and riven with legitimate private rights”).

164. Schmitt, *supra* note 158, at 503.

165. *Id.* at 504. This default policy has been challenged since the 1970s by proponents of land transfers from the federal government to the states, a movement originally identified

The shift towards retention and conservation came too late to stem the fragmentation caused by the federal government's nineteenth-century policies. Today, federal property in the Western United States is severely fragmented and interspersed with state and private lands.¹⁶⁶ Federal administrators can attempt to reduce this fragmentation through strategic land acquisition.¹⁶⁷ Yet where acquisition dollars are available, often through the Land and Water Conservation Fund, the acquisition process still requires Congressional approval and is subject to pushback at the state level, where several state governments and advocacy groups in the West oppose measures to increase federal land ownership.¹⁶⁸ Acquisition funding often is not available or sufficient to meaningfully address the magnitude of the federal checkerboard.¹⁶⁹ Other means of acquiring land—such as eminent domain—carry similar political hurdles.¹⁷⁰

A land exchange avoids these pitfalls. Here, federal agencies can adhere to their retention mandate by ensuring, on balance, that the reservoir of public land does not decrease. Exchanges also circumvent the risk of inaccessible funding by bypassing the intermediate steps of receiving, depositing, and drawing upon cash consideration. Driven by these considerations, Congress delegated express land exchange authority to the executive branch when it passed the FLPMA in 1976.¹⁷¹

as the Sagebrush Rebellion. *See id.* at 510–11.

166. *See* Robert B. Keiter, *Biodiversity Conservation and the Intermixed Ownership Problem: From Nature Reserves to Collaborative Processes*, 38 IDAHO L. REV. 301, 307 (2002); Miller, *supra* note 40, at 211 (“Today, our federal lands look like paint splatters on a map of the United States—‘general cartographic chaos’” (quoting Coggins, *supra* note 160, at 382)).

167. Keiter, *supra* note 166, at 310.

168. *Id.* at 310–11. In 2020, the Great American Outdoors Act was signed into law, with the primary effect of permanently funding the Land and Water Conservation Fund. *See* Great American Outdoors Act, ch. 2004, 134 Stat. 686 (2020) (codified as amended at 54 U.S.C. § 200303). This measure may facilitate more federal land acquisition in the future. Where acquisition funding is available through the Fund, courts have found that the administrative agencies may need to consider acquisition as an alternative to a land exchange. *See* Muckleshoot Indian Tribe v. U.S. Forest Serv., 177 F.3d 800, 814–15 (9th Cir. 1999).

169. Miller, *supra* note 40, at 214; Paul, *supra* note 159, at 114–15.

170. Paul, *supra* note 159, at 114–15.

171. 43 U.S.C. §§ 1701, 1703. Administrative exchange authority dates back to the Taylor Grazing Act. *See id.* § 315.

B. *Federal Exchanges Today*

The FLPMA sets forth a process by which the two federal agencies primarily tasked with managing public lands—the Forest Service and Bureau of Land Management (“BLM”)—may consider and effectuate an administrative exchange.¹⁷² Under § 206 of the Act, the key requirement for approving a land swap is a basic one: a finding that “the public interest will be well served by making that exchange.”¹⁷³ The implementing agency is tasked with considering a broad range of interests—including economic, recreation, management, development, mineral, and fish and wildlife concerns—in assessing the public benefit of the lands being acquired versus those being conveyed.¹⁷⁴ Lands being exchanged must be of approximately equal value, although in certain situations an equalization payment can be made to offset any discrepancies.¹⁷⁵ Underpinning these requirements is a procedural process that involves screening and prioritizing proposals, conducting environmental reviews in accordance with the National Environmental Policy Act of 1969 (“NEPA”), and obtaining property appraisals.¹⁷⁶

Federal law permits the BLM to follow this process in pursuing a conventional bilateral exchange *or* in pursuing an assembled exchange that involves multiple parties. Under an assembled exchange, “multiple parcels of . . . land[] are consolidated into a package for the purpose of completing one or more exchange transactions over a period of time.”¹⁷⁷ The exchange begins when the parties enter into an agreement to swap a package of

172. See Miller, *supra* note 40, at 215. A number of scholars have examined the federal land exchange process in detail. See, e.g., *id.* at 211; GIANCARLO PANAGIA, PUBLIC POLICY AND LAND EXCHANGE: CHOICE, LAW, AND PRAXIS (2015); Beaudoin, *supra* note 157, at 230–31; Monson, *supra* note 41, at 259. Since 1976, several additional statutes have supplemented this regulatory scheme. See Randel Hanson & Giancarlo Panagia, *Acts of Bureaucratic Dispossession: The Huckleberry Land Exchange, the Muckleshoot Indian Tribe, and Rational(Ized) Forms of Contemporary Appropriation*, 7 GREAT PLAINS NAT. RES. J. 169, 182 (2002); Culp & Marlow, *supra* note 157, at 5 (discussing the 1988 Federal Land Exchange Facilitation Act).

173. 43 U.S.C. § 1716; 16 U.S.C. § 516.

174. 43 U.S.C. § 1716; see also Stengel, *supra* note 158, at 575, 582.

175. 43 U.S.C. § 1716. Modifications in 1988 permitted low-value exchanges in particular to proceed under the “approximately equal value” standard. See Culp & Marlow, *supra* note 157, at 5.

176. Miller, *supra* note 40, at 216; Katharine E. Lovett, Comment, *Not All Land Exchanges Are Created Equal: A Case Study of the Oak Flat Land Exchange*, 28 COLO. NAT. RES., ENERGY & ENV'T L. REV. 353, 361 (2017).

177. 43 C.F.R. § 2201.1-1 (2021); see also *id.* § 2200.0-5(f).

properties.¹⁷⁸ A ledger account is used to monitor the transfers and ensure that values of federal lands conveyed and obtained are balanced every three years.¹⁷⁹ The assembled exchange ends when a party terminates the agreement or when all property in the package has been depleted.¹⁸⁰ In authorizing a potentially years-long process that could involve dozens or hundreds of parcels, the statute thus creates a flexible alternative to the standard FLPMA exchange.

By its nature, the BLM and Forest Service exchange process promotes the consolidation of federally owned land. Most explicitly, in weighing the public interest, administrators are required to consider the interests of “better Federal land management.”¹⁸¹ This directive pushes the agencies to examine land management in a given area more broadly, encouraging them to think geographically about opportunities to consolidate adjacent federal holdings and scattered inholdings.¹⁸² The exchange process also promotes public land consolidation through indirect channels. The other interests given weight under the FLPMA’s broad and disparate “public interest” standard—encompassing, notably, both economic development and conservationist considerations—may leave the BLM and Forest Service with vague guidance, torn between coalitions that often share dissimilar objectives.¹⁸³ But both proponents of growth and proponents of conservation can realize benefits where fragmentation is reduced.¹⁸⁴ Because the exchange process provides a voice to these disparate interest groups, opposition can be tempered where a clearly fragmented parcel is being exchanged.¹⁸⁵

178. *Id.* § 2201.1-1(c).

179. *Id.* § 2201.1-1(e).

180. *Id.* § 2201.1-1(f).

181. 43 U.S.C. § 1716.

182. See 36 C.F.R. § 254.3(b)(2)(ii) (2021) (with respect to Forest Service exchanges, providing for the consideration of management objectives on “adjacent Federal lands”). Congress envisioned modern land exchanges as part of a regional and ongoing approach to land planning. See Paul, *supra* note 159, at 113; see also John W. Ragsdale, *National Forest Land Exchanges and the Growth of Vail and Other Gateway Communities*, 31 URB. LAW. 1, 12 (1999) (discussing the authority to use exchanges to address management objectives impaired by private inholdings within national forests); Lovett, *supra* note 176, at 361 (internal citation omitted) (discussing the use of exchanges as a means of improving land management and consolidating ownership).

183. See Brown, *supra* note 161, at 248 (arguing that the regulatory scheme for FLPMA land exchanges “fail[s] to illuminate a workable definition of the public interest”).

184. See *supra* section II.A.

185. For example, a private company can obtain a fragment parcel that carries development value (by virtue of being surrounded by private land) and minimal conservation value

Moreover, exchanges conducted by both the Forest Service and BLM are generally initiated by an outside party.¹⁸⁶ While the role played by outside private parties in the exchange process has been a source of criticism,¹⁸⁷ it also helps bridge the information asymmetry that fragmented land can create. The federal government lacks the resources to identify, investigate, and propose exchanges across its vast checkerboard of public landholdings.¹⁸⁸ Using outside parties to instigate the process provides a way to address intermingled property that may not have been identified otherwise. It also mitigates against agency inertia; once a proposal is submitted, the BLM and Forest Service are not obligated to proceed on the proposal, but the receipt of a proposal alone can be an impetus to action.¹⁸⁹ For all these reasons, land exchanges under the FLPMA have been credited with reducing public land fragmentation in the West.¹⁹⁰

C. Critiques of the Federal Exchange Model

Commentators have broadly criticized federal land exchanges. Because land exchanges may involve valuable property and other resources, they create opportunities for administrative abuse.

(also by virtue of being surrounded by private land); in return, the government can receive property in an area where its default retention policy better serves recreation and conservation uses. See Kenneth Amaditz, Note, *Executive Authority to Perform Interstate Land Exchanges*, 15 J.L. & POL. 195, 201 (1999) (“The exchange approach has won the support of business interests and the tepid approval of environmental advocates . . .”).

186. See Beaudoin, *supra* note 157, at 240, 240 n.103.

187. Brown, *supra* note 161, at 243 (discussing the outsized role played by private timber companies in the federal exchange process).

188. See Monson, *supra* note 41, at 259 (discussing the Government Accounting Office’s 2009 findings that a lack of qualified staff was a contributing factor to the decline in federal land exchanges); see also *supra* note 66 and accompanying text (discussing data issues that arise with respect to fragmented land).

189. See 43 C.F.R. § 2201.1 (2020).

190. See Stengel, *supra* note 158, at 568 (“Land exchanges between the federal government and private individuals or corporations are increasingly being used as a way to consolidate public land holdings . . .”); Culp & Marlow, *supra* note 157, at 1 (discussing land exchanges as a means of “consolidate[ing] land ownership”); Brown, *supra* note 161, at 236 (describing land exchanges as a “solution to the age-old problem of intermingled ownership of land”). Even the Government Accounting Office, which has issued reports critical of federal land exchanges in practice, has noted their utility for reducing fragmented public ownership. See U.S. GOV’T ACCOUNTABILITY OFF., GAO/RCED-00-73, REPORT TO THE RANKING MINORITY MEMBER, COMMITTEE ON RESOURCES, HOUSE OF REPRESENTATIVES, BLM AND THE FOREST SERVICE: LAND EXCHANGES NEED TO REFLECT APPROPRIATE VALUE AND SERVE THE PUBLIC INTEREST 7 (2000) (“Since 1981, the [BLM and Forest Service] have used exchanges to dispose of fragmented parcels of land and to consolidate land ownership patterns to promote more efficient management of land and resources.”).

There are a number of documented cases of illegal or questionable land exchanges that seemingly transferred a valuable property out of public ownership without receiving appreciable public benefits in return.¹⁹¹ The BLM and Forest Service have been criticized for inconsistent decision making that has at times run afoul of the regulatory scheme.¹⁹² Private parties involved in exchanges with these agencies tend to be repeat players, largely represented by corporations in the resource extraction industry.¹⁹³ These parties have received economic windfalls from their participation in exchanges made under the FLPMA.¹⁹⁴ Less common, although no less glaring, is the practice of real estate speculation in an area surrounded by BLM or Forest Service landholdings; the private purchaser then uses their fragmented parcel as a cudgel to extort a favorable land exchange out of the government.¹⁹⁵ Outsized media coverage of these episodes casts a pall over the broader exchange process.¹⁹⁶ In addition, the appraisal component of the exchange process has been criticized, in part due to deficiencies in the appraisal process itself—characterized by insufficiently independent appraisers and an often slow-moving timetable—and in part because the value of remote and fragmented public land is often difficult to accurately capture.¹⁹⁷ A report issued by the Government Accounting Office identified examples where property was exchanged to a private party that subsequently resold the land at a substantially higher price.¹⁹⁸

As a result of widespread criticism, the use of administrative federal exchanges has declined markedly in recent years.¹⁹⁹ Even

191. See Miller, *supra* note 40, at 217–19 (discussing the issue of abuse and providing several examples); Stengel, *supra* note 158, at 579 (providing additional examples).

192. Monson, *supra* note 41, at 259–60; Beaudoin, *supra* note 157, at 243.

193. Paul, *supra* note 159, at 117.

194. Culp & Marlow, *supra* note 157, at 25.

195. See Ragsdale, *supra* note 182, at 24–25 (discussing the “escapades” of Tom Chapman, a Colorado developer who has successfully pursued this technique in multiple areas surrounded by Forest Service land).

196. See, e.g., Jason Blevins, *Controversial Real Estate Speculator Alone in the Wilderness*, DENV. POST (May 10, 2010, 3:34 PM), <https://www.denverpost.com/2010/05/10/controversial-real-estate-speculator-alone-in-the-wilderness> [<https://perma.cc/6JRT-FZLU>].

197. Paul, *supra* note 159, at 118. The agencies have adopted more stringent appraisal policies in recent years. See Monson, *supra* note 41, at 260.

198. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 190, at 3.

199. Miller, *supra* note 40, at 216 (“The [Bureau of Land Management’s] exchange transaction rate was more than twenty times higher in the 1990s than during the period 2004 through 2008, and the Forest Service completed four times as many land exchanges annually during the 1990s.”); see also Monson, *supra* note 41, at 259; Culp & Marlow, *supra* note

so, a number of commentators—among them some of the BLM and Forest Service’s strongest critics—continue to argue that the FLPMA land exchange process is better than the alternatives.²⁰⁰ These commentators emphasize that federal exchanges address management issues and reduce fragmentation, while at the same time granting agencies the flexibility to craft creative solutions to thorny development questions.²⁰¹ For every infamous exchange that appeared misguided or corrupt and drew the public’s attention, proponents of the concept can point to other exchanges, more often falling under the radar, that indeed advanced significant public interests.²⁰² Indeed, citing several of these arguments, one commentator goes a step further and advocates for “massive land exchanges” as a way to reduce fragmentation.²⁰³

D. *Applying the Federal Model to Interlocal Land Exchanges*

Local governments and state legislatures can learn much from the imperfect federal model. As demonstrated above, fragmented federal land is the product of historical policy decisions that differ significantly from the forces that bred fragmentation at the local level.²⁰⁴ The nature of property managed by the BLM and Forest Service is also assuredly different from the vacant urban parcels owned by public entities in Mechanicsville and East Garfield Park. These differences yield land management and redevelopment challenges that likely vary appreciably between federal and local governments. Yet even if the challenges are different, they are exacerbated by fragmentation at both levels. Federal and local administrators must grapple alike with property that is

157, at 3.

200. Paul, *supra* note 159, at 128; Monson, *supra* note 41, at 264; Culp & Marlow, *supra* note 157, at 1, 11; Ragsdale, *supra* note 182, at 22; *see also* Stengel, *supra* note 158, at 569 (“While the GAO Report recommended that Congress impose a moratorium on the current land exchange program, other critics of land exchanges favor agency reforms over a complete ban.”).

201. Paul, *supra* note 159, at 128; Stengel, *supra* note 157, at 568; Brown, *supra* note 161, at 237; Ragsdale, *supra* note 182, at 33.

202. *See, e.g.*, Culp & Marlow, *supra* note 157, at 19 (discussing the public aversion in Arizona to land exchanges and remarking that “[m]ost trust land stakeholders believe . . . that it is unfortunate that a handful of egregious misuses of the tool have poisoned the atmosphere for appropriate uses to rationalize land ownership patterns in the state”).

203. Coggins, *supra* note 160, at 394.

204. *See supra* Part I.

geographically splintered.²⁰⁵ As a remedy to fragmentation, moreover, both federal and local administrators are constrained in their ability to ameliorate the problem through strategic land assembly outside of an exchange process.²⁰⁶

At the same time, land exchanges offer a practical solution to fragmentation, one borne out by the successful use of administrative land exchanges under the FLPMA over the past half century. The salient features of the federal model offer a replicable framework. Despite declining significantly from their heyday of the 1990s, administrative exchanges are still statutorily incentivized and regularly performed, signifying a systematic approach to federal land consolidation that does not exist in local government.²⁰⁷

The federal model is particularly attractive in the context of interlocal land exchanges between two public entities. The critiques levied against administrative exchanges under the FLPMA—which emphasize deficiencies in the appraisal process, cases where the public interest was not protected, and notorious examples of windfalls received by corporate parties—expose problems that are necessarily unique to public-private transactions. In a land swap between local governments, these problematic features of the administrative exchange process are not necessarily implicated. The public is certainly liable to mistrust its local government, and local governments each other,²⁰⁸ but a land exchange where all property remains in public ownership does not trigger the same concerns and does not require an appraisal to ensure it is effectuated in the public interest.

Anecdotal evidence supports this intuition—that federal land exchanges have faced criticism over the past twenty years not because exchanges themselves are flawed, but because exchanges specifically between the federal government and private landowners raise fears, sometimes rooted in reality, that a private owner

205. See *supra* section II.A.

206. Compare, e.g., *supra* notes 101–03 and accompanying text (discussing local hurdles with property acquisition by purchase and eminent domain), with *supra* notes 167–70 and accompanying text (discussing similar hurdles at the federal level).

207. Data from the BLM indicates the agency completed eight exchanges in 2019. BUREAU OF LAND MGMT., U.S. DEPT OF THE INTERIOR, P-108-9, PUB. LAND STAT. 2019, at 50 (2020), <https://www.blm.gov/sites/blm.gov/files/PublicLandStatistics2019.pdf> [https://perma.cc/N82B-2U3Q].

208. See section III.B (examining mutual mistrust in the context of interlocal agreements).

will lobby, extort, or otherwise maneuver its way into a sweetheart deal. Unsurprisingly, examples of problematic exchanges in the legal literature have been of the public-private variety.²⁰⁹ A similar unstated distinction appears to hold true at the local level: while exchanges between public and private owners are susceptible to controversy, public-public exchanges are not.

The distinction is borne out by two recent high-profile exchanges that occurred months apart in Detroit. In early 2019, the Detroit City Council approved a development deal with Fiat Chrysler to build a new car factory in Southwest Detroit, a largely residential area of the city struggling from years of divestment. In order to assemble 215 acres of land for the development, the City engaged in land exchanges with a handful of the largest private landowners in the region.²¹⁰ The exchange was controversial and bitterly contested. Opponents noted that the private landowners benefitting from the transaction were speculators and investors who enjoyed close ties with City leadership; these private parties—notably billionaires Matty Moroun and Anthony Soave, along with one of Detroit's largest landowners, Michael Kelly—had a track record of unscrupulous behavior regarding their real estate investments, and had in some cases invested strategically in land that later became necessary for the factory development.²¹¹ These landowners were deeply unpopular among Detroiters.²¹² It is perhaps not surprising that the optics of the land exchange were so poor. The

209. See, e.g., Lovett, *supra* note 176, at 365–66 (critiquing a federal exchange with a mining company); Brown, *supra* note 161, at 235, 239 (arguing for reform in the exchange process based upon a proposed exchange with a timber company); Miller, *supra* note 40, at 201 (arguing for reform based upon an exchange with a private landowner); Hanson & Panagia, *supra* note 172, at 182 (critiquing an exchange with a timber and real estate company).

210. See Allie Gross, *Morouns, Speculators Look Like Winners in Detroit Land Swap to Ensure FCA Factory Jobs*, DET. FREE PRESS (May 20, 2019, 6:00 AM), <https://www.freep.com/story/news/local/michigan/detroit/2019/05/20/speculators-moroun-detroit-land-swap-fca-jobs/3664661002> [<https://perma.cc/L5YA-7SJ9>]; Steve Neavling & Maryam Jayyousi, *Detroit City Council Narrowly Approves Controversial Land Swap for Fiat Chrysler Plant*, DET. METRO TIMES (May 21, 2019), <https://www.metrotimes.com/news-hits/archives/2019/05/21/detroit-city-council-narrowly-approves-controversial-land-swap-for-fiat-chrysler-plant> [<https://perma.cc/5HA6-NDJH>].

211. See Gross, *supra* note 210; Neavling & Jayyousi, *supra* note 210.

212. See Gross, *supra* note 210 (“For decades, Matty Moroun and his businesses have been the worst neighbors in southwest Detroit, polluting our communities, stealing public land, and letting their properties crumble and turn into nuisances,” said U.S. Rep. Rashida Tlaib, who grew up in southwest Detroit and has been working to hold Moroun accountable for years.”).

private land required for such a large-scale assembly was inevitably owned by those with significant holdings in the city, and these private owners, in part as a result of their vast property inventories, also had historical track records of causing friction in local neighborhoods, on the one hand, and working closely with City officials on the other. High-profile public-private exchanges are prone to these messy realities.

By comparison, only a few months earlier, the City of Detroit engaged in another high-profile land exchange: it transferred an eleven-acre site located adjacent to the prosperous Midtown neighborhood in exchange for a dilapidated and environmentally challenged industrial property.²¹³ The exchange received broad media coverage.²¹⁴ In light of the apparent value of the land the City relinquished, the exchange could have been controversial. But here the City's trading partner was not a disliked local billionaire but a local government agency, the Wayne County Land Bank.²¹⁵ Concerns of speculation, patronage, and private windfall—so inherent to public-private exchanges in practice—dissipated once private parties were removed from the equation.

In practice, then, the criticism that haunts public-private exchanges largely evaporates where public-public exchanges are contemplated. At the federal level, despite the critiques leveled at the BLM and Forest Service over the past couple decades, as summarized above, significant public-public exchanges have nevertheless

213. Dana Afana, *Land Swap Between Detroit and Wayne County Approved as Part of Jail Fix*, MLIVE MICH. (Apr. 6, 2018, 12:00 PM), https://www.mlive.com/news/detroit/2018/04/wayne_county_commission_approv.html [<https://perma.cc/8GWL-NGTF>].

214. *See id.*; Dana Afana, *Former AMC Site Part of Land Swap for Gilbert Soccer Stadium Plan*, MLIVE MICH. (Oct. 5, 2017, 2:48 PM), https://www.mlive.com/news/detroit/2017/10/jail_site_2.html [<https://perma.cc/PP98-HEFB>]; Nicquel Terry, *Wayne Co. Commission OKs Land Swap for Gilbert Jail*, DET. NEWS (Apr. 5, 2018, 9:30 AM), <https://www.detroit-news.com/story/news/local/wayne-county/2018/04/05/gilbert-land-swap-jail-deal/33567101/> [<https://perma.cc/6F5B-PRHS>]; Kirk Pinho, *Proposed Land Swap Between County, City Another Step Toward Gilbert's Jail Site Plan*, CRAIN'S DET. BUS. (Oct. 5, 2017, 9:00 AM), <https://www.craindetroit.com/article/20171005/news/641251/proposed-land-swap-between-county-city-another-step-toward-gilberts> [<https://perma.cc/UT5N-2C92>]; Emma Winowiecki, *Wayne County and City of Detroit Swap Land to Move Forward With Jail Plan*, MICH. RADIO (Oct. 5, 2017, 11:14 AM), <https://www.michiganradio.org/news/2017-10-05/wayne-county-and-city-of-detroit-swap-land-to-move-forward-with-jail-plan> [<https://perma.cc/T76U-YJ3A>].

215. *See Afana, supra* note 214.

proceeded successfully without triggering any of the same substantive concerns.²¹⁶ The distinction holds true at the local level as well.

V. THE MUDDLED LEGAL FRAMEWORK OF INTERLOCAL LAND EXCHANGES

The success of administrative land exchanges under the FLPMA can offer guidance and inspiration to local administrators. Just as at the federal level, while interlocal land exchanges may not represent an incisive attempt to address the underlying causes of checkered public property, they offer a practical first step forward.

Yet a glaring problem remains unaddressed. On the ground, consolidating surplus public land in a given neighborhood may appear a no-brainer. But the governing legal framework does not always comport with practicality. Instead, in many states, it is not clear that local public entities have authority under current law to conduct land exchanges with other public property owners. In other states, moreover, local exchange authority does plainly exist—but it comes saddled with procedural requirements that especially pose impediments where a public-public exchange is contemplated.

In both cases our inquiry starts with state law. Local power is broadly a product of state law, stemming either from statutory enactments or constitutional grants.²¹⁷ Some local governments enjoy broad and liberally construed home rule powers that protect its action in areas of local concern, a grant that may appear more than sufficient to permit the exchange of public property.²¹⁸ Yet the inquiry does not end there. Even where liberal home rule grants are conferred by a state constitution, these grants are ordinarily made only to general purpose governments, in many cases only to

216. See, e.g., John C. Ruple, *The Trump Administration and Lessons Not Learned from Prior National Monument Modifications*, 43 HARV. ENV'T L. REV. 1, 14, 34, 56–57, 66 (2019) (discussing a successful exchange between Utah and the federal government that reflected the largest land exchange in continental United States history and providing additional similar examples of public-public exchanges in the context of national monument land).

217. See generally Richard C. Schragger, *The Attack on American Cities*, 96 TEX. L. REV. 1163, 1165 (2018). The classic case holding that municipal governments are mere creatures of state control is *Hunter v. City of Pittsburgh*, 207 U.S. 161 (1907).

218. See, e.g., *City of Commerce v. State*, 40 P.3d 1273, 1279 (Colo. 2002) (noting that home rule cities in Colorado may regulate in areas of “local concern”); *O’Neill v. City of E. Providence*, 480 A.2d 1375, 1379–80 (R.I. 1984) (finding, in a condemnation case, that a city had not complied with the provisions of state law, but not disrupting the city’s broad charter authority to “acquire property” in general).

municipalities—and even then, often only to a subset of municipalities that satisfy certain population parameters or other requirements.²¹⁹ Home rule is thus unavailing where public land is fragmented not simply between two municipalities, but between an assortment of general and special purpose local governments—perhaps a county, city, park district, and school district—that do not all have home rule power.

As a consequence, the power to conduct interlocal land exchanges is generally anchored to a specific delegation made under state law.²²⁰ Where state law affirmatively empowers local entities to exchange land, local codes and local officials have the flexibility to follow suit.²²¹ Some states have statutory regimes that clearly and independently vest local governments with broad interlocal exchange power. In South Dakota, for example, section 6-5-1 of the South Dakota Codified Laws provides as follows:

All counties, municipalities, sanitary districts, improvement districts, townships, and school districts of this state may exchange with each other and to transfer and convey from one to the other any land or property belonging to them and under their respective jurisdictions and to perform and exchange work between themselves. All transfers of property and work as authorized by this section shall be upon such terms and conditions as may be determined and agreed upon by the respective governing bodies thereof.²²²

219. See *Evins v. Richland Cnty. Historic Pres. Comm'n*, 532 S.E.2d 876, 878 (S.C. 2000) (“Home Rule applies only to counties and municipalities, not special purpose districts.”). Some states grant constitutional home rule to municipalities and only statutory home rule to counties. See Michael R. Heim, *Legal Article: Home Rule: A Primer*, J. KAN. BAR ASS’N, Jan. 2005, at 26, 30. Other states do not provide for county home rule more broadly. For example, the Minnesota Constitution permits local governments to adopt a home rule charter, but enabling law only exists for cities to pursue this process. With the exception of a special law that allowed one county to explore a home rule charter, there is no authority generally for counties to adopt a charter in the state. See Deborah A. Dyson, *State-Local Relations*, MINN. HOUSE RSCH. (2019), <https://www.house.leg.state.mn.us/hrd/pubs/ss/sslcstrel.pdf> [<https://perma.cc/596Z-AZL9>].

220. To be sure, where liberal and clear state grants do exist, local authority to exchange property may also turn on the language of a local ordinance or charter. While an examination of local ordinances and charters is outside the scope of this Article, the discussion below—particularly of whether the ability to “sell” property encompasses the ability to “exchange” it—also applies to some local laws, where the terms also are not clearly defined or interpreted. See *McKinney v. City of Abilene*, 250 S.W.2d 924, 925 (Tex. Civ. App. 1952).

221. See, e.g., *Doll v. Flintkote Co.*, 79 So. 2d 575, 577 (La. Ct. App. 1955), *aff’d*, 91 So. 2d 24 (La. 1956) (state statute governs municipal exchange of property); *Cabana v. Kenai Peninsula Borough*, 50 P.3d 798, 803 (Alaska 2002) (applying a local ordinance modeled after the state statute governing exchanges when a local government’s land exchange was challenged).

222. S.D. CODIFIED LAWS § 6-5-1 (2021).

By this language, section 6-5-1 provides a broad and explicit grant to perform interlocal exchanges. The use of the word “exchange” indicates an independent power, separate and distinct from an entity’s authority to buy or sell property.²²³ The statute’s authorization further encompasses most local governments in the state, not simply municipalities.²²⁴ Its scope broadly covers “any land or property belonging to” these entities.²²⁵ And finally, its procedural constraints are minimal and deferential: an interlocal agreement may proceed “upon such terms and conditions as may be determined and agreed upon” by the governmental parties to the transaction.²²⁶

Section 6-5-1’s permissive grant also withstands scrutiny when assessed against the larger statutory scheme, as it is not sidelined or complicated by another provision of the South Dakota Codified Laws. Other South Dakota statutes permit counties and municipalities to exchange land for public purposes—again “upon such terms and conditions as may be determined and agreed upon” by the entities—and others clarify that properties transferred between political subdivisions of the state need not be offered for sale first or conveyed for cash consideration.²²⁷ At the same time, if a local government wishes to exchange property with a private party, the transfer must follow an appraisal, a public notice, and a hearing.²²⁸

Taken together, South Dakota’s statutory scheme is clear. Local governments may exchange property with each other free of appraisal, auction, pricing, or other procedural constraints. Governments may also exchange property with private parties, but in these cases certain procedures must be followed. The cumulative impact of these statutes is twofold. First, they expressly empower interlocal exchanges without limitation. Second, they incentivize governmental entities to pursue public-public exchanges as

223. *Id.*

224. Section 6-5-1 appears to cover all notable local entities that own property in South Dakota. It excludes some special purpose districts that operate on the local level. *See, e.g., id.* § 46A-10B (drainage basin utility districts); *id.* § 34A-16 (regional recycling and waste management districts); *id.* § 49-17A (regional railroad authority). Yet the section includes all general-purpose local governments and likely covers the vast majority, if not the entirety, of surplus local public land.

225. *Id.* § 6-5-1.

226. *Id.*

227. *Id.* §§ 7-29-20, 6-5-2.

228. *Id.* § 6-5-4.

opposed to public-private ones. Under either situation, local administrators can ultimately act in reliance on section 6-5-1, confident in the clarity of its grant.

A few other state legal regimes approach the clear interlocal exchange grant that exists in South Dakota.²²⁹ But these examples are rare. More commonly, whether local governments have the ability to exchange land with each other is a question to which state constitutions and statutes—and the courts interpreting them—offer only a muddled answer. At best, without this clarity, the validity of an interlocal exchange may be questioned by a stakeholder or challenged and ultimately upheld in court. At worst, the opaque governmental power in this space may dissuade local administrators from even pursuing exchanges that would address important land management and fragmentation issues.

A. *Identifying the Problem*

At the heart of this legal confusion lies a basic point of definition: is the process of exchanging land—i.e., transferring one property *in exchange* for another property—inherently different from the process of acquiring or disposing of land? One could imagine an exchange as merely a combination of property disposition (of the parcel being transferred) and property acquisition (of the parcel being obtained). In accordance with this perspective, an agreement between two governments to “exchange land” would simply reflect a shorthand articulation of two separate but intertwined steps: first, the disposition of one or more parcels of land, and second, the acquisition of one or more different parcels in return. Yet one could also understand land exchanges as an inherently discrete concept along the lines of the FLPMA’s scheme, one where the disposition and acquisition steps are intertwined to the degree that a new process has been born.

Historically, courts interpreting exchange statutes have tended towards the first view—that exchanging property is an inextricable function of either acquiring property, selling property, or both. The Supreme Court of the United States set the tone in 1895, when it remarked that if a county was authorized to sell property for

229. See, e.g., VA. CODE ANN. § 15.2-1800 (Repl. Vol. 2018) (local exchanges in Virginia); N.M. STAT. ANN. § 3-54-2 (2021) (intergovernmental exchanges in New Mexico).

consideration, there is no reason, absent an express provision otherwise, that the county could not also exchange a property by “selling [it] for money’s worth.”²³⁰ State courts have traditionally often endorsed a similar perspective and concluded that exchanges are inherently inseparable from sales.²³¹ Central to this concept is the nongratuitous nature of both transactions: both exchanges and sales are supported by consideration. Both involve conveying property for *something* in return, whether a monetary payment of cash or an in-kind payment of property.²³²

Yet other courts have reached the opposite conclusion. Rather than approaching the issue of consideration from a functional perspective by asking whether the transferring entity got something in return, these courts have emphasized the formal, definitional distinctions that exist between cash and noncash consideration. In *Fox v. Mayor of Chambersburg*,²³³ a Pennsylvania court was asked whether an interlocal conveyance that involved both property and cash consideration constituted an “exchange.” After surveying several dictionary definitions, the court found that “[a]ll of these definitions contemplate a simple bartering of one interest for another of similar value.”²³⁴ Therefore a more “complex” transaction—one that, as in *Fox*, may involve cash and other consideration alongside the properties themselves being swapped—moves beyond a simple barter and outside the realm of exchange.²³⁵

Similarly, in *Fain Land & Cattle Co. v. Hassell*,²³⁶ the Arizona Supreme Court reviewed cases from other jurisdictions where courts have defined the word “exchange,” concluding from this review that “[t]he commonly accepted definition of ‘exchange’ excludes transactions into which money enters, either as the consideration furnished by one party or as a basis for measuring the

230. *Roberts v. N. Pac. R.R. Co.*, 158 U.S. 1, 18 (1895).

231. In California, for example, the California Supreme Court has stated that “[i]n law, an exchange is two sales.” *Robbins v. Pac. E. Corp.*, 65 P.2d 42, 56 (Cal. 1937); *see also* *House v. McMullen*, 100 P. 344, 348 (Cal. Ct. App. 1909) (“[T]here can be no doubt that plaintiff . . . could prove that ‘sale’ was used for ‘exchange,’ which is indeed a species of sale.”).

232. *See, e.g.*, *Bobo v. City of Spartanburg*, 96 S.E.2d 67, 71 (S.C. 1956) (finding that “[t]he power to buy and sell includes the power to exchange” because “the transaction is supported by . . . consideration”).

233. 744 A.2d 808 (Pa. Commw. Ct. 2000).

234. *Id.* at 809.

235. *Id.* at 809–10.

236. 790 P.2d 242 (Ariz. 1990).

value of the property transferred.”²³⁷ Drawing on these definitions, the *Fain* court articulated a test: if two properties are being swapped on the basis of a “fixed value . . . measured in terms of money,” the transaction should be considered a sale; if not, only then is it fairly defined as an exchange.²³⁸

Accordingly, by definition, both *Fain* and *Fox* demand that land exchange transactions occur absent any cash consideration. The effect of this viewpoint is to segregate sales and exchanges into distinct spheres. Because sales and acquisitions generally involve cash payment, or at minimum carry a sense of fixed monetary value, those processes are mutually exclusive from the simple barter that characterizes a land exchange.

The above discussion demonstrates that courts provide fundamentally divergent answers when asked to determine whether land exchanges are unique. Some ultimately conclude that exchanges are merely a subset or mechanism of property sale and acquisition. Others decide that sale and acquisition are mutually exclusive of the process of exchange. But why does this divergence matter? More pointedly, for purposes of this Article, why—and how—does this divergence muddle interlocal exchange authority under state laws?

The answer lies less in the difference between the two approaches than it does in their inconsistent application. In theory, if judicial doctrine offered a consistent answer to the question of whether exchanges are unique, legislatures could respond accordingly by crafting a statutory scheme on the understanding that an exchange is—or is not—a discrete form of property transfer. At the same time, if legislatures offered a consistent approach to the question, courts would be better equipped to discern legislative intent as part of a deliberate statutory scheme.²³⁹ Consistency is a hallmark of clarity. Where courts or legislatures are not consistent in their understanding of land exchanges, cracks are liable to form in the regulatory framework, sowing confusion as to a local government’s authority to exchange land—and its obligations when doing so.

237. *Id.* at 246–47.

238. *Id.* at 247 (internal citation omitted).

239. *See Cabana v. Kenai Peninsula Borough*, 50 P.3d 798, 802–03 (Alaska 2002) (looking to legislative intent to discern the meaning of the word “exchange”).

This latter scenario reflects reality. Both courts and legislatures take an inconsistent approach to the question of land exchanges, in turn spawning a body of law that is internally contradictory and disharmonious. On the legislative side, two state statutes may each ostensibly empower local land exchanges while also imposing apparently contradictory procedural requirements. Louisiana offers a case in point. Section 33:3741 of the Louisiana Revised Statutes gives municipalities authority to “exchange any public property owned by said municipality . . . with property owners for any public purpose.”²⁴⁰ Properties exchanged under this section must be appraised and carry approximate equal values.²⁴¹ A separate statutory provision, also located in the same chapter of the Louisiana Revised Statutes, grants municipalities the power to “sell, lease . . . , exchange, or otherwise dispose of . . . any property.”²⁴² Here, section 4712 requires that the municipality must first establish a minimum price and terms, and in some situations must also advertise and solicit proposals, prior to disposing any property.²⁴³

Taken together, sections 3741 and 4712 are difficult to harmonize. The first demands an appraisal but contemplates that an exchange may be negotiated privately by a municipality before the transaction is publicly consummated. The second requires that a municipality take certain public actions upfront by setting a minimum price and at times soliciting bids, both of which would necessarily constrain an entity’s ability to negotiate exchanges for specific property it is hoping to acquire or consolidate. Sections 3741 and 4712 also appear premised on fundamentally different concepts of exchanges. While section 3741 applies only to the “exchange” of property, section 4712 applies to a laundry list of property disposition mechanisms, “exchange” simply included as one of the listed options.²⁴⁴ In doing so, section 3741 treats exchanges as a separate and unique form of acquiring and selling property, whereas section 4712 views an exchange as a mere subset of property sales.²⁴⁵ It is perhaps unsurprising that section 3741 provides municipalities latitude to conduct private negotiations before taking any formal procedural steps. Inherent to the concept of

240. LA. STAT. ANN. § 33:3741 (2021).

241. *Id.*

242. *Id.* § 33:4712.

243. *Id.*

244. *Id.* §§ 33:3741, 33:4712.

245. *Id.* §§ 33:3741, 33:4712.

exchanges being unique—and inherent to the broader land exchange goals of consolidating property and reducing fragmentation—is the ability to negotiate privately with specific owners and for the ownership of specific properties. Section 3741 arguably acknowledges this goal. Section 4712 does not.

The interplay between these provisions has caused confusion for local governments.²⁴⁶ In an attempt to harmonize the two, an Attorney General opinion commented that section 3741 focuses more on the acquisition of property while section 4712 focuses on property disposition.²⁴⁷ Deciding which statute to apply therefore turns on the intent of the local entity: if its primary goal is to acquire a particular property, the requirements of section 3741 should apply, while section 4712 applies where the primary goal is the disposition of surplus property.²⁴⁸ This conclusion provides little guidance to municipalities contemplating an interlocal land exchange. In a scenario where two municipal governments own property they seek to exchange with each other, which of the two sections applies? On the possibility that section 4712 *may* apply, should each municipality treat the transaction as a sale, by first setting sale terms and a minimum price, or should they proceed to negotiate a like-for-like transfer that resembles more exclusively an exchange? Other statutory schemes demonstrate similar inconsistencies and raise similar questions.²⁴⁹

Courts, too, have struggled to take a consistent approach to land exchanges. The *Fain* decision discussed above—which found that a transaction based upon a fixed value constitutes a sale—posed challenges for subsequent Arizona courts. Along the reasoning of *Fain*, a transaction should be deemed a sale where two properties were appraised before being swapped, or where, as part of a swap, a cash payment was made to equalize a difference in market values between the two parcels. The appraisals would indicate that property included in the transaction was being assigned a monetary value; the cash payment would defy *Fain*'s plain reasoning by including monetary consideration in the deal. Yet courts found

246. For example, the City of Alexandria, Louisiana sought to exchange property with private parties and requested an opinion from the Attorney General as to whether section 3741 or 4712 applied. See La. Att'y Gen. Op. No. 94-273 (1994).

247. *Id.*

248. *Id.*

249. See, e.g., *Tuten v. City of Brunswick*, 418 S.E.2d 367, 370 (Ga. 1992) (analyzing GA. CODE ANN. § 36-37-6).

themselves confronted with statutes that seemed to contemplate a broader definition of “exchange”—in some cases where an appraisal was included notwithstanding Fain’s reasoning.²⁵⁰

The conundrum forced courts to depart from Fain. Rather than relying upon the dictionary definition of “exchange” to conclude when and how it deviates from a sale, legislative intent became the new barometer.²⁵¹ Fain’s categorical rule gave way to a statute-by-statute assessment, one that asks whether the legislature intended exchanges to be unique in that specific legal scheme. As one Arizona court stated after conducting this assessment, “[t]herefore, despite the *Fain* court’s statement that an exchange is a form of sale, in *these* statutes, the legislature has clearly distinguished an exchange from a sale.”²⁵²

In this manner, inconsistent legislative and judicial approaches to land exchanges coalesce to create a murky doctrine, both in the language of the law itself and in its recognized application. The legal inconsistency that hounds land exchanges has a real impact on interlocal exchange power. Where exchanges are interpreted by courts as part-and-parcel components of property sale or acquisition, additional procedural requirements are often brought into play, rendering interlocal public exchanges functionally onerous to pursue. Conversely, where exchanges are interpreted by courts as independent and unique transactions, local governments may lack authority to exchange public property as a consequence of legislative silence.

B. *Exchanges as Inseparable from Land Acquisition and Sale*

First, when exchanges are viewed as components of property sale or acquisition, a public owner seeking to exchange land must also comply with procedural requirements that would govern sale or acquisition under similar circumstances. Rather than being held only to the express statutory procedures associated with

250. *Mackey v. Mayor & Council of City of Tucson*, 96 P.3d 231, 233 (Ariz. Ct. App. 2004).

251. *See supra* notes 236–38 and accompanying text.

252. *Mackey*, 96 P.3d at 234 (emphasis added). Indeed, the quoted text from *Mackey* speaks to the degree judicial confusion exists when assessing land exchanges, as *Fain* did not state that “an exchange is a form of sale.” *See Fain Land & Cattle Co. v. Hassell*, 790 P.2d 242, 247 (Ariz. 1990) (“Thus, the test for determining whether a transaction constitutes a sale or an exchange is whether there is a fixed value at which the exchange is to be made—it is considered a sale if there is a fixed value and an exchange if there is not.”).

exchanges, a government may thus also be subject to the procedures associated with selling property *and* the procedures associated with acquiring property.²⁵³ The issue at its core is a matter of basic arithmetic: the more conveyance mechanisms encompassed by an exchange, the more processes may apply, and therefore the more steps a local administrator must navigate to ensure a land exchange is valid.²⁵⁴ For example, where a municipality must get an appraisal before acquiring property and hold a public hearing before approving a sale, a cautious administrator will aim to check each of these boxes when pursuing an exchange—along with any additional requirements specifically tied to exchanges themselves. These additional layers of process may carry added costs and political constraints, threatening the success of a transaction or discouraging its pursuit in the first place.²⁵⁵ Only rarely have courts recognized that the procedural steps demanded of land exchanges may conflict with the government's normative purpose for pursuing one.²⁵⁶

The issue is particularly stark in states that facially provide broad authority for interlocal exchanges. In Washington, section

253. See *Swims v. Fulton Cnty.*, 475 S.E.2d 597, 598 (Ga. 1996) (exchanges as a method of acquisition and subject to acquisition procedures); *Campbell v. First Baptist Church*, 250 S.E.2d 68, 73–75 (N.C. Ct. App. 1978), *aff'd*, 259 S.E.2d 558 (N.C. 1979) (exchanges as a method of sale and subject to disposition procedures).

254. See, e.g., *Tuten*, 418 S.E.2d at 368–71. In *Tuten*, the Georgia Supreme Court opined on the interplay between GA. CODE ANN. § 36–37–6(a) (2021), which carried bidding requirements for the sale of municipal property, with GA. CODE ANN. § 36–37–6(c) (2021), which provided that “nothing herein shall prevent a municipality from trading or swapping property with another property owner, if said trade or swap is deemed to be in the best interest of the municipality.” *Id.* at 368–69. The city argued that section 36–37–6(c) contained a plenary grant to exchange property without the bidding requirements. See *id.* at 369–70. The Supreme Court disagreed: “[T]o read O.C.G.A. § 36–37–6(c) as a plenary grant of the power of ‘trading’ and ‘swapping’ city property generates logical possibilities that only can be described as bizarre. For example (and bearing in mind the statutory limitations upon the sale of city property), a city is prohibited from selling \$600 worth of scrap iron unless it complies with the bidding requirements of O.C.G.A. § 36–37–6(a). Yet, it could ‘swap’ or ‘trade’ the city hall itself for a goat!” *Id.* at 370 (emphasis in original).

255. See *Campbell*, 250 S.E.2d at 73–75 (because an exchange of property is also a “private sale,” a local redevelopment authority’s exchange was unlawful where it didn’t comply with public hearing and fair market value requirements of a sale).

256. Of the opinions cited in this Article, the most explicit acknowledgment is found in *State ex rel. King v. Lyons*, 248 P.3d 878, 888–89 (N.M. 2011). Even while finding certain public-private exchanges invalid for failing to comply with procedural auction requirements, the court acknowledged their underpinning purpose: “We should be candid about the objectives of these particular exchanges. They were designed to achieve a predetermined result. The exchanges were for the purpose of addressing specific land management problems in specific geographical regions—checkerboard areas—that could only be resolved by privately negotiated exchanges with neighboring landowners.” *Id.* at 899.

39.33.010 of the Revised Code appears to confer upon local governments a clear, explicit, and flexible grant to exchange public property with each other. The statute provides that “any municipality or any political subdivision [of the state]” may between them “exchange . . . any property . . . on such terms and conditions as may be mutually agreed upon by the proper authorities of the state and/or the subdivisions concerned.”²⁵⁷ In the following paragraph, the statute proceeds to expressly signal legislative intent to grant a standalone power: “This section shall be deemed to provide an alternative method for the doing of the things authorized herein, and shall not be construed as imposing any additional condition upon the exercise of any other powers vested in the state, municipalities or political subdivisions.”²⁵⁸

Notwithstanding this language, however, and premised on the view that exchanges are inseparable from property sales, Washington courts have complicated section 39.33.010’s plain reading by imposing additional layers of process. In multiple cases, other statutes have been harmonized with—and thereby layered upon—the terms of section 39.33.010.²⁵⁹ Most notably, in *Heermann v. City of Woodland*,²⁶⁰ a Washington court sought to reconcile section 39.33.010 with section 43.09.210 of the Revised Code, which requires, in part, that property transferred from one local agency to another be priced at its “full value.”²⁶¹ The *Heermann* court acknowledged that section 39.33.010 appeared facially in conflict with section 43.09.210. The first provides local governments unfettered discretion to transfer property upon mutually agreeable terms; the second demands strict compliance with market pricing and would likely require an upfront appraisal.²⁶² Splitting the difference, the court settled on a compromise approach: it concluded that governments transferring property under section 39.33.010 are obligated to negotiate for “full value,” but that this term has a flexible

257. WASH. REV. CODE § 39.33.010 (2021).

258. *Id.*

259. *See, e.g., Heermann v. City of Woodland*, No. 30823-1-II, Wash. Ct. App. LEXIS 481, at *19–21 (Mar. 22, 2005); *Davis v. King Cnty.*, 468 P.2d 679, 680–81 (Wash. 1970). The *Davis* court was analyzing a version of section 39.33.010 that has since been revised, but the core holding that section 39.33.010 operates in tandem with another statutory provision, section 36.34.130, was not premised on the obsolete language. *Id.* at 680–81.

260. 2005 Wash. Ct. App. LEXIS 481, at *19–21.

261. WASH. REV. CODE §§ 39.33.010, 43.09.210 (2021).

262. *See Heermann*, 2005 Wash. Ct. App. LEXIS 481, at *19–21.

and circumstantial meaning, permitting public owners a degree of latitude in demonstrating that adequate value was received.²⁶³

Heermann's conclusion poses a challenge for local administrators. Unable to rest on the permissive language of section 39.33.010, local public owners have been saddled with additional hurdles when seeking to effectuate a valid exchange. Critics of a proposed exchange also have an added source of ammunition when aiming to challenge the exchange and sway opinion against it. Even so, by adopting a compromise approach, *Heermann* nevertheless avoided a more problematic outcome. The court rejected an argument, advanced by the appellants, that the local entity must obtain an appraisal and strictly satisfy "full value" before proceeding with the transaction.²⁶⁴ Appraisal and equal value requirements are particularly fatal to interlocal exchanges. Where *both* parties to the exchange are local public entities and *both* are subject to this same statutory provision, the exchange is functionally only viable where the properties being exchanged appraise at the same amount. The chances are low that two parcels being swapped in the interest of consolidation also happen to appraise independently for the same value.

Unsurprisingly, then, statutory schemes that demand appraisals and equality of value have sidelined exchanges designed to reduce local land fragmentation.²⁶⁵ These demands reflect an understandable concern that public owners and private developers might engage in sweetheart exchange deals.²⁶⁶ But local governments wishing to exchange fragmented property are caught in the cross-hairs.²⁶⁷

263. *Id.* at *20–21.

264. *Id.*

265. *Witt v. Borough of Maywood*, 746 A.2d 73, 83 (N.J. Super. Ct. Law. Div. 1998), *aff'd*, 328 N.J. Super. 343 (App. Div. 2000) (analyzing N.J. STAT. ANN. § 40A:12-16 (West 2021)); *Finn v. Mayor of Norwood*, 592 A.2d 283, 283 (N.J. Super. Ct. App. Div. 1991) (finding invalid an exchange designed to "do away with small spot lots that are contiguous with larger Borough owned pieces and [] help consolidate the ownership of larger tracts of property into the Borough"); *Finn v. Mayor of Norwood*, 545 A.2d 807, 811 (N.J. Super. Ct. App. Div. 1988).

266. *See supra* section IV.D.

267. Equally fatal to interlocal exchanges, although less prevalent, is the requirement that properties be offered for public auction or bid prior to disposition. An auction or bid necessarily anticipates cash consideration being paid for a property, rendering it fundamentally incompatible with the like-for-like negotiations that characterize an exchange. *See State ex. rel. King v. Lyons*, 248 P.3d 878, 897–98 (N.M. 2011) ("We recognize that bargaining and negotiation between buyers and sellers or between buyers prior to a sale negates the essence of what it means to have a public auction free and open to competition. Rather

C. *Exchanges as Distinct from Land Acquisition and Sale*

If the confusion between exchanges and sales forces compliance with too many statutes, and therefore too many layers of process, the second issue set forth above—the inconsistent tendency to treat exchanges as a unique conveyance mechanism—threatens the opposite outcome: it risks interpreting legislative silence as an implicit prohibition where interlocal exchanges are concerned, especially in states where general purpose local governments do not enjoy constitutional home rule immunity. This legislative silence can take several forms. In Utah, for example, a statutory provision grants local governments the ability to acquire property from, and sell property to, another government for agreed-upon consideration.²⁶⁸ The statute raises a relevant question along the lines discussed above: does its language provide for interlocal exchanges where the agreed-upon consideration is another piece of property, rather than cash? Viewing the question in a vacuum, an observer may answer in the affirmative, guided by the belief that the power to buy and sell property between two public entities necessarily confers the power to exchange. But what if other parts of the larger statutory scheme—and indeed, other provisions of the same act—appear to treat interlocal exchanges as unique, separate, and distinct from other interlocal transactions?²⁶⁹

In the absence of any other on-point authority or home rule grant,²⁷⁰ our original question has been complicated. Perhaps the legislature intended its grant of sale and acquisition to encompass exchanges. Perhaps it did not. Or perhaps the legislature did not consciously consider the question of interlocal exchanges either way. In any event, in the absence of judicial direction otherwise, the statutory scheme has clouded a local entity's exchange power. On the risk that exchanges will be interpreted as unique transactions, thereby elevating the legislature's silence from an innocuous

than seeking the highest financial gain through objective means, negotiation and bargaining design a satisfactory exchange for two parties to the exclusion of the public.”).

268. UTAH CODE ANN. § 11-13-214 (LexisNexis 2021).

269. *Id.* § 11-13-202 (differentiating between local governments “providing” and “exchanging” services).

270. The Utah Constitution grants “charter cities” home rule power with respect to “municipal affairs.” UTAH CONST. art. XI, § 5. Yet municipalities must still rely upon delegated legislative authority if they have not adopted a charter, *Provo City v. Ivie*, 94 P.3d 206, 209 (2004), and it appears only one municipality in Utah operates under a home rule charter. See *Amended Tooele City Charter*, TOOLE CITY, <https://tooelecity.org/wp-content/uploads/2014/03/AmendedCityCharter01-02-06.pdf> [https://perma.cc/M4MW-ZCH5].

omission to an implicit prohibition, any interlocal exchange will proceed under a shadow of doubt.

Legislative silence is even more deafening in places where a number of closely related, specific exchange grants have been made to local governments, yet when viewed together these specific grants leave significant holes in a public entity's exchange power. In Ohio, a collection of statutes employ identical language in authorizing local owners to exchange property, free from competitive bidding, with various other public entities—with a regional arts and culture district,²⁷¹ a county transit board,²⁷² a regional transit authority,²⁷³ a regional transit commission,²⁷⁴ and a port authority.²⁷⁵ Other Ohio statutes allow townships to exchange property without public bid and for cities and school districts to exchange property upon mutually beneficial terms.²⁷⁶ Municipalities also hold general power—under both statute and the Ohio Constitution's home rule provision—to sell surplus public property.²⁷⁷

Missing in all these grants is a basic articulation of interlocal land exchanges. Imagine that a city and county wish to exchange surplus property; what source of legal authority can they rely upon? Do they have plenary power to pursue an exchange? And furthermore, if yes, are the city and county obligated to offer the properties for competitive bidding first? One could argue that the Ohio Constitution and Ohio Revised Code have forged a comprehensive scheme that leaves no room for our hypothetical city-county exchange. Under certain circumstances, a public owner may be permitted to exchange property, and under certain circumstances that owner may be able to proceed without a competitive

271. OHIO REV. CODE ANN. § 3381.19 (LexisNexis 2021).

272. *Id.* § 306.06.

273. *Id.* § 306.51.

274. *Id.* § 306.86.

275. *Id.* § 4582.38 (for port authorities created after July 9, 1982); *id.* § 4582.121 (for port authorities existing on July 9, 1982).

276. *Id.* § 505.104 (township exchanges); *id.* § 3313.40 (city and school district exchanges).

277. *Id.* § 721.01; *see also* Young v. City of Dayton, 232 N.E.2d 655, 656 (Ohio 1967) (the Ohio Constitution's grant to municipalities to exercise "local self-government" includes the power to convey surplus public property). The Ohio Constitution also endorses property exchanges "for industry, commerce, distribution, and research, to make or guarantee loans and to borrow money and issue bonds or other obligations to provide moneys for the acquisition, construction, enlargement, improvement, or equipment, of [] property, structures, equipment and facilities." OHIO CONST. art. VIII, § 13. The plain reading of this language does not cover exchanges of surplus property to reduce fragmentation.

bid process. But otherwise, the comprehensive scheme arguably serves to create an implicit prohibition wherever no explicit grant exists.

These questions and arguments again underscore the uncertainty—or at minimum, the potential for uncertainty—that characterizes local land exchanges. Efforts to consolidate fragmented land are prime victims of the resulting legal muddle. The issue comes to a head most conspicuously in jurisdictions where public owners are expressly encouraged to exchange land in the interest of consolidation—yet where legislative silence nevertheless still clouds interlocal exchange power. Section 94.3495 of the Minnesota Statutes offers a compelling example. The law empowers the State of Minnesota to exchange land with local governments upon the approval of a statutorily created land exchange board.²⁷⁸ In granting this authority, section 94.3495 recognizes exchanges as a unique form of property conveyance and squarely identifies land fragmentation as its overriding purpose. “The purpose of this section is to expedite the exchange of public land ownership,” the statute reads. “Consolidation of public land reduces management costs and aids in the reduction of forest fragmentation.”²⁷⁹

This language indicates that the legislature not only considered and understood the problem of land fragmentation, but also that intergovernmental land exchanges were identified as a solution Minnesota law should promote. Even so, section 94.3495 is plainly limited to exchanges conducted by the state, and no similar law addresses exchanges between local entities with the same degree of breadth. Instead, as in Ohio, a constellation of statutes provides local governments only with specific exchange authority under specific circumstances.²⁸⁰ Just as in Ohio, then, local administrators are confronted with uncertainty when pursuing an exchange with another local government. Even more so than in Ohio, however, the statutory scheme in Minnesota highlights the core issues explored in this Article: local exchange authority is clouded notwithstanding a clear legislative intent to address fragmented public land at the state level.

278. MINN. STAT. § 94.3495 (2021).

279. *Id.*

280. *See id.* § 500.222 (local governments may exchange land for certain agricultural property); *id.* § 282.13 (certain cities may exchange certain tax-forfeited property); *id.* § 448.21 (certain cities may exchange property to be used as parks or playgrounds); *id.* § 282.01 (Minneapolis may exchange certain tax-forfeited property).

D. *The Resulting Muddle*

The end result is a muddled body of law and local power. Even where the value of intergovernmental land exchanges is understood—and especially where it is not—the ability of local entities to exchange surplus public land is a question that too often falls through the cracks of the controlling legal framework. Due to inconsistent perspectives on the inherent nature of exchanges, it is not always clear that local authorities are empowered to exchange property with other public owners. Where such power does exist, moreover, it often comes saddled with layers of procedural requirements that threaten to pose hurdles for any land exchange, and it may especially complicate interlocal ones. Indeed, the legal authority for public-private exchanges counterintuitively appears clearer than the authority to engage in public-public exchanges, notwithstanding the greater capacity for abuse that hounds the former.²⁸¹

The functional impact of this murky regime is evident, as a number of the cases cited in this Article found a local government's exchange invalid on procedural or ultra vires grounds.²⁸² But the more widespread impact is likely subtler in nature: the legal framework discourages local government administrators from even exploring exchanges, driven by the possibility and fear that their authority rests on less-than-firm grounds. When an interlocal exchange is actually consummated, the risk still remains that the exchange can later be questioned as invalid. In an environment where stakeholders are prone to inertia,²⁸³ even the shadow of risk can effectively dissuade meaningful action, all the more so where such action is not piecemeal or bilateral in nature (e.g., a one-time exchange of trail parcels in Bloomington, Indiana²⁸⁴) but rather more systematic (e.g., an assembled exchange between multiple public owners).

281. See *supra* section IV.D.

282. See, e.g., *Finn v. Mayor of Norwood*, 592 A.2d 283, 283 (N.J. Super. Ct. App. Div. 1991); *Heermann v. City of Woodland*, No. 30823-1-II, 2005 Wash. Ct. App. LEXIS 481, at *22 (Mar. 22, 2005); *Tuten v. City of Brunswick*, 418 S.E.2d 367, 370 (Ga. 1992); *Campbell v. First Baptist Church*, 250 S.E.2d 68, 75 (N.C. Ct. App. 1978); *Fox v. Mayor of Chambersburg*, 744 A.2d 808, 810 (Pa. Commw. Ct. 2000); *Young*, 232 N.E.2d at 656; see also *State ex. rel. King v. Lyons*, 248 P.2d 878, 901 (N.M. 2011) (in the context of school trust land).

283. See *supra* note 98 and accompanying text.

284. See *supra* notes 139–44 and accompanying text.

The outcome is a sharp contrast from the federal land exchange model. At the federal level, exchanges are expressly authorized and facilitated, thereby creating a systematic approach to land consolidation under the FLPMA's process.²⁸⁵ The FLPMA offers a procedural rubric for exchanges and establishes land consolidation as a normative value. With few exceptions, the concept and fundamental rationale of exchanges do not exist in the local government legal framework. Instead, when it does occur, an exchange is more often a one-off transaction, conducted piecemeal and for purposes of a specific project.²⁸⁶

In this manner, land exchanges speak to the larger problem of opaque local government power. A local entity may arguably hold authority to take a given action, but where the scope or existence of local power is not clear, governments are necessarily hesitant to explore an idea and less likely to act.²⁸⁷ A local government's apparent, perceived, or intended power is not always in lockstep with the power it can comfortably wield in practice.²⁸⁸ In certain areas of governance, a local entity may be motivated to implement policy notwithstanding any confusion about the state of the law because the policy addresses an issue of significant political import to the community or its leadership. Public land fragmentation does not enjoy this measure of momentum. In these cases, robust plenary grants of local authority are especially crucial. It is not sufficient that a local government *might* have the power to conduct land exchanges. Rather, here, the controlling legal framework should expressly and affirmatively confer the power, as a consequence of both facilitating the process and shaping norms as to its inherent value.

CONCLUSION

Fragmented public land is ubiquitous across American cities. Left alone, the current status quo serves to make publicly owned

285. See *supra* section IV.B.

286. See *supra* notes 139–44 and accompanying text (providing an example of a one-off local government exchange); *supra* notes 213–15 and accompanying text (providing another example).

287. This issue was explored in DAVID J. BARRON, GERALD E. FRUG & RICK SU, *DISPELLING THE MYTH OF HOME RULE: LOCAL POWER IN GREATER BOSTON* (2004). The authors interviewed local government officials in the Boston area and found a “general confusion regarding home rule authority” that regularly prompted “administrators to abandon a course of action.” *Id.* at 9–12.

288. See *supra* note 27 and accompanying text.

surplus property more a hindrance than an asset, imperiling development and stewardship objectives even as local governments face deepening economic malaise. There is no miracle cure for the issue. Yet compared with the alternatives, land exchanges offer a practical and politically palatable solution. The concept acknowledges that underpinning fragmented land lies fragmented resources, political power, and political will. A land exchange does not require government leaders to muster the same degree of resources, power, and will that other possible solutions—such as ownership consolidation or interlocal agreements—may entail.²⁸⁹ And land exchanges have a proven track record at the federal level of reducing public land fragmentation.

The initial challenge, therefore, is to start bridging the gap between the plain practical value of land exchanges and the murky legal framework that unevenly empowers them. Promoting interlocal exchanges as a viable tool for public land consolidation requires legislative action in most states. To transform the law of local land exchanges—from a clouded and inconsistent framework to an explicit and affirmative one—legislatures in many states can look to those jurisdictions where their counterparts have more squarely addressed the issue. A couple states have specifically endorsed land exchanges as a response to fragmentation.²⁹⁰ A couple others have not used the same purposivist language, but have still created a legal scheme that clearly authorizes interlocal exchanges in practice.²⁹¹ Both approaches offer valuable guidance.

Yet any meaningful attempt to encourage land exchanges on a systematic basis would be remiss to overlook the federal model, as codified under the FLPMA, and particularly the creative and adaptive concept of assembled exchanges. Of course, while federal laws and initiatives do not neatly translate at the state and local levels,²⁹² the central principles of the federal exchange approach are

289. See *supra* section III.A (regarding ownership consolidation); *supra* section III.B (regarding interlocal agreements).

290. See IDAHO CODE § 31-808 (2021) (authorizing county exchanges in order to “consolidate county real property”); MINN. STAT. § 94.3495 (2021) (“The purpose of this section is to expedite the exchange of public land ownership.”).

291. See *supra* notes 222–28 and accompanying text (discussing the statutory exchange framework in South Dakota).

292. See Richard C. Schragger, *Reclaiming the Canvassing Board: Bush v. Gore and the Political Currency of Local Government*, 50 BUFF. L. REV. 393, 404–05 (2002) (discussing distinctions of institutional competency between local and nonlocal governments); Davis, *supra* note 15, at 128 (arguing, in the context of public land management, that “the political

nevertheless applicable. Any effort to incorporate these principles into state law would draw upon the success of the FLPMA, particularly with respect to public-public exchanges, and it would make an unambiguous statement—to local administrators, judges, and members of the public alike—that exchanges offer a valuable tool in the public land administration toolbox.

In particular, four salient features of the federal model could facilitate and encourage interlocal land exchanges.

First, drawing upon § 206(a) of the FLPMA, local public landowners could be granted express plenary authority to conduct interlocal land exchanges, notwithstanding and independent of any other general authority to acquire and dispose of property.²⁹³ Such authorization would clearly signal that exchanges are viable and useful land management tools. In light of existing precedent, moreover, an exchange scheme should go a step further in distinguishing between interlocal land exchanges, on the one hand, and the acquisition and disposition of property on the other. It should also expressly contrast a grant to conduct *interlocal* exchanges with public-private property transfers, mitigating against a concern that the legislature has created a loophole divorced from common sense.²⁹⁴

Second, drawing upon § 206(b) of the FLPMA, local public owners could be tasked specifically with considering the interests of “better [public] land management” when assessing a potential exchange, a consideration that would incorporate the goal of land consolidation as a solution to fragmented public property holdings.²⁹⁵ Indeed, a hypothetical exchange scheme at the local level could be even more explicit than the federal model in promoting consolidation as a paramount objective; instead of one factor among a group of competing considerations that inform an agency’s

behaviors and dynamics embedded [at the local government level] are not necessarily a miniature version of the federal land management model,” but “[r]ather, intrinsic differences exist between the structure and nature of federal and local agencies”).

293. 43 U.S.C. § 1716; *see also* U.S. GOV’T ACCOUNTABILITY OFF., B-318274, BUREAU OF LAND MANAGEMENT AND GENERAL SERVICES ADMINISTRATION—SELECTED LAND TRANSACTIONS 2 (2010) (“Although BLM has specific authority to sell land, this authority is separate and distinct from its authority to exchange land.”).

294. *See, e.g., supra* note 228 and accompanying text (discussing the distinctions made in South Dakota’s statutory scheme between public-public and public-private exchanges).

295. 43 U.S.C. § 1716; *see also supra* note 182 and accompanying text (discussing the interest of consolidation as promoted in the FLPMA framework).

assessment of “public interest,” the issue of fragmentation and concept of consolidation could be elevated to the forefront.

Third, as with the federal regulatory framework—which provides that “[e]xchanges may be proposed by the [agency] or by any person, State, or local government”²⁹⁶—a scheme for interlocal public land exchanges could expressly permit any local governmental entity (for example, any municipality, county, special purpose government, or other subdivision of the state) to propose a land exchange to another governmental entity. Similar to the federal model, creating a proposal mechanism combats administrative inertia by encouraging parties to submit proposals and receiving entities to consider them.

Finally, interlocal exchange authority could endorse and promote the use of assembled land exchanges as an adaptive response to fragmented public property. Given the procedural value of embarking upon assembled exchanges,²⁹⁷ the statutory scheme could push local governments to start this process and enter into expansive agreements to pool, assemble, and redistribute land. As with land exchanges more generally, this encouragement could take the form of a proposal mechanism, whereby one local government can formally propose an assembled exchange agreement to one or more other entities. The power to propose an assembled exchange could likewise be given to residents via a ballot initiative or referendum. Drawing upon the federal model, significant flexibility should be baked into the grant such that local administrators and stakeholders have sufficient time to construct and conduct the exchange’s component transactions.

These salient features of the FLPMA scheme would meaningfully promote the systematic use of land exchanges among local governments, who would be empowered to pursue exchanges in the interest of consolidation. Indeed, the very juxtaposition in local power—between a limited ability to sell property to private parties and a permissive ability to conduct public exchanges—may well incentivize public-public consolidation not simply as an affirmative goal, but also as an alternative to more procedurally burdensome public-private disposition or land assembly efforts.

These measures may also offer secondary interlocal benefits. If governments are expressly empowered to submit an exchange

296. 43 C.F.R. § 2201.1 (2020).

297. See *supra* section III.D.

proposal to other public owners or enter into an assembled exchange pool, the process may facilitate conversations about mutual interests in land management more broadly, even if the exchange itself does not ultimately come to fruition. A failed exchange could also promote introspection. Perhaps the exchange failed because one or more entities did not have clear data or disposition policies in place.²⁹⁸ Here, the failed exchange may offer a wakeup call for public administrators to review their property holdings and attendant management practices.

The fragmentation of public land is a multifaceted local government issue. Its causes are diverse, as are its adverse effects. The externalities posed by fragmentation—on local management, governance, and power—are very real, yet low visibility places the issue on the political backburner. For these reasons and more, there is no easy, magic pill solution to the problem of fragmentation. Yet land exchanges promise a starting point. They offer a relatively simple and palatable mechanism for ameliorating thorny land governance issues. A significant impediment remains, however: the use of interlocal land exchanges depends upon, and is limited by, an inconsistent and often murky legal scheme, with interlocal exchange power often falling between the cracks of local authority. It is apt time to shore up these cracks in the law and keep pace with practicality.

298. See *supra* notes 81–82 and accompanying text.