THE PERILS OF REGULATORY PROPERTY IN LAND USE REGULATION

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ABSTRACT

"Regulatory property" is the right to engage in specified activities, made valuable by government prohibitions against competitors, and protected by de jure or de facto status as property. This Article explores regulatory property and focuses upon its applications in land use regulation. It considers, inter alia, transferrable development rights, exclusive leases of subsidized sports stadia, and urban revitalization condemnations for retransfer for pre-arranged private development. The Article concludes that these generally are unfair and inefficient practices.

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INTRODUCTION

This Article focuses on the use of "regulatory property"[1] in the context of land use regulation. Regulatory property refers specifically to governmental dispensations of

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[1] *See* 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 (2001) (coining term and defining "regulatory property" as "a property right created and allocated by a government entity, such as a right to emit specified pollutants into the atmosphere under the terms of a permit issued by a government regulator."). *See infra* notes 73–79 and accompanying text for additional explication.

special privilege to individuals, legally or functionally regarded as property, bestowed for the articulated purpose of furthering the public good. This kind of regulation should be distinguished from typical zoning restrictions, which affect the uses of parcels of land within sizeable geographic areas regardless of the owners' identity; regulations that provide an average reciprocity of advantage;[2] and regulations intended to enrich only specified landowners, as often is the case with so-called spot zoning.[3]

The essential nature of the regulatory property bargain is that private parties are incentivized to advance the public interest through the award of use rights not generally available to other landowners. The underlying controlling metaphor, popularized by David Osborne and Ted Gaebler's book *Reinventing Government*,[4] is that public agencies will steer and private actors will row.[5] Steer-and-row is dubious for two reasons. First, it is always a conceit for any organization to imagine that it could obtain all of the information needed for intelligent planning, much of which is highly localized or tacit.[6] Be-

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[2] Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) (noting that what "secured an average reciprocity of advantage that has been recognized as a justification of various laws"); City of New Orleans v. Dukes, 427 U.S. 297 (1976) (upholding regulation in Vieux Carre district as enhancing tourism to landowners' mutual advantage).

[3] *See, e.g.*, Smith v. Skagit County, 453 P.2d 832, 848 (Wash. 1983) ("Spot zoning has come to mean arbitrary and unreasonable zoning action by which a smaller area is singled out of a larger area or district and specially zoned for a use classification totally different from and inconsistent with the classification of surrounding land, and not in accordance with the comprehensive plan. Spot zoning is a zoning for private gain designed to favor or benefit a particular individual or group and not the welfare of the community as a whole."). "Reverse spot" zoning, on the other hand, is designed to discriminate against a particular landowner. *See* Penn Cent. Transp. Co. v. City of York, 438 U.S. 104, 132 (distinguishing landmark preservation restrictions from those evincing discriminatory intent).

[4] DAVID OSBORNE AND TED GAEBLER, REINVENTING GOVERNMENT: HOW THE ENTREPRENEURIAL SPIRIT IS TRANSFORMING THE PUBLIC SECTOR (1992).

[5] *Id.* at 30 ("As they unhook themselves from the tax-and-service wagon, [political leaders] have learned that they can steer more effectively if they let others do more of the rowing. Steering is very difficult if an organization's best energies and brains are devoted to rowing.").

[6] *See* F. A. HAYEK, THE FATAL CONCEIT (1988) (advocating use of market prices as a mechanism by which millions of individuals can send signals as to their willingness to supply or demand goods, thus adding every person's insights to the store of public knowledge).

yond the assumption that government experts can plan the voyage, the execution of public policy inherently is improvisational and opportunistic.[7]

"Agency costs" sap away much of the benefit of regulatory property claimed by public officials.[8] Most discernibly, those who labor at the oars, who are selected through governmental "forging of alliances,"[9] will want to increase their pecuniary returns by rowing to ports of their own choosing. The public officials awarding regulatory property also have a correspondingly strong incentive to look towards their own interests, leading to mutually advantageous crony capitalism.[10] These types of concerns lead to a more general unease about the accountability of entrepreneurial government.[11]

Aside from personal self-seeking, public officials naturally are inclined to select projects in areas that show the greatest promise of success, which often are diametrically opposed to areas with the greatest need.[12] Their quest might well result in consequential losses of tax revenues collected by other public bodies to serve important community

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[7] *See* Michael Oakeshott, *Political Education*, in RATIONALISM IN POLITICS AND OTHER ESSAYS 61, Michael Oakeshott, ed. (1991).

> In political activity, then, men sail a boundless and bottomless sea; there is neither harbour for shelter not floor for anchorage, neither starting-place not appointed destination. The enterprise is to keep afloat on an even keel: the sea is both friend and enemy; and the seamanship consists in using the resources of a traditional manner of behaviour in order to make a friend of every hostile occasion.

[8] *See* Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976) (originating use of term). "If both parties to the relationship are utility maximizers there is good reason to believe that the agent will not always act in the best interests of the principal." *Id*. at 308.

[9] Nikolas Rose & Peter Miller, *Political Power Beyond the State: Problematics of Government*, 43 BRIT. J. SOC. 173, 180 (1992).

[10] *See, e.g.*, Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 709 (2000) (considering the issue of government employees "selling out" the administration's program to maximize their own post-government employment opportunities).

[11] *See, e.g.*, Matthew Diller, *The Revolution in Welfare Administration: Rules, Discretion, and Entrepreneurial Government*, 75 N.Y.U. L. REV. 1121 (2000) (expressing such concerns regarding welfare policy and its implementation).

[12] *See generally* George Lefcoe, *After* Kelo*, Curbing Opportunistic TIF-Driven Economic Development: Forgoing Ineffectual Blight tests; Empowering Property Owners and School Districts*, 83 TUL L. REV. 45 (2008). "Officials in cash-hungry local governments rack their brains trying to find ways of complying with state laws restricting redevelopment to hard-core blighted areas. But they will not have chosen their redevelopment sites because they were located within blighted areas, but because they held the promise of increased tax yields." *Id*. at 70.

needs.[13] While public expenditures classically benefit primarily the middle class,[14] that state of affairs is predicated on the assumption that taxes and expenditures are visible, and that the middle class, the "dominant group" within the electorate, would be able to "employ the machinery [of government] to improve its own position."[15] Regulatory property, however, is more subtle. It employs no direct taxation, but rather benefits small, well-organized groups at the expense of larger unorganized ones.[16]

A classic use of regulatory property commenced with the attempt to create decent wages for taxi drivers and safer roads.[17] In the land use context, typical goals are to ameliorate the loss of rights of neighborhood shopkeepers, to offset reductions in land value befalling stringently regulated downtown investors, to achieve downtown revitalization, or to achieve affordable housing. In all of these situations, the underlying problems are the same. The processes by which individuals obtain and use regulatory property represent tempting shortcuts to achieve the public good,[18] but contains ample opportunities for arbitrary government conduct and favoritism that subvert both private property rights and governmental goals.

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[13] *Id*. at 71 (noting that studies of TIF-funded redevelopment "conclude that other taxing entities surrender approximately twice as much real property tax revenue as they eventually gain").

[14] *See* George J. Stigler, *Director's Law of Public Income Redistribution*, 13 J. L. & ECON. 1 (1970). "Aaron Director proposed a law of public expenditures: Public expenditures are made for the primary benefit of the middle classes, and financed with taxes which are borne in considerable part by the poor and rich." *Id*. at 1.

[15] *Id*.

[16] *See infra* notes 85–86 and accompanying text.

[17] *See infra* Part I.B.

[18] Such shortcuts were the subject of Justice Holmes' prescient warning: "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 146 (1922).

I. PROPERTY AND ITS REGULATION

A. Property Rights and Entitlement Aspirations

The eighteenth century understanding of "property" was considerably broader than is conveyed in contemporary speech. John Locke included within its meaning individuals' lives and freedom.[19] "Property" referred broadly to the attributes "proper" to a full member of society.[20]

Private property has been regarded as a fundamental institution in Anglo-American law and culture at least from the time of Magna Carta.[21] The American Framers were particularly interested in property rights, as evidences by John Adams's declaration that "[p]roperty must be secured or liberty cannot exist."[22]

This does not mean that property rights are absolute.[23] While those claiming property's undiluted supremacy sometimes cite Blackstone's reference to property as an

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[19] John Locke, *The Second Treatise of Government*, in TWO TREATISES OF GOVERNMENT, ed. Peter Laslett (New York: Mentor, 1965). "Lives, Liberties, and Estates, which I call by the general Name, *Property*." *Id*. at § 123.

[20] FOREST MCDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION (1985). [W]hen the Framers of the Constitution said that the protection of property was a (or the) fundamental purpose for submitting to the authority of government, they understood that the word *property* had more meanings than one. In its older and more general sense it was related to the word *proper*, derived from the Latin *proprius*, meaning particular to, or appropriate to, an individual person. *Id* at 10–11.

[21] *See* Magna Carta, chs. 39 and 40 (1215) (pertaining to property rights), consolidated into ch. 29 of the 1225 revision:

> No free-man shall be taken, or imprisoned, or dispossessed, of his free tenement, or liberties, or free customs, or be outlawed, or exiled, or in any way destroyed; nor will we condemn him, nor will we commit him to prison, excepting by the legal judgment of his peers, or by the laws of the land. To none will we sell, to none will we deny, to none will we delay right or justice.

[22] 6 THE WORKS OF JOHN ADAMS 280 (Charles Francis Adams ed. 1851), *quoted in* JEAN EDWARD SMITH, JOHN MARSHALL: DEFINER OF A NATION 388 (1996).

[23] *See* Bret Boyce, *Property as a Natural Right and as a Conventional Right in Constitutional Law*, 29 Loy. L.A. INT'L & COMP. L. REV. 201 (2007) (reviewing the history of absolutist rhetoric).

individual's "sole and despotic dominion,"[24] his other writings exhaustively qualified this hyperbole.[25]

Going significantly beyond traditional property doctrine, however, a body of contemporary scholarship asserts that "property" should be interpreted broadly through the lens of relational interests.[26] Some have added that property should further human flourishing, and that the State should require redistribution as necessary to achieve that end.[27]

In the 1960s, the idea that society was obligated to provide the basic wherewithal that would enable individuals to flourish and achieve their potential was enunciated in Isaiah Berlin's formulation that the traditional "negative liberty" to be left undisturbed should be augmented by the "positive liberty" to societal nurture, which Berlin acknowledged imposed correlative obligations on others.[28]

Charles Reich's influential article *The New Property*[29] argued that welfare benefits, occupational licenses, and the like were not mere gratuities. Rather, they were the functional equivalent of traditional property, and hence should be given the same protection accorded traditional property rights. Six years later, in *Goldberg v. Kelly*,[30] Reich's

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[24] 2 WILLIAM BLACKSTONE, COMMENTARIES *2 ("that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.").

[25] *See, e.g.*, Carol M. Rose, *Canons of Property Talk, or, Blackstone's Anxiety*, 108 YALE L.J. 601, 603 (1998) ("Blackstone himself was thoroughly aware of these pervasive and serious qualifications on exclusive dominion. Indeed, he discussed them at great length, particularly with respect to the feudal system and its later permutations.")

[26] *See, e.g.*, Jennifer Nedelsky, *Reconceiving Rights as Relationship*, 1 REV. CONST. STUD. 1 (1993). "If we approach property rights as one of the most important vehicles for structuring relations of power in our society and as a means of expressing the relations of responsibility we want to encourage, we will start off the debate in a useful way." *Id*. at 16.

[27] *See, e.g.*, Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745 (2009); Eduardo M. Peñalver, *Land Virtues*, 94 CORNELL L. REV. 821 (2009).

[28] Isaiah Berlin, *Two Concepts of Liberty*, in FOUR ESSAYS ON LIBERTY 118, 122–24 (1969).

[29] Charles A. Reich, *The New Property*, 73 Yale L.J. 733 (1964). "It is time to see that the 'privilege' or 'gratuity' concept, as applied to wealth dispensed by government, is not much different from the absolute right of ownership that private capital once invoked to justify arbitrary power over employees and the public." *Id*. at 787.

[30] 397 U.S. 254 (1970).

influence reached its zenith.[31] The Supreme Court quoted Reich's views in holding that benefits of welfare recipients could not be terminated without a hearing.[32]

Professor Mary Ann Glendon's book *Rights Talk*[33] lamented that societal dialogue about the needs and desires of individuals and groups had degenerated into demands for recognition of self-proclaimed Constitutional rights. In an article discussing *The Rhetoric and Practice of Rights in America*,[34] Fourth Circuit Judge Harvie Wilkinson quoted Glendon: "In America, when we want to protect something, we try to get it characterized as a right. . . . [W]hen we specially want to hold on to something (welfare benefits, a job), we try to get [it] characterized as a property right."[35] Wilkinson added, perhaps somewhat incredulously, that the Supreme Court in *Goldberg v. Kelly* "even suggested that welfare benefits were the 'new' property."[36] He buttressed this observation with a quotation from *The New Property*.[37]

It is important to note that Reich was particularly concerned that government's provision of largess, for which it was unaccountable, would overwhelm the private sector, in which individuals had legal recourse for harms.[38] In the fifty years since publication of *The New Property*, however, the focus of much scholarly attention has turned from the danger that government's increasing provision of wherewithal would be uncon-

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[31] David A. Super, *A New New Property*, 113 COLUM. L. REV. 1773, 1780 (2013) (discussing *Goldberg v. Kelly*, and declaring that "Reich's article reshaped legal debate to a degree that most scholars can only dream about").

[32] *Goldberg*, 397 U.S. at 162 n.8 ("It is only the poor whose entitlements, although recognized by public policy, have not been effectively enforced.") (quoting Charles A. Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245, 1255 (1965), and citing *The New Property*, supra note 29).

[33] MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE (1991).

[34] J. Harvie Wilkinson III, *The Dual Lives of Rights: The Rhetoric and Practice of Rights in America*, 98 Cal. L. Rev. 277 (2010).

[35] *Id.* at 285 (quoting Glendon, *supra* note 33, at 31).

[36] *Id*. (citing *Kelly v. Goldberg*, 397 U.S. at 262 n.8).

[37] *Id.* (quoting from Reich, *supra* note 29: "It is time to see that the 'privilege' or 'gratuity' concept, as applied to wealth dispensed by government, is not much different from the absolute right of ownership .... We must create a new property.").

[38] Super, *supra* note 31, at 1779–80.

strained and arbitrary to the fear that the private sector had veered towards the creation of vast inequality, with insufficient wherewithal for many.[39] From this perspective, Reich's aspiration that the relational interests of the less powerful be protected in the same manner as the traditional property of those with more wealth has largely been unrealized.[40]

The view asserted in this Article is that the problem with regulatory property is not just that government will abuse it, or that the wealthy are able to protect themselves better than those less well off. Rather, officials in a position to offer favorable bargains and those well off and desirous of them will strike bargains that are injurious to the public welfare.

B. An Introduction to Regulatory Property

An initial glimpse of regulatory property in its raw form was supplied in the political memoir of reporter Jack Germond.[41] The tale involved Daniel O'Connell, the longtime political boss of Albany, New York, who was reputed to have an interest in a number of local businesses, including the Yellow Cab Company.

Every Monday while the state legislature was in session, trains from Buffalo and New York City converged at the Albany station, packed with legislators and lobbyists anxious to get to their hotels. Only Yellow Cabs were on hand, and passengers often had to wait for them to make several trips before they could be picked up. In Germond's description, "if they walked out of the station hoping to hail an independent taxi, they would find city police stationed for two or three blocks in each direction and waiving off the independents until the Yellows took all the fares."[42]

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[39] *Id*. at 1781–82. For a recent and important exposition that long-term trends among industrialized nations show increasing returns to capital and a decreasing share of wealth inuring to labor, with the twentieth century being exceptional due to destruction of capital during the world wars and a juxtaposition of reconstruction and redistributive tax policies after World War II, *see* THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY (2014).

[40] *Id*. at 1818–40.

[41] JACK W. GERMOND, FAT MAN IN A MIDDLE SEAT: FORTY YEARS OF COVERING POLITICS (1999).

[42] *Id*. at 26–27.

In a similar vein, the motto of George Washington Plunkitt, the legendary leader of New York City's Tammany Hall, was "I seen my opportunities and I took 'em."[43] Plunkitt did not engage in bribery, but rather, more germane to this Article's focus, used his knowledge and control of where attractive municipal improvements were to be constructed to acquire adjacent land, which soon shot up in value. Coining a phrase, Plunkitt described his gain as "honest graft."[44]

The maneuvering of such leaders was not "regulation" in a legal sense, since the Anglo-American tradition defines "law" as the confluence of power to enforce decisions and legitimation through regular process and generally accepted social norms.[45] Among these norms is confinement of the sovereign's police power to protection of the "safety, health, morals and general welfare of the public."[46] Likewise, the institution of "property" exists to increase a society's pecuniary and subjective wealth, and not to bleed it. Unlike government policy, which one might expect would be improvisational,[47] government regulation of private property and private commercial activity should aim at facilitating and regularizing generally advantageous conduct.[48] Facilitation of the use of land to everyday advantage does not seem consistent with the episodic conversion of the public domain and private property into "regulatory property."

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[43] *See Plunkitt, Champion of "Honest Graft,"* N.Y. TIMES, Nov. 23, 1924 at XX3 (obituary of George Washington Plunkitt).

[44] *Id*.

[45] *See, e.g.*, Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 718 (1975) (asserting that common law adjudication "consists of the generally accepted social norms applied in the decision of the cases, [contrary to positivism,] quite independent of their promulgation through defined lawmaking procedures").

[46] Lochner v. New York, 198 U.S. 45, 53 (1905) ("There are, however, certain powers, existing in the sovereignty of each State in the Union, somewhat vaguely termed police powers, the exact description and limitation of which have not been attempted **by** the courts. Those powers, broadly stated and without, at present, any attempt at a more specific limitation, relate to the safety, health, morals and general welfare of the public. Both property and liberty are held on such reasonable conditions as may be imposed **by** the governing power of the State in the exercise of those powers, and with such conditions the Fourteenth Amendment was not designed to interfere.").

[47] *See supra* note 7 and accompanying text.

[48] *See* Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 139–142 (2001) (making that point in connection with the power of the federal government "to regulate" interstate commerce).

Moreover, employment of the normal legislative process does not ensure that regulations serve the welfare of the public. The story of New York City taxicab regulation, for instance, is one of special benefit to the few. Under a scheme upheld by the courts,[49] only taxicabs bearing medallions may pick up customers who hail them on the street.

During the Great Depression, New York had many thousands of cabs, and market entry was unrestricted. However, a 1937 ordinance[50] provided for registration of existing cabs for a $10-dollar fee. The number of medallions was capped at 16,900, the number of cabs registered. Some cabs dropped out, but by the end of World War II, business started to pick up. Medallions then traded for about $2,500. Only in 1996 were an additional 133 medallions issued. At present, there are only 13,437 yellow cab medallions providing for passenger service in all parts of a world-class city of some eight million people.[51]

The cap was imposed because of the widespread view during the Depression that too many taxis were causing traffic congestion, unsafe driving in desperate efforts to pick up fares, and depressing driver earnings. Thus, the medallion system apparently began as classic police power regulation for the public good. Much later, one of the drafters of the 1937 ordinance recalled that the growing resale prices of medallions "was a fluke; no one ever foresaw that these licenses would ever be valuable."[52] And valuable the medallions are. The resale price for a medallion for a single cab now exceeds $1 million.[53]

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[49] *See, e.g.* G & C Transp., Inc. v. McGrane, 949 N.Y.S.2d 113 (2d Dep't 2012), appeal dismissed, 983 N.E.2d 763 (N.Y. 2013) (upholding regulatory system as legitimately serving the public interest).

[50] *See* Katrina Miriam Wyman, *Problematic Private Property: The Case of New York Taxicab Medallions*, 30 YALE L. ON REG. 125, 168 (2013) (supplying details).

[51] N.Y.C. Taxi & Limousine Commission, 2014 Taxicab Factbook (Taxicab Factbook) (*available at* http://www.nyc.gov/html/tlc/downloads/pdf/2014_taxicab_fact_book.pdf). There are additional provisions for handicapped-accessible cabs, and "Boro Taxis" that are prohibited from picking up fares in Lower- or Midtown-Manhattan or at the airports. Post WWII $10 annual renewal fees were paid for only 11,878 cabs.

[52] Wyman, *supra* note 50, at 169 n.218 (2013) (quoting Edward G. Rogoff, Theories of Economic Regulation Tested on the Case of the New York City Taxicab Industry 90 (1980) (unpublished Ph.D. thesis, Columbia University) (citing interview with Oscar Katz, Aug. 23, 1979)).

[53] Matt Flegenheimer, *$1 Million Medallions Stifling the Dreams of Cabdrivers*, N.Y. TIMES Nov. 14, 2013 at A24 (noting that "in an age of soaring prices across the city, the taxi industry has emerged as a striking example of how exclusive some corners of New York have become").

The majority of cabs are owned within fleets,[54] and most drivers are immigrants.[55] After expenses, they net a little over $20 per hour, and receive no benefits.[56] According to a recent taxi commissioner, "Like a lot of the economy, the taxi industry has become a winner-take-all industry where the profits at the top are very large and the wages at the bottom are grindingly low."[57]

In contrast, Uber, which arranges rides between erstwhile passengers and drivers through a smartphone app, reports that the median wage for an UberX driver working at least 40 hours a week in New York City is $90,766 a year. As a *Washington Post* account notes, "[t]he gap in compensation for providing similar services is astounding, and illuminates the power of Uber, which is using its mastery of technology to steadily disrupt the traditional cab industry."[58]

C. What Makes Regulation "Property"?

According to a 2013 *New York Times* account, "both city and industry officials have cast [increased prices of medallions] as a sign of confidence in the future of yellow cabs."[59] But, are medallions "property"? They *are* valuable licenses from the State, and, under *Goldberg v. Kelly*[60] and its progeny, constitute "property" in the sense that holders cannot be deprived of them without due process of law.[61] There is little fear that taxi

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[54] Taxicab Factbook, *supra* note 51, at 8 (noting requirement that fleet cabs be leased to two-shifts of drivers each day).

[55] *Id*. at 9 (noting that less than 6 percent of drivers were born in the United States and its territories).

[56] *Id*. at 7.

[57] Flegenheimer, *supra* note 53 (quoting David S. Yassky, now dean of Pace University School of Law). Yassky added: "Climbing the ladder of opportunity from driver to owner is more of a challenge today." *Id.*

[58] Matt McFarland, *Uber's Remarkable Growth Could End the Era of Poorly Paid Cab Drivers*, WASH. POST, May 27, 2014, at A10.

[59] Flegenheimer, *supra* note 57.

[60] 397 U.S. 254, 262 & n.8 (1970) (holding that a State could not deprive recipients of welfare benefits without a pre-termination hearing).

[61] *See* Boonstra v. City of Chicago, 574 N.E.2d 689 (Ill. App. 1991) (holding decedent's administrator had constitutionally protected property interest in taxicab license and its assignability). *See*

owners will be deprived of their medallions arbitrarily. There are lenders that specialize in financing New York taxi medallion purchases. Buyers have to make a small down payment and borrow the rest, using the medallion as collateral.[62]

What if the City should decide to issue an unlimited number of new medallions, for a permit fee amounting only to the cost of a review of the driver's traffic and arrest records, mechanical inspection of the cab, and evidence of proper liability insurance? Someone who had just purchased a medallion for $1 million, using mostly borrowed funds, now would have an investment that is essentially worthless.

Might such a person have a valid cause of action against the City, claiming that "stranded costs,"[63] incurred under expectations of gain, constitutes a Fifth Amendment taking?[64] Gregory Sidak and Daniel Spulber, coining the term "deregulatory takings," made just that argument.[65] The courts have not been receptive, holding that States should not be presumed to enter into contracts unless that is explicitly provided.[66] Without a

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also Matthews v. Eldridge, 424 U.S. 319, 376) (social security disability payments); Bishop v. Wood, 426 U.S. 341, 344 (1976) (tenured public employment).

[62] Wyman, *supra* note 50, at 137.

[63] *See* Susan Rose-Ackerman & Jim Rossi, *Disentangling Deregulatory Takings*, 86 VA. L. REV. 1435 (2000). "By calling costs 'stranded' those who argue for compensation imply that the costs are 'shipwrecked'—that is, investors are the victims of misadventure brought about by government action. Economically, stranded costs occur when the costs to the incumbent exceed the costs to new entrants because of the actions of the state, not because of changes in technology or other exogenous economic shocks. These costs reflect the fact that some investments cannot earn a fair rate of return in the deregulated marketplace." *Id*. at 1457–58.

[64] U.S. CONST. amend. V (". . . nor shall private property be taken for public use, without just compensation.").

[65] J. Gregory Sidak and Daniel F. Spulber, *Deregulatory Takings and Breach of the Regulatory Contract*, 71 N.Y.U. L. Rev. 851 (1996); J. Gregory Sidak and Daniel F. Spulber, *Givings, Takings, and the Fallacy of Forward-Looking Costs*, 72 N.Y.U. L. Rev. 1068 (1997); J. GREGORY SIDAK AND DANIEL F. SPULBER, DEREGULATORY TAKINGS AND THE REGULATORY CONTRACT: THE COMPETITIVE TRANSFORMATION OF NETWORK INDUSTRIES IN THE UNITED STATES (1997). The authors examined heavily regulated public utilities that spent many millions of dollars building power plants, secure in the knowledge that they had the franchise to supply power for a given area, and that statutes required that a "reasonable rate of return" would include these investments. The regulator's subsequent provision for competition in power generation made these investments largely valueless. This approach gives central importance to the "investment-backed expectations" ad hoc test of *Penn Central Transp. Co. v. City of New York*, 434 U.S. 104, 124 (1978).

[66] *See* Susan Rose-Ackerman & Jim Rossi, *Disentangling Deregulatory Takings*, 86 VA. L. REV. 1435 (2000) (noting that, despite its notoriety, only a handful of court decisions have mentioned

contract right, the claimants have no claim for breach of contract, and no "property" that could be taken by eminent domain.

The same would be true of the taxicab medallion owners, who would be wiped out if unlimited medallions were issued.[67] Nevertheless, the issuance of more than a few new yellow cab medallions is remote. The reasons are not legal, but rather political. The fleet owners are among the largest municipal campaign contributors, and independent owners work ferociously to avoid dilution of their investments, as well.[68]

The removal of individuals' rights of action from the ambit of the common law, and the resigning of them as regulatory property, might be seen as a way of establishing order, of "pricing the priceless."[69] Yet most of the price of obtaining regulatory property is dissipated in the very competition for obtaining it.[70]

D. The Nature of "Regulatory Property" and Rent Seeking

What makes a taxi medallion worth over $1 million? It's not the centuries-old ability of hack drivers to be hailed by passengers on the street. Nothing in the city ordi-

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deregulatory takings, in passing). "To date, no court has accepted the sweeping deregulatory takings argument advocated by the industry. Where the breach of contract claim has been raised, courts have uniformly required clear and explicit contracts as a basis for protection of the utility's interest in stranded cost recovery." *Id.* at 1466.

[67] There is no compensable taking when government acts collaterally affect the value of an asset. *See* Cruz v. Town of Cicero, Ill., 1999 WL 560989 (N.D. Ill. 1999) report and recommendation adopted sub nom. Cruz v. Town of Cicero, 99 C 3286, 2000 WL 369666 (N.D. Ill. 2000) (noting that "a mere reduction in the value of their property or significant limitations on certain uses does not necessarily invite a just compensation claim"). This follows from the fact that "property" is what one owns, and "value" is what others think it's worth. The owner of a motel along a crowded U.S. highway, for example, is not shielded from financial ruin when the traffic diverts to a newly built interstate highway nearby. What judges call the "mere expectation" of gain is not a legally protected property right. The situation might have been different had the City terminated the rights of particular medallion holders and retransferred those rights for the City's own gain. *See* Almota Farmers Elevator and Warehouse Co. v. United States, 409 U.S. 470 (1973) (requiring payment of just compensation for improvements the value of which reasonably extended beyond lease term, where the government acquired lessee's property interest for its own use).

[68] Wyman, *supra* note 50, at 174 & n.252 (enumerating accounts).

[69] *See* Lisa Heinzerling & Frank Ackerman, *Pricing the Priceless Cost-Benefit Analysis of Environmental Protection*, 150 U. PENN. L. REV. 1553 (2002).

[70] *See infra* note 89 and accompanying text.

nance gives medallion cabs some new technology or ability.[71] Rather, the heart of the ordinance is the prohibition against the picking up passengers by others.

Professors Bruce Yandle and Andrew Morriss coined the term "regulatory property"[72] as a broad description for an allocation of resources based on a Pigovian scheme of regulation rather than a Coasean scheme, under which individuals trade existing well-defined property rights to achieve a more desirable end.[73] Under the Pigovian tradition, the solution for societal problems resides in "government taxation or regulation, and the politically determined rules will form a public or regulatory property regime."[74] The Pigovian mechanism in essence creates privileges conferred by government that derive value from precisely the fact that they are denied others.

As described by Professor Carol Rose, a principal precursor of regulatory property was "hybrid property."[75] This shorthand term was developed by Richard Stewart to denote what Rose termed "market-oriented environmental controls" that would result in the creation of "regulatorily-created, transferable property-like rights."[76]

It is important to note, as Professor Rose put it, that hybrid property was intended to preserve environmental resources that were "large and diffuse but nevertheless finite," using the assignment of tradable portions within an overall cap.[77] The breakthrough came

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[71] Indeed, licensees have resisted new technology. *See, e.g.* Black Car Assistance Corp. v. City of New York, 973 N.Y.S.2d 626 (N.Y. App. 2013) (upholding pilot program permitting medallion cabs to arrange passenger pickups via smart phone applications such as Uber, over protests from the trade association of the prearranged luxury sedan service ("black car") licensees).

[72] Yandle & Morriss, *supra* note 1, at 129.

[73] Yandle & Morriss, *supra* note 1, at 124 n.2–4 (citing the seminal works, A. C. PIGOU, THE ECONOMICS OF WELFARE (1920) and R. H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960) and also Bruce Yandle, *Coase. Pigou, and Environmental Rights*, in WHO OWNS THE ENVIRONMENT? 119 (Peter J. Hill & Roger E. Meiners eds., 1998)).

[74] Yandle & Morriss, *supra* note 1, at 124.

[75] Carol M. Rose, *The Several Futures of Property: Of Cyberspace and Folk Tales, Emission Trades and Ecosystems*, 83 MINN. L. REV. 129-182 (1998).

[76] *Id*. at 163–64 (quoting Richard Stewart, *Privprop, Regprop, and Beyond*, 13 HARV. J.L. & PUB. POL'Y 91, 93 (1990) (coining term "hybrid property").

[77] *Id*. at 164.

with the provision for tradable emission rights for air pollution in 1990,[78] and subsequently applied to urban smog, water pollution, and fishing rights.[79] Even in the area of environmental emissions, however, the cap and trade approach is susceptible to significant problems involving secondary rent seeking.[80]

As a practical matter, however, it is fair to say that medallion owners and similar claimants have "property," forged by their burning sense that it would be unfair that their investment be wiped out, and by the political clout that they have amassed to prevent that result. As Professor Katrina Wyman recently argued, "New York taxicab licenses are an instance of inefficient private property rights sustained by political decision-making processes subject to pressures from powerful interest groups."[81] What attracts scholars to the issue of taxi regulation[82] is that, at the same time, the medallion system makes cab drivers poorer, fleet owners and lenders richer, and results in the public having less available and more expensive transportation.[83]

Like other forms of regulatory property, the medallion system remains in place because its benefits are concentrated among a small number of medallion owners and lenders, who can organize to protect their privilege,[84] whereas the victims are unorganized and hardly could be expected to employ lobbyists or litigate. This is consistent

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[78] *Id.* at 165 (discussing the 1990 Amendments to the Clean Air Act, 42 U.S.C. §§ 7401, 7651-7651o (1990)).

[79] *Id*. at 165–66.

[80] *See infra* Part III.C.

[81] Wyman, *supra* note 50, at 129.

[82] *Id.* at 129 n. 17 (citing, inter alia, Ross D. Eckert, *The Los Angeles Taxi Monopoly: An Economic Inquiry*, 43 S. CAL. L. REV. 407 (1970); Edmund W. Kitch et al., *The Regulation of Taxicabs in Chicago*, 14 J. L. & ECON. 285 (1971).

[83] *Id*. at 129 n. 16 (2013) (citing Jeff Horwitz & Chris Cumming, *Taken for a Ride: The Taxi Medallion System in New York and Other Cities Raises Fares, Impoverishes Drivers, and Hurts Passengers. So Why Can't We Get Rid of It?*, SLATE (June 6, 2012, 6:30 AM), http://www.slate.com/articles/business/moneybox/2012/06/taxi_medallions_how_new_york_s_terrible_taxi_system_makes_fares_higher_and_drivers_poorer_.html.

[84] *See* Horwitz & Cumming, supra note 83. *See also*, Black Car Assistance Corp. v. City of New York, 973 N.Y.S.2d 626 (N.Y. App. 2013) (discussed at note , *supra*).

with Mancur Olson's *The Logic of Collective Action*,[85] which exposited the counter-intuitive truth that small groups often have a political advantage in legislative and regulatory conflicts over much larger ones. They tend to have larger individual stakes in the relevant issue, and can more easily organize, coordinate their activities, and keep track of shirkers.

Groups that are easy to organize include those in regulated industries, where the regulatory scheme itself both defines membership in the group and gives members an incentive to act. While licensing schemes and commissions are set up to benefit the community, the only groups that follow them closely after initial public interest lapses are those most affected. Through the process of "regulatory capture,"[86] or "client politics,"[87] commissions generally become the tools of the very industries they were designed to regulate.

"Economic rents" are payments made for the use of resources above the market price for such resources.[88] Undeveloped land can be very valuable, depending upon where it is located, whether it is superior for growing crops, and many other variables. The owner of such land can sell it for a lot of money, although investing nothing to produce it. "Rent seeking" refers to efforts to obtain economic rents—things that cost nothing to produce.[89] A classic example of rent seeking is a corporation's attempt to obtain

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[85] MANCUR OLSON THE LOGIC OF COLLECTIVE ACTION; PUBLIC GOODS AND THE THEORY OF GROUPS. (1965).

[86] The seminal exposition is George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGT. SCI. 3 (1971). "[A]s "as a rule, regulation is acquired by the industry and is designed and operated primarily for its benefit." *Id*. at 3.

[87] JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT, 76 (1989) (noting that client politics "occurs when most or all of the benefits of a program go to some single, reasonably small interest (and industry, profession, or locality) but most or all of the costs will be borne by a large number of people (for example, all taxpayers)").

[88] *See generally* JAMES BUCHANAN, ROBERT TOLLISON & GORDON TULLOCK, TOWARD A THEORY OF THE RENT-SEEKING SOCIETY (1980). *See also* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 10 (8th ed. 2014) (noting that, at the market clearing price for a crop, good farm land will command a higher price than marginal farm land).

[89] Gordon Tullock, *The Welfare Costs of Tariffs, Monopolies, and Theft*, 5 WESTERN ECON. J. 224 (1967). *See generally* Gordon Tullock, *The Welfare Costs of Tariffs, Monopolies, and Theft*, *in* TOWARD A THEORY OF THE RENT-SEEKING SOCIETY 39, 48 (James M. Buchanan et al. eds., 1980). The specific term "rent seeking" was coined by Professor Anne Krueger. *See* Anne O.

monopolies granted by government.[90] Rent seeking is costly to society because it is not economically productive, but rather uses up resources in the quest to obtain special privilege.[91] Rent seeking snowballs, since once the mechanism, such as condemnation for revitalization, is established, it is relatively less expensive to use; competitors will be forced to turn to the same behavior in self-defense; and as the volume of rent-seeking grows, strength in numbers makes it harder to punish violators.[92]

More generally, the holder of regulatory property does not have to invent or manufacture a new product, or work harder, or smarter. The holder simply enjoys the state of affairs by which government prohibits others from offering competing goods or services, albeit at the same time taking care to protect the privilege.[93] Undeveloped land in a desirable location is an archetypical generator of economic rent. A principal impetus for the transfer to private individuals of government-owned property is that "democratic-

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Krueger, *The Political Economy of the Rent-Seeking Society*, 64 AM. ECON. REV. 291 (1974). Success in winning the competition for bestowal of regulatory property often requires a great deal of money. Not only does not have to have equipment and possibly a network affiliation, but one must prove that he or she is the "best" applicant by putting together a very elaborate and expensive application, and by obtaining letters vouching for one's civic-mindedness from local community leaders, many of whom would be highly impressed by a substantial contribution to their organization. In effect, seekers of regulatory property have to pay handsomely to receive it. This is called "rent dissipation."

[90] *See* Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 Colum. L. Rev. 223, 268 n.6 (1986). "Rent-seeking refers to the attempt to obtain economic rents (i.e., payments for the use of an economic asset in excess of the market price) through government intervention in the market. A classic example of rent-seeking is a corporation's attempt to obtain monopolies granted by government. Such monopolies allow firms to raise prices above competitive levels. The increased income is economic rent from government regulation." *Id.* Rent seeking occurs in many contexts, *see, e.g.*, Mark J. Roe & Frederick Tung, *Breaking Bankruptcy Priority: How Rent-Seeking Upends the Creditors' Bargain*, 99 VA. L. REV. 1235 (2013).

[91] *See* Kevin M. Murphy, Andrei Shleifer & Robert W. Vishny, *Why Is Rent-Seeking So Costly to Growth?*, 83 AM. ECON. REV. Papers & Proc. 409, 409 (May 1993).

[92] *Id*. *See, e.g.*, Daniel Patrick Moynihan, *Defining Deviancy Down*, 62 THE AMERICAN SCHOLAR 17 (1993).

[93] The advantages of economic rent are, to some extent, dissipated by expenses and effort required to protect the incumbent's position. Taxicab fleet owners making large political contributions is an example. *See* Gordon Tullock, *Efficient Rent Seeking*, in TOWARD A THEORY OF THE RENT-SEEKING SOCIETY 97, 97-112 (James Buchanan et al., eds., 1980) [hereinafter Tullock, Efficient Rent Seeking]; Gordon Tullock, The Welfare Costs of Tariffs, Monopolies, and Theft, 5 W. Econ. J. 224, 226, 232 (1967).

representative government inescapably operates as a vehicle for creating economic rents."[94]

It is true that state and local governments, faced with apparently monolithic and intractable business sectors, can use regulatory property to "split an industry into prospective winners and losers, thereby dividing the opposition to regulation."[95] However, the converse is just as true. It is as easy for firms contemplating moving or establishing new facilities to solicit competing offers of regulatory property, thereby splitting states and localities into winners and losers in the quest to retain and attract jobs.[96]

While explicit cartel behavior by trade associations in restraint of trade is impermissible under the Sherman Act,[97] there is an exception, under *Parker v. Brown*,[98] for the anti-competitive actions of sovereign states. This is true, under *Columbia v. Omni Outdoor Advertising, Inc.*,[99] even if the regulation results from a conspiracy between state officials and market actors. In rejecting a "conspiracy exception" to *Parker* immunity in that case, Justice Scalia explained:

> The impracticality of such a principle is evident if, for purposes of the exception, "conspiracy" means noting more than an agreement to impose the regulation in question. Since it is both inevitable and desirable that public officials often agree to do what one or another group of private citizens urges upon

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[94] Ronald A. Cass, *Privatization: Politics, Law, and Theory*, 71 MARQ. L. REV. 449, 469 (1988).

[95] Shi-Ling Hsu, *A Two-Dimensional Framework for Analyzing Property Rights Regimes*, 36 U.C. DAVIS L. REV. 813, 879 (2003).

[96] *See generally* Dan T. Coenen, *Business Subsidies and the Dormant Commerce Clause* 107 YALE L.J. 965 (1998) (noting that the Supreme Court has refused to decide whether subsidies to in-state business come under the ambit of the so-called Dormant Commerce Clause, which forbids discrimination against out-of-state businesses); Richard C. Schragger, *Cities, Economic Development, and the Free Trade Constitution*, 94 VA. L. REV. 1091, 1096 (2008) (noting that "cities are apt to engage in behavior that might be too solicitous of mobile capital, by forcing current residents to subsidize the entry of new or preferred arrivals"); *see also* Louise Story, *As Companies Seek Tax Deals, Governments Pay High Price*, N.Y. TIMES, Dec. 1, 2012, at A1 (describing communities that sought economic salvation by offering incentives to companies that later deserted them).

[97] 15 U.S.C. § 1 ("Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.").

[98] 317 U.S. 341 (1943).

[99] 499 U.S. 365 (1991).

> them, such an exception would virtually swallow up the *Parker* rule: All anti-competitive regulation would be vulnerable to a "conspiracy charge."[100]

Local restrictions granting downtown merchants zoning protection from what they deemed incompatible downtown stores and "big box" stores at the edge of town have been justified by state courts on the grounds that they were not anti-competitive, but rather designed to protect the economic viability of the central business district.[101] This situation is rife with possibilities of abuse in favor of well-connected local businesses and should be reexamined.[102]

The tenaciousness of regulatory property holders often is exacerbated when they acquire their interests from existing incumbents. The "transitional gains trap" results in new government largess being immediately factored into the price of the benefitted asset.[103] Thus, subsequent buyers rightfully believe that *they* haven't gotten something for nothing, but will bear all of the loss if the special privileges are withdrawn.

An additional element furthering the creation of regulatory property in the United States is the privatization of government's regulatory functions. In other nations, "privatization" generally refers to the sale of government-owned enterprises to private investors. In the United States, however, it also refers to the "disinvolvement" of government for reasons of cost savings or ideology.[104] Supporting the economic perspective, "[c]ontracting out has been promoted within government for the same reasons that outsourcing has been encouraged in the private sector: as a means of enabling organizations to benefit from competition among suppliers and of keeping them focused on their core

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[100] *Id*. at 374.

[101] *See, e.g.*, Hernandez v. City of Hanford, 159 P.3d 33 (Cal 2007). *See also* STEVEN J. EAGLE, REGULATORY TAKINGS § 4-8(b) (5th ed. 2012) for additional discussion.

[102] An occasion for reconsideration of *Parker* and *Columbia* might be N.C. Bd. of Dental Examiners v. FTC, 13-534 (cert. granted, Mar. 3, 2014) (appealing Fourth Circuit ruling that sending cease-and-desist orders to non-dentists performing teeth whitening services was in restraint of trade by). That case presents the issue of whether a state regulatory board, the majority of members of which were market participants, elected by other market participants, qualifies for *Parker* immunity.

[103] *See generally* Gordon Tullock, *The Transitional Gains Trap*, *in* TOWARD A THEORY OF THE RENT-SEEKING SOCIETY 211–221 (James M. Buchanan et al. eds., 1980).

[104] Ronald A. Cass, *Privatization: Politics, Law, and Theory*, 71 MARQ. L. REV. 449, 451–52 (1988).

functions."[105] In addition, for some privatization has the added advantage of obscuring normative concerns about reducing the scope of government beneath the positive guise of efficiency.[106]

The efficiency gains inuring to private suppliers are contested, both because public officials derive non-pecuniary gains from performing their tasks well and because proper government supervision of private contractors requires expensive monitoring, which often is neglected.[107] Also, there can be no benefits inuring from the existence of a market when a government service is transferred to a sole provider who faces no competition."[108]

E. Regulatory Property Distorts Government Goals

Apart from its negative effects on landowners, regulatory property has adverse implications for government itself. The classic statement, in Professor Jerold Kayden's *Zoning for Dollars*,[109] is that "cities grant private real estate developers the legal right to disregard zoning restrictions in return for their voluntary agreement to provide urban design features such as plazas, atriums, and parks, and social facilities and services such as affordable housing, day care centers, and job training."[110] When people sit down at the bargaining table, the results are predicated on who they are and what they bring to the table. This seems like the antithesis of the rule of law, where the rules are stable, known

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[105] Matthew Diller, *Form and Substance in the Privatization of Poverty Programs*, 49 U.C.L.A. REV. 1739, 1744 (2002).

[106] *See* Cass, *supra* note 104 at 452. "The term privatization avoids direct argument over the proper goals for society. It suggests in a general, imprecise way, that we can all agree on goals, but that the real issue is finding the right way to accomplish those goals. Individuals who are concerned with efficiency and individuals who are concerned with autonomy both can appreciate the benefit of substituting private for government action." *Id*.

[107] *See* Jonas Prager, *Contracting Out Government Services: Lessons from the Private Sector*, 54 PUB. ADM. REV. 176, 179, 181–82 (1994).

[108] Ellen Dannin, *Red Tape or Accountability: Privatization, Public-ization, and Public Values*, 15 CORNELL J.L. & PUB. POL'Y 111, 118 (2005).

[109] Jerold S. Kayden, *Zoning for Dollars: New Rules for an Old Game? Comments on the* Municipal Art Society *and* Nollan *Cases*, 39 WASH. U. J. URB. & CONTEMP. L. 3 (1991).

[110] *Id*. at 3.

in advance, and, above all, where everyone is treated equally.[111] The bargaining process "intrinsically delegitimizes the entire regulatory system."[112]

> There should be no mistake that the bargaining process is about dollars.
>
> > Under utilitarian calculations, the private developer seeks to maximize the amount of development on a fixed quantity of land and enters an incentive zoning deal if the value of additional building rights exceeds the amenity's cost. Confronting decreased federal support and louder cries for social services, local governments view incentive zoning as an off-budget mechanism to meet public needs.[113]

In meeting these public needs, the factor often most important to the initiation of redevelopment projects is "the ultimate difference between pre- and postproject, tax-assessed values."[114] In other instances, entire neighborhoods might be leveled in the quest for obtaining federal dollars.[115] Such negotiations take place within the context of what, in some areas, is a broader theme. A recent account regarding Texas noted: "In a state that markets itself as 'wide open for business,' the lines are often blurred between decision makers and beneficiaries, according to interviews with dozens of state and local officials and corporate representatives."[116]

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[111] *See* Richard H,. Fallon, Jr., *"The Rule of Law" as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1, 8–9 (1997) (defining elements of "rule of law" as (1) people must be able understand and comply with the law, (2) they should be ruled by the law and generally obey it, (3) the law must be reasonably stable, (4) the law should rule all, including legislators and judges, and (5) the law should be impartially enforced through fair procedures).

[112] Kayden, *supra* note 109, at 67.

[113] *Id.* at 51.

[114] *See* Lefcoe *supra* note 12, at 68 (stating that most important to the initiation of redevelopment projects is "the ultimate difference between pre- and postproject, tax-assessed values").

[115] William A. Fischel, *The Political Economy of Public Use in* Poletown*: How Federal Grants Encourage Excessive Use of Eminent Domain*, 2004 MICH. ST. L. REV. 929, 942-43 (asserting that the City of Detroit perceived that the construction of a General Motors assembly plant to replace a large ethnic neighborhood as a way to obtain federal funds, with city taxpayers pay little towards the questionable project, and that other localities were eager to offer cheaper land (including greenfield areas) and equivalent tax advantages to GM).

[116] Louise Story, *Lines Blur as Texas Gives Industries a Bonanza*, N.Y. TIMES, Dec. 3, 2012, at A1.

II. REGULATORY PROPERTY AND LAND USE

A. The Conflation of Open Access, Public Domain and Private Property

Access to resources or business opportunities that become sequestered and assigned as regulatory property previously were available under other regimes.

1. Open Access Regimes

The most basic scheme for the organization of resources is the lack of a scheme—which is to say "open access." Resources and opportunities are available for the taking.[117]

Our thinking about open access often is befuddled by Professor Garrett Hardin's confusing metaphor "the tragedy of the commons."[118] Hardin was attempting to deal with a common pool problem, and, as noted earlier, dealing with such problems in the context of environmental law gave rise to the concept of "hybrid property," the precursor of regulatory property.[119] During the quarter century after its publication, there were "a steady stream of articles and books that have made plain the errors and shortcomings of Hardin's article."[120]

Professors David Haddock and Lynne Kiesling have illustrated that "commons" are not unowned, but rather are the collective property of defined groups, so that a better

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[117] *See* Thráinn Eggertsson, *Open Access Versus Common Property*, in PROPERTY RIGHTS 73 (Terry L. Anderson & Fred S. McChesney eds., 2003).

[118] Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243, 1245 (1968). It is important to note that Hardin used the term "commons" not with regard to resources owned in common, but rather to resources which were bereft of ownership, and where there was open access to all. For an earlier and more sophisticated explanation of the problem of common pool resources, *see* H. Scott Gordon, *The Economic Theory of a Common-Property Resource: The Fishery*, 62 J. POL. ECON. 124 (1954).

[119] *See supra* notes 75–80 and accompanying text.

[120] Michael Taylor, *The Economics and Politics of Property Rights and Common Pool Resources*, 32 NAT. RES. J. 633, 633–34 (reviewing books on common pool problems, collective action, and public policy).

title for Hardin's essay would be "The Tragedy of Open Access."[121] While Hardin had the advantage of a beguiling title, the grazing area he posits was open to all, which makes it quite unlike a true commons, such as a homeowners association swimming pool, with its "members only" sign on the gate.[122] Based on the circumstances, it might be feasible to ensure sustainability of a resource by formal government prohibitions on use (in which case the benefits of prudent use are lost) or awarding of the right to use under a "merit" or "public interest" standard.[123] Resources also could be allocated informally within small communities where residents have other family, social and economic ties, and where monitoring use is relatively easy,[124] or where disputing neighbors find recourse in informal norms.[125]

The lack of clearly defined property rights leads to a Hobbesian "war of all against all," where people constantly fight over resources, or, for those of a more romantic inclination, a Rousseauian state of nature in which people could co-exist happily.[126] Some resources, such as ambient air, are so abundant as to defy the need for ownership. Economic resources, however, are scarce. As Harold Demsetz postulated, property rights tend to be created in scarce goods when the cost of establishing and maintaining them is less than the resulting gains.[127]

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[121] David D. Haddock & Lynne Kiesling, *The Black Death and Property Rights*, 31 J. LEGAL STUD. 545, 557 (2002).

[122] *See* Rose, *supra* note 75, at 155 (referring to property owned in common as "commons on the inside, property on the outside").

[123] A well-known example is licensing of TV and radio stations by the Federal Communications Commission to serve the "public convenience, interest, or necessity." 47 U.S.C. § 303.

[124] *See generally* ELINOR OSTROM, GOVERNING THE COMMONS (1990).

[125] *See generally* ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1991).

[126] *See* Michael I. Swygert & Katherine Earle Yanes, *A Unified Theory of Justice: The Integration of Fairness into Efficiency*, 73 WASH. L. REV. 249, 327 & n.246 (1998).

[127] *See* Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. (Papers & Proc.) 347, 350 (1967) (noting that "property rights develop to internalize externalities" where it is cost-effective to do so). *Cf.* Katrina Miriam Wyman, *From Fur to Fish: Reconsidering the Evolution of Private Property*, 80 N.Y.U. L. REV. 117 (2005) (asserting that Demsetz unduly neglected the role of the State in property formation).

2. Public Domain and the Public Trust Doctrine

While "open access" implies the absence of government or private regulation, another form of free availability of resources results from a deliberate societal choice. An important illustration is the "public trust doctrine," traceable to Roman law, under which "that land covered by tidal waters belonged to the sovereign, but for the common use of all the people."[128] As formulated by Professor Joseph Sax, public trust property must be used by the general public, for the original use intended, and may not be sold.[129]

While the doctrine has been understood to espouse an inherent right of access to certain resources by the "unorganized public,"[130] its origins have been the subject of considerable dispute.[131] Furthermore, with the impetus of Professor Sax,[132] efforts have been made to expand its scope.[133]

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[128] Borough of Neptune City v. Borough of Avon-By-The-Sea, 294 A.2d 47, 51 (N.J. 1972). The principle is grounded in the view that "[b]y the law of nature" "the air, running water, the sea, and consequently the shores of the sea," were "common to mankind." JUSTINIAN, INSTITUTES 2.1.1 (T. Sandars trans. 1st Am. ed. 1876).

[129] Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 477 (1970) (internal citation omitted). "Three types of restrictions on governmental authority are often thought to be imposed by the public trust: first, the property subject to the trust must not only be used for a public purpose, but it must be held available for use by the general public; second, the property may not be sold, even for a fair cash equivalent; and third, the property must be maintained for particular types of uses."

[130] *See* Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 721 & n.37 (1986) (quoting as source of phrase Phillips v. Stamford, 71 A. 361, 363 (Conn. 1908)).

[131] *See, e.g.*, Lloyd R. Cohen, *The Public Trust Doctrine: An Economic Perspective*, 29 CAL. W. L. REV. 239, 240 (1992) (referring to the doctrine as "an obscure, unfixed, unclear, doctrine of communal rights to fishing and commercial uses of tidal lands, held in trust by the King of England"); *cf.* James L. Huffman, *Speaking of Inconvenient Truths—A History of the Public Trust Doctrine*, 18 DUKE ENVTL. L. & POL'Y F. 1, 1 (2007) (asserting that adherents of an expansive view of the public trust doctrine "rely on a mythological history").

[132] Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 477 (1970) (internal citation omitted). "Of all the concepts known to American law, only the public trust doctrine seems to have the breadth and substantive content which might make it useful as a tool of general application for citizens seeking to develop a comprehensive legal approach to resource management problems."

[133] *See, e.g.*, Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355 (N.J. 1984) (holding right of access to public trust shoreline over private land). One vivid suggestion is that a municipal sports authority could utilize the doctrine to force private teams using heavily subsidized stadia

The inalienability of public trust property was suggested in the Supreme Court's seminal decision in *Illinois Central Railroad Company v. Illinois*.[134] However, it remains unclear that there is a "constitutional home" for the public trust doctrine, and *Illinois Central* might be heavily influenced by the grossly inadequate compensation received by the State of Illinois for its later-repudiated sale of a large tract of land just offshore of Chicago's central business district to the railroad.[135] Perhaps, in summary, *Illinois Central* is important "as a font of new doctrine, as a justification for that doctrine, and as a source of confusion about the doctrine."[136]

A contemporary debate in which concerns about the common intellectual heritage of humanity plays a role akin to the public trust doctrine involves patent and copyright, recently recast as "intellectual property." Opponents of "propertization" assert that "[t]he rise of property rhetoric in intellectual property cases is . . . closely identified not with common law property rules in general, but with a particular view of property rights as the right to capture or internalize the full social value of property."[137] Through a "classic public choice problem," the "narrowly focused interests of content industries" swamps the "diffuse interest" of the public in "preserving shared information entitlements."[138] Other scholars argue, however, that close historical analysis reveals that the genesis of patent and copyright in America is not monopoly tolerated for utilitarian ends, but rather

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nominally owned by quasi-public entities to revise lease agreements to make them more favorable to the city. *See* Chris Dumbroski, *Application of the Public Trust Doctrine to the Pittsburgh Stadium and Exhibition Authority*, 7 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 63, 74 (2010).

[134] 146 U.S. 387, 452 (1892) (noting that the title under which Illinois held the submerged lands under the navigable waters of Lake Michigan is "different in character from that which the state holds in lands intended for sale .... It is a title held in trust for the people of the state that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interferences of private parties.").

[135] Richard A. Epstein, *The Public Trust Doctrine*, 7 CATO J. 411, 427–428 (1987).

[136] Joseph D. Kearney & Thomas W. Merrill, *The Origins of the American Public Trust Doctrine: What Really Happened in* Illinois Central, 71 U. CHI. L. REV. 799 (2004).

[137] Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031, 1037-45 (2005)

[138] David Fagundes, *Property Rhetoric and the Public Domain*, 94 MINN. L. REV. 652, 690 (2010).

adherence to natural law concepts of social contract and the rights of individuals to the fruits of their labor.[139]

More generally, whether members of the "unorganized public"[140] have a right to engage in a productive trade or business was considered by the Supreme Court in 1873, in *The Slaughterhouse Cases*.[141] There, the Court ruled that the new Fourteenth Amendment, which forbade any State from "abridg[ing] the privileges or immunities of citizens of the United States,"[142] applied only to incidents of national citizenship, such as interstate travel. Likewise, the Court never has extended the substantive aspect of the Due Process Clause to encompass rights to practice lawful occupations, or for that matter to use one's land in ways traditionally deemed appropriate. Such rights are protected, if at all, only under state law. It is precisely the ability of the State to limit such rights to its designees that is the heart of regulatory property.

3. Private Property

Private property is a principal vehicle for vesting individuals with the autonomy to further their own preferred values.[143] Thus, property has an important function beyond pecuniary wealth enhancement.[144]

Regulatory property might result from an arrogation of individuals' "expressive property." In an interesting inversion, that term has been employed to support violation of

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[139] *See* Adam Mossoff, *Who Cares What Thomas Jefferson Thought About Patents? Reevaluating the Patent "Privilege" In Historical Context*, 92 CORNELL L. REV. 953, 958 (2007).

[140] *See* Rose, *supra* note 130, and accompanying text for discussion.

[141] Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873).

[142] U.S. CONST. amend. XIV, § 1. "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

[143] *See, e.g.*, Eric R. Claeys, *Virtue and Rights in American Property Law*, 94 CORNELL L. REV. 889, 917 (2009).

[144] *See* Thomas W. Merrill & Henry E. Smith, Essay, *What Happened to Property in Law and Economics*, 111 Yale L.J. 357 (2001) (noting the tendency of economists to conflate property with command over resources for wealth enhancement).

the legal property rights of others, for expressive purposes.[145] Here, I refer to actions of owners themselves, using their property in ways that vindicate their own personhood.[146]

An illustration of the problem is the creation of regulatory property rights in the fruits of control of deposits in client trust accounts held by attorneys. In *Brown v. Legal Foundation of Washington*,[147] the Supreme Court upheld the mandatory transfer of small client trust deposits that could not earn interest if placed in separate accounts to Interest on Lawyers Trust Accounts (IOLTA). Lawyer IOLTA accounts would earn interest, which was mandated to inure to support designated legal services programs. The Court held that the commandeering of client trust deposits with their lawyers did not constitute a taking, since the lawyers had no property interest in them and their clients, who had equitable ownership, did not forego interest by dint of the incorporation of their funds in the IOLTA program.

The Court looked to pecuniary value only, and disregarded that the *Brown* petitioners obviously had strong subjective values in not having their property used in ways of which they disapproved. The most conventional definition of "property," after all, is based on exclusion.[148] "Fruits of control," as used here, refers to the non-pecuniary as well as financial benefits of ownership. Property is, after all, a way of owners impressing their personhood on the objects of their ownership.[149] Those objecting to the mandatory funding of legal services programs could have been exempted from IOLTA. While they do not comprise a traditionally disfavored group, the story of the *Brown* petitioners illustrates that "[t]he power of eminent domain does not fall on the . . . powerful," but on in-

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[145] *See* Gregory P. Magarian, *The Jurisprudence of Colliding First Amendment Interests: From the Dead End of Neutrality to the Open Road of Participation-Enhancing Review*, 83 NOTRE DAME L. REV. 185, 193–98 (2007) (discussing, inter alia, access for political and labor organizing); Laura S. Underkuffler, *The Politics of Property and Need*, 20 CORNELL J.L. & PUB. POL'Y 363, 363–66 (2010) (discussing, inter alia, squatting to protest housing shortages and civil rights sit-ins).

[146] *See* Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1981) (asserting the importance of private property in the development and projecting of individual autonomy).

[147] 538 U.S. 216 (2003).

[148] Felix S. Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357 (1954). "To the world: Keep off X unless you have my permission, which I may grant or withhold. Signed: Private citizen Endorsed: The state." *Id*. at 374.

[149] *See generally* Radin, *supra* note 146.

dividuals whose benighted views, in this instance, deems them "less worthy than others."[150]

B. The Right of Development and Private Property

Since regulatory property often takes the form of rights in land development, it is important to consider whether development rights already are inherent in land ownership. In *Lucas v. South Carolina Coastal Council*,[151] the Supreme Court declared that "[i]t seems unlikely that common-law principles would have prevented the erection of any habitable or productive improvements on petitioner's land; they rarely support prohibition of the 'essential use' of land."[152] Likewise, in the Court's first impermissible exactions case, *Nollan v. California Coastal Commission*,[153] it indicated in dicta that "the right to build on one's own property—even though its exercise can be subjected to legitimate permitting requirements—cannot remotely be described as a "governmental benefit."[154]

Indeed, as proclaimed in the Court's most recent impermissible exactions case, *Koontz v. St. Johns River Water Management District*,[155] the existence of an inherent right of development is implicit in the prohibition of "extortionate demands" for property or money as a condition for granting development permits.[156] It is far more likely that a fair resolution of reasonable restrictions on development could be ascertained in the courtroom than in rough-and-tumble negotiations in plan commission backrooms and the like, where such deals generally are worked out.[157] But that is one more reason for judi-

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[150] Underkuffler, *supra* note 145, at 375.

[151] 505 U.S. 1003 (1992).

[152] *Id*. at 1031.

[153] 483 U.S. 825 (1987).

[154] *Id*. at 833 n.2.

[155] 133 S.Ct. 2586 (2101).

[156] *Id*. at 2596.

[157] *See* Steven J. Eagle, Koontz *in the Mansion and the Gatehouse*, 46 URB. LAW. 1 (2014) (analogizing Yale Kamisar's comparison of respect accorded a defendant's right to remain silent in the courtroom and the then-pervasive disregard of that right in the backroom of the police station-house).

cial recognition that development rights should not be treated as regulatory property to be sold for exactions.

The existence of owners' intrinsic rights in land development likewise has been understood by commentators as a traditional attribute of the common law.[158] Most particularly, this traditional view has been distinguished from the commandeering of development rights that is implicit in the form of regulatory property known as transferable development rights (TDRs).[159]

In some situations, density of development might reasonably be limited to enhance a community's quality of life.[160] Also, the lumpiness of land into fixed parcels of variable sizes means that every parcel cannot have the number of houses.[161] In such situations, transferrable development rights supplies an answer. Unlike the practice of according such right in outsiders, as regulatory property, the fractional development rights should be provided to every landowner in the applicable area.[162] They, in turn, would be free to sell these rights to developers, who could then purchase and more densely develop particular parcels. By this means, to the extent consistent with the police power, every owner's intrinsic right to development is preserved. In *Suitum v. Tahoe Regional Plan-*

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[158] *See, e.g.*, George Lefcoe, *The Right to Develop Land: The German and Dutch Experience*, 56 OR. L. REV. 31, 31–32 (1977) (noting a "presumption in favor of the owner's inherent right to subdivide"); Richard F. Babcock & Duane A. Feurer, *Land as a Commodity "Affected With a Public Interest*, 52 WASH. L. REV. 289, 301 (1977) (contrasting that "[t]he kind and intensity of land development is, of course, regulated by government through regulatory programs such as building and housing codes and environmental controls . . ."); R.S. Radford, *Takings and Transferable Development Rights in the Supreme Court: The Constitutional Status of TDRs in the Aftermath of* Suitum, 28 STETSON L. REV. 685, 692 (1999) (stating that "[s]ound authority exists for viewing the right to develop as an inherent incident of land ownership," and quoting *Nollan* and *Lucas*).

[159] John J. Delaney, et. al., *TDR Redux: A Second Generation of Practical Legal Concerns*, 15 URB. LAW. 593 (1983). "Contrary to the traditional view of private property, which holds that development rights are inherent in specific land alone, TDR programs are premised on the notion that development rights in land are themselves distinct property entities and, as such, are freely separable from conventional rights of ownership. The development right becomes a separate property res which can be transferred from the "sending parcel" where it was created, to a designated "receiving parcel." *Id.* at 595.

[160] Smithfield Concerned Citizens for Fair Zoning v. Smithfield, 907 F.2d 239, 244–45 (1st Cir. 1990).

[161] *See* Lee Anne Fennell, *Lumpy Property*, 160 U. PA. L. REV. 1955 (2012).

[162] See Barancik v. County of Marin, 872 F.2d 834 (9th Cir. 1988).

ning Agency,[163] the Supreme Court held that the issuance of TDRs "ripened" a regulatory takings case for federal judicial review.[164] However, the Court did not consider whether TDRs mitigated regulations that otherwise would be compensable takings provided partial compensation for such takings,[165] or whether the downzoning of land in receiving areas that provided TDRs with their value infringed upon the Constitutional rights of those owners.[166]

Contrary to this traditional view of property rights is the notion that economic returns from the ownership of land in its undeveloped state (as opposed to buildings and other improvements) are unearned, and constitute only economic rent.[167] As John Stuart Mill put it, landowners unjustly grow richer in their sleep.[168] The theory that the growing value of land was due only to the activities of society and government, and hence should be the basis of all taxation, was popularized by Henry George.[169] Subsequently, the United Kingdom's Town and Country Planning Act of 1947 nationalized all land develop-

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[163] 520 U.S. 725 (1997).

[164] *Id*. at 734 (holding that the award of TDRs met the "final decision" prong of Williamson Cty. Reg'l Plan Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 186 (1985)).

[165] *See infra* notes 263–266 and accompanying text.

[166] *See infra* note 271 and accompanying text.

[167] *See* R. Wilson Freyermuth, *Of Hotel Revenues, Rents, and Formalism in the Bankruptcy Courts: Implications for Reforming Commercial Real Estate Finance*, 40 UCLA L. REV. 1461, 1544 n.194 (1993) ("The land/services distinction may reflect the influence of early economists and their conceptions of economic rent. David Ricardo defined rent as 'that portion of the produce of the earth which is paid to the landlord for the use of the original and indestructible powers of the soil.'") (quoting FRANCIS A. WALKER, LAND AND ITS RENT 35 (1883)).

[168] II JOHN STUART MILL, PRINCIPLES OF POLITICAL ECONOMY WITH SOME OF THEIR APPLICATIONS TO SOCIAL PHILOSOPHY, 412 [Book V., Chap. II, §5] (1864) (1848) (stating of landowners: "They grow richer, as it were in their sleep, without working, risking, or economizing. What claim have they, on the general principle of social justice, to this accession of riches?").

[169] HENRY GEORGE, PROGRESS AND POVERTY THE REMEDY: AN INQUIRY INTO THE CAUSE OF INDUSTRIAL DEPRESSIONS AND OF INCREASE OF WANT WITH INCREASE OF WEALTH 406 (1940) (asserting the efficiency of a single tax on the value of land, without improvements as a substitute for all other taxes).

ment rights, while providing only a limited fund to compensate owners whose development rights were taken completely or significantly reduced.[170]

As one English commentator put it:

> In the eyes of the legislators, there was no reason why the Whiteacre farmer should enjoy this windfall; it arose solely by grace of the planning authority, which represented the community. Hence, it was right that it should be seized by the community. And who, in this context, was the community? Naturally, the central government.
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> Thus, the property to be taken into social ownership came to be thought of not as the site value as such or as the "original and indestructible properties of the soil," but simply as any kind of value increase arising from a permitted change of use. If the price of food rose because of a rise in public demand, so that, through no effort of his own, the Blackacre farmer found the value of his land rising to £ 100 per acre, he was entitled to keep the increment. But if he obtained permission to change his land use, so that its value rose to £90 per acre, the increment of £40 properly belonged to the government.[171]

While the Town and Country Planning Act approach never was comprehensively implemented in the United States, it did strike a favorable chord. When the Council on Environmental Quality proposed something similar in 1973, it received the approbation of a Citizens Advisory Committee chaired by philanthropist Laurance Rockefeller.[172]

Regulatory property is effectuated through the transmutation of what the common law regarded as normal attributes of landownership, and permitting development only through special permit or dispensation. This government "permit power" reverses the

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[170] *See* Daniel H. Cole, *Political Institutions, Judicial Review, and Private Property: A Comparative Institutional Analysis*, 15 SUP. CT. ECON. REV. 141, 163 (2007) (citing MALCOLM GRANT, URBAN PLANNING LAW 63 (1982)).

[171] Arthur Shenfield, *The Mirage of Social Land Value: Lessons from the British Experience*, 44 APPRAISAL J. 523 (1976).

[172] *See* Gideon Kanner, *Do We Need to Impair or Strengthen Property Rights in Order to "Fulfill Their Unique Role"? A Response to Professor Dyal-Chand*, 31 U. HAW. L. REV. 423, 473 n.211 (2009) (citing Gladwin Hill, *Authority to Develop Land is Termed a Public Right*, N.Y. TIMES, May 20, 1973, at 21).

"classical American view . . . that all that is not prohibited is permitted."[173] It also represents "the creation of . . . enormous power in the state."[174]

1. Land Use and Land Use Regulation

Land use regulation is rooted in the State's police power, and is designed to further the public's health, safety, and welfare.[175] Regulatory property comports uneasily with these purposes. To the extent that regulatory property quashes productive use, it reduces society's welfare. To the extent that it transfers to others the owner's rightful share of the burden of regulations that prevent harm, it reduces both efficiency and fairness. Regulatory property is particularly pernicious regarding land use for two reasons.

Property in land always has represented great comparative wealth. While real estate developers and speculators often are held in opprobrium,[176] they are successful only to the extent that they correctly anticipate the desires of subsequent residential and commercial purchasers and their tenants. Land development not only benefits those market actors, but also has a direct and substantial bearing on such regional and national concerns as housing affordability.[177] By encouraging or discouraging movement to economi-

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[173] Richard A. Epstein, *The Permit Power Meets the Constitution*, 81 IOWA L. REV. 407, 407 (1995).

[174] *Id*. at 413.

[175] *See supra* note 46 and accompanying text.

[176] A highly consequential example is the hostility towards developers evident in Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1234 (1967) (comparing an apartment house owner who would lose "the apartment investment he depended on" with "the nearby land speculator who is unable to show that he has yet formed any specific plans for his vacant land" and who "still has a package of possibilities," albeit with "lessened" value). This approach informed Justice Brennan's adoption of what has become the supremely important "investment-backed expectations" test of the leading regulatory takings case, *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124, 127–28 (1978). For further discussion, *see* Steven J. Eagle, *The Four-Factor* Penn Central *Regulatory Takings Test*, 118 PENN ST. L. REV. (forthcoming 2014) (discussing, inter alia, the "investment-backed expectations" test).

[177] *See* Edward L. Glaeser & Joseph Gyourko, *The Impact of Building Restriction on Housing Affordability*, 9 FED. RES. BANK N.Y. ECON. POL'Y REV. 21 (2003).

cally vibrant areas, government policies affecting real estate development affect national productivity.[178]

Justice Stevens wrote the Supreme Court opinion in *Kelo v. City of New London*,[179] which held that condemnation for urban revitalization satisfied the Fifth Amendment's "public use" requirement. Nevertheless, shortly thereafter he stated his personal view that such condemnation was unwise, because "the allocation of economic resources that result from the free play of market forces is more likely to produce acceptable results in the long run than the best-intentioned plans of public officials."[180]

From a legal perspective, the creation of property rights through regulation appears incompatible with both the police power and the institution of private property. As a general matter, a government action that "takes property from *A.* and gives it to *B.* . . . is against all reason and justice[,]" and thus antithetical to due process of law.[181] As applied to land use, the creation and award of regulatory property changes the focus of regulation from permissible *uses* of land to permissible *users* of land. This is contrary to the premise of the rule of law that all individuals are subject to general rules, and that substantive justice is not based upon the identity of the affected parties.[182]

It is ironic to observe that, at its worst, the "crony capitalism" sometimes associated with the creation of regulatory property brings Anglo-American real property law full circle. After the Norman Conquest, the basis of English land holdings was liegeship,

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[178] *See* Peter Ganong & Daniel Shoag, *Why Has Regional Income Convergence in the U.S. Declined?* (March 28, 2013). HKS Working Paper No. RWP12-028, *available at* ssrn.com/abstract=2081216. *But see* Greg Kaplan and Sam Schulhofer-Wohl, *Understanding the Long-Run Decline in Interstate Migration*, NBER Working Paper No. 18507 (November 2012) (asserting that fall in interstate migration is due to a decline in the geographic specificity of returns to occupations, together with an increase in workers' ability to learn about other locations before moving there).

[179] 545 U.S. 469 (2005).

[180] John Paul Stevens, *Judicial Predilections*, 6 NEV. L.J. 1, 4 (2005).

[181] Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798). *See also* Kelo v. City of New London, 545 U.S. 469, 477–78 & n.5 (2005) (reiterating that "it has long been accepted that the sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B*, even though *A* is paid just compensation").

[182] *See, e.g.*, Fallon, *supra* note 111.

the intimate and personal bond between lord and vassal.[183] Magna Carta first interposed the rule of law between the landholding nobility and the king.[184] While, as Sir Henry Maine famously observed, "the movement of the progressive societies has hitherto been a movement from Status to Contract[,]"[185] regulatory property can bring us back to the tenuous bonds of clientalism.[186] In contrast, the lure that attracted settlers to the American colonies was allodial (fee-simple) title to land, free from the distasteful burdens of feudal subordination.[187]

2. Is Zoning Regulation "Property"?

Among the types of government regulation of land use that are most familiar are zoning and the issuance of building permits for new homes. A typical residential suburb, for example, contains many single-family homes, the owners of which tend to be conscientious voters; a small retail district; and some undeveloped land, often owned by non-residents. The homeowners are a substantial majority of the electorate. The undeveloped land gives them pleasant surroundings and informal parks. If houses were to be built on undeveloped lots, the existing homeowners would lose those amenities. They also would face some additional traffic congestion, and also houses that would compete with their own in the resale market.

For such reasons, existing homeowners would favor little or no additional development. To the extent additional development is permitted, it is in their interest to siphon off as much of the developers' profits as possible, in the form of local permitting fees and other exactions. Also, they have the incentive to demand that new residences should be at

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[183] *See* MARC BLOCH, FEUDAL SOCIETY 446 (1962) (noting as an important aspect of feudalism that ties of obedience and protection bound one man to another).

[184] *See, e.g.*, Robert N. Clinton, *Original Understanding, Legal Realism, and the Interpretation of 'This Constitution'*, 72 IOWA L. REV. 1177, 1187 n.23 (1987) (noting that Magna Carta established rules of law and fundamental rights of citizens binding on the sovereign).

[185] HENRY SUMNER MAINE, ANCIENT LAW 170 (2002) (1866).

[186] *See, e.g.*, John C. Reitz, Export of the Rule of Law, 13 TRANSNAT'L L. & CONTEMP. PROBS. 429, 485 (2003) (noting problem of exporting the rule of law to societies embodying "systems of clientalism, patronage, or clan loyalties").

[187] *See* JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 11-12 (3rd ed. 2008).

least as handsome and expensive as existing homes. In short, homeowners become typical monopolists.[188]

Land economists have "examine[d] the ramifications of declaring that the right to profit from development in any community belongs to the present, politically active residents of that community," and might be sold by them in the open market, "with proceeds going to reduce local taxes or to finance expenditures that benefit current residents."[189] Professor Robert Nelson flatly states that zoning constitutes neighborhood property rights,[190] that neighborhood "land assembly districts" should have the power of eminent domain,[191] and that "block-level improvement districts" could impose taxes.[192] In short, zoning makes the life of suburbanites more pleasant and their homes more valuable. They cling tenaciously to regulatory advantages in the same manner that taxicab owners do.[193]

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[188] *See* Robert C. Ellickson, *Suburban Growth Controls: An Economic Analysis*, 80 YALE L.J. 385, 400–403 (1977).

[189] William A. Fischel. *The Economics of Land Use Exactions: A Property Rights Analysis, 50* L. & CONTEMP. PROBS. 101, 101 (1987).

[190] ROBERT H. NELSON, ZONING AND PROPERTY RIGHTS: AN ANALYSIS OF THE AMERICAN SYSTEM OF LAND-USE REGULATION (1977); Robert H. Nelson, *Privatizing the Neighborhood: A Proposal to Replace Zoning with Private Collective Property Rights to Existing Neighborhoods*, 7 GEO. MASON L. REV. 827, 833-34 (1999) (listing five parts of the Private Neighborhood Association plan).

[191] Michael Heller & Rick Hills, *Land Assembly Districts*, 121 HARV. L. REV. 1465 (2008).

> "LADs are essentially a form of special district with the power of eminent domain over all of the land located within the district's jurisdiction. The essential purpose of this district is to allow the LAD's residents to overcome collective action problems arising from fragmentation of ownership. The LAD accomplishes this task by giving these stakeholders the collective power to force each member of the LAD to accept a land assembler's proposal to buy the neighborhood."
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> *Id*. at 1488.

[192] Robert C. Ellickson, *New Institutions for Old Neighborhoods*, 48 DUKE L.J. 75, 97-98 (1998) (proposing block-level improvement districts that would enable existing residential neighborhoods to offer amenities, such as landscaping and security now available in condominiums, and to impose corresponding assessments).

[193] *See infra* notes 67–68 and accompanying text.

Furthermore, while we think about exclusionary zoning as occurring in affluent suburbs, there also are similarly sheltered affluent neighborhoods within cities.[194]

Professor Bernard Siegan was a leading opponent of zoning. In summarizing his views, Professor Nelson observed that the nuisance and planning justifications for zoning were "patently false."[195] Furthermore, "[o]nce municipalities took possession of their new zoning rights, municipal politicians found it impossible to resist the temptation to exercise the rights promiscuously. Zoning ultimately served the political interests of the most powerful elements of the municipality, rather than any public interest."[196]

III. REGULATORY PROPERTY SCHEMES AND THE PERILS THEY CREATE

This Part of the Article deals with particular types of regulatory property affecting land use. An area of land use regulation that has been particularly notable for the creation of regulatory property and the attendant possibility of abuse has been urban redevelopment. Dangerous and pestilential conditions call for police power correction. However, the widespread demolition of neighborhoods, with subsequent urban renewal, gained traction only as a result of warnings about ill-defined urban "blight."[197] Sixty years ago, in *Berman v. Parker*,[198] Justice Douglas declared that bulldozing of entire neighborhoods, including sound buildings, was warranted so that the area would not "revert again to a blighted or slum area, *as though possessed of a congenital disease*."[199] Although often

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[194] *See* Christopher Serkin & Leslie Wellington, *Putting Exclusionary Zoning in Its Place: Affordable Housing and Geographical Scale*, 40 FORDHAM URB. L.J. 1667, 1679-80 (2013) (noting, inter alia, that affluent city neighborhoods value good schools as much as affluent suburbs do, and asserting that the recent administration of New York City Mayor Michael Bloomberg "has used its zoning power aggressively to maintain property values in those more affluent parts of the city").

[195] Nelson, *Privatizing the Neighborhood*, *supra* note 190, at 846 (citing BERNARD H. SIEGAN, LAND USE WITHOUT ZONING 231 (1972)).

[196] *Id.* at 847.

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

[198] 348 U.S. 26 (1954).

[199] *Id*. at 34 (emphasis added).

harming displaced low- and moderate-income residents,[200] renewal has been a boon to developers of luxury housing and shops in neighborhoods adjacent to prosperous central business districts. Such areas often were homes to minority-group residents. The strong link between "urban renewal" and "Negro removal" was noted by Justice Thomas in his dissent in *Kelo v. City of New London*,[201] where the Court gave carte blanche to urban revitalization condemnations.

A. Eminent Domain and Secondary Rent Seeking

It is possible, as Professor Lynn Blais has maintained,[202] that eminent domain is "indispensable to effective and efficient urban revitalization."[203] She cited the difficulty that cities have in assembling the large tracts of land needed for multi-purpose revitalization projects in secret without the use or threat of condemnation.[204] Blais asserted, however, that restrictions on the use of eminent domain for non-blighted property and for re-transfers for private revitalization, adapted in numerous states in the wake of *Kelo v. City of New London*,[205] would make revitalization more difficult and less effective.[206]

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[200] *See* Linda Wheeler, *Broken Ground, Broken Hearts In'50s, Many Lost SW Homes to Urban Renewal*, WASH. POST, June 21, 1999, at A-1 (discussing harm to former residents by the Southwest Washington D.C. renewal upheld in *Berman v. Parker*).

[201] 545 U.S. 469, 522 (2005) (Thomas, J., dissenting) (asserting that "[urban renewal projects have long been associated with the displacement of blacks; '[i]n cities across the country, urban renewal came to be known as "Negro removal."'" (quoting Pritchett, supra note 197, at 47).

[202] Lynn E. Blais, *Urban Revitalization in the Post*-Kelo *Era*, 34 FORDHAM URB. L.J. 657 (2007). *See also* Gerald S. Dickinson, *Inclusionary Eminent Domain*, 45 LOY. U. CHI. L.J. 845 (2014) Dickinson asserted that the proffered inclusionary construct "encourages a constructive, three-way engagement process and partnership among the community, private developer and municipality where condemnation is already, or anticipated, to be granted by the courts." *Id*. at 883.

[203] *Id*. at 683.

[204] *Id*. (citing Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 74–77 (1986). As Professor Merrill noted, the greater transparency of government budgeting and acquisitions leads cities to assemble parcels using eminent domain rather than "private developers' 'guile.'" *Id*. at 82.

[205] 545 U.S. 469 (2005).

[206] Blais, *supra* note 202, at 684–686.

In a trilogy of cases culminating in *Kelo*, the U.S. Supreme Court essentially has vitiated the Fifth Amendment's requirement that condemnation be for a "public use."[207] Some states and localities have taken advantage of that uncabined discretion to wrest pecuniary value from landowners in ways that provide them with less than fair compensation, and which might even reduce the value of the affected parcels.

In *Berman v. Parker*,[208] the Court upheld the condemnation and demolition of a sound department store building located within what was termed a "blighted area" in Southwest Washington, D.C.[209] The Court disclaimed any independent significance of the Public Use Clause: "Once the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear. For the power of eminent domain is merely the means to the end."[210] In *Hawaii Housing Authority v. Midkiff*,[211] Justice O'Connor declared that "[t]he 'public use' requirement is . . . coterminous with the scope of a sovereign's police powers."

The conflation of "public use" with "public benefit" was completed in *Kelo*,[212] where Justice Stevens concluded that the Court had defined public use "broadly."[213] Both Stevens'[214] and Justice Kennedy's concurring opinions[215] warned against eminent do-

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[207] U.S. CONST. Amend. V (". . . nor shall private property be taken for public use, without just compensation.").

[208] 348 U.S. 26 (1954). For elaboration of background and context, see Amy Lavine, *Urban Renewal and the Story of* Berman v. Parker, 42 URB. LAW. 423 (2010).

[209] *Id*. at 28–29 (asserting that these ends "cannot be attained 'by the ordinary operations of private enterprise alone without public participation").

[210] *Id*. at 33.

[211] 467 U.S. 229 (1984).

[212] Kelo v. City of New London, 545 U.S. 469 (2005) (condemnation of sound housing for re-transfer land for commercial use to help revitalize economically distressed city).

[213] *Id*. at 516 (citing, inter alia, *Berman*, *Midkiff*, and Strickley v. Highland Boy Gold Mining Co., 200 U.S. 527 (1906) (upholding condemnation of aerial right-of-way for bucket line operated by mining company important to local economy).

[214] *Id*. at 477.

[215] *Id*. at 493 (Kennedy, J., concurring) ("[A] presumption of invalidity is not warranted for economic development takings in general . . . [but t]here may be private transfers in which the risk of undetected impermissible favoritism of private parties is so acute that a presumption (rebuttable or otherwise) of invalidity is warranted under the Public Use Clause.").

main abuse, but subsequently the federal courts have shirked from examining plausibly abusive instances.[216] The problem reached what is perhaps its apogee in *Didden v. Village of Port Chester*,[217] where a Second Circuit panel (including now-Justice Sotomayor) upheld a decision favoring a private redeveloper, to whom the village had given the power of eminent domain within a large redevelopment district, and who condemned a parcel after its owner refused to pay the redeveloper $800,000 not to condemn it.

In an area of homes or neighborhood businesses, most individual parcels will be small. It would be difficult to assemble from these a single large parcel, since the cost of negotiating with numerous parties, each of whom has an incentive to settle last and drive a hard bargain, would be formidable. If the local government condemns all of these parcels, it could circumvent this process and keep the "assembly gains" (*i.e.*, the greater value of the superparcel than the aggregate value of the smaller parcels) for itself.[218]

Some of the impetus for this type of analysis is derived from Professor Michael Heller's study of "anticommons," where ownership interests in shops and the like were so highly fractionalized as to make them almost completely dysfunctional.[219] However, the Moscow interests in land that Heller considered did not arise from the operation of real estate markets, but rather were the fragments of an imploded system of Soviet property holdings. It is not clear, a priori, whether the coerced consolidation of small-scale homes and businesses really creates wealth for the neighborhood, city, or region in which it occurs. In particular, some egregious cases of abusive condemnations occurred in the context of municipal efforts to increase sales tax revenues that otherwise might benefit an

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[216] For elaboration, see Steven J. Eagle, *Public Use in the Dirigiste Tradition: Private and Public Benefit in an Era of Agglomeration*, 38 FORDHAM URB. L.J. 1023, 1055–69 (2011). *See also* Gideon Kanner, *Detroit and the Decline of Urban America*, 2013 MICH. ST. L. REV. 1547, 1552 (noting that post-*Kelo* government decisions to condemn property are "well-nigh conclusive and, as such, not subject to meaningful judicial review or referenda") (internal citations omitted).

[217] Didden v. Village of Port Chester, 322 F. Supp. 2d 385 (S.D.N.Y. 2004), *aff'd*, 173 Fed. Appx. 931 (2nd Cir. 2006).

[218] *See* Merrill, *supra* note 204, at 86.

[219] Michael Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621 (1998).

adjoining community.[220]After *Kelo*, it should be noted, state courts have become less receptive to tax-driven eminent domain.[221]

The use of eminent domain for urban revitalization inherently is problematic, since all condemnation creates winners and losers. Because of "serious practical difficulties" with more subjective standards, the Supreme Court defines "just compensation" in terms of fair market value.[222] However, most landowners value their property in excess of its marginal value to strangers, and do not have it on the market.[223] The disregard of the owner's idiosyncratic value, which encompasses sentiment, goodwill, and the dislocations of moving, make it likely in many instances that government is not promoting economic efficiency.[224]

While rent seeking[225] encompasses many types of reciprocal benefits conferred by public officials, it has a byproduct, "secondary rent seeking,"[226] that is especially germane in urban revitalization. If "rent seeking" is an attempt to capture the benefits of an existing government monopoly, then "secondary rent seeking" is an attempt to capture

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[220] *See, e.g.*, 99 Cents Only Stores v. Lancaster Redev. Agency, 237 F.Supp.2d 1123 (C.D. Cal. 2001), *dismissed as moot and remanded*, 60 Fed. Appx. 123 (9th Cir 2003) (contrived blight benefitting commercially more important competitor to which parcel was to be retransferred); Cottonwood Christian Center. v. Cypress Redev. Agency, 218 F. Supp. 2d 1203 (C.D. Cal. 2002) (church parcel condemned for retransfer to big box store that would generate sales taxes).

[221] *See* David Schultz, *Economic Development and Eminent Domain After* Kelo*: Property Rights and "Public Use" Under State Constitutions*, 11 ALB. L. ENVTL. OUTLOOK J. 41 (2006) (discussing cases).

[222] United States v. 564.54 Acres of Land, 441 U.S. 506, 511 (1979) (quoting United States v. Miller, 317 U.S. 369, 374 (1943)).

[223] Coniston Corp. v. Village of Hoffman Estates, 844 F.2d 461, 464 (7th Cir. 1988).

[224] Abraham Bell & Gideon Parchomovsky, *Takings Reassessed*, 87 VA. L. REV. 277, 290 (2001).

[225] *See supra* notes 88–92 and accompanying text for discussion.

[226] Merrill, *supra* note 204. Merrill discussed the additional value inuring to cities through their condemnation of many small and unwieldy contiguous parcels of land, converting them into one superparcel with a much higher aggregate value. *Id*. at 86. However, the ensuing surplus **"**may produce a kind of secondary rent seeking of its own, as competing interest groups attempt to acquire or defeat a legislative grant of the power of eminent domain. In this way, eminent domain, an instrument designed to overcome rent-seeking behavior associated with thin markets, may inadvertently produce the very type of socially inefficient resource allocation it was designed to avoid. Indeed, in the extreme, the expenditures undertaken to obtain or defeat a grant of eminent domain could completely offset the expected surplus that would be generated by the use of eminent domain. *Id*. (citations omitted).

the benefit of government creation of a new monopoly. Programs for "urban revitalization" have loomed large in efforts to create rent seeking schemes and are an integral part of the cozy deals sometimes referred to as crony capitalism.[227]

As an illustration of secondary rent seeking, a savvy real estate developer could find a site that, with various government subsidies, would be valuable to redevelop. The developer would ask a local official, with which he or she has an existing relationship, perhaps consolidated through campaign contributions, to condemn it. As the old saying goes, "one hand washes the other."[228]After condemnation, the site would be transferred to the developer for purposes of urban revitalization, with ensuing financial rewards. The former owners of the redevelopment site would receive only "just compensation" for their small parcels, but little or nothing for their idiosyncratic personal value, customization of premises, business goodwill, and costs of moving.

This account suggests merit in the admonition that "[c]ities ought to focus on doing what they do well: rezoning, laying down infrastructure, ensuring basic public services, and providing basic police and fire protection."[229]

B. Public-Private Partnerships

Redevelopment through public-private partnerships (PPPs) has been justified as resulting from "a consensus among economists, attorneys, planners, and developers that the unassisted operation of the free market would not reverse stubborn economic decline in certain defined situations and geographic areas."[230] In fact, PPPs have been widely employed in recent urban renewal projects. "Virtually all of the successful revitalization

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[227] *See infra* Part III.D. for discussion.

[228] *See Plunkitt, Champion of "Honest Graft,"* N.Y. TIMES, Nov. 23, 1924, at XX3 (obituary) (explaining that New York Tammany Hall boss George Washington Plunkitt coined the term "honest graft" in connection with "financial foresight due to inside information" involving city real estate activity).

[229] Eric R. Claeys, *Don't Waste A Teaching Moment: Kelo, Urban Renewal, and Blight*, 15 J. AFFORD. HOUS. & COMMUNITY DEV. L. 14, 17 (Fall 2005).

[230] Marc B. Mihaly, *Living in the Past: The* Kelo *Court and Public-Private Economic Redevelopment*, 34 ECOLOGY L.Q. 1, 6 (2007).

projects featured an emphasis on creating partnerships between the public and private sectors."[231]

Nevertheless, ambivalence about urban revitalization suggests that "government today really is commingling political and businesslike agendas in ways both liberating and threatening."[232] Professor Richard Briffault, generally supportive of the business improvement district (BID), a form of PPP, has noted that such private entities, with their own taxing authority within their districts, affect others in the city, but have uncertain accountability to local officials.[233]

The nature of many PPPs recently was elucidated by a U.S. district court in *District of Columbia v. Department of Labor*.[234] The court held that the Davis-Bacon Act,[235] which provides that prevailing wages be paid for the construction of government "public works,"[236] does not apply to the "CityCenterDC" project, the redevelopment of the old Washington Convention Center site. The District had entered into 99-year leases for land upon which private developers would build "a mixed-use development that will feature condominium and apartment buildings, two office buildings, a hotel, retail establish-

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[231] Blais, *supra* note 202, at n.55 (*quoting* Fritz W. Wagner, Timothy E. Jader & Anthony J. Mumphrey, Jr., *Introduction to Urban Revitalization: Policies and Programs*, ix, *in* URBAN REVITALIZATION: POLICIES & PROGRAMS (Fritz W. Wagner, Timothy E. Joder & Anthony J. Mumphrey, Jr. eds., 1995)).

[232] Jon D. Michaels, *Privatization's Progeny*, 101 GEO. L. REV. 1023, 1088 (2013).

[233] Richard Briffault, *A Government for Our Time? Business Improvement Districts and Urban Governance*, 99 COLUM. L. REV. 365, 456 (1999) (noting that "it is unclear how vigorously municipal governments actually oversee their BIDs"). *See also* Wayne Batchis, *Business Improvement Districts and the Constitution: The Troubling Necessity of Privatized Government for Urban Revitalization*, 38 HASTINGS CONST. L.Q. 91, 94 (2010) ("BIDs achieve their goals by harnessing the power of coercive taxation while at the same time eliminating the 'messiness' of democracy".).

[234] District of Columbia v. Dep't of Labor, ___ F. Supp. 2d ____, 2014 WL 1292788, No. 13-0730 (D. D.C. Mar. 31. 2014).

[235] 40 U.S.C. § 3141 et seq.

[236] 40 U.S.C. § 3142(a).

ments, and some public open spaces."[237] The project would be "entirely privately funded, occupied, and maintained."[238] The court stated:

> At bottom, there are two signature elements of a public works project: public dollars going into the project, and a public facility coming out of the project. CityCenterDC has neither. It is being privately financed by for-profit entities, and it will result in the creation of condominiums, apartments, office space, retail space, and a hotel that will be privately owned and operated. The fact that the project is expected to give rise to incidental public benefits—such as employment opportunities, increased tax revenue, and even a certain amount of open space—does not transform it into a public work; these are the goals of every urban development project. And the fact that the District has imposed certain requirements–even some at the level of particularity of the width of the sidewalks–does not alter the essence of the finished product. The [Department of Labor's] reliance on these details ignores the big picture: that the project is not being built by the government, for the government, or for the people the government represents.
>
> The CityCenterDC development may be a laudable and exciting public-private partnership, and it may entail a more comprehensive level of urban planning and cooperation than the ordinary project, but the exercise will result in the creation of an enclave of private facilities.[239]

C. Cap and Trade Regulation

Many valuable natural resources are either sustainable or wasting assets, depending on human management or exploitation of them. As noted earlier, Garrett Hardin's *The Tragedy of the Commons*[240] led the resource debate astray by conflating open access with ownership by a group of persons, or other regimes that embody monitoring of use.[241]

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[237] ___ F. Supp. 2d ____, 2014 WL 1292788 *1.

[238] *Id*. at ___, 2014 WL 1292788 *1.

[239] *Id*. at ___, 2014 WL 1292788 *2.

[240] Hardin, *supra* note 118.

[241] *See supra* notes 117–125 and accompanying text for discussion.

Through what Professor Carol Rose termed "community-based management regimes," customary rules within a community can be adapted to changing needs.[242] However, American courts generally have been hostile to customary law as "smacking of the hierarchy of manorial life," the charms of a close-knit community can look xenophobic to outsiders.[243] Moreover, it is difficult for semi-formal management concepts to be scaled up, and "larger governmental forays into resource management are distinctly inferior to community-based solutions."[244]

Also, there are largely market-based solutions to overexploitation of a resource. One such solution is a Pigovian tax, which would force users to internalize the social costs of their activities, which otherwise would be diffused negative externalities, adversely affecting many others.[245]

Another market solution to the externalizing of the costs of resource depletion is internalization through privatization of the resource. The holder of regulatory property in an emissions allotment would have the right to engage in an activity that is denied others. A cap is placed on overall resource exploitation, and owners of fractional interests within the cap may trade with others. Through "cap and trade," Coasean bargaining results in the allocations migrating to those who value them most highly.[246] The internalization results from the need of the holders of allocations to take into account the value placed upon them by those who would put the allocations to alternative uses, which might be more productive.

Although "cap and trade" is a market mechanism, it is a significant mistake to assume that it is independent of government regulation. Regulatory property in resource exploitation does not have an immaculate conception. Rather decisions regarding the setting of caps, the allocation of property rights, and the tradability of such rights all result

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[242] Carol M. Rose, *Common Property, Regulatory Property, and Environmental Protection: Comparing Community-Based Management to Tradable Environmental Allowances, in* THE DRAMA OF THE COMMONS 233, 233–34 (Elinor Ostrom et al. eds., 2002).

[243] *Id.* at 252.

[244] *Id.* at 234.

[245] *See generally* A.C. PIGOU, THE ECONOMICS OF WELFARE, 710-19 (4th ed. 1932).

[246] *See generally* Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

from political decisionmaking.[247] As I have discussed elsewhere,[248] there is great validity in Professor N. Gregory Mankiw's formulation: "Cap-and-trade = Carbon tax + Corporate Welfare."[249]

> For a long time, the politics of the allocation process received relatively little attention because the Coase Theorem demonstrates that any initial distribution of resource rights can eventually be efficient if the rights are fully specified and tradable. From the perspective of resource use efficiency, then, the trading process is far more important than the initial allocation. This overlooks the fact, though, that the basic purpose of the allocation process is to distribute scarce and valuable assets—resource rights among competing actors locked in a zero-sum relationship.[250]

With respect to cap and trade, "[t]he trading mechanism that eventually emerges from intricate negotiations and political compromise is unlikely to have efficiency as its top priority[,]" and thus "[a]ctual transactions have been fewer, markets less competitive and efficiency gains less impressive than predicted."[251] One account of "Why did cap and trade die?" declared: "The short answer is that it was done in by the weak economy, the Wall Street meltdown, determined industry opposition and its own complexity."[252]

An important example of this problem is presidential candidate Barack Obama's 2008 proposal to impose a cap on carbon emissions in an effort to ameliorate climate change, with all of the allowances to be sold at auction.[253] After Congressional bargaining before the proposal died, most of the value of emissions permits, intended to go to the

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[247] *See generally* B. Timothy Heinmiller, *The Politics of "Cap and Trade" Policies*, 47 NAT. RES. J. 445 (2007).

[248] Steven J. Eagle, *A Prospective Look at Property Rights and Environmental Regulations*, 20 GEO. MASON L. REV. 725, 736–737 (2013).

[249] *Id*. at 736 (quoting Greg Mankiw, *The Fundamental Theorem of Carbon Taxation*, GREG MANKIW'S BLOG (Aug. 2, 2007), http://gregmankiw.blogspot.com/2007/08/fundamental-theorem-of-carbon-taxation.html).

[250] Heinmiller, *supra* note 247, at 456.

[251] Bonnie G. Colby, *Cap-and-Trade Policy Challenges: A Tale of Three Markets*, 76 LAND ECON. 638, 640 (2000).

[252] John M. Broader, *'Cap and Trade' Loses Its Standing as Energy Policy of Choice*, N.Y. TIMES, Mar. 25, 2010, at A13.

[253] *See* N. Gregory Mankiw, *A Missed Opportunity on Climate Change*, N.Y. TIMES, Aug. 9, 2009, at BU4.

Treasury, were instead promised to incumbent emitters.[254] While cap and trade seems to work fairly well in dealing with selected pollutants, such as nitrous oxide, it is questionable whether it readily could be applied to the much more economically significant problem of carbon emissions.[255] However, a recent and more positive account involves a cap and trade program among Northeastern states, where at least ten states apparently have cut their emissions by 30 percent between 2005 and 2012.[256]

D. Condemnation and Crony Capitalism

Condemnation for large redevelopment projects naturally lends itself to cozy deals between local officials and favored developers. This largely results from information asymmetries, which make it difficult for localities to keep their own nascent redevelopment plans hidden, while at the same time making it hard for them to ferret out opportunities of which developers would be aware.[257]

Since it is difficult for developers to sell their unverified insiders' knowledge of real estate opportunities, they must capture its value through actual participation in the redevelopment process.[258] A paradigmatic example involves tax increment financing: "[T]he local agency typically consults informally with private developers before going forward. Even though an informal agency-developer understanding could precede public hearings on the project and blatant cronyism or corruption might elude easy detection, a judge could look at the contract documents between a redevelopment agency and its mas-

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[254] *Id*.

[255] Jason Scott Johnston, *Climate Change Confusion and the Supreme Court: The Misguided Regulation of Greenhouse Gas Emissions Under the Clean Air Act*, 84 NOTRE DAME L. REV. 1, 62 (2008) (asserting that "the widespread preference for cap and trade global warming regulatory regimes" is "based on an overly facile belief that a policy instrument that has seemed to work relatively well for some air pollutants (in the United States, sulfur dioxide and nitrous oxides) will also be appropriate for a radically different set of air emissions whose reduction involves virtually every sector of the U.S. economy").

[256] Justin Gillis & Michael Wines, *In Some States, Emissions Cuts Defy Skeptics*, N.Y. TIMES, June 6, 2014, at A1.

[257] *See generally* Steven J. Eagle, *Public Use in the Dirigiste Tradition: Private and Public Benefit In an Era of Agglomeration*, 38 FORDHAM URB. L.J. 1023, 1078–79 (2011) (noting, inter alia, that officials and developers have a strong preference for dealing with counterparts who are well-recommended and known to be discrete).

[258] *Id*. at 1080–81.

ter redeveloper to make sure the public is receiving something of substantial value for its investment.[259] Of course, this problem is not unique to the United States.[260]

Another aspect of the revitalization of places as a way of benefitting their inhabitants is that economists have noted that subsidized investments in declining areas are not efficient ways of developing human capital.[261] Thus, expenditures and hardships created by condemnation and subsidized redevelopment may not ultimately be beneficial. However, the places versus people debate continues.[262]

E. Transferable Development Rights

Transferrable development rights (TDRs) are a device by which existing development rights in one location may be transferred to another location, where the development otherwise would not be permissible. Conventionally, TDRs have been used to permit an owner to transfer development from one part of a parcel to another part of the

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[259] George Lefcoe, *Redevelopment Takings After* Kelo*: What's Blight Got to Do with It?*, 17 S. CAL. REV. L. & SOC. JUST. 803, 841 (2008).

[260] *See* Barbara L. Bezdek, *Dreaming in Chinese: Accountable Development*, 27 MD. J. INT'L L. 48, 55-56 (2012) (describing China as in a "trapped transition," in which half-finished reforms have transferred power to new, affluent elites "who are using crony capitalism to generate high economic growth that is not sustainable," and who generate popular discontent "when it appears that officials invoke the general public's interest as justification for the land takings, yet it is evident that private land development pockets the profits." (internal citations omitted)).

[261] "Although there is no doubt that theory can provide an intellectually coherent rationale for supporting declining areas, it is less obvious that the model's conditions for federal government support to be beneficial are met in the real world. After all, providing incentives for geographic stability is a more direct means of promoting social capital investment than propping up declining areas. . . . If human capital investments also create spillovers, and if the returns to human capital are higher outside of declining regions, then propping up those regions will cause a reduction in human capital investment that must be weighed against any gains from social capital investment." Edward L. Glaeser & Charles Redlick, *Social Capital and Urban Growth*, 32 INT'L REG. SCI. REV. 264, 265 (2009).

[262] *See*, *e.g.*, Jack Sommer, *United States Urban Policy: What is Left? What is Right?*, 27 U. MICH. J.L. REF. 661 (1994) (discussing the lack of clear directions in urban renewal policy); Kenneth Stahl, *Mobility and Community in Urban Policy*, URB. LAW (forthcoming 2014) (*available at* http://ssrn.com/abstract=2422084) (asserting need for reconsideration of people vs. places in light of data, contained in ROBERT J. SAMPSON, GREAT AMERICAN CITY: CHICAGO AND THE ENDURING NEIGHBORHOOD EFFECT (2012), that "demonstrates that people are ineluctable products of their local environments, and he concludes that "place-based" policies that focus on building community are more likely to be successful than policies premised on the assumption of individual mobility and choice").

same parcel. In 1978, *Penn Central Transportation Co. v. City of New York*,[263] the Supreme Court seemed to give the device its blessing.[264]

"Regulatory takings" are regulations so severe that they require compensation under the Fifth Amendment's Takings Clause.[265] In *Penn Central*, the leading regulatory takings case, the Court upheld the rejection, based on a historic preservation ordinance, of plans for the construction of an office building on top of Grand Central Terminal. The Court discussed transferable development rights briefly.

Justice Brennan observed that the city gave the railroad the right to build more intensively on the rest of its parcel than otherwise would be allowed, and that this would "undoubtedly mitigate" the financial burden of the regulation, thus contributing to the regulation not constituting a taking.[266] However, in neither *Penn Central* nor subsequent cases did the Court directly consider the constitutionality of TDRs.[267] New York's highest court originally was skeptical,[268] but the device now is used in New York City and many others both to mitigate losses and to add flexibility to zoning.[269]

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[263] 438 U.S. 104 (1978).

[264] *See supra* notes 158–166 and accompanying text for earlier discussion of TDRs.

[265] In *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005), the Supreme Court noted that "government regulation of private property may, in some instances, be so onerous that its effect is tantamount to a direct appropriation or ouster-and that such 'regulatory takings' may be compensable under the Fifth Amendment." *Lingle* also summarized the Court's regulatory takings jurisprudence. *Id*. at 538–540.

[266] 438 U.S. at 137. "While these rights may well not have constituted 'just compensation' if a "taking" had occurred, the rights nevertheless undoubtedly mitigate whatever financial burdens the law has imposed on appellants and, for that reason, are to be taken into account in considering the impact of regulation."

[267] An aspect of TDRs was considered in *Suitum v. Tahoe Reg'l Plan. Agency*, 520 U.S. 725 (1997). *See supra* notes 163–165 for discussion.

[268] Fred French Investing Co. v. City of New York, 350 N.E.2d 381 (N.Y. 1976) (holding the substitution of property rights with transferable development rights of uncertain or contingent value a deprivation of due process).

[269] *See* Vicki Been & John Infranca, *Transferable Development Rights Programs: "Post-Zoning"?*, 78 BROOK. L. REV. 435, 437-38 (2013) ("TDR *438 programs outside New York City serve various (and sometimes multiple) purposes, including the preservation of historic sites, farmland, and environmentally sensitive land; the development of affordable housing; and broader urban design and revitalization goals." (citing ARTHUR C. NELSON, ET AL., THE TDR HANDBOOK 131-227 (2012)) (functionally listing TDR programs)).

> Implicit in the TDR concept was the idea that an area should have some overarching density cap; but within that cap, allowable density units could be moved from location to location. Thus TDRs introduced the idea of an unconventional form of hybrid and at least somewhat marketable entitlements-entitlements effectively created by regulation.[270]

TDRs are valuable only because they are regulatory property. Indeed, "[t]o make TDRs valuable, [a] city may restrict permitted densities in the receiving area below what the city otherwise would have been willing to permit."[271]

Assume that the local government fears that severely restrictions on a downtown parcel might constitute a taking. To alleviate that possibility, it awards the downtown owner TDRs, enabling it to build 8 dwelling units per acre (DUA) in a residential neighborhood ("receiving area") zoned for 4 DUA. Thus, the TRD is regulatory property that enables its holder to purchase a parcel and then upzone it to a more intense and valuable use that was denied the seller.

According to Professor Vicki Been and Mr. John Infranca,[272] recent TDR programs use "complex subdistricting" to determine TDR sites and density, serve as "one component of a comprehensive rezoning and redevelopment plan," and "use additional regulations and incentives to strengthen the market for TDRs."[273] Together, "these newer programs enable more creative uses of TDRs and more distant transfers, but they accomplish these results through complex regulations that render TDRs less a mechanism to alleviate zoning's rigidity than simply another tool in service of traditional zoning principle."[274]

However, just as medallions distort the taxicab market, TDRs distort land use regulation. If it indeed harms the public health, safety, and welfare for the former owner

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[270] Rose, *supra* note 75, at 165.

[271] ROBERT C. ELLICKSON & VICKI L. BEEN, LAND USE CONTROLS: CASES AND MATERIALS 193 (2d ed. 2000).

[272] Vicki Been and John Infranca, *Transferrable Development Rights Programs: "Post-Zoning"?*, 78 BROOK. L. REV. 435 (2013) (Been was appointed Commissioner of the New York City Department of Housing Preservation and Development in February 2014).

[273] *Id*. at 440.

[274] *Id*.

of a lot to build 8 units per acre,[275] why is it suddenly acceptable for the TDR holder to build 8 units per acre? As suggested earlier,[276] the TDR device introduces an inverse Robin Hood problem on a grand scale.

F. Affordable Housing

The creation of affordable housing is a prime situation in which TDRs and similar incentives are utilized. Typically, a developer who promises to devote two units to below-market-rate housing is accorded the right to build eight units, whereas otherwise the developer could build only four. If it is only feasible that a few parcels in a neighborhood be built to a higher density, the benefit should be shared by all neighborhood owners, instead of being handed out as a reward.[277]

From a public policy perspective, however, the most essential flaw in land use regulation for affordable housing is that it conflates problems of poverty and low incomes with problems of housing production. Instead, "a housing affordability crisis means that housing is expensive relative to its fundamental costs of production—not that people are poor.[278] Stringent land use regulations have the effect of pricing lower-income workers out of vibrant and affluent cities.[279]

Professor Edward Glaeser, a leading authority on the economics of land use, has concluded that the way to have more affordable housing is to have more housing.[280] Furthermore, economic studies have demonstrated that increased housing correlates with less

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[275] Ambler Realty Co.

[276] *See supra* notes 159–162 and accompanying text.

[277] *See* Barancik v. County of Marin, 653 F.2d 364 (9th Cir. 1981) (holding enhanced development rights should be shared by owners in the targeted area).

[278] Glaeser & Gyourko, *supra* note 177, at 21.

[279] *See* Ganong & Shoag, *supra* note 178, at 22 ("The U.S. is increasingly characterized by segregation along economic dimensions, with limited access for most workers to America's most productive cities.").

[280] *See generally* Edward L. Glaeser, et al., *Why is Manhattan So Expensive? Regulation and the Rise in Housing Prices*, 48 J.L. & ECON. 331 (2005).

onerous regulation.[281] Thus, while there is amble low- and moderate-cost housing in Mid-America, it is scarce in many areas on the East and West Coasts, where zoning and similar restrictions makes residential construction prohibitive. When highly-paid tech workers from Silicon Valley move to San Francisco, for instance, existing residents who cannot afford the higher rents are forced out. Activists have blocked and vandalized the luxury busses on which the "filthy rich" tech companies transport their workers.[282]

Mandates for affordable housing through "inclusionary zoning" result in a few individuals winning life's lottery, while the majority who are similarly situated get left behind, and those who might have a little further ahead due to hard work and savings get leapfrogged.[283] By serving as a tax on market-rate housing, the ultimate result of affordable housing is that less housing is built and it is more expensive.[284]

Rather remarkably, a recent report by the New York State Comptroller, highlighting the lack of affordable housing in all New York counties except for a few in rural areas, mentioned as causes declining real personal income, low vacancy rates, and rising property taxes. Conspicuously absent was mention of housing limitations on housing creation.[285]

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[281] *See* Edward L. Glaeser & Joseph Gyourko, *The Impact of Building Restrictions on Housing Affordability*, 9 ECON. POL'Y REV. 21, 23 (2003). "As a whole, our paper concludes that America does not uniformly face a housing affordability crisis. In the majority of places, land costs are low (or at least reasonable) and housing prices are close to (or below) the costs of new construction. In the places where housing is quite expensive, building restrictions appear to have created these high prices." *Id*.

[282] *See*, *e.g.*, David Streitfeld & Malia Wollan, *Tech Rides Are Focus of Hostility in Bay Area*, N.Y. TIMES, Jan. 31, 2014, at B1.

[283] *See* Howard Husock, *Back to Private Housing*, WALL ST. J. July 31, 1997, at A18. ("Why, after all, should a small minority of families gain amenities and low rent, not because they've worked hard and improved their station but because of a combination of need and luck?")

[284] Robert C. Ellickson, *The Irony of Inclusionary Zoning*, 54 S. CAL. L. REV. 1167, 1170 (1981) ("The programs will usually increase general housing prices, a result which further limits the housing opportunities of moderate-income families. In short, despite the assertions of inclusionary zoning proponents, most inclusionary ordinances are just another form of exclusionary practice.").

[285] Thomas DiNapoli, *Housing Affordability in New York State* (March 2014) (*available at* http://www.osc.state.ny.us/reports/housing/affordable_housing_ny_2014.pdf).

G. Tax Increment Financing

Among the most popular development incentives has been tax increment financing (TIF). The theory is that blighted areas generate little property taxes, so that real estate taxes on the increment of real estate value to be generated by new development could be dedicated to pay for the bonds issued to construct the new development.[286] The interest rate on these bonds is low, because the lenders receive their interest free of federal income taxes.[287] The popularity of TIF results from its apparently providing cities cost-free revitalization.

According to Professor Richard Briffault:

> Tax increment financing (TIF) is the most widely used local government program for financing economic development in the United States, but the proliferation of TIF is puzzling. TIF was originally created to support urban renewal programs and was narrowly focused on addressing urban blight, yet now it is used in areas that are plainly unblighted. TIF brings in no outside money and provides no new revenue-raising authority. There is little clear evidence that TIF has done much to help the municipalities that use it, and it is also a source of intergovernmental tension and a site of conflict over the scope of public aid to the private sector.[288]

Professor Briffault explained that TIF is so popular because it is decentralized, is part and parcel of the "fiscalization of development policy," and plays off one unit of local government against others.[289] The reason why TIF has become attenuated in urban renewal is that it "do[es] not work well in stagnant, poorer communities."[290] The most important factor in the initiation of redevelopment projects is "the ultimate difference be-

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[286] *See* Steven J. Eagle, Kelo, *Directed Growth, and Municipal Industrial Policy*, 17 SUP. CT. ECON. REV. 63, 78–79 (2009).

[287] 26 U.S.C. §144(c) (2006) (providing that bonds used for redevelopment are tax exempt if they are "qualified redevelopment bonds," defined as bonds designed so that at least 95 percent of proceeds will be used for redevelopment of an area that is blighted and the bonds will be paid off from tax revenue).

[288] Richard Briffault, *The Most Popular Tool: Tax Increment Financing and the Political Economy of Local Government*, 77 U. CHI. L. REV. 65, 65 (2010).

[289] *Id.*

[290] *See* Lefcoe, *supra* note 12, at 69 (internal citations omitted).

tween pre- and postproject, tax-assessed values."[291] TIF financing is one tool that localities use in their competition for development. Others include free infrastructure and employee training.[292]

There are many justifiable criticisms of TIF financing, including: Prosperous suburbs use TIF to lure jobs from less well-off communities; TIF projects don't confront seriously blighted urban areas, but rather support projects in the best commercial districts that could qualify; TIF often is used to subsidize retail development for the property and sales taxes it will bring, displacing sales and tax revenues from other locations; TIF projects drain property tax revenues from schools and counties; local governments sometimes confer excessive TIF-funded benefits to attract private redevelopers; and many local governments hide or neglect to gather information that would reveal whether TIF projects are successful.[293] Finally, "[s]cant public reporting of TIF expenditures and revenues, 'guided by the invisible hand of lobbyists, political action committees and campaign contributions,' does nothing to allay suspicions of favoritism and corruption."[294]

California recently abolished its local redevelopment agencies. As Professor George Lefcoe put it: "Even successful redevelopment efforts are often implemented with a jaw-dropping lack of financial transparency, accountability, and oversight" of redevelopment agencies.[295]

"Both the rise and fall of redevelopment are attributable to the fact that cities and counties sponsoring redevelopment could pledge not just their own share of the property

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[291] *Id.* at 68.

[292] *See* Coenen, *supra* note 96, and Dan T. Coenen, *Where* United Haulers *Might Take Us*, 95 IOWA L. REV. 541 (2010) (discussing bidding wars to subsidize business and that the Dormant Commerce Clause does not apply to subsidies for in-state business); *see generally* Robin P. Malloy, *The Political Economy of Co-Financing America's Urban Renaissance*, 40 VAND. L. REV. 67, 73-81 (1987) (introducing various methods of co-financing urban renewals, such as acquisition, development, and construction assistance, and tax-related assistance).

[293] George Lefcoe, *Competing for the Next Hundred Million Americans: The Uses and Abuses of Tax Increment Financing*, 43 URB. LAW. 427, 427–28 (2011).

[294] *Id*. at 473 (*quoting* Ike Wilson, *Study: Young Businesses Grow Faster*, FREDERICK NEWS-POST, April 30, 2009, http://www.fredericknewspost.com/sections/archives/display_detail.htm?StoryID=96285).

[295] George Lefcoe, *Redevelopment in California: Its Abrupt Termination and a Texas-Inspired Proposal for a Fresh Start*, 44 URB. LAW. 767. 774 (2012).

tax increments from redevelopment project areas, but also those of the other taxing entities including schools and special districts."[296] They are "uninterested in reviving state redevelopment without TIF because if they are limited to using their own revenues, and can achieve virtually any public or economic development purpose they wish, free of the considerable constraints and levies of redevelopment law compliance[,]" that program is superfluous.[297]

H. Sports Pork — A Confluence of Regulatory and Cartel Property

A fascinating form of regulatory property is the exclusive access to ostensibly public facilities provided to owners of professional athletic franchises. These owners are the beneficiaries of "enormous public funding for new and renovated stadiums after threatening to depart their hometowns, or by actually moving elsewhere."[298] During the 1990s, for instance, "approximately $15 billion was spent on major league facilities, with approximately $11 billion of the funding contributed by state and local governments."[299]

The term "sports pork" possibly first appeared in the title of a 1995 article, *Sports Pork: Tax-Paid Stadium-Building Madness Makes Sports Moguls Rich*.[300] The author, Philip Siekman, discounted pressure from local residents as the motivating factor for this largess, noting that public officials do not lose their jobs when sports teams move. Rather, he presented the view that sports arenas are "just another diversion of public funds into ill-conceived efforts to save the urban core," largely at the behest of "tight groups of businessmen and property developers with a strong economic interest in the vitality of the

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[296] *See* George Lefcoe & Charles W. Swenson, *Redevelopment in California: The Demise of TIF-Funded Redevelopment in California and Its Aftermath*, 67 NAT'L TAX J. (forthcoming 2014), *available at* ssrn.com/abstract=2428347, at 36.

[297] *Id*. at 1.

[298] David Haddock, Tonja Jacobi & Matthew Sag, *League Structure & Stadium Rent-Seeking—the Role of Antitrust Revisited*, 65 FLA. L. REV. 1, 1 (2013).

[299] Martin J. Greenberg & Dennis Hughes, Jr. (FN1), *Sports.comm: It Takes A Village to Build A Sports Facility*, 22 MARQ. SPORTS L. REV. 91 (2011).

[300] Philip Siekman, *Sports Pork: Tax-Paid Stadium-Building Madness Makes sports Moguls Rich*, 6 AM. ENTERPRISE 80 (Issue No. 3 May/June 1995).

downtown."[301] A close reading of an article by defenders of municipal subsidization of professional sports indicates nothing to refute this assertion.[302]

As previously discussed, the assignment of property owners into a regulatory category often both incentivizes and facilitates their organization into an interest group, and their subsequent capture of the regulatory agency for their own ends.[303] Professional sports franchises, however, already are organized into leagues, and their principal asset is cartel property,[304] which has characteristics similar to those of regulatory property. "As owners raise demands under the threat of evacuation, local governments are left with little meaningful choice in accepting or rejecting the demands. One-sided leases have become the norm and are often the only way a city can keep its home team."[305] Thus, team owners are able to bootstrap exclusive rights to compete within a sports league into exclusive rights to occupy municipal stadia built and subsidized by taxpayers at their behest.[306]

Apart from star athletes, who generally reside outside the community in which the stadium is located, workers in sports arenas generally have sporadic employment and modest pay. Money spent on public construction could have been used for public services or municipal infrastructure. Most team revenues are entertainment dollars that consumers otherwise would have spent elsewhere.[307] Furthermore, no independent economic study

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[301] *Id*. (citing Trinity University (San Antonio) Professor Heywood T. Sanders).

[302] Greenberg & Hughes, *supra* note 299.

[303] *See supra* notes 84–86 and accompanying text.

[304] David Haddock, et al., *supra note* 298, at 1 ("North American sports leagues are cartels: they control entry of teams, then collaborate to maximize effective rent-seeking, stave off competition, and keep prices high.").

[305] Keith Negrin, *If You Build It, They Might Stay: Unconscionability in Modern Sports Stadium Leases*, 30 PUB. CONT. L.J. 503, 507 (2001).

[306] *See* Arline F. Schubert, *A Taxpayer's and a Politician's Dilemma: Use of Eminent Domain to Acquire Private Property for Sport Facilities*, 86 N.D. L. REV. 845 (2010).

[307] *See generally* Kenneth L. Shropshire, *Sports Facility Construction in the Coming Millennium: the Lawyer's Role*, 16 ENT. & SPORTS L. 1, 27 (1998).

in recent decades has supported the assertion that cities derive a positive economic impact from stadium construction.[308]

Nevertheless, the New York Court of Appeals has accepted that the construction of a private, major league sports arena is a "civic project," on the somewhat dubious grounds that it would "serve a public purpose by providing a needed recreational venue in the area of the project."[309] As localities seek rescue from their impulses to engage in expensive competition to become major league cities, it even has been suggested that courts mandate fair team owner behavior through invocation of the public trust doctrine.[310]

CONCLUSION

Furthering the public good through the use of regulatory property is beguiling. However, the creation of property rights in entitlements and monopolies is a negative sum game. In an era of increased international competition, stagnant incomes for most Americans, and a common feeling that economic and political power are fusing together to the detriment of the average citizen, that's not an effective strategy.

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[308] *Id.*

[309] Kaur v. New York State Urban Dev. Corp., 933 N.E.2d 721, 734 (N.Y. 2010) (quoting Matter of Develop Don't Destroy [Brooklyn], 874 N.Y.S.2s 414, 424 (N.Y. App. 2009)).

[310] *See* Dumbroski, *supra* note 133; *see also supra* Part II.A.2. for discussion of "public trust."