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ESSAY

PENN CENTRAL TAKE TWO

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Abstract

Penn Central v. New York City *is the most important regulatory takings case of all time. There, the Supreme Court upheld the historic preservation of Grand Central Terminal in part because the City offset the burden of the landmarking with a valuable new property interest—a transferable development right (TDR)—that could be sold to neighboring property. Extraordinarily, 1.2 million square feet of those very same TDRs, still unused for over forty years, are the subject of newly resolved takings litigation. According to the complaint, the TDRs that saved Grand Central were themselves taken by the government, which allegedly wiped out their value by permissively upzoning neighboring property where they could have been used. The litigation is not only a captivating postscript to* Penn Central, *but also a compelling context for examining the category of regulatory property more generally. Regulatory property—such as TDRs and pollution credits, for example—is increasingly important and valuable, but raises complicated trade-offs between the need for stability in property-based entitlements and policy flexibility in governance. This Article ultimately argues that the creation of regulatory property should not prevent policy changes far into the future.*

Introduction

Without any question, the most important case interpreting the Fifth Amendment's Takings Clause is *Penn Central Transportation Co. v. New York City*.[1] It involved the historic preservation of Grand Central Terminal, the majestic railroad terminal in the heart of Manhattan. With its landmarking, the City of New York prevented the terminal's owner—the Penn Central Authority—from developing a massive high-rise atop the ornate Beaux-Arts

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1 438 U.S. 104 (1978).

building. When the Penn Central Authority sued, claiming that the landmarking was a taking of its valuable development rights, the United States Supreme Court articulated the eponymous ad hoc three-factor balancing test and held that the landmarking was not a taking.[2] In reaching its conclusion, the Court focused partly on the fact that the City had enacted a regime of transferable development rights that allowed the Penn Central Authority to transfer at least some of the building's development potential to its immediate neighbors.[3] Now, extraordinarily, 1.2 million square feet of the very same TDRs from that original landmarking—unused for over forty years—are back in the news as the subject of a new round of takings litigation.[4] New York City recently relaxed the zoning restrictions in the area around Grand Central, and in so doing allegedly wiped out much—if not all of—the value of the remaining unused TDRs.[5] The owner of the TDRs sued, arguing that the City's favorable treatment of neighboring property was a taking of the original *Penn Central* TDRs.[6] The case has just been settled on terms that, while confidential, were characterized as *de minimis* by knowledgeable insiders.[7] But the poetic injustice of the situation seems striking. The TDRs that saved the original landmarking of Grand Central were themselves allegedly taken through the upzoning of neighboring property.

Even though the case has been resolved, the fact of the litigation raises a number of important substantive and conceptual issues that go to the heart of the Takings Clause and the nature of regulatory property. If the mere

2 *Id.* at 124 ("The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action." (citation omitted)).

3 *Id.* at 137 ("[T]o the extent appellants have been denied the right to build above the Terminal, it is not literally accurate to say that they have been denied *all* use of even those pre-existing air rights. Their ability to use these rights has not been abrogated; they are made transferable to at least eight parcels in the vicinity of the Terminal . . . .").

4 Complaint ¶ 5, Midtown TDR Ventures LLC v. City of New York, No. 1:15-cv-07647 (S.D.N.Y. Sept. 28, 2015) [hereinafter Compl.]; *see also* Charles V. Bagli, *Owner of Grand Central Sues Developer and City for $1.1 Billion Over Air Rights*, N.Y. TIMES (Sept. 28, 2015), http://www.nytimes.com/2015/09/29/nyregion/owner-of-grand-central-sues-developer-and-city-for-1-1-billion-over-air-rights.html (describing litigation).

5 Compl., *supra* note 4, ¶ 10; *see also* Michael Pappas, *A Right to be Regulated?*, 24 GEO. MASON L. REV. (forthcoming 2016) (describing litigation); Samantha Peikoff Adler, Note, *Penn Central 2.0: The Takings Implications of Printing Air Rights*, 2015 COLUM. BUS. L. REV. 1120 (same); Tim Cramton, *Penn Central's Revenge*, CORNELL J.L. & PUB. POL'Y (Nov. 3, 2015), http://jlpp.org/blogzine/penn-centrals-revenge/ (same).

6 Compl., *supra* note 4, ¶¶ 111–18.

7 *See* Notice of Dismissal, Midtown TDR Ventures LLC v. New York, No. 1:15-cv-07647 (S.D.N.Y. Aug. 10, 2016); *see also* Charles V. Bagli, *Owners of Grand Central Drop Lawsuit, Clearing Way for a 1,401-Foot-Tall Skyscraper*, N.Y. TIMES (Aug. 10, 2016), http://www.nytimes.com/2016/08/11/nyregion/owners-of-grand-central-drop-lawsuit-clearing-way-for-a-1401-foot-tall-skyscraper.html ("SL Green paid the investment group a sum, which executives who had been briefed on the deal but requested anonymity because they were not authorized to discuss the details described as 'de minimis.'").

existence of TDRs transforms favorable upzonings into impermissible takings, then a TDR program threatens to lock in land use regulations against subsequent regulatory change. That, in turn, is problematically entrenching and binds the hands of future governments.[8] However, if the value of TDRs can be so easily undermined, the viability of TDR programs may be in jeopardy. This Article therefore charts a careful middle path, one that balances the value of stability in the expectations of rights holders against the need for policy flexibility in the future. In particular, it argues that promises of regulatory stability should not be implied but should be subject to a clear statement rule, and that even in the presence of a clear statement, their strength should decrease over time.

This tension between stability and flexibility is inherent in regulatory precommitments. It also explains the complex stakes of the new *Penn Central* litigation for developers and preservationists alike, whose natural attitudes towards the Takings Clause were turned on their ear. Developers and their allies generally want looser land use regulations.[9] They are inclined to favor upzonings and regulatory changes that increase development potential. Indeed, a criticism of TDR regimes from this perspective is that they encourage governments to enact unduly restrictive zoning ordinances precisely to enhance the value of the TDRs.[10] On the other hand, developer interests also tend to favor expansive constitutional protection for property and generally advocate for interpreting the Takings Clause to protect settled expectations, whatever the source.[11] Invoking the Takings Clause to thwart more permissive land use regulations starkly reveals this tension.

Simultaneously, preservationists and others in favor of broad land use authority have come to rely on TDRs as an important tool. New York City used TDRs to build the innovative High Line Park, for example, and regularly uses TDRs to facilitate historic preservation and other limits on development.[12] While TDRs are controversial, they serve as a potent lubricant for

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8 *See* Christopher Serkin, *Public Entrenchment Through Private Law: Binding Local Governments*, 78 U. CHI. L. REV. 879 (2011).

9 *See, e.g.*, David Schleicher, *City Unplanning*, 122 YALE L.J. 1670, 1675 (2013) ("[B]ig cities allow relatively untrammeled growth because of the political influence of developers.").

10 *See, e.g.*, Steven J. Eagle, *The Perils of Regulatory Property in Land Use Litigation*, 54 WASHBURN L.J. 1 (2014).

11 *See generally* WILLIAM FISCHEL, REGULATORY TAKINGS (1995); *cf.* Joseph William Singer, *The Ownership Society and Takings of Property: Castles, Investments, and Just Obligations*, 30 HARV. ENVTL. L. REV. 309, 312 (2006) ("Conservatives tend to view ownership as embodying both expansive rights and strong protections from government interference. The conservative framework sees property and regulation as opposites: broad property rights mean less regulation and more regulation means less protection for property rights.").

12 *See, e.g.*, FURMAN CTR. FOR REAL ESTATE & URBAN POLICY, UNLOCKING THE RIGHT TO BUILD: DESIGNING A MORE FLEXIBLE SYSTEM FOR TRANSFERRING DEVELOPMENT RIGHTS 7 (2014), http://furmancenter.org/files/FurmanCenter_UnlockingtheRighttoBuild.pdf (describing use of TDRs to preserve theaters in Times Square and the High Line park); N.Y. CITY DEP'T OF CITY PLANNING, A SURVEY OF TRANSFERABLE DEVELOPMENT RIGHTS MECHANISMS IN NEW YORK CITY 23–25, 47 (2015) (same). For a selective list demonstrating the

many regulatory innovations.[13] Preservationists therefore could reasonably worry going forward that the City's decision to rezone will undermine confidence in TDRs broadly and so reduce or even remove their utility in the future. These groups should naturally be inclined to try to protect the value of the TDRs from the City's upzoning. On the other hand, they generally favor fewer legal protections for private property and a narrower conception of the Takings Clause.[14] There is something ironic about preservationists arguing for takings protection for TDRs, while arguing against applying the Takings Clause to protect development from more restrictive regulations generally, like the original landmarking of Grand Central itself.

Simply the fact of this new chapter in the *Penn Central* litigation is bound for fame (or infamy) and has instantly become a critical addendum to the most-studied takings case of all time.[15] Just the story behind the litigation is fascinating and worthy of attention. But the questions raised by the litigation implicate the ongoing viability of TDRs in New York City and beyond. More than that, too, the new litigation offers an unusual insight into the value and protection of "regulatory property"[16] and the entrenching effect it can have on public policy.

The concept of regulatory property is not new, and indeed has been the topic of important scholarship since at least the 1960s.[17] But regulatory property has become increasingly important and valuable in our modern economy, and includes such assets as pollution credits, fishing quotas, taxi medallions, financial guarantees, and the telecommunications spectrum, among many others.[18] Extending takings protection to these forms of prop-

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breadth of TDRs, see ARTHUR C. NELSON ET AL., THE TDR HANDBOOK: DESIGNING AND IMPLEMENTING TRANSFER TO DEVELOPMENT RIGHTS PROGRAMS 131–40 (2012) (surveying examples); Matthew P. Garvey, *When Political Muscle Is Enough: The Case for Limited Judicial Review of Long Distance Transfers of Development Rights*, 11 N.Y.U. ENVTL. L.J. 798, 802 (2003) (describing TDR regimes); Andrew J. Miller, *Transferable Development Rights in the Constitutional Landscape: Has* Penn Central *Failed to Weather the Storm?*, 39 NAT. RESOURCES J. 459, 466 n.35 (1999); *see also id.* at 512 app. A (compiling list of TDR programs).

13 *See, e.g.*, NELSON ET AL., *supra* note 12, at 15–25 (evaluating pros and cons of TDRs); Miller, *supra* note 12 (examining legal challenges to TDRs); *cf.* Steven J. Eagle, *Environmental Amenities, Private Property, and Public Policy*, 44 NAT. RESOURCES J. 425, 437 (2004) (describing the incentive of government officials to achieve goals "off budget" (quoting Pennell v. City of San Jose, 485 U.S. 1, 22 (1988) (Scalia, J., concurring in part, dissenting in part))).

14 *See, e.g.*, JOHN R. NOLON, PROTECTING THE ENVIRONMENT THROUGH LAND USE LAW: STANDING GROUND 96–97 (2014); J. Peter Byrne, *Regulatory Takings Challenges to Historic Preservation Laws After* Penn Central, 15 FORDHAM ENVTL. L. REV. 313 (2004).

15 *See, e.g.*, Cramton, *supra* note 5 ("While it is unclear how the court will decide, it is clear that the controversy surrounding *Penn Central* is back—and Property professors might need to update their casebooks accordingly.").

16 *See* Eagle, *supra* note 10, at 1 ("Regulatory property refers specifically to governmental dispensations of special privilege to individuals that are legally or functionally regarded as property, and are bestowed for the articulated purpose of furthering the public good.").

17 *See, e.g.*, Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964).

18 Thanks to Nestor Davidson for highlighting some of these examples.

erty, however, can transform the regulatory regime that creates them into a kind of one-way ratchet that limits governmental power. Having created fishing rights or pollution credits, can a later government change course and regulate more directly—say by prohibiting certain kinds of fishing or pollution outright? TDRs raise precisely this problem, and so the new Grand Central litigation offers an unusually crystalized opportunity to examine these important questions. Even without a judicial resolution to the litigation, the genie is out the bottle, and the issues need to be addressed.

This Article tells the captivating story of the new Grand Central litigation, identifies the important tensions it reflects between regulatory stability and the need for change, and ultimately proposes a kind of clear-statement rule that will preserve the viability of TDRs going forward. The Article ultimately and provocatively argues that the strength of regulatory promises—here, that zoning in the receiving area for the TDRs would not change—naturally decreases over time. While the value of regulatory property depends on legal stability, there is a countervailing need for regulatory flexibility that increases as time passes. It is therefore unreasonable for investors to assume that regulatory promises will last in perpetuity. This Article concludes by identifying the self-amortizing character of such regulatory property.

I. The Saga of the Grand Central TDRs

In 1965, following the destruction of the original Penn Station, New York City adopted a comprehensive landmarks law that created a preservation commission with the power to protect individual buildings as well as entire neighborhoods.[19] In 1967, after public hearings, the commission designated Grand Central Terminal as one of the early landmarks. Only a few months later, the Penn Central Authority—the owner of Grand Central at the time—entered into a partnership with a developer to build a fifty-five-story office building on top of the terminal. When the landmarks commission rejected the proposal, Penn Central sued, claiming that the commission's actions amounted to a taking of the air rights above Grand Central.

According to the Court, the landmarking of Grand Central was not a taking, in part, because of the offsetting benefits that Penn Central received from transferable development rights.[20] Those TDRs effectively allowed Penn Central to transfer its air rights over Grand Central to adjacent property. Because they were sufficiently valuable, the landmarking did not effect an unconstitutional taking.[21]

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19 Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 107 (describing history of landmark preservation).

20 *Id.* at 137.

21 There are numerous questions about the TDRs that have been addressed in depth in the literature, even if they remain unresolved. One is whether the TDRs counted as just compensation for the landmarking of Grand Central, or whether they blunted the regulation's impact such that there was no taking and therefore no compensation was required at all. *See, e.g.*, Miller, *supra* note 12 (examining problem); Paul Merwin, Note, *Caught*

New York (and many other cities) regularly use TDRs to minimize the harm from land use regulations, or as part of a bargained-for exchange for air rights.[22] If, for whatever reason, a municipality wants to prevent development in a certain location—perhaps for historic preservation—it can create TDRs for the affected property owners. Broadly speaking, those TDR holders can then sell their TDRs to developers who want to build bigger buildings than the applicable zoning regime would otherwise allow. But this interaction between TDRs and zoning requires some additional explanation.

A zoning ordinance limits buildings' bulk by imposing maximum height limits, establishing minimum setbacks from property lines, and—at least in some municipalities—specifying maximum floor area ratios (FARs), among other limits. FAR is particularly important for New York City's TDRs. It refers to the relationship between the size of the lot and the maximum amount of floor space that a building can contain. For example, a 1000-square-foot lot, with an FAR of two, could contain no more than 2000 square feet of floor area. In New York City, TDRs allow developers to transfer FAR from one lot to another, effectively allowing the acquirer to include more floor space in a building.[23] For example, if a lot is subject to an FAR of ten, a developer could acquire TDRs and build, perhaps, to an FAR of fifteen (which might represent as many as ten additional floors if the building only occupies half of the lot, for example). Extra stories resulting from TDRs are particularly valuable because they frequently allow the developer to build higher than neighboring buildings, and higher floors are more valuable than lower ones.[24] In an impressive and thorough study of TDR markets in New

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Between Scalia and the Deep Blue Lake: The Takings Clause and Transferable Development Rights Programs, 83 MINN. L. REV. 815, 840 (1999) (discussing whether "TDRs merely represent compensation for a taking"). Another is whether it was important to the outcome in *Penn Central* that the Penn Central Authority owned some of the parcels on which the TDRs could be used. In a subsequent decision, Justice Scalia intimated as much. *See* Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725, 749 (1997) (Scalia, J., concurring in part and concurring in the judgment).

22 *See* NELSON ET AL., *supra* note 12, at 265–83 (listing different TDR programs); Brandon Keith Boffard, Transferable Development Rights in New York City (May 1, 2014) (unpublished manuscript), http://scholarship.shu.edu/student_scholarship/413 (describing TDRs in New York); *see also generally supra* note 12.

23 *See, e.g.*, Vicki Been & John Infranca, *Transferable Development Rights Programs: "Post-Zoning"?*, 78 BROOK. L. REV. 435 (2013) (describing TDR programs and how they work).

24 *See, e.g.*, Daniel Geiger, *The Little Loophole Helping Developers Build Their Supertall Towers Even Higher*, CRAIN'S N.Y. BUS. (Jan. 17, 2016), http://www.crainsnewyork.com/article/20160117/REAL_ESTATE/160119882/the-little-loophole-helping-developers-build-higher-supertall-skyscrapers-in-new-york-city ("'Higher floors are more valuable,' [developer] Beninati said. 'It's a bedrock rule of real estate.' The value of height can vary significantly, said Ryan Schleis, vice president of research and analytics at brokerage Corcoran. 'In general, a floor premium, controlling for other factors such as view, is 0.5% to 2%,' he said.").

York City, the Furman Center found that while TDR values can fluctuate dramatically, there is a robust market for them.[25]

TDRs, however, could undermine the integrity of a zoning ordinance if they could be used anywhere in any amount. It is one thing to add fifteen stories to a building in midtown Manhattan; it is another altogether to do the same in brownstone Brooklyn. For this reason, New York City's TDR regime only allows the receiving property to exceed the FAR limits and not other bulk limits such as height or setback requirements.[26] Moreover, TDRs typically restrict the so-called receiving area where they can be used, and sometimes the amount that can be transferred to any one lot.[27] The receiving area for the Grand Central TDRs was originally limited to only property contiguous to, cattycornered from, or directly facing Grand Central, or to "any chain of adjacent lots in the same ownership as the landmark site."[28]

The narrowly circumscribed receiving area made the Grand Central TDRs quite difficult but not impossible to use. In 1979, Penn Central transferred nearly 75,000 square feet of TDRs to the Philip Morris building across from Grand Central.[29] It also sought to transfer an additional 800,000 square feet of TDRs to a building several blocks away, reasoning that the building was in a "chain of adjacent lots" because it was connected via the underground railroad tracks that Penn Central owned.[30] The City objected to this argument but partially relented by expanding the receiving area of the TDRs within a newly-identified "midtown subdistrict." This expanded to twenty-one the number of eligible lots that could receive the TDRs. As a result, Penn Central subsequently transferred over 300,000 square feet of TDRs to the new receiving area. Nevertheless, forty years later, Penn Central still owned approximately 1.2 million square feet of unused TDRs from the original Grand Central landmarking.[31] By way of comparison, a 1.2 million-square-foot development in Los Angeles could provide a fifty-six-bed hospital,

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25 FURMAN CTR. FOR REAL ESTATE & URBAN POLICY, BUYING SKY: THE MARKET FOR TRANSFERABLE DEVELOPMENT RIGHTS IN NEW YORK CITY 9 (2013) ("[P]rices paid in individual transactions varied widely, from less than $50 to more than $500 per square foot.").

26 Other TDR regimes allow property owners to transfer additional height, or other forms of density, as well. *See* NELSON ET AL., *supra* note 12, at 106 ("Development rights may be calculated and allocated in accordance with factors including dwelling units, area, floor area, floor area ratio, height limitations, traffic generation, or any other criteria that will quantify a value for the development rights . . . ." (quoting GA. CODE ANN. § 36-66A-1 (2016))).

27 Transfers can be effected through zoning lot mergers, in which case the receiving property must be adjacent, or through the creation of special districts that are nevertheless narrowly defined. For an excellent and thorough description of these and other program designs, see Been & Infranca, *supra* note 23.

28 ROBERT C. ELLICKSON ET AL., LAND USE CONTROLS: CASES AND MATERIALS 158 (4th ed. 2013) (quoting N.Y. City Planning Comm'n, No. CP-20938, in Calendar of the City of New York, Nov. 5, 1969, at 875 (describing history of Grand Central TDRs)).

29 *See id.*

30 *See id.*

31 *See* Compl., *supra* note 4, ¶ 5.

nearly 900 units of housing, shops, and 1500 parking spaces.[32] In Nashville, Tennessee, a massive new convention center is listed at 1.2 million square feet; it spans six square blocks and nearly a quarter of the downtown.[33] This is an enormous amount of development potential contained in the unused TDRs.

In 2006, a consortium of investors, Midtown TDR Ventures ("Midtown Ventures"), purchased Grand Central.[34] The terminal itself had an entirely predictable and—according to Midtown Ventures—limited value because it is subject to a 300-year ground lease with the Metropolitan Transit Authority at "minimal rent."[35] But the New York real estate market has been incredibly hot, and Midtown Ventures anticipated that the area around Grand Central was ripe for redevelopment. Midtown Ventures claims that the TDRs were, in fact, the principle value in the transaction.[36]

Midtown Ventures was right, at least in part. Shortly after purchasing Grand Central, a developer—SL Green—acquired property next door and formulated plans to develop a sky-high new building named One Vanderbilt for its address on Vanderbilt Place. Green proposed a nearly 1500-foot-tall building that would tower over both the Empire State and Chrysler buildings nearby.[37] It is expected to be one of the tallest buildings in New York City. As proposed, it also far exceeded the FAR on the lot, and so Midtown anticipated being able to sell as much as half of its 1.2 million square feet of TDRs to SL Green.[38]

Simultaneously, however, New York City undertook plans—allegedly in consultation with, and at the behest of, SL Green[39]—to rezone the East Midtown corridor around Grand Central, comprising a total of five lots including One Vanderbilt. On May 27, 2015, the City adopted the rezoning, allowing SL Green to build One Vanderbilt without acquiring any TDRs from Mid-

32 *See What Does a Million-Square-Foot Development Look Like? Echo Park May Soon Find Out*, EASTSIDER (Aug. 26, 2009), http://www.theeastsiderla.com/2009/08/what-does-a-million-square-foot-development-look-like-echo-park-may-soon-find-out/.

33 *See* Keith Schneider, *Nashville's Skyline Being Reshaped by Building Boom*, N.Y. TIMES (Oct. 13, 2015), http://www.nytimes.com/2015/10/14/realestate/commercial/nashvilles-skyline-being-rebuilt-by-building-boom.html.

34 *See* Sam Roberts, *Grand Central's Flesh-and-Blood Landlord*, N.Y. TIMES: CITY ROOM BLOG (Jan. 29, 2013, 3:16 PM), http://cityroom.blogs.nytimes.com/2013/01/29/grand-centrals-flesh-and-blood-landlord/?_r=0 (noting that Midtown Trackage Ventures purchased Grand Central in 2006).

35 *See* Compl., *supra* note 4, ¶ 5.

36 *See id.* (stating that "Midtown made its investment in order to acquire these TDRs").

37 *See, e.g.*, Jessica Dailey, *City Council Green Lights 1,500-Foot One Vanderbilt*, CURBED N.Y. (May 27, 2015), http://ny.curbed.com/2015/5/27/9956470/city-council-green-lights-1500-foot-one-vanderbilt (describing development); *see also* Amy Plitt, *New Looks at 1,500-Foot One Vanderbilt Amid NYC's Skyline*, CURBED N.Y. (Dec. 4, 2015), http://ny.curbed.com/2015/12/4/9894320/new-looks-at-1500-foot-one-vanderbilt-amid-nycs-skyline ("The 1,500-foot-tall tower pretty much dwarfs [the Chrysler Building and the Empire State Building] . . . .").

38 *See* Compl., *supra* note 4, ¶ 54.

39 *Id.* ¶ 8.

town Ventures, so long as it invested in certain infrastructure and transit improvements instead.[40] The effect, according to Midtown Ventures, was to transfer $475 million from Midtown Ventures to SL Green, because SL Green no longer needed to acquire the TDRs to build the planned skyscraper.[41] And this, according to Midtown Ventures, constituted a regulatory taking of the TDRs.

Midtown Ventures' complaint set forth a number of causes of action. It alleged spot zoning, unjust enrichment, and also a provocative claim that the City engaged in impermissible "zoning for dollars."[42] However, it was the pure takings claim that raised the most important conceptual issues.[43]

During the summer of 2016, the original investors in Midtown Ventures sold their stake in the TDRs. One new investor reportedly paid $63 million for a share, and other investors included K. Thomas and Frederick Elghanayan, real estate developers in New York City, who paid an undisclosed sum.[44] The new owners of Midtown Ventures quickly changed their approach to the lawsuit and settled.[45] It is difficult to know their motives, but one can speculate that the Elghanayans anticipate using the TDRs themselves, perhaps for a new project in the receiving area.[46] Regardless, the case settled quickly, and One Vanderbilt is back on track.

The question that the litigation presented, however, remains pressing: whether the existence of the TDRs means that the government cannot upzone property in the receiving area without violating the Takings Clause. That, in turn, depends upon the extent to which the Takings Clause protects regulatory property—i.e., property that is wholly the creation of the state—from regulatory changes that significantly impact its value. This question is not limited to TDRs, but implicates government control over all forms of regulatory property, and indeed perhaps over more traditional property as well.

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40 *Id.* ¶¶ 70–71.

41 *Id.* ¶ 79.

42 *Id.* ¶¶ 148–65 (setting forth spot zoning and reverse spot zoning claims); *id.* ¶¶ 166–71 (setting forth unjust enrichment claim); *id.* ¶¶ 140–47 (setting forth "zoning for dollars" claim). The "zoning for dollars" claim alleges that the City, in effect, sold its zoning power by offering additional FAR in exchange for improvements that the City and the Metropolitan Transportation Authority (MTA) were already obligated to undertake. Therefore, the neighborhood did not benefit from the infrastructure improvements required of SL Green, since they would have happened anyway; only the City's coffers improved. *See id.* ¶¶ 95–110; *see also* Mun. Art Soc'y of N.Y. v. City of New York, 522 N.Y.S.2d 800 (N.Y. Sup. Ct. 1987) (invalidating zoning decision that, in effect, exchanged an FAR bonus for cash).

43 *See* Compl., *supra* note 4, ¶ 12.

44 *See* Bagli, *supra* note 7 (describing dismissal of suit).

45 *See id.* ("The new partners promptly abandoned the litigation strategy.").

46 *Cf.* Holly Dutton, *Elghanayan Scion Who Grew up with the New Long Island City*, REAL EST. WKLY. (May 8, 2015), http://rew-online.com/2015/05/08/elghanayan-scion-who-grew-up-with-the-new-long-island-city/ (describing new building projects in Manhattan and Brooklyn).

II. TDRs and the Takings Clause

There are two pieces of conventional wisdom about regulatory takings: (1) the analysis is hopelessly muddled; and (2) governments seldom lose. Neither is quite right. The outlines of takings analysis are by now quite well established, even if the application is difficult to predict in any given case.[47] And, as Professors Jim Krier and Stewart Sterk have recently shown, plaintiffs at least occasionally survive summary judgment.[48] So how should courts analyze takings claims like Midtown Ventures'?

The purpose here is not to predict what a court would actually have done if the case had not settled prior to trial. Midtown Ventures' takings claim raises important theoretical issues that highlight the contested nature of regulatory property. Nevertheless, it is worth first working through the outlines of the relevant doctrinal analysis, at least in cursory fashion, to highlight how and why the more theoretical issues arise.

The relevant regulatory takings standard comes from the original *Penn Central* three-factor ad hoc balancing test that focuses on (1) the character of the regulation; (2) the diminution in value resulting from the regulation; and (3) the extent to which the regulation interferes with distinct (or reasonable) investment-backed expectations.[49] There is little doubt that Midtown Ventures' takings claim would have faced a number of hurdles. The case likely settled as it did because the parties recognized that some might have proven insurmountable.[50]

First, it is not at all clear why the *Penn Central* analysis should be applied to the TDRs alone, instead of to the entire Grand Central parcel.[51] While Midtown Ventures claimed that the terminal itself retains only limited value, the Supreme Court in *Penn Central* rejected that takings claim in 1978 in part because the landmarking of the terminal did not interfere with the ongoing use of property as a railroad terminal, which the Court characterized as con-

47 *See* Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 536–40 (2005) (summarizing takings analysis).

48 James E. Krier & Stewart E. Sterk, *An Empirical Study of Implicit Takings*, 58 Wm. & Mary L. Rev. 35, 58 (2016).

49 For a thorough discussion of each of the elements, see Robert Meltz, *Takings Law Today: A Primer for the Perplexed*, 34 Ecology L.Q. 307 (2007). None of the per se takings rules apply. The upzoning is not a permanent physical occupation, under *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), nor is it a total wipeout of all economically valuable use of the property under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), because the TDRs can still be used on other parcels.

50 *See, e.g.*, Bagli, *supra* note 7 ("Carl Weisbrod, the chairman of the city's Planning Commission, also welcomed the settlement, saying that the de Blasio administration believed that the lawsuit had no merit."). This is so despite Midtown Ventures being represented by Laurence Tribe, the preeminent constitutional scholar. For a lively account of the parties involved, see Charles V. Bagli, *Law Professor Opposes Grand Central Tower Plan*, N.Y. Times (Feb. 4, 2015), http://www.nytimes.com/2015/02/05/nyregion/law-professor-opposes-grand-central-tower-plan.html.

51 The so-called "parcel as a whole" rule is perennially contested. *See, e.g.*, *Lucas*, 505 U.S. at 1016 n.7.

stituting Penn Central's principal expectations regarding the use of its property.[52] The fact that Midtown Ventures purchased the property primarily for the TDRs does not transform them automatically into a distinct interest for constitutional purposes.[53] But assuming arguendo that the TDRs are the relevant property, application of the *Penn Central* factors was still likely to be contested.

The character of the regulation would not have cut one way or another in this case. Typically, this first factor is used only to identify those regulations that amount to permanent physical occupations of property.[54] Even where a court adopts a more capacious approach, the weight of this factor is difficult to predict. On the one hand, a rezoning—and in particular, an upzoning—is a routine regulation that seldom raises takings problems. On the other hand, Midtown Ventures alleged that the upzoning in this instance was the result of favoritism and amounted to a kind of singling out of the TDRs themselves—that the purpose of the rezoning was explicitly to transfer value from Midtown Ventures to SL Green.[55] Evidence of that claim might, in fact, have changed the application of this first factor, depending on how a court applied it. Regardless, this factor is seldom dispositive for the resolution of regulatory takings that do not involve a permanent physical occupation of property by the government.[56]

The diminution in value prong would have required significant factual development. Undoubtedly, upzoning the property around Grand Central reduced the value of Midtown Ventures' TDRs, but the extent of the diminution would have been contested. After all, the receiving area of the TDRs includes twenty-one different parcels, and the rezoning affected only five.

52 *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 136 (1978) ("[T]he New York City law does not interfere in any way with the present uses of the Terminal. Its designation as a landmark not only permits but contemplates that appellants may continue to use the property precisely as it has been used for the past 65 years: as a railroad terminal containing office space and concessions. So the law does not interfere with what must be regarded as Penn Central's primary expectation concerning the use of the parcel.").

53 *Cf.* Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1674–78 (1988) (defining conceptual severance).

54 *See* Thomas W. Merrill, *The Character of the Governmental Action*, 36 VT. L. REV. 649 (2012) (surveying the "character" prong); *see also* John D. Echeverria, *Making Sense of* Penn Central, 23 UCLA J. ENVTL. L. & POL'Y 171, 186–99 (2005) (same).

55 For an argument that the purpose of the Takings Clause is to prevent such singling out, see for example Daniel A. Farber, *Public Choice and Just Compensation*, 9 CONST. COMMENT. 279, 300–03 (1992); John E. Fee, *The Takings Clause as a Comparative Right*, 76 S. CAL. L. REV. 1003, 1004 (2003); Saul Levmore, *Takings, Torts, and Special Interests*, 77 VA. L. REV. 1333, 1338 (1991); *see also* Michael Pappas, *Singled Out*, 76 MD. L. REV. (forthcoming 2016) (evaluating various approaches to "singling out"). *But see* Nestor M. Davidson, *The Problem of Equality in Takings*, 102 NW. U. L. REV. 1, 37–52 (2008) (arguing against an equal-treatment conception of takings liability).

56 *See* Davidson, *supra* note 55, at 30; *see also* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 441 (1982) (articulating the "permanent physical occupation" test).

The TDRs were potentially valuable if they could be used on any of the additional sixteen parcels. But that depends on the likelihood of redevelopment on any other parcel in the receiving area. TDRs, after all, are only valuable when property is developed. If buildings already in place are not likely to be redeveloped anytime in the foreseeable future—as Midtown Ventures in fact claimed[57]—then the impact of the upzoning on the remaining TDRs looks more significant. The dynamic is entirely predictable. The fewer viable receiving lots there are, the greater the bargaining power of the prospective buyer (even monopsony power, at the extreme). And the greater the impact of the rezoning on the value of the TDRs, the more likely it would have been a taking. It is at least plausible that the East Midtown upzoning dramatically decreased the value of the remaining TDRs, as Midtown Ventures alleged in its complaint.[58] Of course, the fact that a new investor reportedly paid $63 million for a share of Midtown Ventures, and other investors more, suggests that the TDRs retained considerable value even after the rezoning.[59] Indeed, the fact of that purchase may have been the nail in the coffin of the takings claim and precipitated the settlement.

The final factor is the most important for defining the content of regulatory property. As originally articulated by the Court in *Penn Central*, this factor concerns the extent to which the regulation interferes with *distinct* investment-backed expectations.[60] Midtown Ventures claims that City officials made representations that the TDRs would remain valuable property at the time Grand Central was originally landmarked.[61] And in fact, the Penn Central Authority had successfully sold over one million square feet of TDRs in the past, demonstrating that the TDRs were valuable.[62] There is little doubt that Midtown Ventures had distinct expectations that it would be able to sell the TDRs, backed by the investment that Midtown Ventures made to purchase them.

However, following *Penn Central*, the Supreme Court has subtly restated this factor to focus instead on protecting *reasonable* investment-backed expectations.[63] Under this formulation, the *sine qua non* is not whether the property owner's expectations were distinct—as opposed to vague—but whether they were reasonable. A property owner denied permission to build a gas station in the heart of a quiet residential neighborhood may not have reason-

57 *See* Compl., *supra* note 4, ¶ 82 ("[T]he Vanderbilt Corridor includes the only sites in the Grand Central Subdistrict with the possibility for redevelopment within any reasonable time horizon.").

58 *Id.* ¶ 84.

59 *See* Bagli, *supra* note 7.

60 Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

61 *See* Compl., *supra* note 4, ¶ 4.

62 *See supra* notes 26–27 and accompanying text (describing disposition of TDRs).

63 *See* Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979); *see also* Steven J. Eagle, *The Regulatory Takings Notice Rule*, 24 U. HAW. L. REV. 533, 560–61 (2002) (discussing the change from "expectations" to "reasonable expectations"); Christopher Serkin, *Passive Takings: The State's Affirmative Duty to Protect Property*, 113 MICH. L. REV. 345, 350 & n.18 (2014) (same).

able expectations, for example.[64] This analysis is quite different than whether a property owner had actually spent money in reliance on specific plans (i.e., whether the expectations were distinct). For Midtown Ventures, it depends on the extent to which it was reasonable to rely on the stability of the TDR regime. But there is something inherently circular about this analysis. The reasonableness of Midtown Ventures' expectations depends in large part on the legal protection afforded to the TDRs.[65]

The real question, then, which the *Penn Central* analysis does not answer, is whether and to what extent the existence of the Grand Central TDRs should prevent the City from upzoning the neighboring property in the absence of compensation. If the creation of the TDRs comes with an implicit promise not to regulate in a way that undermines their value, then Midtown Ventures' investment looks much more reasonable. If not, then the rezoning is a risk that Midtown Ventures should have anticipated.[66]

Although this particular litigation has been settled, the stakes remain very high for the viability of TDR regimes going forward. TDRs are only useful for reducing the impact of government actions to the extent that they are actually valuable. The risk that the government might upzone the receiving area where the TDRs can be used will reduce their value ex ante. Absent strong legal protection, the value of TDRs will have to be discounted by the risk of adverse regulatory action in the future.

III. Protecting the Value of the TDRs

The perceived value of the TDRs is a central consideration, both for courts evaluating the offsetting benefits of TDRs, and for property owners evaluating whether to accept TDRs as part of a voluntary transaction.[67] If the value of TDRs going forward must be significantly discounted to reflect an increased risk that the City will undermine them, then more TDRs will be necessary to appease courts or property owners. As the price per square foot

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64 *See* Serkin, *supra* note 63, at 351 ("If someone buys property in a neighborhood zoned single-family residential, she cannot complain when she is prevented from developing the property as a gas station, an adult theater, an apartment building, or for another more intensive use.").

65 The problem is closely analogous to the problem of "deregulatory takings" where owners of regulated property—like energy infrastructure—object when the industry is deregulated. *See* J. Gregory Sidak & Daniel F. Spulber, *Deregulatory Takings and Breach of the Regulatory Contract*, 71 N.Y.U. L. Rev. 851 (1996); *see also* Susan Rose-Ackerman & Jim Rossi, *Disentangling Deregulatory Takings*, 86 Va. L. Rev. 1435 (2000).

66 For an insightful treatment of expectations in the context of financial firms, see Nestor M. Davidson, *Resetting the Baseline of Ownership: Takings and Investor Expectations After the Bailouts*, 75 Md. L. Rev. 722 (2016).

67 Many TDR programs are voluntary or are part of a voluntary transaction. When New York City built the High Line, for example, it bargained for air rights using TDRs, resulting in consensual transactions. *See supra* note 12 and accompanying text (discussing creation of High Line). Those transactions may have occurred in the shadow of eminent domain, but that does not change the fact that property owners ultimately agreed to the City's terms.

of TDRs goes down to reflect the kind of regulatory risk of the East Midtown rezoning, a municipality will have to give away more square footage in TDRs to achieve the same value of benefit.

This is particularly important because governments may already have a tendency to give them away too freely. TDRs are a kind of off-balance-sheet benefit that can be created spontaneously at no obvious expense to the public. As a result, there is little political accountability associated with their creation.[68] They are not, however, free. The costs come from the increased congestion in the receiving area. Since TDRs allow development at greater density than the zoning ordinance anticipates or approves, they create a kind of "extra" burden on the receiving area, from traffic and infrastructure burdens, to school crowding, aesthetic harms, and so forth.[69] By undermining the value of the Grand Central TDRs, the City may be undermining overall confidence in the TDR regime, potentially requiring the City to create many more TDRs to generate the same value as before, or else requiring other, more explicit forms of compensation in the alternative.

A complementary response is equally problematic. Instead of or in addition to issuing more TDRs, a government could impose greater restrictions on the receiving area to enhance the value of the TDRs, at least in the short term.[70] This dynamic is already embedded in any TDR regime. Professor Steven Eagle has argued against the use of TDRs precisely because they rely on the government over-regulating the receiving area.[71] Eagle argues that if higher density development in the receiving area is appropriate following acquisition of TDRs, it should be appropriate in the absence of the TDRs.[72] That is, if TDRs would allow a developer in the receiving zone to build to an FAR of six instead of an FAR of five, then the developer should be allowed to build to an FAR of six as of right.

In its strong form, this argument misconstrues the kinds of tradeoffs that are ubiquitous in land use controls. Eagle implicitly asserts that an FAR of six either is appropriate in the receiving area or it is not. If it is not appropriate, it should not be allowed, regardless of TDRs. And if it is appropriate, then developers should be able to build to that limit as of right. In fact, however, zoning is much more fluid than this and frequently represents dynamic

68 In New York City, some measure of political accountability comes from any zoning action that triggers the Uniform Land Use Review Procedure (ULURP), *see* N.Y. CITY CHARTER ch. 8, § 197-c (2016) (identifying actions that trigger the ULURP process). Rezonings trigger ULURP, but zoning lot mergers—one way of creating TDRs—do not. *Cf.* Been & Infranca, *supra* note 23, at 440–43 (describing TDRs created through zoning lot mergers).

69 NELSON ET AL., *supra* note 12, at 18 (discussing objections to the designation of receiving areas). Some theorists view this consequence of TDRs as a benefit, effectively unlocking development potential in places where existing zoning is too restrictive. *See, e.g.*, FURMAN CTR. FOR REAL ESTATE & URBAN POLICY, *supra* note 12.

70 *See, e.g.*, Adler, *supra* note 5, at 1188–90.

71 *See* Eagle, *supra* note 10, at 34–36 ("If it indeed harms the public health, safety, and welfare for the former owner of a lot to build eight units per acre, why is it suddenly acceptable for the TDR holder to build eight units per acre?" (footnote omitted)).

72 *See id.*

tradeoffs. A city may, for example, have good reason to limit buildings in an area to an FAR of five, and adopt that limit in its zoning regime. But it may have an even greater interest in protecting a historic building. It is appropriate to weigh the costs of adding height in the receiving zone against the benefits of the historic preservation. Creating TDRs to preserve the historic building that nevertheless allows an FAR of six in the receiving zone represents nothing more than a straightforward cost-benefit analysis. It does not undermine the city's implicit assertion that an FAR of six in the otherwise FAR five zone is harmful, but means instead that it is less harmful than the destruction of the historic building.[73] Nevertheless, the weaker form of Eagle's argument is undoubtedly correct; local governments have an incentive to enact overly restrictive zoning in receiving areas in order to enhance the value of TDRs.[74] If increased risks associated with TDRs undermine their value, local governments might respond by enacting even more restrictive zoning in order to increase their value in the short term, at the expense of sound land use planning.

The discussion so far suggests that courts should protect the value of TDRs from regulatory change ex post in order to preserve their value and usefulness to government ex ante. Courts, in other words, should step in to protect government from itself. But the problem is actually deeper and subtler than it already appears because government preferences change over time. Municipal governments are not static and their preferences are not set in amber. Moreover, conditions in the world change. Appropriate land use controls at one time may become wholly inappropriate at another as technology changes, preferences evolve, and sea levels rise, for example.[75] If the existence of TDRs means that a government cannot upzone property in the receiving area, this can lock in out-of-date land use policy and hobble a subsequent government's ability to respond to change. Framed in this way, affording constitutional protection to TDR holders like Midtown Ventures raises a real entrenchment problem.[76]

73 *Cf.* NOLON, *supra* note 14, at 97 (describing the TDR program as protecting valuable environmental resources while allowing the town to preserve its rural character by encouraging denser planned unit developments).

74 *See* Eagle, *supra* note 10, at 35–36.

75 *See* Serkin, *supra* note 63, at 353–54; *see also* Christopher Serkin & Leslie Wellington, *Putting Exclusionary Zoning in Its Place: Affordable Housing and Geographical Scale*, 40 FORDHAM URB. L.J. 1667, 1682–83 (2013) (describing the effect of changing consumer preferences on the forms of exclusionary zoning).

76 The entrenchment problem has received recent scholarly attention. Leading articles include: Julian N. Eule, *Temporal Limits on the Legislative Mandate: Entrenchment and Retroactivity*, 1987 AM. B. FOUND. RES. J. 379 (1987); Eric A. Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 YALE L.J. 1665 (2002); Serkin, *supra* note 8.

IV. The Entrenching Effect of Takings Protection for TDRs

It is a fundamental tenet of democracy that one government cannot make policy decisions for future governments.[77] One legislature cannot pass un-repealable laws, and even the Constitution is subject to amendment through Article V (although it is undoubtedly specially entrenched).[78] Despite this black letter prohibition, governments regularly find ways to entrench their policies into the future. In an earlier article, I explored this phenomenon in depth, examining in particular the ways in which local governments can, and do, use private law to lock in policy commitments.[79] For example, issuing debt, entering into long-term contracts, creating conservation easements, and so forth, all significantly limit future governments' ability to change course.[80] More recently, Professors Daryl Levinson and Benjamin Sachs explored political entrenchment and the ways in which government officials can leverage political devices to entrench policies.[81] Both analyses recognize that entrenchment is much more common than most scholarship has acknowledged, but that does not make it benign. Instead, the underlying insight is that entrenchment is not binary but instead exists on a spectrum. The question in every instance is therefore not whether the government action is entrenching; most are. The question is whether the government action is "problematically or impermissibly entrenching."[82] Answering that requires weighing both the costs and the benefits of regulatory lock-in.

Preventing a government from enacting a regulatory change because of an earlier government's precommitment can impose a very real cost. In the case of Grand Central, preventing neighboring property from being upzoned—or increasing the cost of the upzoning so as to make it prohibitively expensive—would have imposed a meaningful cost to the City as well as to real estate consumers. Restricting the supply of developable land in midtown Manhattan marginally increases prices there and elsewhere. It also means that property next door to one of the most important transit hubs in New York City is under-used compared to what the City would now prefer.[83] Retaining overly restrictive zoning marginally pushes development pressure elsewhere in the city, increasing congestion in places less able to manage it. All else being equal, increased development around Grand Central makes good sense as urban policy and unlocks value for property owners and con-

77 Serkin, *supra* note 8, at 881 ("In a democracy, governments are not allowed to bind future governments.").

78 *See* Christopher Serkin & Nelson Tebbe, *Is the Constitution Special?*, 101 Cornell L. Rev. 701, 753–58 (2016) (describing constitutional entrenchment).

79 *See* Serkin, *supra* note 8.

80 *See id.* at 892–915 (surveying forms of entrenchment).

81 Daryl Levinson & Benjamin I. Sachs, *Political Entrenchment and Public Law*, 125 Yale L.J. 400 (2015).

82 Serkin, *supra* note 8, at 889; *see also* Levinson & Sachs, *supra* note 81, at 460.

83 This takes at face value the purpose of the rezoning and rejects—for purposes of this discussion—Midtown Ventures' allegations of cronyism as a reason for the rezoning.

sumers. If the existence of the Grand Central TDRs had prevented the City from upzoning the property, these would have been real costs.

Some might object that the stakes were far lower than this analysis suggests. After all, even the takings protection for TDRs that Midtown Ventures initially sought would not have prevented the City from upzoning property in the receiving zone; it would only have required the government to pay for the adverse impact on the value of the TDRs. In other words, because of the nature of the Takings Clause, TDRs receive at most liability-rule protection against regulatory change and not property-rule protection.[84] The City could always upzone property in receiving zones, but simply must pay to do so. In other words, the TDRs, at their strongest, would not prevent the government from regulating; they merely require the government to compensate for the resulting diminution in value.[85] But where the alleged harm is $475 million, and the claim for damages is over $1 billion,[86] that may be a distinction without a meaningful difference.[87] At the very least, the threat of takings liability is likely to affect regulatory incentives.

Midtown Ventures also pointed out in its complaint that nothing in the prior zoning regime prevented intensive development around Grand Central, even at the density proposed by SL Green.[88] It simply required that the developer acquire TDRs from Midtown Ventures instead of building as of right. The stakes of takings protection for TDRs, then, are not whether development happens, but only the allocation of profits between the TDR holder and the developer.

In this case, Midtown Ventures characterized the upzoning as a one-to-one transfer from Midtown Ventures to SL Green.[89] The outcome that Midtown Ventures anticipated in its complaint was simply that the cost of the

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84 *See* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1092 (1972) (describing the difference between property- and liability-rule protections).

85 *See* Christopher Serkin, *Entrenching Environmentalism: Private Conservation Easements over Public Land*, 77 U. CHI. L. REV. 341, 359 (2010) (identifying eminent domain as an important anti-entrenchment mechanism).

86 *See* Compl., *supra* note 4, ¶ 12; *see also* Bagli, *supra* note 4 (identifying damages as $1.1 billion).

87 *See, e.g.*, John D. Echeverria, *Regulating Versus Paying Land Owners to Protect the Environment*, 26 J. LAND RESOURCES & ENVTL. L. 1, 11 (2005) ("[I]f regulatory programs were to generate significant, recurring takings awards, the general expectation is that government would be forced to abandon the regulatory option."). By way of comparison, New York City's total budget in 2015 was $75 billion. *See, e.g.*, Yoav Gonen, *City Council Approves $75B Budget for 2015 Fiscal Year*, N.Y. POST (June 26, 2014), http://nypost.com/2014/06/26/city-council-approves-75b-budget-for-2015-fiscal-year/.

88 *See* Compl., *supra* note 4, ¶ 10 (claiming that One Vanderbilt would have been built regardless of the rezoning).

89 *Id.* ¶ 78 ("SL Green succeeded in persuading the City to transfer the value and benefits of the necessary Grand Central Terminal TDRs to it without paying Midtown for them.").

TDRs would eat into SL Green's profits.[90] But that is not necessarily so. In her analysis of development exactions, Professor Vicki Been demonstrated that the price of exactions will not always be borne by the developer that actually pays them.[91] Even if SL Green had paid Midtown Ventures to acquire the TDRs in the first instance, it might have passed some or all of those costs along to its customers, effectively building them into the price that it would have charged to the eventual occupants of the building.[92] The ability of a developer to pass on costs, though, depends on the elasticity of the real estate market and the availability of substitute property.[93] If there are sufficiently comparable properties nearby that were built at a lower price-per-square-foot without TDRs, those developers could have undercut SL Green. In that case, going forward, the cost of TDRs may instead be borne in part by the owners of the underlying land. In effect, higher development costs can often be capitalized into land values. A developer like SL Green would be expected to pay less for the land if the costs of development are higher because of the need to acquire TDRs.

In most cases, the cost of the TDRs is likely to be absorbed to some extent by all three: the owner of the underlying land, the developer, and the end consumers. At the very least, the effect of the City's upzoning is much more complex and contingent than a one-to-one transfer from Midtown Ventures to SL Green.

There is another way in which prohibiting the upzoning in this case would have been costly for the City. When the City rezoned One Vanderbilt, it did not simply give away the extra FAR. It required SL Green to engage in certain infrastructure improvements in and around Grand Central in order to obtain the density bonus. According to Midtown Ventures, the City priced that extra FAR much too cheaply, giving an unprecedented bonus for a relatively modest cost.[94] Regardless, the City in effect undercut the price of the TDRs by offering SL Green a density bonus for less money than the TDRs would have cost. Cheaply or not, the City will obtain some meaningful infra-

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90 *Id.* ¶ 10 ("[T]he City's 'zoning' took from Midtown the entire value of the Grand Central TDRs and transferred over $475 million of that value to SL Green, for no purpose other than to reduce SL Green's costs and increase its profits in constructing an office tower *that it was going to build anyway*.").

91 *See, e.g.*, Vicki Been, *"Exit" as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine*, 91 COLUM. L. REV. 473, 540 (1991) ("Many scholars have assumed or theorized that the full costs of exactions usually will be passed on to the buyer. Others have argued that the costs generally will be passed back to the landowner. Both extremes are unlikely because the incidence of exactions will depend upon the nature of the supply and demand in the market, as well as the structure of the local building industry." (footnotes omitted)); *see also* Vicki Been, *Impact Fees and Housing Affordability*, 8 CITYSCAPE 139, 148 (2005).

92 *See* NELSON ET AL., *supra* note 12, at 17 ("These extra costs [of TDRs] may reduce the profit margin for developers or increase the prices charged to the final consumers, the home buyers.").

93 *See supra* note 91 and accompanying text.

94 Compl., *supra* note 4, ¶ 70

structure improvements in exchange for the FAR bonus—improvements that would otherwise have been paid out of public coffers if SL Green had acquired the density bonus through TDRs instead.[95]

Finally, city officials had an expressive interest in upzoning the property. Newly elected Mayor de Blasio wanted to signal that his administration would be willing to work with developers. The upzoning around Grand Central was intended, in part, to demonstrate his commitment to development.[96] Presumably, this reputational benefit among developers and their allies could stimulate increased—or at least continued—development in other parts of the City.

The bottom line is that prohibiting the City from loosening the zoning in the receiving area could have had significant policy consequences. Likewise, constraining the City's power to upzone property in the future has the potential to impose real costs, beyond just lost profits between Midtown Ventures and SL Green, or between other TDR holders and developers. TDRs would become meaningfully entrenching if they required a city to pay compensation when upzoning property in receiving areas and thereby limited this policy flexibility.

V. How to Protect TDRs

For local officials seeking to constrain development in a specific location, TDRs have the twin virtues of being relatively easy and inexpensive to create. Indeed, their ubiquity is largely a result of the fact that they are off-budget items; their opacity means that they generate little political accountability.[97] However, the proliferation of TDRs may look quite different to officials in the future if they limit regulatory control over the receiving area.

In an earlier article, I argued that it is important to view the entrenchment problem from the competing perspectives of the government making a precommitment and the subsequent government bound by it. "[E]very government is simultaneously a present and future government vis-à-vis others in time."[98] There is no doubt that strong commitments create some genuine benefits in other contexts. Local governments can only borrow money if they can obligate future governments to repay it. Contractual counterparties may offer a better price for services if government precommitments are, in fact, robust.[99] This can benefit not only the precommitting government, but

95 Midtown Ventures also claims that the City was already obligated to provide these same infrastructure improvements, meaning that the City was not providing the local community with an adequate quid pro quo for the density bonus. *See supra* note 42.

96 *See, e.g.*, Bagli, *supra* note 50 ("[T]he de Blasio administration is eager to see the project built, if only to signal to the real estate industry that it is not anti-development.").

97 *See supra* text accompanying note 68.

98 Serkin, *supra* note 8, at 948.

99 *Id.* at 937 ("If the government cannot bind itself, then promisees will have to discount the value of government promises, raising the prices that the public has to pay." (citing Christopher Serkin, *Local Property Law: Adjusting the Scale of Property Protection*, 107 Colum. L. Rev. 883, 915 (1996))).

future governments as well that continue to reap some of the benefits. But at the same time, binding obligations can impose real costs if conditions in the world change, or if preferences evolve in unexpected ways. All governments therefore want at least some ability to make such precommitments, even if it means being bound by earlier obligations that they would prefer to avoid, but only so much as is necessary.[100] The real question, then, is not whether to permit government precommitments at all, but is instead how much to allow.

At some level, all contracts reflect this tension. Individuals and private parties decide every day whether it is worth giving up future flexibility in exchange for benefits today. But, as I have argued, government precommitments are different in kind because of the possibility of political malfunctions.[101] One way of exploring the problem is to ask whether and to what extent we trust a particular government to bind the future. It should depend on the extent to which that government takes adequate account of the long-term costs of its actions. The less it does, the easier it should be for subsequent governments to change course.

I pointed out that protection from entrenchment can occur either ex ante or ex post. Ex ante protections consist either of procedural safeguards or substantive prohibitions that are designed to minimize the risk of excessive inter-temporal agency costs.[102] Bond election requirements are a good example of the former; forcing local governments to seek voter approval before incurring excessive debt helps to ensure that local officials are not passing on unwarranted financial burdens to future generations.[103] Strict constitutional debt limits are a good example of the latter; there are levels of indebtedness that local officials are simply not allowed to incur.[104] Ex post protections preserve some range of flexibility for future generations. Municipal bankruptcy is de-entrenching in this account, as are eminent domain and specialized rules that allow governments to breach contracts without paying expectation damages.[105] Entrenchment is therefore most problematic when there is a mismatch between the ease of making a precommitment and the ease of escaping it later on. The more likely it is that government officials did not adequately consider the future costs of their precommitments, the more important it is for future generations to have flexibility in escaping them.

This is true of TDRs. If the existence of TDRs prevents subsequent governments from upzoning receiving areas, then there will be a significant mis-

100 *Id.* at 948 ("The question . . . [is] how much power government actors, in general, want to have to control the future, knowing that it means accepting the thick cords of preexisting obligations.").

101 *See id.* at 938–39.

102 *See id.* at 915 (describing anti-entrenchment protection).

103 *See id.* at 925–26 (describing state law rules around issuing municipal debt).

104 *See id.* (describing constitutional debt limits).

105 *See id.* at 919–20 (describing municipal bankruptcy rules as ex post entrenchment protection).

match between the ease of their creation and the extent of their entrenchment.

One solution is to limit the ability of TDRs to entrench land use policy. A judicial determination that upzoning the receiving area is not a taking would have that effect. But the very existence of a TDR regime may require some protection from this kind of legal change. As described above, a TDR regime depends on property owners' willingness to rely on their value. As the risks associated with TDRs increase, their value becomes more speculative. Owners subjected to development limits, and courts evaluating such restrictions, will therefore demand more TDRs to offset the burdens, if they continue to accept TDRs at all. Furthermore, the real public cost of TDRs in the form of increased congestion in the receiving area will likely be borne in the future. If future governments could communicate their preferences to earlier ones, they might happily agree to be bound by the zoning in the receiving area—to some extent—in order to limit the number of TDRs that have to be issued in the first place. In other words, it is helpful to governments inter-temporally if they can encourage property owners to rely on TDRs as valuable benefits.

Indeed, land use law contains other tools that reflect precisely this desire. Governments are not generally allowed to promise future regulatory treatment. They cannot promise, for example, specific future tax rates, or which drugs will be legal or illegal. But, in narrow circumstances, they can promise future zoning treatment as part of an exchange for benefits provided by a developer. These so-called developer agreements are authorized by state statute and allow a local government to promise favorable land use treatment in the future in order to induce a developer to make infrastructure and transit improvements, for example.[106] This solves a particular problem. A local government will want to delay granting approvals until the developer has actually performed under the agreement so as to ensure satisfactory compliance. But a developer would be unlikely to undertake those investments without some meaningful guarantee that municipal officials will live up to the bargain.[107] Enforceable developer agreements solve this problem by allowing the government to make promises specifically in order to induce reliance—and performance—by developers.[108]

The analogy to development agreements is useful not only because it shows the benefits of entrenched precommitments, but also because it provides an example of protections that can be put in place. In most states that have authorized them, development agreements require public hearings and

106 *See id.* at 892–94.

107 While this problem is a familiar one in many private contracts, there is a particular risk of defection by governments. Agency costs—and in particular inter-temporal ones—mean that local officials may not fully bear the costs of breach. Moreover, governments are generally not obligated to pay expectation damages when they breach contracts. These features, combined, make breach more likely. *See id.* at 937–38 & nn. 272–74 (discussing the dynamics surrounding breach of public contracts).

108 *See id.* at 892–93 (discussing developer agreements).

city council approval.[109] In other words, procedural rules ensure some broad measure of transparency before a government can bind future governments' zoning power. Moreover, some statutes authorizing development agreements have a time limit. In Oregon, for example, development agreements are limited to fifteen years.[110]

The same should be true of TDRs. At the very least, courts should not imply from the simple existence of TDRs that the government that created them intended to prevent future governments from upzoning the receiving area. But it should be possible for a government to make that kind of commitment, so long as it does so explicitly and after adequate public notice. It must be apparent to voters that the TDR regime will constrain the adoption of future land use policies before a TDR should be so strongly entrenching.

This proposal closely resembles the "clear statement" rule that applies to government grants—a different but analogous form of regulatory property. The most famous articulation comes from *Charles River Bridge v. Warren Bridge*.[111] In 1785, Massachusetts had conveyed a monopoly franchise to a private corporation to operate a toll bridge across the Charles River. Because of its success, Massachusetts subsequently granted a new franchise to a different corporation to operate a second bridge. The first franchisee sued, alleging that Massachusetts had promised it exclusive rights for at least forty years. In rejecting the claim, the United States Supreme Court reasoned that the initial franchise was not explicit about the grant of exclusive rights. It reasoned that the power to regulate for health, safety, and welfare "is as much inherent and inalienable, as the right of taxation; which, it is said, resides in the government, and need not be reserved expressly, in any grant of property or franchises, to individuals or corporations."[112] In other words, the police power is so important that a government seeking to bargain it away must do so expressly. In the absence of a clear statement to that effect, the Court would not imply one.

Allowing—but neither requiring nor implying—promises accompanying TDRs to preserve the existing zoning in the receiving area creates flexibility for the government both today and in the future. The extent of TDRs' entrenching effect becomes a bargained-for term between property owners and the government. The default is to preserve flexibility for future governments. But where a government has a strong reason to attach to TDRs a commitment not to change the zoning in the receiving area, it can do so explicitly, just as with other government grants.

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109 *See id.* at 927 (citing Shelby D. Green, *Development Agreements: Bargained-for Zoning That Is Neither Illegal Contract nor Conditional Zoning*, 33 CAP. U. L. REV. 383, 396–99 (2004)).

110 OR. REV. STAT. ANN. § 94.504 (West 2016); *see also* FLA. STAT. ANN. § 163.3229 (West 2015) (thirty years); S.C. CODE ANN. § 6-31-40 (2016) (imposing schedule depending on acreage affected of between five and twenty years); *cf. id.* § 6-31-110 (creating presumptive limit of eight years).

111 36 U.S. (11 Pet.) 420, 465 (1837).

112 *Id.* at 468 (citing Providence Bank v. Billings, 29 U.S. (4 Pet.) 514, 560–61, 563 (1830)).

The government issuing the TDRs should not, however, have unfettered discretion to make the TDRs as binding as it wants. There is a limit to the strength of the precommitment that the issuing government can make. Even with the added procedural protection of a clear statement rule, there is still a risk that a government today will unduly entrench its land use regulations. An issuing government may have an interest in enhancing the value of its TDRs by making an accompanying promise to maintain the zoning in the receiving area. But that interest decreases over time. Simultaneously, the need for future governments to reclaim land use control increases as development pressures and conditions in the world change.

This inter-temporal trade-off closely resembles the problem of dead-hand control in the context of private precommitments, like trusts that impose ongoing restrictions on the use and disposition of property.[113] Increasing the power of grantors to control their property after death decreases the alienability of the property for future generations, and vice-versa. But this is not the zero-sum game it appears, because the interests of the grantor decrease over time, while the interests of future generations in being free of restrictions increase. A grantor may feel strongly about preserving property for some prescribed use in the short or even medium term, but that interest becomes more hypothetical as time passes.[114] The longer the grasping hand, the more likely it is that the world has diverged from expectations. At some point—maybe ten, fifty, or even a hundred years after death—the interests of the living outweigh the preferences of the past. The rule against perpetuities at least roughly reflects this very calculus.[115]

This is even clearer in the context of TDRs. From the perspective of the issuing government, the central concern is the value of the TDRs to the burdened property owner. The value of a precommitment to preserve the zoning in the receiving area diminishes over time for two complimentary reasons. Most obviously, a zoning change can only affect the value of unused TDRs. If the zoning remains stable long enough for the property owner to expect to be able to sell all of the TDRs, then any risk of a later rezoning is immaterial. Adding additional time to the precommitment is therefore only valuable to the extent that it increases the likelihood of allowing all the TDRs to be used. The marginal value will therefore naturally decrease over the duration of the precommitment. Moreover, the value of the TDRs themselves decreases over time, thanks to discount rates. At any moment, the value of a TDR is the expected value of the development potential it represents when it is actually sold. The farther off that is, the lower the value today. Think of it this way: a TDR that cannot be used for twenty years will be worth much less than a TDR that can be used tomorrow. Therefore, the impact of a risk that would decrease the value of a TDR will also diminish over time.

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113 *See* Serkin, *supra* note 8, at 946 (making this analogy).

114 *See id.* at 950.

115 *Id.* at 949–50 (examining the rule against perpetuities).

Simultaneously, the costs of entrenching TDRs through zoning increase over time. Early zoning advocates believed that the goal of a comprehensive zoning regime was to identify the ultimate end-state distribution of land uses within the municipality.[116] People quickly realized, however, that zoning was an evolutionary process. It is impossible for planners to predict the future. Technological change, as well as changing demographics and consumer preferences, can combine to make a zoning regime quickly obsolete. As described in the previous Part, the actual costs of outdated zoning can be very high and include exclusionary pressures, as well as real economic costs if developers and property owners cannot satisfy consumer preferences.[117] But the important point here is that those kinds of costs will rise over time. Actual community preferences will increasingly diverge from a static zoning regime.

Costs and benefits will undoubtedly vary by context, but the overall dynamic is easy enough to see. The benefits of entrenched precommitments around zoning decrease over time, while the costs increase inversely. Therefore, there should be limits to the duration of explicit promises that a government can attach to TDRs. A government should be able to make an explicit precommitment not to rezone the receiving area for a limited period of time, but it should not be enforceable indefinitely. A rezoning that undermines the value of TDRs shortly after their issuance looks much more like an interference with reasonable expectations than a rezoning after many decades. Midtown Ventures' complaint would have looked very different in 1980 than it does today.

VI. Consequences for Property Theory

The dynamic relationship between the costs and benefits of government precommitments implicates more than TDRs. This new Grand Central litigation provides a useful lens for identifying broader themes about regulatory property and property more generally. Stepping back from the narrow context of TDRs, the fundamental issue is whether and to what extent regulatory regimes can give rise to protectable property rights.

Since the 1960s, when Charles Reich published his important article, *The New Property*,[118] scholars and courts have recognized that regulatory entitlements like welfare should receive due process protection before they can be taken away.[119] In more recent years, scholars have recognized a broad category of regulatory property that includes such government grants as taxi

116 *See* Christopher Serkin & Gregg P. Macey, *Post-Zoning: Alternative Forms of Public Land Use Controls*, 78 Brook. L. Rev. 305, 307 (2013) (describing the history of zoning development).

117 *See supra* Part IV.

118 Reich, *supra* note 17, at 785.

119 *See* Goldberg v. Kelly, 397 U.S. 254, 264 (1970) (requiring procedural due process protections before the state can remove public entitlements); *see also* Harry W. Jones, *The Rule of Law and the Welfare State*, 58 Colum. L. Rev. 143, 154–55 (1958) (arguing for new rights); Kay P. Kindred, *God Bless the Child: Poor Children,* Parens Patriae, *and a State Obligation to Provide Assistance*, 57 Ohio St. L.J. 519, 522 & n.13 (1996) (reviewing literature).

medallions, grazing permits on federal land, pollution credits, and so forth.[120]

There is no doubt that regulatory regimes can create rights that are protectable property for at least some purposes. As Professor Katrina Wyman has described in detail, taxi medallions have many of the indicia of private property.[121] They give holders the right to exclude others from using the medallion; they are transferable, can be used as collateral for loans, and are generally viewed as valuable assets.[122] But property rights are contextual; rights good against one person may not be good against another.[123] Regulatory property is uniquely within the control of the government. Its existence and the scope of its protection is defined by the regulatory regime that creates it. Pollution credits have value only because of the regulatory framework that creates them. Grazing rights give access to public resources that would not otherwise be available for private use. The government therefore has broad power to alter and even to eliminate such regulatory property.

This is not unfettered power. Government actions affecting regulatory property are subject to some important legal constraints. Where the property is the product of explicit regulation, changes to the regulatory regime are subject to the Administrative Procedures Act, or to its state analogue.[124] A government therefore cannot act arbitrarily and capriciously to remove or alter regulatory property, and must provide adequate notice and an opportunity to be heard. These administrative rules are backstopped by constitutional due process protections, both procedural and substantive.[125] It is therefore no surprise that courts have extended due process protection to taxi medallions and to other forms of regulatory property.[126]

Takings protection is another matter, however. The Takings Clause, after all, protects only the reasonable expectations of property owners.[127] And, at least as a general matter, people should expect legal and administrative rules to change. The legal system is fluid, and legal change is the norm not the exception. Pick almost any field and the evolution of policy prefer-

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120 *See* Eagle, *supra* note 10, at 1; Katrina Miriam Wyman, *Problematic Private Property: The Case of New York Taxicab Medallions*, 30 YALE J. ON REG. 125 (2013) (discussing taxi medallions as property); Bruce Yandle & Andrew P. Morriss, *The Technologies of Property Rights: Choice Among Alternative Solutions to Tragedies of the Commons*, 28 ECOLOGY L.Q. 123, 129–30 (2001) (identifying "regulatory property"); *supra* note 18 and accompanying text (including pollution credits as an example of regulatory property).

121 Wyman, *supra* note 120, at 135–39.

122 *Id.*

123 The law of finders is a classic example, giving finders rights against successive but not prior possessors. *See, e.g.*, CHRISTOPHER SERKIN, THE LAW OF PROPERTY 49–52 (2013) (surveying the law of finders).

124 *The Administrative Procedure Act (APA)*, ELEC. PRIVACY INFO. CTR., https://epic.org/open_gov/Administrative-Procedure-Act.html (last visited Nov. 7, 2016).

125 *See, e.g.*, Reich, *supra* note 17 (discussing constitutional protection for regulatory property).

126 *See* Wyman, *supra* note 120, at 137.

127 *See supra* note 63 and accompanying text.

ences will be starkly apparent. The most obvious may be environmental laws, where new science—whether about climate change or carcinogens—reconfigures substantive views about appropriate emissions.[128] Simultaneously, technological advances can expand the range of regulatory options, leading to requirements to adopt new technologies, or to move to performance standards to accommodate the rate of change.[129] But that same dynamism in legal and regulatory approaches is ubiquitous, whether in food and drug law with a new focus on genetic engineering, in extraction industries with the rise of hydrofracking, in transportation safety, data privacy, and so on.[130]

Law's dynamic nature is particularly evident in land use regulation. As consumer preferences change, zoning ordinances shift from protecting single-family neighborhoods to accommodating mixed-use zones; from a focus on permissible uses to form-based codes; from cul-de-sac to transit-oriented development, to name just a few.[131] In the face of sea level rise, municipalities are increasing setbacks from the ocean, modifying height requirements, changing building standards, and rethinking entire development patterns.[132] These are often fast-moving changes. It would be unreasonable for a property owner on the beach today to expect to be able to build indiscriminately in the future. The only certainty now is that change is coming, and regulatory restrictions will look different relatively soon. Indeed, I have argued that a government's failure to change the law in the face of ecological change may itself be a taking of private property.[133]

This is not to say that the law is like quicksand with no secure purchase. Often, politics and the inertia of the political process create a kind of de facto stability that even appears to rise to the level of robust property rights. Professor Wyman, in her discussion of taxi medallions, documented in politi-

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128 *See, e.g.*, A. Dan Tarlock, *Environmental Law: Ethics or Science?*, 7 DUKE ENVTL. L. & POL'Y F. 193, 202–03 (1996) (describing the effect of new scientific understanding on regulation). *But see* Richard B. Stewart, *A New Generation of Environmental Regulation?*, 29 CAP. U. L. REV. 21, 31 (2001) (criticizing current regulations for failing to incorporate cutting-edge science).

129 *See, e.g.*, J.B. Ruhl & James Salzman, *Gaming the Past: The Theory and Practice of Historic Baselines in the Administrative State*, 64 VAND. L. REV. 1, 25 (2011) ("A best available technology standard may work much better for emissions than aiming for particular historic levels achieved by what surely is no longer the best available technology.").

130 *See, e.g.*, John R. Nolon & Victoria Polidoro, *Hydrofracking: Disturbances Both Geological and Political: Who Decides?*, 44 URB. LAW. 507, 512 (2012) (describing legal responses to hydrofracking); Ross H. Pifer, *Mandatory Labeling Laws: What Do Recent State Enactments Portend for the Future of GMOs?*, 118 PENN ST. L. Rev. 789, 799–806 (2014) (surveying state labeling laws in response to GMOs); Christopher Slobogin, *Government Data Mining and the Fourth Amendment*, 75 U. CHI. L. REV. 317 (2008) (discussing impact of new technology on Fourth Amendment law).

131 *See, e.g.*, Serkin & Wellington, *supra* note 75, at 1685 (describing changes in modern zoning).

132 *See* Edna Sussman et al., *Climate Change Adaptation: Fostering Progress Through Law and Regulation*, 18 N.Y.U. ENVTL. L.J. 55, 67 (2010) (describing zoning changes for climate change adaptation).

133 *See* Serkin, *supra* note 63.

cal terms the transformation of regulatory permission into full-fledged property.[134] In her account, taxi owners can rely on medallions as property entitlements because they have persisted for so long, and the politics supporting them appears so strong.[135] At least implicitly in this account, property arises through the political fact of being able to rely on the stability of the regulatory regime into the future. Property, in this view, amounts to a kind of prophetic legal realism—property consists of what people think it will be in the future, and if change is not anticipated, then stable property is the result.

Of course, politics alone is no guarantee of stability, as Professor Wyman's analysis unintentionally illustrates. Today, with Uber, Lyft, and other ride-sharing services rapidly proliferating, taxi medallions are suddenly worth much less than they were just a few years ago.[136] The power of the taxi lobby has been unable to generate enough political opposition to regulate Uber out of New York City, for example, and now the politics surrounding the regulation of cabs in New York has been profoundly reconfigured.

But this example also demonstrates the importance of regulatory flexibility. Robust takings protection in this context would transform taxi medallions into one-way ratchets. Once property-like rights have been created, the regulatory regime would become entrenched against subsequent changes, even where the world has dramatically transformed in the interim. That is problematic from the perspective of entrenchment, but also defies the more commonsense understanding that legal rules are and should be responsive to changes in the world, whether technological, ecological, or societal.[137]

The idea here is straightforward: the more that the world diverges from the expectations that gave rise to the regulatory property in the first place, the more owners should expect some regulatory alteration. Inevitably, then, the longer a regime has been in place, the more people should expect it to change. This is not a positive prediction. Plenty of outmoded rules and regulations remain on the books for political reasons or out of simple inattention.[138] And people regularly bet on just such stability—as the example of taxi medallions painfully illustrates, given actual events. It is instead a normative claim about the reasonableness of people's expectations. People *should* increasingly expect rules to change the more the world turns.

This is not as obvious as I hope that it seems. There is a strong countervailing intuition that the longer a rule or regulation has been in effect, the

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134 *See* Wyman, *supra* note 120, at 156–67.

135 *Id.* at 139–40.

136 *See, e.g.*, Robin Sidel, *Uber's Rise Presses Taxi Lenders*, WALL ST. J. (Oct. 21, 2015), http://www.wsj.com/articles/ubers-rise-presses-taxi-lenders-1445471757.

137 *See* Nestor M. Davidson, *Property's Morale*, 110 MICH. L. REV. 437, 440, 443 (2011) (arguing that people enjoy a morale benefit when government appropriately responds to problems, which should be counted against the "demoralization costs" that are more typical of takings analysis).

138 *Cf.* GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 18–19 (1982) (describing outmoded and outdated laws).

more reasonable the expectation that it will remain in place longer. Indeed, as a positive and psychological claim, this latter intuition hews closer to the truth. Grazing permits and rights to minerals on federal land are viewed, increasingly, as inviolable because they have persisted for so long.[139] Likewise, flood insurance and FEMA's responses to flooding have worked their way into people's background expectations about flood-prone property, and efforts to modernize the approach are stubbornly resisted.[140]

The descriptive accuracy of this psychological account actually reinforces the importance of the contrary normative one. Longstanding rules are already very difficult to change precisely because of a strong status quo bias. Holders of regulatory property often constitute discrete groups with a strong interest in preserving their entitlements. This is a recipe for disproportionate political influence.[141] The resulting pressure is already sufficiently strong that it does not need to be reinforced by takings protection.

This is partly the lesson of the Grand Central TDRs. It was important for property owners to rely on their stability, at least initially and even for some extended period. But as more time passes, the costs of stability increase. For TDRs, as with all regulatory property, there comes a predictable point when the interests of the issuing government are outweighed by the needs of the present. In property terms, government precommitments amortize slowly over time, and eventually give way to new policies and priorities, the Takings Clause notwithstanding.[142]

Whether or not this same analysis applies to more traditional forms of private property depends on one's underlying theoretical commitments to positivism as opposed to natural rights or other conceptions of property.[143] Positivists—and I count myself in this camp—will have trouble distinguishing

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139 *See, e.g.*, Gary D. Libecap, *The Assignment of Property Rights on the Western Frontier: Lessons for Contemporary Environmental and Resource Policy*, 67 J. ECON. HIST. 257, 259 (2007) ("Once an allocation rule is established, it becomes very difficult politically to modify.").

140 *See, e.g.*, Omri Ben-Shahar & Kyle Logue, *The Unintended Effects of Government-Subsidized Weather Insurance*, 38 REGULATION, Fall 2015, at 24, 26 (describing recent efforts to reform flood insurance).

141 *See* Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 37 (1991) (predicting that "small groups with concentrated (high per capita) interests in lawmaking will come closer to their optimal level of petitioning than large groups with diffuse (low per capita) interests" (first citing MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION 28, 32–33, 35–36 (2d ed. 1971); and then citing Sam Peltzman, *Toward a More General Theory of Regulation*, 19 J.L. & ECON. 211, 212–13 (1976))); Amnon Lehavi & Amir N. Licht, *Eminent Domain, Inc.*, 107 COLUM. L. REV. 1704, 1719 (2007) ("[Public choice theory] points to the disproportionate influence that special interest groups, and chiefly politically powerful real estate entrepreneurs, have over governmental decisions in land policy issues.").

142 *See* Christopher Serkin, *Existing Uses and the Limits of Land Use Regulations*, 84 N.Y.U. L. REV. 1222, 1235 (2009) (discussing amortization rules).

143 *Compare* Frederic Bloom & Christopher Serkin, *Suing Courts*, 79 U. CHI. L. REV. 553, 572 (2012) (describing positivism), *with* Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 CORNELL L. REV. 1549, 1566–74 (2003) (describing different natural rights approaches to property).

regulatory property from other resources. In our regulatory state, the content of all property is largely if not entirely determined by state positive law.[144] The rights and responsibilities attached to land are determined by complex and overlapping rules and regulations. From zoning to environmental rules to common law doctrines, the content of rights is governed by the state to an extent that becomes difficult to distinguish from regulatory property like TDRs. At the very least, the value of property can be affected dramatically by regulatory changes.[145] If owners should expect changes to regulatory property over time, they should perhaps also expect changes to the regulatory restrictions that apply to more traditional private property, as well.

Those less predisposed to positivism will find more equivocal lessons here for other forms of property. Admittedly, the differences between regulatory property and more traditional types of property seem stark. Regulatory property is created by the state. The government is entirely responsible for its existence, not to mention its content and value. Remove the regulatory regime and nothing is left. Traditional property is, at most, regulated by the state. Remove regulations of traditional private property and the owner still has the house, the land, or whatever else the underlying resource might be. As a result, expectations about the persistence of property may well be different than for regulatory property. Property owners can and should reasonably rely on the stability of the underlying resource itself.

Some of the most venerable accounts of property in the common law view property's stability as among its core benefits. It creates a sphere of ordered liberty, a space relatively free from government incursion where people can arrange their affairs as they wish.[146] For property to serve this function fully, owners must be able to rely on the fact that their investments today will be theirs to reap to tomorrow. This conception is less tolerant of change.

There are doctrinal consequences to these competing precommitments. The most obvious are to be found in the Takings Clause. In *Lucas v. South Carolina Coastal Council*,[147] the Supreme Court held that a total wipeout of all economically beneficial uses of property is a per se taking. The Court, however, carved out one important exception: a regulation is not a taking if it is consistent with background principles of property and nuisance law.[148] The intuition appears to be that if a regulation merely codifies expectations that property owners should have had anyway—e.g., that they cannot use their property in ways that rise to the level of a nuisance—then restrictions prohibiting those activities are not takings. What counts as a background principle depends in no small measure on one's underlying conception of property.

144 *See* Bloom & Serkin, *supra* note 143, at 574.

145 *See, e.g.*, Palazzolo v. Rhode Island, 533 U.S. 606 (2001) (identifying diminution in value from over $3,000,000 to $200,000 as a result of environmental regulation).

146 *See, e.g.*, JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS (3d ed. 2008).

147 505 U.S. 1003 (1992).

148 *Id.* at 1031.

Positivists are much more willing to view regulatory restrictions as part of the legal warp through which property expectations are woven. Once a new law or regulation is put into place, property owners are on notice that they are subject to its restrictions.[149] Those rules then become part of the background principles of property to which new owners—and even existing ones[150]—are subject, and takings liability will not attach. Natural rights theorists, however, will judge new regulations against some largely immutable core of property. Whether a regulation is longstanding or of recent vintage, if it cuts too deeply into the core of property, it is a taking.

This is not the proper forum for defending one approach over another. It is enough to see that expectations around legal change implicate the content of traditional property in addition to regulatory property. If one assumes that change and transformation are inherent in the content of property—like positivists, for example, who view the content of property as inherently political—then owners hold their property subject to this background expectation of change. As a result, new regulatory enactments are much less likely to interfere with reasonable expectations, and so are much less likely to rise to the level of a taking. For present purposes, though, the point is simply this: the tension between flexibility and stability, between entrenchment and change, is not limited to regulatory property. The issues presented by the Grand Central TDRs implicate the very nature of property itself.

Conclusion

The recent litigation involving the *Penn Central* TDRs makes for a fascinating postscript to the leading regulatory takings decision. Even though the case settled before trial, the fact of the litigation implicates the viability of TDRs going forward. If governments are free to undermine TDRs' value, then property owners will be reluctant to accept them and courts will be less likely to view them as a meaningful exchange for regulatory burdens. But if the existence of TDRs locks in existing land use regulations then they become both costly and problematically entrenching. This Article has proposed a straightforward solution. By requiring a clear statement before TDRs are entrenched, and then limiting the duration of that effect, it is possible to balance the competing needs of reliance and flexibility.

This suggestion not only preserves the value of TDR programs for the future, it also highlights an inherent dynamic of regulatory property where the value of stability is offset against the loss of flexibility into the future. It is unreasonable for owners of regulatory property to expect that the law will be static indefinitely in a changing world. Past a certain point, the Takings Clause should not inhibit regulatory change.

149 *See, e.g.*, Nestor M. Davidson, *Standardization and Pluralism in Property Law*, 61 VAND. L. REV. 1597, 1661 (2008) ("The issue of the mechanism through which state restrictions on property become background principles essentially recapitulates the question of property as a pre- or post-political institution.").

150 *See generally* Serkin, *supra* note 142.