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## The New Politics of New Property and the Takings Clause

Christopher Serkin

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# THE NEW POLITICS OF NEW PROPERTY AND THE TAKINGS CLAUSE

Christopher Serkin\*

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## INTRODUCTION

The politics of property is being turned on its head. Nowhere is that more evident than at the intersection of public power and private rights. That intersection—defined in part by the Takings Clause<sup>1</sup>—has a conventional political valence. Liberals and progressives favor broad regulatory power.<sup>2</sup> Conservatives and libertarians favor strong protection for private property.<sup>3</sup> Those predictable positions have become increasingly unstable, however. In many different regulatory contexts—from zoning, to eminent domain, to regulatory property—instinctive political reactions no longer track the underlying substantive stakes of various property conflicts.<sup>4</sup>

It is especially important to recognize these new trends and pressures given the contemporary state of politics. With extreme polarization, people increasingly adopt positions reflexively, responding more to the political battle lines than to the substance of the issues.<sup>5</sup> The result is liberals sometimes fighting against what should be their underlying normative commitments towards progressive redistribution and conservatives the

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1. U.S. CONST. amend. V (“[N]or shall private property be taken for public use, without just compensation.”).

2. See, e.g., Nestor M. Davidson, *Property’s Morale*, 110 MICH. L. REV. 437, 443 (2011) (arguing for expansive view of regulatory power).

3. See, e.g., Joseph Singer, *The Ownership Society and Takings of Property: Castles, Investments, and Just Obligations*, 30 HARV. ENVTL. L. REV. 309, 312 (2006) [hereinafter Singer, *Just Obligations*] (“Conservatives tend to view ownership as embodying both expansive rights and strong protections from government interference. The conservative framework sees property and regulation as opposites: broad property rights mean less regulation and more regulation means less protection for property rights.”).

4. See discussion *infra* Part II (describing the “shifting political valence of property and property protection,” which conventional politics does not capture).

5. See, e.g., Libby Jenke & Scott A. Huettel, *Issues or Identity? Cognitive Foundations of Voter Choice*, 20 TRENDS COGNITIVE SCI. 794, 800–01 (2016) (finding that people voting consistently with identity politics sometimes vote against their own interests).

opposite.<sup>6</sup> At the very least, failing to recognize the evolving stakes of property disputes means that unnoticed schisms have developed on the left, in particular.<sup>7</sup> Identifying those fault lines is the first step to reconciling them.

This Essay offers a broad gloss on the traditional politics of property protection and then catalogues a number of ways in which those politics have been changing. In many cases, the account is of fragmentation and fracture as once stable commitments have become much more contingent and fact dependent.<sup>8</sup> Admittedly, this characterization paints with an extremely broad brush. That is both its contribution and its weakness. This short Essay deliberately simplifies the characterization of preferences across the political spectrum. Much more nuanced definitions would better track the complexity of the underlying issues. Judges and scholars discussed below might also object to being lumped together in one group or another. Furthermore, given these broad definitions, it is always possible to find counter-examples where the politics lined up differently in the past or line up differently today. There is nevertheless value in this Essay's rough-cut approach. It reveals trends that one might miss when looking with a narrower gaze. The analysis that follows deliberately sacrifices some specificity in order to capture higher-level themes and observations.

## I. THE TRADITIONAL POLITICS OF PROPERTY PROTECTION

Property and property protection have traditionally had a predictable political valence. This is not true in the sense of party politics, which are messy, fickle, and often hard to classify, especially following the recent presidential election. But it is true of a more abstract set of commitments. Broadly speaking, conservatives are mistrustful of regulation, favor protecting the status quo, and resist redistribution. Liberals, in contrast, have more faith in government, mistrust unregulated markets and private power, and favor redistribution to protect the interests of the poor and the relatively powerless.<sup>9</sup> There are admittedly many other ways to distinguish

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6. See *infra* notes 100–14 and accompanying text (describing liberal support for NIMBY zoning).

7. Joseph William Singer, Kormendy Lecture, *Justifying Regulatory Takings*, 41 OHIO N.U. L. REV. 601, 626–27 (2015) [hereinafter Singer, Kormendy Lecture].

8. See *id.* (discussing contradictions within conservative and liberal approaches to property protection).

9. Compare ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 168, 172 (1974) (arguing against government redistribution), with JOHN RAWLS, A THEORY OF JUSTICE 326 (1971) (offering normative justification for redistribution to be more equal and essential for meeting the basic needs of those less favored). This is not to suggest that conservatives do not care about the poor and the relatively

between liberal and conservative positions that might generate different and differently shifting constellations of interests. Some might distinguish conservatism and liberalism on broader moral grounds.<sup>10</sup> Liberal and conservative positions are also not monolithic; both contain divergent strands that can hide more disagreement than agreement.<sup>11</sup> But this high-level definition captures a foundational difference that animates liberal and conservative approaches to different areas of law, as well as their competing normative commitments.

According to this definition, there is something inherently conservative about protecting property interests. It reinforces pre-existing distributions of resources and stands as a bulwark against redistribution. As a result, conservatives have traditionally opposed regulations that interfere with the rights of private owners, whether environmental, land-use, or economic regulations.<sup>12</sup> On the other hand, liberals believe that property should not pose a significant barrier to redistributive policies.<sup>13</sup> For example, if the government seeks to enact rent regulations, the burden on landlords may be unfortunate, but will not stand in the way of the policy.<sup>14</sup>

This divide is on sharp display in contemporary property theory. In response to the increasing contextualization of property rights over the course of the twentieth century, some recent scholars have refocused on the right to exclude as the fundamental basis of all property.<sup>15</sup> Echoing Blackstone, and his famous conception of property as a “despotic

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powerless, only that they believe strong protection of property rights will ultimately be better at doing so.

10. Compare BARRY GOLDWATER, *THE CONSCIENCE OF A CONSERVATIVE* 9–14 (1960) (discussing moral and ideological characteristics of conservatives), with PAUL KRUGMAN, *THE CONSCIENCE OF A LIBERAL* 190, 192, 197 (2007) (discussing liberal morals).

11. Traditional conservatives and libertarians, for example, adopt distinctive positions on many issues, as do traditional liberals and progressives. See, e.g., Pew Research Ctr., *Beyond Red vs. Blue: The Political Typology* 1, 1–3, 15 (June 26, 2014), <http://www.people-press.org/files/2014/06/6-26-14-Political-Typology-release1.pdf> (cataloguing political subgroups).

12. See, e.g., John D. Echeverria, *The Politics of Property Rights*, 50 OKLA. L. REV. 351, 365 (1997) (characterizing the political players in disputes over property rights).

13. See *id.* (discussing how environmental groups support liberal delegation of government programs such as redistribution); see also, Robert H. Nelson, *A Private Property Right Theory of Zoning*, 11 URB. LAW. 713, 716 (1979) (“[P]rogressive forces believed that the quality of urban environments could be significantly enhanced by much greater public planning.”).

14. Cf. David Willetts, *Modern Conservatism*, 63 POL. Q. 413, 415 (1992) (describing conservative opposition to rent regulation).

15. See, e.g., Thomas W. Merrill, Essay, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 734–35 (1998) (describing the right to exclude as a core attribute of property). See generally J.E. PENNER, *THE IDEA OF PROPERTY IN LAW* 68–73 (1997) (arguing that property consists of the right of exclusive use and possession).

dominion,”<sup>16</sup> this approach prioritizes the right to resist others’ demands and is therefore inherently conservative, as this Essay defines the term. In contrast, an important strand of progressive property theory has articulated a “social-obligation norm” embedded in the very content of property rights.<sup>17</sup> In this alternative view, property creates not only rights to exclude, but also obligations to share resources with others (at least in certain contexts).<sup>18</sup> The conceptual move is to recognize redistribution as inherent within property and not as an attack on property.

These competing attitudes toward property have also resulted in familiar and predictable clashes around the constitutional protection of property under the Takings Clause. Conservatives favor an expansive reading of the Takings Clause and would require the government to compensate for most, if not all, regulatory burdens.<sup>19</sup> For conservatives, this is important as a matter of restorative justice—ensuring that property owners are made whole—and as a constraint on government.<sup>20</sup> Liberals, on the other hand, favor a narrow view of the Takings Clause.<sup>21</sup> They reject the category of regulatory takings altogether, or confine it only to those regulatory burdens that are tantamount to outright expropriation.<sup>22</sup> In this view, the Takings Clause should not be a meaningful constraint on routine government regulations.

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16. 2 WILLIAM BLACKSTONE, COMMENTARIES \*2 (identifying property as “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”).

17. See, e.g., Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745, 757 (2009) [hereinafter Alexander, *Social-Obligation*] (“A fully developed social-obligation norm requires . . . some substantive conception of the common good that serves as the fundamental context for the exercise of the rights and duties of private ownership.”); PROPERTY AND COMMUNITY 61, 65–66 (Gregory S. Alexander & Eduardo M. Peñalver eds., 2010) (discussing property standards and how they define legitimate interests); Gregory S. Alexander, *Pluralism and Property*, 80 FORDHAM L. REV. 1017, 1022–23 (2011) [hereinafter Alexander, *Pluralism*] (“[P]roperty rights should have their share of social responsibility.”).

18. See Alexander, *Social-Obligation*, *supra* note 17, at 747, 807 (describing the right to exclude and the duty to share property with others under certain circumstances).

19. See RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 314–24 (1985) [hereinafter EPSTEIN, TAKINGS] (discussing conservatives’ expansive views on takings).

20. See Echeverria, *supra* note 12, at 351 (characterizing the conservative perspective on the Takings Clause).

21. Singer, *Just Obligations*, *supra* note 3, at 313.

22. See, e.g., William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 810, 812, 821 (1995) (advocating a narrow view of takings liability based upon analogies to physical expropriation).

This conventional divide traces back to the origins of the regulatory-takings doctrine.<sup>23</sup> In *Pennsylvania Coal Company v. Mahon*,<sup>24</sup> Justice Holmes famously articulated the broad outlines of the problem. He recognized that “[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.”<sup>25</sup> However, he also reasoned that “if regulation goes too far it will be recognized as a taking.”<sup>26</sup> In other words, not every burden on property violates the Takings Clause, but property nevertheless imposes some meaningful constraints on government action.

Justice Brandeis, in dissent, argued for a more limited view of property protection: he reasoned that if coal mining released poison gas, the government could undoubtedly prohibit the practice without paying compensation.<sup>27</sup> For him, property would not stand in the way of regulations that protect the health, safety, and welfare of the public. As the scope of these police powers has expanded over time, that position ineluctably results in narrow—or even nonexistent—protection of property from valid government regulations.<sup>28</sup>

Conservatives have long responded to the Brandeis view by decrying property’s secondary status in constitutional law.<sup>29</sup> They argue that property is identified specifically in the Constitution, is intrinsically important, and is necessary for preserving liberty and other rights.<sup>30</sup> The independence afforded by private property is important for preserving the right to practice religion, the right to assemble, and the right to privacy, among others.<sup>31</sup> However, liberals point to the fact that property, in the Constitution, is

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23. See generally Singer, Kormendy Lecture, *supra* note 7, at 605–06 (mentioning the long-standing conflicts between conservatives and liberals in takings law leading to confusing court precedent).

24. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 413, 415 (1922).

25. *Id.* at 413.

26. *Id.* at 415.

27. *Id.* at 417–19 (Brandeis, J., dissenting).

28. See, e.g., Christopher Serkin, *Existing Uses and the Limits of Land Use Regulations*, 84 N.Y.U. L. REV. 1222, 1248 (2009) [hereinafter Serkin, *Existing Uses*] (“[Some courts] reason that harm prevention is a valid exercise of a state’s police power and that, since all property is owned subject to the police power, no such harm prevention can trigger a compensation requirement.”).

29. See JAMES W. ELY, JR., *THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS* 8 (3d ed. 2008) (“The political and intellectual triumph of the New Deal seemingly settled this conflict [over the constitutional protection of property] by consigning property to a secondary status with only minimal constitutional protection . . . .”); see also EPSTEIN, *TAKINGS*, *supra* note 19, at 15–18 (arguing that property should be treated like other rights).

30. See ELY, JR., *supra* note 30, at 150–51 (discussing how some justices do not like to draw a sharp line between personal and property rights).

31. *Id.* at 150–51, 167.

protected primarily by a liability rule and not a property rule.<sup>32</sup> The government is not prohibited from taking property; it is only prohibited from taking property without just compensation.<sup>33</sup> Private property is not protected from compensated expropriations.<sup>34</sup>

These dynamics have combined to create entirely expected attitudes towards many government regulations. Conservatives have decried regulations that burden property rights or, at least, have viewed them skeptically.<sup>35</sup> Against a baseline presumption that property owners are entitled to do what they want with their property, any regulatory restriction amounts to a kind of redistribution from the property owner to the beneficiaries of the regulation. In this view, environmental regulations amount to a redistribution from property owners to the public, who benefit from environmental protection.<sup>36</sup> Zoning and land-use controls are exactly the same.<sup>37</sup> For conservatives, both can easily rise to the level of a taking.<sup>38</sup> Liberals, in contrast, favor such redistribution and promote the very regulatory interventions that conservatives dislike.<sup>39</sup> They favor regulations that will protect the environment or existing communities despite any incidental impact on property rights.<sup>40</sup> All are explicitly or implicitly redistributive.<sup>41</sup> For example, environmental regulations limit property

32. Christopher Serkin, *Public Entrenchment Through Private Law: Binding Local Governments*, 78 U. CHI. L. REV. 879, 884 (2011).

33. *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194 (1985) ("The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation.").

34. *See id.* at 194–95 (quoting *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1013, 1018 n.21 (1984)) ("If the government has provided an adequate process for obtaining compensation, and if resort to that process 'yield[s] just compensation,' then the property owner 'has no claim against the Government' for a taking.").

35. *See, e.g.*, Molly S. McUsic, *The Ghost of Lochner: Modern Takings Doctrine and Its Impact on Economic Legislation*, 76 B.U. L. REV. 605, 605–06 (1996) (describing conservative reliance on property to oppose regulations); EPSTEIN, *TAKINGS*, *supra* note 19, at 263–82 (arguing that almost all regulatory burdens should be compensable takings).

36. *See* Richard J. Lazarus, *Essay, Fairness in Environmental Law*, 27 ENVTL. L. 705, 725 (1997) ("[E]nvironmental law is purposefully and necessarily redistributive in a manner antagonistic to some private property interests."); *see also* James S. Burling, *Private Property Rights and the Environment After Palazzolo*, 30 B.C. ENVTL. AFF. L. REV. 1, 35–36, 64 (2002) (arguing that many environmental regulations should be viewed as takings).

37. EPSTEIN, *TAKINGS*, *supra* note 19, at 265 ("Local boards may take private rights of use and disposition into the public domain without compensation, then parcel them out again to others by majority rule.").

38. *Id.* at 265–67.

39. *Id.* at 266, 315, 322–23.

40. Singer, *Kormendy Lecture supra* note 7, at 614.

41. *See generally* JOEL P. TRACHTMAN, *TRADE LAW, DOMESTIC REGULATION AND DEVELOPMENT* 312 (2015) (explaining that liberalized intervention is characterized by implicit redistribution of regulations, ultimately providing for a better quality of life).



owners' rights but protect society—and the planet—as a whole.<sup>42</sup> Rent regulations burden the property owning landlords, but to the benefit of social capital and community stability.<sup>43</sup> The liberal view is much more willing to accept individual regulatory burdens that improve the welfare of the many and is much less sympathetic to any takings claims that might arise in the process.<sup>44</sup>

Undoubtedly, the source of the disagreement is often animated by different views about the value of the underlying regulatory intervention. Conservatives are often skeptical that regulations actually produce their putative benefit to the public.<sup>45</sup> Sometimes this is because they dispute the underlying goal. For example, conservatives and liberals may simply disagree about the importance of environmental protection and the regulation of carbon emissions.<sup>46</sup> But sometimes this is because conservatives doubt the efficacy of the regulation.<sup>47</sup> Disagreements are not about the ends but the means. Conservatives—on this stylized account—put faith in the markets and in voluntary transactions to improve everyone's wellbeing.<sup>48</sup> Property protection is therefore key to preserving individuals' ability to decide how best to use their own assets. Liberals, in contrast, are more willing to embrace direct regulatory interventions to address market failures and to limit the power disparities that arise through the unequal distribution of property.<sup>49</sup>

However, this traditional knee-jerk conservative opposition to property regulations, and the corollary liberal one, now miss the mark as often as not. In fact, the political valence of property protection in a number of

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42. See Jonathan H. Adler, *Back to the Future of Conservation: Changing Perceptions of Property Rights & Environmental Protection*, 1 N.Y.U. J.L. & LIBERTY 987, 995, 1001 (2005) (discussing the effect of environmental regulation on property rights despite its contribution to environmental protection).

43. Margaret Jane Radin, *Residential Rent Control*, 15 PHIL. & PUB. AFF. 350, 359–63 (1986).

44. Singer, Kormendy Lecture, *supra* note 7, at 614–15.

45. See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 73–74 (8th ed. 2011) (arguing that compensation is necessary to force government to internalize costs of its actions, a view that is inherently skeptical of regulations' benefits); RICHARD A. EPSTEIN, *BARGAINING WITH THE STATE* 84–85 (1993) [hereinafter EPSTEIN, *BARGAINING*] (discussing skepticism of regulatory benefits).

46. See John R.E. Bliese, *Conservative Principles and Environmental Policies*, 7 KAN. J.L. & PUB. POL'Y 1, 3 (1997) (discussing the wide variety of political opinions and philosophies in recognizing and remedying environmental problems).

47. POSNER, *supra* note 45, at 75.

48. Ellen Byers, *Corporations, Contracts, and the Misguiding Contradictions of Conservatism*, 34 SETON HALL L. REV. 921, 952–53 (2004).

49. See Ganesh Sitaraman, *The Puzzling Absence of Economic Power in Constitutional Theory*, 101 CORNELL L. REV. 1445, 1508–10 (2016) (describing alternate views of government regulations to remedy market failures).

contexts no longer tracks these traditional conservative and liberal views.<sup>50</sup> It is not automatically conservative and anti-redistributive to protect property. In fact, protecting property in many cases is progressive, redistributive, and actually promotes traditionally progressive values.<sup>51</sup> In this more complex landscape, people must be more attuned to the underlying stakes of fights over property rights. Moreover, they cannot simply rely on a strong assumption about the appropriateness of regulation one way or the other.

## II. THE NEW POLITICS OF PROPERTY

This shifting political valence of property and property protection represents a kind of pragmatism or perhaps consequentialism. That is, effects and consequences matter. Focusing myopically on conceptual categories makes it easy to align with one camp or another. But attending to the consequences of different rules requires confronting the messier role of property in the real world. This results in more fluid attitudes toward property protection.

For example, favoring regulatory power over property rights is conventionally liberal.<sup>52</sup> But, in fact, regulations are not always forces for progressive redistribution.<sup>53</sup> Instead, they are sometimes the product of entrenched economic interests engaging in protectionism and burdening the broader public to further their own economic interests.<sup>54</sup> The politics of property protection change considerably with increased attention to these dynamics. In other cases, political changes reflect transformations in the world—changes in the nature of the property being protected and the individuals who benefit.<sup>55</sup> Finally, some creative approaches to property law have sought to use property protection for expressly redistributive

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50. Singer, Kormendy Lecture, *supra* note 7, at 614–15, 628–29.

51. *Id.* at 614.

52. See Treanor, *supra* note 22, at 782, 783, 818, 820–21, 825–26 (discussing conventional liberalism in regards to property rights and societal regulations).

53. See Byers, *supra* note 48, at 958 (“[T]he law’s protection of big business against the harsh realities of pure competition has allowed greed and self-interest, along with a lack of accountability, to flourish.”).

54. Treanor, *supra* note 22, at 844.

55. See Edward D. McCutcheon, Note, *Think Globally, (En)Act Locally: Promoting Effective National Environmental Regulatory Infrastructures in Developing Nations*, 31 CORNELL INT’L L.J. 396, 441–42 (1998) (describing an example of impacts of political changes on beneficiaries of property protection).

purposes.<sup>56</sup> This is not all new.<sup>57</sup> Some of these dynamics have been around for years.<sup>58</sup> Nevertheless, identifying these themes in a variety of areas reveals a profound realignment in the politics of property. Consider these changes in order.

The conventional politics of property protection relies on an implicit—and sometimes explicit—assumption that government regulations burden discrete private property owners to the benefit of the wider public.<sup>59</sup> Indeed, this concern is at the heart of the Takings Clause, which James Madison viewed as important to protect what he expected to be decreasing numbers of property owners against expropriations by the ascendant propertyless working class.<sup>60</sup> That concern carries through to contemporary scholarship. In his seminal work on the Takings Clause, Frank Michelman assumed that takings claims arise only in the context of regulations that generate more benefit to the public than harm to individual property owners.<sup>61</sup> If that were not true, he argued, the regulation would simply be impermissible and there would be no need to inquire into the need for compensation.<sup>62</sup> For Michelman, then, property protection under the Takings Clause presupposes a welfare-enhancing redistribution.<sup>63</sup> This approach to the Takings Clause provided the intellectual foundation for the *Penn Central* test and is consistent with very limited bases for takings liability.<sup>64</sup>

Richard Epstein offered a contrasting, conservative account of takings liability.<sup>65</sup> He argued that compensation is necessary to ensure that a

56. See JOHN R. NOLON, PROTECTING THE ENVIRONMENT THROUGH LAND USE LAW: STANDING GROUND 96, 99, 101–03 (2014) [hereinafter NOLON, LAND USE LAW] (discussing creative approaches to land-use law for societal redistribution).

57. *Id.*

58. Singer, *Just Obligations*, *supra* note 3, at 331.

59. Singer, Kormendy Lecture, *supra* note 7, at 635.

60. Treanor, *supra* note 22, at 848–49 (“Of the three types of property identified by Madison—landed, commercial, and manufacturing—he believed landed property was the type that in the long run was most threatened by majoritarian rule. This belief stemmed from Madison’s anticipation that this country would experience enormous population growth.”).

61. Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law*, 80 HARV. L. REV. 1165, 1214–15 (1967) (describing utilitarian calculus).

62. *Id.* at 1195 (“The approving majority may gain less from the measure than the resistant minority lose. In such a case, the imposition cannot appeal even to the weak justification that it contributes a positive sum to the long-run social accounting.”).

63. See *id.* at 1168, 1182, 1195 (discussing social equality by welfare-enhancing redistribution).

64. See Serkin, *Existing Uses*, *supra* note 28, at 1255 n.162 (describing the evolution of the *Penn Central* test from Michelman’s article).

65. See EPSTEIN, BARGAINING, *supra* note 45, at 85 (discussing the need for compensation to ensure valid governmental takings).

government action is welfare enhancing.<sup>66</sup> In his view, compensation forces the government to internalize the costs of its actions and thereby promotes efficient regulatory incentives.<sup>67</sup> Instead of assuming an efficient regulation to begin the takings inquiry, Professor Epstein called for takings liability to help ensure that regulations are actually efficient.

Liberals (and most courts) have rejected Professor Epstein's approach for a variety of reasons. Among them is an abiding skepticism that forcing the government to compensate will have a meaningful impact on regulatory incentives.<sup>68</sup> A greater faith in government comes with a presumption that regulations are well meaning and welfare enhancing.<sup>69</sup> Compensation is an unnecessary check on regulations if government officials are already presumed to be regulating in their constituents' best interests.<sup>70</sup>

The assumption that regulations are net beneficial seems increasingly fanciful in some contexts. When regulations or other government actions are the product of regulatory capture by entrenched economic interests, the liberal justification for deference to regulations disappears.<sup>71</sup> In that case, property rights can serve as an important bulwark against regressive expropriation. Property *protection* can be consistent with liberal goals in ways that the traditional politics of property ignores.

This dynamic is on display in the sharp responses to *Kelo v. City of New London*.<sup>72</sup> In that case, the Supreme Court famously upheld New London's exercise of eminent domain as part of an economic-development plan that involved a new research and development facility for the Pfizer Corporation.<sup>73</sup> The Court ruled that the condemnation for economic

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66. *Id.*; see also POSNER, *supra* note 45, at 73–74 (describing the government's sensitivity to budgetary expenses); Frederic Bloom & Christopher Serkin, *Suing Courts*, 79 U. CHI. L. REV. 553, 576 (2012) (describing the conventional economic account of the Takings Clause).

67. See EPSTEIN, BARGAINING, *supra* note 45, at 85 (describing just compensation as a reasonable administrative cost to eschew "poor legislative schemes").

68. See, e.g., Lawrence Blume & Daniel L. Rubinfeld, *Compensation for Takings: An Economic Analysis*, 72 CALIF. L. REV. 569, 621 (1984) (explaining that because "fiscal illusion" plays an important role in government actions, "[o]nly those costs ignored by the decisionmaker should be compensated").

69. Cf. Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 354–57 (2000) (arguing that governments should internalize costs and benefits symmetrically, so if they do not need fiscal incentives to regulate for the benefit of society, they should not need such incentives to avoid the costs).

70. More cynically, public choice theorists have questioned whether compensation will, in fact, have any meaningful deterrent effect on inefficient government actions. See, e.g., Blume & Rubinfeld, *supra* note 68, at 620–22 (discussing the effect of budgetary outlays and fiscal illusion on determination of compensation).

71. For a careful consideration of the literature on regulatory capture by economic elites, see Sitaraman, *supra* note 49, at 1509 (discussing self-regulation of corporations).

72. *Kelo v. City of New London*, 545 U.S. 469 (2005).

73. *Id.* at 473, 490.

development was a permissible “public use” within the meaning of the Takings Clause.<sup>74</sup> The Supreme Court granted certiorari following the Michigan State Supreme Court’s reversal of its seminal case, *Poletown Neighborhood Council v. City of Detroit*,<sup>75</sup> which had been a high-water mark of condemnation power. The Supreme Court used *Kelo* to reaffirm its longstanding rule that the Public Use Clause in the Constitution is extremely limited, even “coterminous” with a state’s police powers.<sup>76</sup>

The Court’s decision split on traditional political lines. The liberals on the Court sided with the government.<sup>77</sup> Their majority opinion reasoned that New London had engaged in long-term planning to try to generate economic redevelopment at the Pfizer site. Therefore, it was appropriate to defer to the government’s claim that the Pfizer project would provide a substantial economic boost to the local economy.<sup>78</sup> Implicitly, the Court concluded that the individual property rights of the condemnees should not stand in the way of a well-considered government plan to benefit the community.<sup>79</sup> Private rights generally must give way to valid exercises of public power. In dissent, the conservatives on the Court concluded precisely the opposite.<sup>80</sup> They reasoned that private ownership should have been protected against what they viewed as governmental overreach.<sup>81</sup> This is the conventional division between liberals and conservatives when it comes to property protection.<sup>82</sup>

The backlash to *Kelo*, however, was anything but predictable. Both liberals and conservatives denounced the decision.<sup>83</sup> Conservatives complained about its anemic protection for private property.<sup>84</sup> On the other hand, liberals expressed deep concern that New London’s economic-development plan involved expropriating property from middle-class

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74. *Id.* at 489.

75. *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455, 458–60 (Mich. 1981), *overruled by* *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004).

76. *See* *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 240 (1984) (“The ‘public use’ requirement is thus coterminous with the scope of a sovereign’s police powers.”).

77. *Kelo*, 545 U.S. at 470, 483–85.

78. *Id.* at 483 (“The City has carefully formulated an economic development plan that it believes will provide appreciable benefits to the community, including—but by no means limited to—new jobs and increased tax revenue.”).

79. *See id.* at 483, 489 (pronouncing that a city is authorized to take private property for economic development).

80. *Id.* at 498 (O’Connor, J., dissenting).

81. *Id.* at 496–97 (discussing the importance of property).

82. *See* Christopher Serkin, Response, *Testing the Value of Eminent Domain*, 89 TUL. L. REV. 115, 118 (2014) (discussing the political divide following *Kelo*).

83. *See generally* Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo*, 93 MINN. L. REV. 2100 (2009) (discussing the liberal and conservative reactions to *Kelo*).

84. *Id.* at 2109–10 (cataloguing conservative responses).

homeowners for the benefit of Pfizer.<sup>85</sup> The underlying government action looked to some like a product of regulatory capture by a large multinational corporation, so liberals invoked property rights and the Takings Clause to stop this regressive redistribution of wealth.<sup>86</sup> Not all liberals agreed with the characterization.<sup>87</sup> Indeed, those (few of us) inclined to defend *Kelo* generally did so by invoking the significant public benefits of the economic redevelopment plan and—more abstractly—the relative institutional competence of legislatures over courts in evaluating those benefits.<sup>88</sup> Nevertheless, the mainstream backlash crossed over political lines, scrambling traditional attitudes toward property. In fact, the liberal concern with New London’s underlying action mirrored Justice Thomas’s argument that a city’s poor and minority communities are the most likely to be burdened by eminent domain.<sup>89</sup>

This political shift was at least partly the product of careful strategy by the Institute for Justice and other conservative property-rights groups.<sup>90</sup> Understanding that private rights and governmental power are generally zero-sum, they looked for cases that tip the balance toward property protection.<sup>91</sup> Viewed as a narrow case about the meaning of “public use,” the case generated nearly universal disapproval.<sup>92</sup> But viewed as a strengthening of private property rights against government power, the

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85. See, e.g., *id.* at 2107–09 (cataloguing liberal responses); see also Ashira Pelman Ostrow, *Minority Interests, Majority Politics: A Comment on Richard Collins’ “Telluride’s Tale of Eminent Domain, Home Rule, And Retroactivity,”* 86 DENV. U. L. REV. 1459, 1465 (2009) (distinguishing subsequent case from *Kelo* because it did not involve “a politically vulnerable landowner, such as Suzette Kelo, being forced from her lifelong home or business”).

86. See Somin, *supra* note 83, at 2101–02, 2108 (summarizing the liberal responses).

87. Cf. Christopher Serkin, *Local Property Law: Adjusting the Scale of Property Protection*, 107 COLUM. L. REV. 883, 895 (2007) (explaining that due to economic benefits, people may prefer towns where local governments could condemn).

88. *Id.* (“[T]hose local governments with the greatest power to engage in aggressive economic redevelopment may fare the best in the Tiebout-style battle for residents and property values. While living in such a town comes with some risks—risks that yours will be the property that ends up being taken—it may also come with significant economic benefits.”). Cf. James E. Krier & Christopher Serkin, *Public Ruses*, 2004 MICH. ST. L. REV. 859, 864 (discussing the high costs of judicial errors in applying the Public Use Clause).

89. *Kelo v. City of New London*, 545 U.S. 469, 521 (2005) (Thomas, J., dissenting) (“[E]xtending the concept of public purpose to encompass any economically beneficial goal guarantees that these losses will fall disproportionately on poor communities.”).

90. See Jeffrey Rosen, *The Unregulated Offensive*, N.Y. TIMES (Apr. 17, 2005), [http://www.nytimes.com/2005/04/17/magazine/the-unregulated-offensive.html?\\_r=0](http://www.nytimes.com/2005/04/17/magazine/the-unregulated-offensive.html?_r=0) (“Chip Mellor’s organization, the Institute for Justice, represented *Kelo*, whom the institute’s lawyers had sought out because she seemed like a sympathetic victim.”).

91. See, e.g., A.E. Dick Howard, *The Constitution and the Role of Government*, 6 CHARLESTON L. REV. 449, 482 (2012) (describing efforts of the Institute for Justice and other conservative organizations).

92. See Somin, *supra* note 83, at 2107, 2108–10 (highlighting the disapproval of *Kelo*).

stakes look both higher and more controversial. Nevertheless, the result is that many liberals responding to *Kelo* agreed that the Takings Clause should prohibit at least some condemnations for economic redevelopment.<sup>93</sup> This is a real change in the traditional politics of private-property protection and one based on an increased willingness to question whether a government action generates real public benefits.

In other cases, changes in urban development have precipitated changes in attitudes toward property protection.<sup>94</sup> This is particularly true of zoning and land-use controls. Throughout much of the twentieth century, the stakes of zoning disputes were relatively clear. Pro-growth developers sought to limit local land-use authority and argued for the protection of their property rights reflected in the right to build.<sup>95</sup> Liberals, on the other hand, were generally more concerned about protecting in-place communities from over-development; they sought to defend the use of zoning and land-use controls to restrict development and minimize its externalized harms.<sup>96</sup> In their view, zoning was an appropriate restriction on individual owners' property rights in order to preserve and promote the community's overall wellbeing.<sup>97</sup>

But that basic divide—perhaps never completely accurate—has become less stable. Liberals now increasingly recognize that overly restrictive zoning decreases the supply of developable property and, therefore, decreases affordability.<sup>98</sup> Zoning, in many places today, is associated with conservative not-in-my-backyard (“NIMBY”) efforts to thwart needed increases in density and housing stock.<sup>99</sup> Moreover, sophisticated large-scale developers may actually embrace complex zoning

93. See *id.* at 2109 (cataloguing liberal responses).

94. David Schleicher, *City Unplanning*, 122 YALE L.J. 1670, 1735, 1737 (2013).

95. See, e.g., *id.* at 1698 (“[P]olitical scientists like Harvey Molotch argue that big cities are ‘growth machines,’ dominated by a ‘regime’ of downtown builders and compliant political figures seeking to expand the local tax base by allowing development to run wild.”).

96. See, e.g., Jon C. Dubin, *From Junkyards to Gentrification: Explicating a Right to Protective Zoning in Low-Income Communities of Color*, 77 MINN. L. REV. 739, 741 (1993) (“Minority communities, which were often established as separate communities as the result of discriminatory zoning and planning devices, are then frequently deprived of the land use protection basic to Euclidean zoning principles.”).

97. Singer, Kormendy Lecture, *supra* note 7, at 614–15.

98. Edward L. Glaeser & Joseph Gyourko, *Zoning's Steep Price*, 25 REGULATION 24, 26 (2002) (finding evidence that suggests land-use restrictions are responsible for high housing costs in New York City and California); Rolf Pendall, *Local Land Use Regulation and the Chain of Exclusion*, 66 J. AM. PLAN. ASS'N 125, 129, 138 (2000); Christopher Serkin & Leslie Wellington, Essay, *Putting Exclusionary Zoning in Its Place: Affordable Housing and Geographical Scale*, 40 FORDHAM URB. L.J. 1667, 1682, 1685 (2013).

99. See Serkin & Wellington, *supra* note 98, at 1672–73, 1676 (identifying new forms of exclusionary zoning).

because they have a comparative advantage over smaller developers seeking to navigate the regulatory landscape.<sup>100</sup> In this view, zoning complexity serves as a kind of barrier to entry and so amounts to protectionism for large-scale developers.

New York City offers a powerful example of these new dynamics. The populist and liberal Mayor de Blasio has focused on relaxing regulatory restrictions, like minimum parking-space requirements and other limitations on density.<sup>101</sup> This effort is explicitly designed to *increase* density and, therefore, improve housing affordability.<sup>102</sup> It marks a change from the previous administration, which had loosened restrictions in the outer boroughs, but tightened them in much of Manhattan.<sup>103</sup> The result was to protect property values in the more affluent areas and keep housing well out of reach of many.

This kind of response to affordability is often not purely deregulatory. In some instances, like in New York City, loosening zoning restrictions on density is coupled with affirmative obligations on developers to provide affordable housing or other changes that increase regulatory interventions.<sup>104</sup> It is therefore not the case that this new liberal attitude is simply opposed to zoning. In other settings, too, liberals favor restrictive zoning regulations primarily to precipitate bargaining moments that will force developers to bear some of the externalized costs of new development.<sup>105</sup> Nevertheless, reducing or restricting land-use controls has increasingly become a new rallying cry for liberals concerned about zoning protectionism and its adverse impact on affordability.

This relatively recent liberal focus on increasing density remains in tension with a more traditional liberal attitude toward restrictive land-use

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100. See C. Tsuril Somerville, *The Industrial Organization of Housing Supply: Market Activity, Land Supply, and the Size of Homebuilder Firms*, 27 REAL EST. ECON. 669, 687 (1999) (finding data consistent with the hypothesis that complex regulatory environments favor larger builders).

101. See, e.g., N.Y.C. Dep't of City Planning, *Zoning for Quality and Affordability*, N.Y.C. PLANNING, <http://www1.nyc.gov/site/planning/plans/zqa/zoning-for-quality-and-affordability.page> (describing the City Planning Department's approach to relaxing density restrictions) (last visited Nov. 26, 2017).

102. See *id.* (summarizing the goals of zoning changes, including housing affordability).

103. See Amy Armstrong et al., *How Have Recent Rezoning Affected the City's Ability to Grow?* N.Y.U. FURMAN CTR. 10 (2010), [http://furmancenter.org/files/publications/Rezoning\\_Furman\\_Center\\_Policy\\_Brief\\_March\\_2010.pdf](http://furmancenter.org/files/publications/Rezoning_Furman_Center_Policy_Brief_March_2010.pdf) (“[U]pzoned lots were located in areas with significantly lower income than the City median . . .”).

104. N.Y.C. Dep't of City Planning, *Inclusionary Housing Program*, N.Y.C. PLANNING, <http://www1.nyc.gov/site/planning/zoning/districts-tools/inclusionary-housing.page> (describing New York City's inclusionary zoning regime) (last visited Nov. 26, 2017).

105. See, e.g., Vicki Been, *Community Benefits Agreements: A New Local Government Tool or Another Variation on the Exactions Theme?*, 77 U. CHI. L. REV. 5, 13, 17 (2010) (describing developer and neighborhood roles in community benefits agreements).



controls and, in particular, concerns about gentrification. Many on the left still advocate for restrictive zoning in order to protect in-place communities.<sup>106</sup> In this view, new development is, in effect, parasitic on existing social capital and amounts to a regressive redistribution from in-place residents to the developer.<sup>107</sup> Zoning is justifiable in liberal terms as a means of stopping or limiting that regressive transfer.<sup>108</sup> Similarly, restrictive zoning in some places promotes environmental interests, which also amounts to a transfer from the developer to society more broadly.<sup>109</sup> But this is deeply dependent on context. Limiting growth in cities is almost certainly bad for the environment insofar as it increases sprawl and carbon emissions.<sup>110</sup> Limiting growth in rural areas, however, can have the opposite effect.<sup>111</sup> In other words, the reality is complex.

Nevertheless, broadly speaking, the increasing liberal emphasis on encouraging density joins forces with the traditionally conservative position in opposition to restrictive zoning regulations, at least in places facing significant development pressures. And property protection can be the legal hook that helps to dismantle protectionist NIMBY zoning.<sup>112</sup> Liberals, for example, might find themselves supporting takings claims by developers of lower-income, multi-family housing seeking to challenge an overly restrictive land-use regulation.

The changing nature of some regulated property accounts for still other changes in the politics of property. Property protection advances one set of interests if the assets at issue belong to the poor and another if they belong to wealthy corporations. The clearest example is perhaps regulatory

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106. See, e.g., Stephanie M. Stern, *The Dark Side of Town: The Social Capital Revolution in Residential Property Law*, 99 VA. L. REV. 811, 828 (2013) (describing new zoning for social capital in which “[c]omprehensive zoning plans describe the community ‘stock’ of social capital and report on how to enhance social capital through zoning, support for community groups and organizations, and growth controls”).

107. Cf. *id.* at 833 (questioning “the necessity of abundant social capital” and discussing the undesirability of redistribution in some cases).

108. *Id.* at 846–49.

109. John R. Nolon, *An Environmental Understanding of the Local Land Use System*, 45 ENVTL. L. REP. 10215, 10219 (2015) (“Municipal zoning authority can be used to preserve open space and protect natural resources. Zoning districts can be established specifically to protect environmentally sensitive areas.”).

110. Robert Hardaway, *The Great American Housing Bubble: Re-Examining Cause and Effect*, 35 U. DAYTON L. REV. 33, 55 (2009).

111. See generally NOLON, LAND USE LAW, *supra* note 56, at 97 (describing the relationship between growth and the aesthetic character of rural areas).

112. See Peter W. Salsich, Jr., *Toward a Policy of Heterogeneity: Overcoming a Long History of Socioeconomic Segregation in Housing*, 42 WAKE FOREST L. REV. 459, 463–65 (2007) (describing background on local regulations against affordable housing and recommending “a federal override of local zoning laws” as one solution to address the problem).

property, which has become a term of art that refers to property rights in regulatory benefits.<sup>113</sup>

The concept of regulatory property has a long and important intellectual history.<sup>114</sup> The definitive treatment comes from Charles Reich's path-breaking work, *The New Property*, in which he argued that welfare benefits and other forms of public assistance should be treated as vested property rights.<sup>115</sup> Courts, including the Supreme Court, at least partly agreed.<sup>116</sup> Recognizing these government entitlements as a form of property meant that they could not be removed without due process of law.<sup>117</sup> Expanding recognition of regulatory property was therefore a progressive crusade.<sup>118</sup> Although the project was ultimately reined in by a conservative Supreme Court,<sup>119</sup> recognizing regulatory entitlements as property shifted the political valence of property protection.

Regulatory property today is much more expansive than welfare benefits, however, making the politics even more complicated. A recent case in New York City demonstrates both the context in which regulatory property is litigated and also the complex political stakes.

By far, the most important and influential regulatory-takings case is *Penn Central Transportation, Co. v. New York City*.<sup>120</sup> The case involved New York City's landmarking of Grand Central Terminal.<sup>121</sup> Grand Central's owners, the Penn Central Authority, sought permission from the

113. Steven J. Eagle, *The Perils of Regulatory Property in Land Use Regulation*, 54 WASHBURN L.J. 1, 1 (2014) ("Regulatory property refers specifically to governmental dispensations of special privilege to individuals that are legally or functionally regarded as property, and are bestowed for the articulated purpose of furthering the public good.").

114. *Id.* at 6–7 (describing the origin of regulatory property).

115. Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 742, 785–86 (1964).

116. *Id.* at 773–74.

117. See *Goldberg v. Kelly*, 397 U.S. 254, 261–64 (1970) (noting that termination of welfare benefits requires due process and "when welfare is discontinued, only a pre-termination evidentiary hearing provides the recipient with procedural due process"); see also Reich, *supra* note 115, at 785 (clarifying how government entitlements are seen as a form of property and cannot be taken away without due process of the law; it is similar to the constitutional benefits seen in criminal proceedings); Harry W. Jones, *The Rule of Law and the Welfare State*, 58 COLUM. L. REV. 143, 154 (1958) ("Even more important than the regulatory aspect of the welfare state is its office as the source of new rights—for example, the expectations created by a comprehensive system of social insurance.").

118. See Frank I. Michelman, *The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 9 (1969) (arguing that wealth inequality implicates constitutional principles).

119. See, e.g., *Mathews v. Eldridge*, 424 U.S. 319, 340–45 (1976) (holding that an evidentiary hearing is not required to comport with due process in termination of social security disability benefits by distinguishing *Mathews* from the facts of *Goldberg v. Kelly*).

120. See generally *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978).

121. *Id.* at 115–16.

Landmarks Commission to build a new office tower above the terminal.<sup>122</sup> The Commission denied the request, and Penn Central sued, alleging a taking of its air rights.<sup>123</sup> In upholding the landmarking and the decision of the Landmarks Commission, the Supreme Court famously announced its ad hoc three-factor test. The factors are: (1) the character of the regulation; (2) the extent to which the regulation interferes with distinct investment-backed expectations; and (3) the resulting diminution in value.<sup>124</sup> Applying the last factor, the Court focused, in part, on the City's conveyance of transferable development rights (TDRs) to Penn Central as part of the landmarking.<sup>125</sup> Those TDRs could be sold in a limited, pre-designated receiving area to allow development that would otherwise exceed zoning limits. In effect, by purchasing TDRs from Penn Central, a developer in the narrowly defined receiving area could build a bigger and taller building than would otherwise be allowed. As a result, the TDRs were quite valuable.

In the ensuing decades, Penn Central managed to sell a significant amount of its TDRs.<sup>126</sup> However, as of 2006, Penn Central still owned TDRs representing approximately 1.2 million square feet of development potential.<sup>127</sup> At that time, a consortium of investors, called Midtown TDR Ventures, engaged in a sale-leaseback transaction of Grand Central, primarily to purchase the TDRs.<sup>128</sup> The investors were betting that the hot Manhattan real estate market made some property in the receiving area ripe for redevelopment. And they were right; just a few years later, developer SL Green purchased property adjacent to Grand Central and proposed an enormous new residential building called One Vanderbilt, named for its

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122. *Id.*

123. *Id.* at 117, 130.

124. *Id.* at 124 (“The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action.” (internal citation omitted)). For a thorough discussion of each of the elements, see Robert Meltz, *Takings Law Today: A Primer for the Perplexed*, 34 *ECOLOGICAL Q.* 307, 329 (2007) (describing each element of the *Penn* test).

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

126. The facts recounted in this and the next paragraphs are discussed in detail in Christopher Serkin, Essay, Penn Central *Take Two*, 92 *NOTRE DAME L. REV.* 913, 919 (2017) [hereinafter Serkin, *Take Two*].

127. See *id.* at 919–20 (“[In 2009], Penn Central still owned approximately 1.2 million square feet of unused TDRs from the original Grand Central landmarking. . . . This is an enormous amount of development potential contained in the unused TDRs.”).

128. *Id.* at 920.

address on Vanderbilt Place.<sup>129</sup> In order to build up to the proposed height, however, SL Green needed additional development rights. As a result, Midtown TDR Ventures expected to sell nearly half of its newly acquired TDRs to SL Green for approximately \$475 million.<sup>130</sup> The two parties began negotiating the transaction.<sup>131</sup>

Simultaneously, however, SL Green also allegedly entered into discussions with New York City to rezone its property.<sup>132</sup> In 2015, the City agreed and granted a significant upzoning, effectively allowing SL Green to build One Vanderbilt as of right after paying for certain infrastructure improvements.<sup>133</sup> The result was that SL Green no longer needed the Grand Central TDRs.<sup>134</sup> Midtown TDR Ventures then sued, alleging that the upzoning of the neighboring property was a regulatory taking of the TDRs—the very same TDRs from the original landmarking in *Penn Central*.<sup>135</sup> In the summer of 2016, the case settled on undisclosed terms, so there will be no judicial resolution of the provocative takings claim.<sup>136</sup> Nevertheless, for present purposes, the fact of the litigation reveals a changing political landscape.

This particular litigation over the Grand Central TDRs created unusual political dynamics. Consider, first, the interests of preservationists.<sup>137</sup> In New York City, historic preservation efforts often rely on TDRs as a kind of lubricant for historic designations.<sup>138</sup> Granting TDRs to landmarked property will sometimes make property owners willing partners in preservation efforts.<sup>139</sup> And even if a landmarking is not entirely voluntary, the creation of TDRs may at least forestall litigation by appeasing the burdened property owner. Additionally, it will almost certainly prevent any successful takings claim.<sup>140</sup> Therefore, preservationists should worry about government actions that undermine the value of TDRs. The City's upzoning of SL Green's property reveals a previously hidden risk to TDRs; it might

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129. *Id.*

130. *Id.* at 921.

131. *See id.* at 920–21 (noting Midtown Ventures' anticipation of sale and SL Green's simultaneous consultation with New York City).

132. *Id.* at 920.

133. *Id.* at 920–21.

134. *Id.* at 921.

135. Complaint ¶¶ 11–12, *Midtown TDR Ventures, LLC v. City of New York*, 1:15-cv-07647 (S.D.N.Y. Sept. 28, 2015).

136. *See Serkin, Take Two, supra* note 126, at 914.

137. *Id.* ¶ 3.

138. *See* ARTHUR C. NELSON ET AL., *THE TDR HANDBOOK* 131–40 (2012) (discussing TDRs for historic preservation in New York City).

139. *See, e.g., id.* at 215 (discussing examples of TDRs' successful contribution in preserving landmarks in New York City).

140. *Id.* at 214–15.

make property owners in the future wary of relying on them as a tool for recouping the value of regulatory burdens. Preservationists, therefore, might be sympathetic to Midtown TDR Ventures' regulatory-takings claim in order to protect the value of TDRs. However, preservationists generally object to expansive takings protection.<sup>141</sup> Indeed, historic preservation is the quintessential example of the traditional politics of regulatory takings, with preservationists favoring the ability of government to impose some burden on individual property owners for the benefit of the community.<sup>142</sup> In short, there is a real tension between preservationists' desire to protect the value of TDRs and their natural objection to takings liability.

Developers find themselves in precisely the opposite bind. For the reasons discussed above, they traditionally favor an expansive view of regulatory takings law.<sup>143</sup> They should naturally support an effort to protect property interests—like TDRs—from regulatory interference. On the other hand, developers also object to restrictive land-use regulations.<sup>144</sup> They generally support upzonings and municipal efforts to ease regulatory burdens.<sup>145</sup>

The politics of this litigation is complicated because protecting the TDRs from regulatory change means preserving more restrictive regulations instead of looser ones.<sup>146</sup> Stepping back, the shifting nature of regulatory property means that there are new politics surrounding the protection of new property. Quintessential examples of regulatory property today are not limited to the public assistance that Charles Reich discussed, but instead include TDRs, radio spectrum, grazing permits, taxi medallions, and so forth.<sup>147</sup> These forms of property have been around for a long time, but issues around their constitutional protection are of more recent vintage.<sup>148</sup> And expansively protecting these forms of regulatory property generally means protecting large commercial or corporate interests and is

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141. See, e.g., NOLON, *LAND USE LAW*, *supra* note 56, at 96–97 (discussing the TDRs' success in restricting development to preserve historic landmarks). Cf. J. Peter Byrne, *Regulatory Takings Challenges to Historic Preservation Laws After Penn Central*, 15 *FORDHAM ENVTL. L. REV.* 313, 330 (2004) (noting that regulators tend to find a middle ground in preserving historic resources and that property owners have some means of protecting their property).

142. Serkin, *Take Two*, *supra* note 126, at 915.

143. See NOLON, *Land Use Law*, *supra* note 56, at 96–99, 102–03 (discussing developers' view of favoring expansive takings).

144. See, e.g., Schleicher, *supra* note 94, at 1675 (“[B]ig cities allow relatively untrammled growth because of the political influence of developers.”).

145. Serkin, *Take Two*, *supra* note 126, at 915.

146. *Id.* at 925, 927.

147. See *id.* at 916 (identifying types of regulatory property).

148. See, e.g., Katrina Miriam Wyman, *Problematic Private Property: The Case of New York Taxicab Medallions*, 30 *YALE J. REG.* 125, 140 (2013) (discussing taxi medallions as property).

decidedly not redistributive. The TDR litigation described above pits well-financed investors against the government and its effort to allow greater development density around Grand Central.<sup>149</sup> Recognizing protectable property interests in regulatory entitlements does not necessarily serve the progressive interests championed by Professor Reich in his seminal work. The new politics of new property are fundamentally different and often involve protecting entrenched economic interests.

Finally, property protection can sometimes be invoked for expressly redistributive purposes. This is unquestionably the goal of communitarian property theory, which seeks to incorporate redistributive commitments—what Greg Alexander calls a social-obligation norm—into the core definition of property.<sup>150</sup> Protecting property looks very different if property itself contains these social obligations.<sup>151</sup> But this is true of other theories, too.

One example comes from the anthropological work of Peruvian economist, Hernando de Soto.<sup>152</sup> In two important books, he explored the causes of poverty and political turmoil in Peru and in other developing countries.<sup>153</sup> He argued that over-regulation and overly burdensome regulation prevented large segments of the population from accessing formal property regimes.<sup>154</sup> As he detailed, overcoming the bureaucratic hurdles to obtain a simple business license, for example, required a total of 1,800 hours.<sup>155</sup> The regulatory regime was so burdensome partly because it was designed to protect entrenched interests and to exclude new entrants.<sup>156</sup> As a result, most people seeking to enter the market were relegated to informal property regimes, like becoming a street vendor instead of opening a store.<sup>157</sup> Street vendors do have something resembling property rights in

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149. Serkin, *Take Two*, *supra* note 126, at 926, 931.

150. See Alexander, *Social-Obligation*, *supra* note 17, at 786 (stating that South African courts could use “communitarian social-obligation norm to ameliorate the intolerable conditions that are the lingering result of apartheid”).

151. Alexander & Peñalver, *supra* note 17, at 64.

152. HERNANDO DE SOTO, *THE OTHER PATH* 189 (June Abbott trans., 1989) [hereinafter DE SOTO, *PATH*].

153. *Id.* at 189–92; HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL* 189–90 (2000) [hereinafter DE SOTO, *THE MYSTERY OF CAPITAL*].

154. See DE SOTO, *THE MYSTERY OF CAPITAL*, *supra* note 153, at 182–83 (describing extensive bureaucratic procedures to access legal property systems in Egypt and Haiti).

155. *Id.* at 189.

156. DE SOTO, *PATH*, *supra* note 152, at 190–91, 194.

157. See Christopher Serkin, *The Missing Rung: Challenging Regulatory Barriers to Property Acquisition*, 6 BRIGHAM-KANNER PROPERTY RIGHTS CONFERENCE J. 275 (2017) [hereinafter Serkin, *The Missing Rung*] (describing the effects of regulatory and legal barriers).

their locations, but they are privately enforced, by norms and by force, and are therefore far less secure.<sup>158</sup>

Where the underlying regulatory regime is organized so profoundly in the service of protecting entrenched economic interests, recognizing private property rights can actually be redistributive. Hernando de Soto generally called for loosening the barriers to the formal property regime as a means to further economic equality.<sup>159</sup> Indeed, in a previous essay, I tentatively suggested that it might be possible to make out a takings claim to challenge regulatory barriers to property acquisition.<sup>160</sup> In other words, a vested property right might not be a prerequisite to a regulatory-takings claim if it challenges regulations that make it too difficult to acquire property in the first place. Whatever the merits of the specific proposals, the important observation here is simply that deregulation, and greater access to formal property protection for informal rights, can actually promote the conventional liberal goal of redistribution in this context.<sup>161</sup>

A second example comes from a recent article in which I argued that governments can violate the Takings Clause by failing to act.<sup>162</sup> The claim is a controversial one because the Constitution is usually said to protect only negative rights against the government; it does not create affirmative obligations, except in very rare circumstances.<sup>163</sup> When it comes to the Takings Clause in particular, people have long believed that legal change is a necessary trigger for a takings violation.<sup>164</sup> The Takings Clause, in this view, is designed to protect property owners from legal transitions so there can be no takings claim in the absence of a change in the law.<sup>165</sup> However,

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158. See generally DE SOTO, *THE MYSTERY OF CAPITAL*, *supra* note 153, at 179 (discussing the presence of street vendors and regulatory norms). Participants in informal property regimes have to spend more of their time and resources protecting their assets, which also cannot be used as collateral for loans. DE SOTO, *PATH*, *supra* note 152, at 195, 198–99, 236–37.

159. DE SOTO, *PATH*, *supra* note 152, at 256.

160. Serkin, *The Missing Rung*, *supra* note 157, at 275–76.

161. Some have labeled this liberalitarianism. See Brink Lindsey, *Liberalarians*, *NEW REPUBLIC* (Dec. 11, 2006), <https://newrepublic.com/article/64443/liberalarians> (defining the term).

162. Christopher Serkin, *Passive Takings: The State's Affirmative Duty to Protect Property*, 113 *MICH. L. REV.* 345, 345 (2014) [hereinafter Serkin, *Passive Takings*].

163. See, e.g., Laurence H. Tribe, *Commentary, The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence*, 99 *HARV. L. REV.* 330, 330 (1985) (discussing the government's obligation to refrain from infringing rights instead of an obligation to affirmatively protect them); see *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 200 (1989) (discussing rare exceptions).

164. See Holly Doremus, *Takings and Transitions*, 19 *J. LAND USE & ENVTL. L.* 1, 11 (2003) (“Regulatory takings claims are all about change. They are obviously about distribution of the costs of regulatory transitions between landowners and society.”).

165. See *id.* at 11–12, 24–25 (explaining the necessity of change to a takings claim and “[d]emands for compensation” as an attempt to “prevent legal transitions”).

in *Passive Takings*, I argued that this is not necessarily true, and that a cognizable takings claim can arise when the law remains stable, but the world has changed.<sup>166</sup> I argued that there are situations in which the government may be obligated to change the law to address ecological change or else pay compensation.<sup>167</sup> The animating example is sea-level rise. I argued that, in certain regulatory contexts, like regulations governing sea walls, it is nonsensical to distinguish between regulatory acts and omissions.<sup>168</sup> Specifically, where the government has acted comprehensively in the past, such as when it disables self-help, the government cannot then ignore subsequent threats to that property by arguing it has not acted.

There is no space (nor need) to repeat the argument here. The point is that expanding property protection to cover government inaction can compel the government to act and regulate (or at least to re-regulate, where existing regulations have become out of date). The argument, in other words, is that property protection can become strong enough to compel the government to act to protect it. Property can therefore be a constitutional impetus for regulation, and not an impediment. This is a long way from the libertarian concept of property which creates a sphere of autonomy safe from government intervention.<sup>169</sup> It turns the conventional politics of property protection on its head. When property is protected enough, it becomes a hook for compelling the government to intervene.

Across all of these different examples, then, the politics of property has become more contingent and complex. As such, liberal and conservative attitudes do not simply correspond to weaker or stronger property rights, respectively.

### III. MOVING FORWARD

What do these changes mean for property protection moving forward? Most basically, they demand an end to the reflexive attitudes that have dominated debates about property and takings law. It is simply not the case that greater takings protection is always and inherently conservative, and that deference to regulations is always and inherently liberal.<sup>170</sup>

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166. Serkin, *Passive Takings*, *supra* note 162, at 352.

167. *Id.* at 404.

168. *Id.* at 347.

169. Robert C. Ellickson, *Federalism and Kelo: A Question for Richard Epstein*, 44 *TULSA L. REV.* 751, 754–55 (2009).

170. Serkin, *Passive Takings*, *supra* note 162, at 360.



Some might object that the changes identified here are, in fact, all conservative. That is, liberals should perhaps “toe the line” and support even those regulations that appear to favor economic elites, for example, or should object to expanding takings protection even for redistributive purposes. There is no change in the political valence of property protection; there is only capitulation to more conservative perspectives. It may be that the very project of examining the underlying economic stakes of different government actions starts to look uncomfortably like *Lochnerizing*, and is inherently conservative.<sup>171</sup>

This response, however, amounts to adopting a kind of irrebuttable presumption: regulations increase overall wellbeing and property protection does not. It is consistent with a fear that any willingness to extend property protection is a slippery slope to Richard Epstein’s libertarian view of the Takings Clause. But this attitude reflects a kind of dogmatism that makes it prohibitively difficult to do anything other than object to property rights.<sup>172</sup> Politically, it risks alienating property owners and others with contrary intuitions in particularly sympathetic contexts. Conceptually, this makes it difficult to think critically about which regulations and government actions actually deserve support. Such inflexibility is a real problem in modern property law. So, recognizing the underlying interests in property protection allows for more nuance and, ultimately, a more principled normative approach to the Takings Clause.

Recognizing the shifting politics of property protection should make it easier to move beyond dogmatism and toward a property discourse that focuses on underlying values. This does not suggest any likely consensus about what those underlying values might be. But it is important to continue to focus on those values instead of on property, for its own sake, in order to develop any kind of principled approach to property protection.

This does not suggest that liberals should necessarily support expansive takings protection in any of the particular contexts described above. Indeed, liberals may be appropriately wary of using the Takings Clause as the doctrinal tool to achieve their goals. There is a risk that expanding takings protection in one area may bleed into others and produce uncomfortable results. Indeed, that slippery-slope argument may motivate at least some liberal resistance to expanding takings protection. But it is increasingly important to recognize the real stakes of some of these fights because there are contexts, as I argued in *Passive Takings*, where expanding

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171. See *id.* (describing how the Takings Clause is inherently conservative).

172. For an argument that constitutionalizing issues, like property, can stifle political discussion, see Christopher Serkin & Nelson Tebbe, *Is the Constitution Special?*, 101 CORNELL L. REV. 701, 775 (2016).

takings protection can serve important liberal values.<sup>173</sup> In a world with unstable and dramatically shifting politics, it has never been more important to look beyond conventional attitudes and to focus on underlying goals.

#### CONCLUSION

The conventional politics of property has been entirely predictable. Protecting property preserves the status quo and is inherently conservative. There is a tautological sense in which that is, of course, true. But looking beyond the protection of the status quo, for its own sake, to competing attitudes toward redistribution reveals a more complex picture. In fact, property protection can serve redistributive ends. Attention to these underlying dynamics invites a more nuanced view of the politics of property protection and the Takings Clause.

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173. *Id.* at 361–62, 365, 368–70.