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# Condemning the Decisions of the Past: Eminent Domain and Democratic Accountability

Christopher Serkin
*Brooklyn Law School*

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## Cover Page Footnote

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# CONDEMNING THE DECISIONS OF THE PAST: EMINENT DOMAIN AND DEMOCRATIC ACCOUNTABILITY

*Christopher Serkin*[*]



## INTRODUCTION

Eminent domain represents a critical and contested point of intersection between government power and private property rights. As debates over eminent domain have leapt from the pages of academic articles[1] to legislatures[2] and even to popular culture,[3] the battle lines have largely crystal-

[*] Associate Professor of Law, Brooklyn Law School. Thanks to Brooklyn Law School for supporting this project.

1. Since *Kelo v. City of New London*, 545 U.S. 469 (2005), much ink has been spilled on the problem of eminent domain. The bibliography is far too vast to catalogue here. For the leading pre-*Kelo* article, see Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61 (1986).

2. *See generally* Ilya Somin, *The Limits of Backlash: Assessing the Political Response to* Kelo, 93 MINN. L. REV. 2100 (2009) (summarizing legislative responses).

3. *See, e.g.*, Charles Isherwood, *A Brooklyn Civics Lesson, Offered in Word and Song*, N.Y. TIMES, Nov. 23, 2010, at C1 ("As subjects for musical comedy go, it would be hard to fathom anything less promising than the legal intricacies of the concept of eminent domain. . . . Yet [it is] rhapsodized in song with style and wit in the spirited new show from the Civilians . . . .").

lized. Most people now seem to agree that eminent domain, for better or worse, is primarily a tool for the government to use to assemble property and overcome holdouts.[4] In this Essay, I argue that an entirely different interest is also at stake. Eminent domain serves an important structural role in American democracy—ensuring that governments are not bound by the policy choices of their predecessors.[5] In this account, eminent domain is a tool for acquiring not just property, but also democratic legitimacy.

It is a core principle of democracy that one government is not allowed to make policy choices for future governments.[6] Democratic power requires that a representative government be responsive to the will of its own constituents, not the constituents of the past. For that reason, legislatures are not allowed to pass unrepealable legislation, and constitutions contain mechanisms for amendment.[7] Despite the prohibition on entrenchment, as it is usually called, governments have many tools at their disposal to propel their policy preferences into the future.[8] Among the most powerful but least theorized are those that rely on private rights. Long-term government contracts, physical developments, and property conveyances in many forms can lock in policy preferences beyond a single legislative lifecycle.[9] Faced with incorporeal and physical manifestations of past policies, eminent domain is an important tool for subsequent governments to de-entrench those preferences, buying back policy control from the past.

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4. *See, e.g.*, STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 124-25 (2004) (discussing holdout problem and eminent domain); Abraham Bell & Gideon Parchomovsky, *The Hidden Function of Takings Compensation*, 96 VA. L. REV. 1673, 1674 (2010); Nicole Stelle Garnett, *The Neglected Political Economy of Eminent Domain*, 105 MICH. L. REV. 101, 138 (2006).

5. *See* Christopher Serkin, *Public Entrenchment Through Private Law: Binding Local Governments*, U. CHI. L. REV. (forthcoming) [hereinafter Serkin, *Public Entrenchment*] (on file with author).

6. *See* Julian N. Eule, *Temporal Limits on the Legislative Mandate: Entrenchment and Retroactivity*, 12 AM. B. FOUND. RES. J. 379, 381-404 (1987).

7. Tom Ginsburg & Eric A. Posner, *Subconstitutionalism*, 62 STAN. L. REV. 1583, 1599-1600 (2010) (discussing constitutional amendments in context of entrenchment).

8. Examples include bicameralism, staggered-term agency appointments, and the Constitution itself. *See* Michael C. Dorf, *The Aspirational Constitution*, 77 GEO. WASH. L. REV. 1631, 1631 (2009) ("[A] constitution burdens rather than benefits future generations by limiting their political freedom to choose policies that, in their judgment, best serve their interests."); William N. Eskridge & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523, 528 (1992) (discussing bicameralism); Richard J. Lazarus, *Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future*, 94 CORNELL L. REV. 1153, 1213 (2009) (identifying staggered-term appointments as mechanism for reducing political responsiveness of agency officials); *see also* Ginsburg & Posner, *supra* note 7, at 1586 ("[I]deas of entrenchment are central to the notion of constitutions.").

9. *See* Serkin, *Public Entrenchment*, *supra* note 5, at 3 (discussing public entrenchment through private law).

This is not just abstract political theory. Indeed, viewed through the lens of entrenchment, New York provides ready examples of eminent domain's role in changing policies adopted by previous governments. This Essay examines some of those examples, and also current policies that future governments might need eminent domain to undo. This Essay therefore highlights a seldom-explored role for eminent domain: preserving the ability of New York's elected representatives to respond to the will of the people.

## I. ENTRENCHMENT BY ANOTHER NAME

Eminent domain plays no obvious role in traditional debates about legislative entrenchment. Entrenchment, as typically conceived, refers to unrepealable legislation—that is, public laws that are binding into the future.[10] Eminent domain is irrelevant in that context. But entrenchment concerns should not be so narrowly construed. Indeed, the concerns animating prohibitions on entrenchment apply far more broadly than just to unrepealable legislation, and once the range of entrenching government actions is expanded to include commitments made through private law, the importance of eminent domain is easy to see.

In political science terms, anti-entrenchment rules are about preserving sovereignty and democratic accountability. A genuinely democratic government must be able to respond to the will of its constituents, and that means today's constituents, not yesterday's.[11] There can be no democratic accountability—indeed, there can be no sovereignty—if the power to act has been captured by a previous government.[12] Imagine a state passing a *meta* law declaring that it, and all other existing laws, could never be changed. What power would subsequent governments have? The very idea of a government as rule maker would disappear. Governments' powers are limited by the immutable policies they inherit.

The inter-temporal allocation of power is something of a zero sum game. Allowing governments to decide their laws' temporal reach would increase the power—and, hence, the democratic responsiveness—of the enacting

10. *See, e.g.*, Eric A. Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 YALE L.J. 1665, 1667 (2002) (defining entrenchment).

11. *See* Michael W. McConnell, *Why Hold Elections? Using Consent Decrees to Insulate Policies From Political Change*, 1987 U. CHI. LEGAL F. 295, 296 ("Future lawmakers have just as much power to depart from the decisions of their forbears as their forbears had to make the decisions in the first place.").

12. *See, e.g.*, Eule, *supra* note 6, at 392 ("If Parliament is to remain supreme, it must necessarily retain the power to make *or unmake* any law.").

government.[13] But it comes at the expense of future governments. Of course, prohibiting entrenchment has the opposite effect, giving authority to the present and divesting it from the past. Nevertheless, democracy has a strongly presentist prejudice, and its concern is primarily with the ability of the government to respond to the will of the people today, but only insofar as it preserves the power of future governments to be similarly responsive.

There is an important functional justification for anti-entrenchment rules as well: preventing inter-temporal externalities. Some entrenching government actions allow a government to reap benefits today while shifting the costs onto the future. Debt is perhaps the most familiar example.[14] Politicians often refer to government borrowing as "mortgaging the future."[15] At the most general level, this concept is absolutely right. Debt of any kind allows a government to collect a pile of cash today, while externalizing the costs of repaying onto future generations. A resulting temporal misalignment of costs and benefits can be a recipe for political malfunction and abuse.[16]

The underlying concerns about entrenchment exist, then, whenever one government can make precommitments that are binding on the future. At this level of generality, entrenchment is ubiquitous. Everything that a government does will limit future policy choices. Building out infrastructure, like roads or mass transit, will determine the shape of future development, as will forgoing such investments. Entrenchment concerns are most serious, however, when a government, by making a specific policy precommitment, can reap immediate benefits while shifting the costs to the future. It is easy to identify some examples where entrenchment concerns are likely to be particularly acute.

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13. *See, e.g.*, Posner & Vermeule, *supra* note 10, at 1672 (describing entrenchment as increasing the power of a government to set policy).

14. *See* Richard Briffault, *The Disfavored Constitution: State Fiscal Limits and State Constitutional Law*, 34 RUTGERS L.J. 907, 918 (2003); C. Dickerman Williams & Peter R. Nehemkis, *Municipal Improvements As Affected By Constitutional Debt Limitations*, 37 COLUM. L. REV. 177, 182 (1937) ("[I]n any system of public economy bonded debt is merely a means of allocating payment between the present and the future.").

15. *E.g.*, Billy House & Clifford Marks, *Boehner Reacts Coolly to Geithner's Warning on Debt Limit*, NAT'L J., Jan. 6, 2011 ("[W]e cannot continue to borrow recklessly, dig ourselves deeper into this hole, and mortgage the future of our children and grandchildren.").

16. Where debt is used to finance investments that generate benefits for future generations—like roads, which generate positive inter-temporal externalities—debt can be a useful tool for aligning costs and benefits. Nancy Staudt, *Constitutional Politics and Balanced Budgets*, 1998 U. ILL. L. REV. 1105, 1141 (1998) ("The use of public debt to pay for capital expenditures would distribute the cost of the long-lasting goods, among all the beneficiaries throughout time."). Indeed, without some mechanism for spreading costs over time, governments may under-invest in resources that generate significant benefits in the future.

In addition to debt, long-term contracts can allow a government to secure an immediate benefit from a private counter-party while binding future governments to the terms of the contract. Whether a procurement contract for the provision of services or a development agreement promising future regulatory treatment, the effect is the same: the government can obtain an immediate or short-term benefit by binding itself to some future conduct.

Property arrangements can similarly generate immediate gains while pushing costs forward. Selling off assets is one example.[17] Privatizing municipal functions can generate money (or other beneficial services) today, but lock the government into a private contract for the outsourced good or service. More ephemeral property rights can also be entrenching. A government that allows property rights to vest—whether development rights, a public franchise, or pension benefits—creates rights that run against subsequent governments and, in the process, locks in policy choices surrounding land use policy or labor arrangements. Physical development, too, can generate short-term gains and long-term policy constraints. A government receives a short-term political and economic boost from siting a new stadium or even just a big box store, but in the process limits subsequent governments' ability to adopt a different strategy for economic development.

Of course, government actions are not necessarily inappropriate simply because they are entrenching. The benefits of entering into binding precommitments can easily outweigh the costs. Return to the example of municipal debt. The ability to borrow money—whether through bonds or otherwise—depends fundamentally on the enforceability of the repayment obligation. If every government could decide for itself whether to honor its financial obligations, the cost of borrowing money would presumably become exorbitant.[18] Likewise, all governments would be worse off without some capacity to enter into long-term procurement contracts, which allow them to minimize risks of price fluctuations and supply disruptions. The point is simply this: many government actions implicate a particularly complicated trade-off between short-term benefits and long-term costs. There is reason to worry that government actors are not incentivized to balance these appropriately, and so long-term government precommitments

17. *See* Julie Roin, *Privatization and the Sale of Tax Revenues*, 95 MINN. L. REV. (forthcoming 2011) (discussing similarity between selling assets and incurring debt).

18. *See* Stewart Sterk, *The Continuity of Legislatures: Of Contracts and the Contracts Clause*, 88 COLUM. L. REV. 647, 699 (1988) ("When a legislature repudiates a contract, it demoralizes its contract partners, and that demoralization is likely to make future legislative contracting—even if efficient—more difficult or expensive.").

can create private law obligations that inappropriately limit future policy choices.

The risk of inter-temporal power grabs has given rise to various legal responses. There are some actions that governments simply cannot undertake. Most directly, governments cannot enact unrepealable legislation. A subsequent government can always change the law. But other kinds of protections are in place that prevent entrenchment in its other forms. For example, state constitutions often impose substantive limits on indebtedness and also provide complex procedural hurdles that a government must clear before incurring general recourse debt.[19] These arose out of a realization in the nineteenth century that governments have an incentive to borrow too heavily against the future.[20] Similarly, governments cannot enter into enforceable contracts promising future regulatory treatment.[21] The only notable exceptions are development agreements, which generally require statutory authorization and then include significant procedural protections to minimize the risk of political malfunction.[22]

In general, though, outright prohibitions on government actions are few and far between. They operate at the fringe to take the most extreme entrenchment risks off the table, but do not address the more run-of-the-mill government actions that can nevertheless impose significant costs and policy constraints on the future. More important, then, are the legal doctrines that protect subsequent governments' ability to change course, even if at some financial or political expense.

Chief among these is the general inapplicability of injunctive relief against governments for breach of contract.[23] A government cannot be forced to continue performing under a contract, so long as it compensates the injured party for the breach. More subtly, but perhaps even more pro-

19. *See* Briffault, *supra* note 14, at 915-16 (surveying approaches to debt limits); Clayton Gillette, *Fiscal Home Rule*, 86 DENV. U. L. REV. 1241, 1255-56 (2009) (describing history of debt limits).

20. *E.g.*, Briffault, *supra* note 14, at 918 ("A central justification of constitutional limits on debt is to offset the temptations that can cause elected officials to burden future generations with unnecessary debt."); Sterk, *supra* note 18, at 720-21 ("[The] very existence [of debt limits] demonstrates that the attempt to develop institutional mechanisms to cope with the problem of legislative discontinuity has been longstanding.").

21. *E.g.*, Janice C. Griffith, *Local Government Contracts: Escaping From the Governmental/Proprietary Maze*, 75 IOWA L. REV. 277, 379 (1990).

22. *See* Shelby D. Green, *Development Agreements: Bargained-For Zoning That Is Neither Illegal Contract Nor Conditional Zoning*, 33 CAP. U. L. REV. 383, 396-99 (2004) (describing requirements).

23. *E.g.*, Frank Easterbrook, *Justice and Contract in Consent Judgments*, 1987 U. CHI. LEGAL F. 19, 37 ("By and large even authorized contracts may not be specifically enforced against governments.").

foundly, governments are not generally liable for expectation damages when they breach contracts. Instead, and unlike private parties, they are typically liable only for reliance damages—that is, the damages that the counterparty actually incurred from relying on the government.[24] In the context of procurement contracts, courts will often imply a "termination for convenience" clause, allowing the government to breach unilaterally by paying only reliance damages.[25] If the government no longer needs its widget contract, it can terminate without paying full expectation damages.

Limits on contract remedies, however, do not protect governments from all kinds of inherited precommitments. Breach is no relief from the entrenching effect of vested rights or from actual development. In these contexts, something stronger is needed to preserve flexibility for future governments, and that something is eminent domain. In addition to the power to take real property, eminent domain applies to vested development rights, contract rights, and also more esoteric future interests in property. Eminent domain allows a government to change course on the use of property and on matters of urban policy from the location of adult uses to transportation and other infrastructure. It is, in short, a de-entrenching tool of last resort, and its availability is a backstop to the power of government to decide policy for itself and not to be tied to the preferences of the past.

## II. EMINENT DOMAIN IN NEW YORK

This symposium's topic, eminent domain in New York, provides a useful opportunity to examine actual examples of a government using eminent domain to change a prior government's policy decision. The goal here is to provide a cross-section of examples that is as broad as possible with regard to the nature of the policy at issue and the kind of property being taken. It also includes different temporal perspectives, identifying some instances where the city has exercised eminent domain to reverse a policy decision, and others in which the city has recently adopted a policy (or is considering adopting a policy) that would require eminent domain in the future to undo.

Admittedly, not all of the examples below present the issue as cleanly as one might hope. Some involve merely the threat of eminent domain, some involve contestable claims about the content of earlier governments' policy choices, and some rely on events that almost but did not quite come to pass.

24. Daniel R. Fischel & Alan O. Sykes, *Governmental Liability for Breach of Contract*, 1 AM. L. & ECON. REV. 313, 354-57 (1999); Richard H. Seamon, *Separation of Powers and the Separate Treatment of Contract Claims Against the Federal Government for Specific Performance*, 43 VILL. L. REV. 155, 212-13 (1998).

25. Harold J. Krent, *Reconceptualizing Sovereign Immunity*, 45 VAND. L. REV. 1529, 1567 n.150 (1992).

Nevertheless, all of the examples at least gesture at the role that eminent domain did play, could have played, or might still play in preserving a government's power to decide policy for itself.

### A. The Built Environment

The most straightforward examples of the de-entrenching power of eminent domain involve changes in land use policy that rely on eminent domain to alter the built environment. At the most general level, the problem of existing uses has been around for as long as zoning.[26] The constraints of established land uses can transform forward-looking land use planning into a mere codification of pre-existing development patterns.[27]

Of course, the point of land use policy is to stimulate private development consistent with the government's plans and priorities. A government can reap substantial benefits from that private reliance, whether political benefits from developers or property owners, financial benefits from exactions and other developer concessions, or general benefits from a temporary uptick in economic activity through the development itself. But in the face of those immediate gains, governments (and government actors) may be insufficiently attentive to the costs of the development down the road. In those situations, eminent domain can be a critical tool for implementing prospective changes in land use policy where prior policies have resulted in private development that is inconsistent with new plans and priorities. Two examples come readily to mind: Times Square, and the New York City waterfront.

#### *1. Rejuvenating Times Square*

Adult uses pose a particular urban policy challenge to local governments, and New York City is no exception. First Amendment rules established by the Supreme Court prevent a government from banning adult uses altogether and allow regulating them only to prevent secondary effects.[28] Responding to these limits, local governments have adopted one of two diametrically opposed land use strategies. Some have sought to exclude adult uses from most parts of a municipality in order to limit the neighbor-

26. *See* Christopher Serkin, *Existing Uses and the Limits of Land Use Regulations*, 84 N.Y.U. L. REV. 1222, 1236 (2009) [hereinafter Serkin, *Existing Uses*] (noting that existing use problems were discussed during the formation of the Standard Zoning Enabling Act of 1926).

27. *Id.* at 1225 n.7 (citing sources).

28. *See, e.g.*, City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 434 (2002) (noting that ordinances aimed at secondary effects of adult entertainment on the surrounding community can be valid); City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986).

hoods exposed to them. This, of course, has the effect of concentrating adult uses in a few places. Others have sought to disperse concentrated adult uses to prevent the development of a red light district or skid row.[29]

In the 1970s, New York City was squarely in the prior camp. Indeed, in 1976, responding to concerns about the proliferation of adult uses in new neighborhoods, New York City adopted a zoning ordinance relegating "adult physical culture establishments" to Times Square.[30] This was a deliberate policy decision to protect other residential and commercial districts from adult uses, and the effect was obvious to any Times Square visitor.

Within a few years, however, New York City decided to change course. In the 1980s, under Mayor Ed Koch, the City initiated a redevelopment plan that called for dispersing the adult uses in Times Square.[31] The existing adult businesses, however, were entitled to constitutional protection against zoning changes.[32] A central component of the plan therefore called for condemning some of the adult uses and breaking up their concentrated hold on the neighborhood.[33] Eminent domain was a central tool in reversing the policy decision to concentrate adult uses in Times Square and helped to implement the new policy of dispersing them throughout the City to reclaim Times Square.

Whatever the relative merits of these two approaches—and reasonable minds continue to disagree—the entrenchment point is simply this: different governments may want to adopt very different urban policy responses to the problem of adult uses (and, presumably, other forms of locally unwanted land uses (LULUs) as well). The ability to carry out a policy preference, however, may depend on the government's ability to compel a change in the use of property, whether to disperse concentrated adult uses or to remove them from a neighborhood in order to concentrate them somewhere else. The point can easily be generalized. Existing uses of property are often the vestiges of earlier governments' decisions and may impede or even prevent changes in policy preferences. Eminent domain ensures that those vestigial uses do not perpetuate the failed (or at least anachronistic) policy choices of the past.

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29. *See, e.g.*, North Ave. Novelties, Inc. v. City of Chicago, 88 F.3d 441, 444 (7th Cir. 1996) (summarizing approaches).

30. *See* CITY OF NEW YORK, DEP'T OF CITY PLANNING, ADULT ENTERTAINMENT STUDY 32 (1994).

31. *See Did Guiliani Really Clean Up Times Square?*, CBS NEWS, Dec. 28, 2007, *available at* http://www.cbsnews.com/stories/2007/12/28/politics/main3655538.shtml.

32. *See* Serkin, *Existing Uses*, *supra* note 26 (discussing constitutional protection for existing uses).

33. *See* Charles V. Bagli, *Slow Economy Likely to Stall Atlantic Yards*, N.Y. TIMES, Mar. 21, 2008, at C1.

### *2. Reclaiming the Waterfront*

Perhaps no figure in New York's history had more influence on the City's development patterns than Robert Moses.[34] He created most of the bridges, parkways, and expressways that connect New York's five boroughs to each other and to the suburbs.[35] In the process, he cut through existing neighborhoods displacing, by some accounts, 500,000 people.[36] His use of eminent domain to effect a particular vision of "urban renewal" was, for better or worse (and mostly worse), a way of de-entrenching the more organic development patterns the City had promoted earlier in its history. He was, in part, reclaiming planning authority that New York City had turned over to private parties.[37] More interesting for present purposes, though, is the current use of eminent domain to begin to undo some of the Moses legacy and policy choices that he made.

Consider, for example, the decision under Moses to ring the City with expressways providing what was once easy access into and out of the City by car. The plan created great benefits for the City at the time—and for Robert Moses personally—partly because of the scale of the public investment the plans represented.[38] The unfortunate long-term result, however, was to cut the City off from its waterfront, turning great swaths of what could have been the most desirable real estate into decaying warehouses and industrial husks.[39] Moses' legacy of roads and bridges are physical vestiges of specific policy decisions about the relationship between New York City and its more rural environs, and about how to get from one to the other.

In more recent years, New York City has tried to change course on some of these decisions, but it is a process that invariably involves moving or shifting roads yet again, and displacing some of the uses of land that developed around the existing infrastructure. Consider, for example, the reclamation of the waterfront in Brooklyn, underneath the Promenade, to make the new Brooklyn Bridge Park. Unfortunately, the Brooklyn Queens Expressway (the BQE in local speak) separates picturesque Brooklyn Heights

34. For the leading historical treatment of Moses' career, see ROBERT A. CARO, THE POWER BROKER: ROBERT MOSES AND THE FALL OF NEW YORK (1999).

35. *Id.* at 5-9 (describing Moses' projects).

36. *Id.* at 20 ("[T]here are available no accurate figures on the total number of people evicted from their homes for all Robert Moses public works, but the figure is almost certainly close to half a million.").

37. HENDRIK HARTOG, PUBLIC PROPERTY AND PRIVATE POWER 45 (1983) (discussing New York City's eighteenth century waterfront grants to private parties as abandonment of future planning power).

38. *See* CARO, *supra* note 34, at 5-15 (describing benefits of Moses' plans).

39. *See* PHILLIP LOPATE, WATERFRONT: A WALK AROUND MANHATTAN 80 (2004).

from the new park. In a remarkable feat of engineering, the BQE is cantilevered out from a cliff so that it is below a pedestrian promenade, but above the river. It therefore serves as a physical barrier to the East River. To change this land use decision and re-open the waterfront, the City and the U.S. Department of Transportation are undertaking a project to replace this critical stretch of the BQE, "[f]amous for its rush-hour traffic,"[40] either by enclosing it in a large tunnel or perhaps by re-routing it under a different part of Brooklyn. In either case, effectuating this changed policy toward waterfront development has and will continue to require eminent domain to overcome the problem of the BQE. The same dynamic is at work throughout the city with its efforts to reclaim the waterfront.

### B. Vested Rights

Vested rights provide a more ephemeral constraint on changes in public policy. A government might allow or encourage rights to vest in order to induce reliance by private parties. The paradigmatic example here would be a government allowing development rights to vest in order to attract a developer. But more uniquely New York examples exist, too, and include taxi medallions and a power plant in Brooklyn. These are both examples of current policies that are—or, in the case of the power plant, almost were—locked in through vested rights doctrines. If the City wanted to change course sometime in the future, it might have to use eminent domain to address these and similar places in which vested rights reflect the inherited policy preferences of a prior government.

#### *1. Reinventing Taxis*

There are perhaps few sites more evocative of New York than the paradigmatic Yellow Cab. A major component of New York City's transportation system, cabs are ubiquitous throughout the City and, unlike in most cities in the world, can (usually) be hailed easily from (almost) any street corner. But cabs are more than personal yellow buses. They are also rolling financial assets. Each Yellow Cab in New York is required to obtain a license to do business and that license takes the form of a transferable medallion.[41] Those medallions, limited in number, are worth vast sums of money. Many yellow cab passengers would be shocked to learn that the

40. NEW YORK ACCELERATED CONSTRUCTION TECHNOLOGY TRANSFER, ENVISIONING THE FUTURE: THE BQE TRIPLE CANTILEVER PROJECT 1 (2006), *available at* http://www.fhwa.dot.gov/construction/accelerated/wsbqe06.pdf (describing the project).

41. *See* Katrina M. Wyman, Is Bentham Right? The Case of New York City Taxi Medallions (Dec. 15, 2008) (unpublished manuscript) (on file with author).

cab is worth more than they are; individual medallions have sold for hundreds of thousands of dollars.[42]

But what is the property status of those medallions? As Katrina Wyman details in her thoughtful and careful history, they are licenses conferred by the City. Originally, licensees would simply return them to the City when they were done with them, and the City would reissue them to someone else.[43] Over time, however, the city changed course and made them transferable.[44] It also restricted the number of medallions in circulation.[45] This scarcity turned the medallions into valuable assets that may represent contractually vested property rights, which, in turn, means that the medallion licensing system has entrenched a regulatory approach to an entire industry.

This might prove extremely problematic. In the not-too-distant past when times were more flush, the relative scarcity of cabs became something of a hot-button political issue. Riders complained of the difficulty of getting cabs at peak times, and many people have complained for years about the absence of cabs in under-served neighborhoods.[46] One potential response would be to dramatically increase the number of cabs on the road or even to remove the medallion system in exchange for some other form of licensing requirement—perhaps a license that is personal to the driver instead of one that moves with the car.

The problem, of course, is that the existing medallion holders would fiercely object. Such changes would dramatically reduce, if not wipe out, the value of their significant investments. It is, of course, possible that the government would be able to act anyway; that regulatory takings doctrine or the Due Process Clause, for example, would not stretch far enough to protect medallions.[47] But they might. In the face of constitutional protection, then, the only real option available to the City would be to take the medallions by eminent domain.[48] This is hardly likely to happen any time soon, but eminent domain would again prove crucial in effectuating a policy change that would result in divesting people of valuable property rights.

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42. Tracy Connor, *Cab Licenses at Cadillac Prices*, N.Y. DAILY NEWS, May 30, 2007 (detailing sale of two medallions for $600,000 each).

43. *See* Wyman, *supra* note 41.

44. *Id.*

45. *Id.*

46. The issue has reared its head again. *See* Michael M. Grynbaum, *Where Do All the Cabs Go in the Late Afternoon*, N.Y. TIMES, Jan. 11, 2011, at A18.

47. *See* Wyman, *supra* note 41 ("[T]he Due Process Clause does not offer medallion owners much protection, and the Takings Clause likely does not safeguard them at all.").

48. Alternatively, the governments could use inverse condemnation, but I will avoid distinguishing between them as their differences turn only on regulatory strategy and not on the underlying substance of the government's actions.

### *2. Rethinking Inlet Park*

The second example is really a case of rights that almost vested but ultimately did not. Nevertheless, it presents the issue of policy change cleanly, and so serves as a particularly useful illustration of the potentially entrenching power of vested rights.

New York City faces real strains on its electricity supply. For years now, TransGas has been looking to build a new power plant for New York City. There appears to be demand for a new power plant, but its siting is controversial. In 1997, the Giuliani administration suggested a location in Williamsburg, Brooklyn, on the waterfront and near important infrastructure support.[49] Plans progressed, and TransGas applied for the various permits to build the plant. In the meantime, however, Michael Bloomberg replaced Giuliani as Mayor of New York and had a very different vision for waterfront development in Brooklyn. Instead of a power plant, he supported building a new park, to be called the Bushwick Inlet Park. This change in policy preferences put the TransGas power plant at the center of a controversy over the development of the area and spawned years of litigation.[50]

The plant triggered a significant fight at the City and community levels over the use of the property. With the TransGas applications pending, the Bloomberg administration sought to rezone the property. At the time, proponents of the City's new plans warned that failure to rezone the property as soon as possible might allow the power plant to go forward.[51] Presumably, they were at least partly concerned that development rights might vest in the interim, at which point the plant would become a protected prior non-conforming use in any subsequent rezoning.

As it turns out, the relevant state agency ultimately denied TransGas permission to build on the site, and courts have rejected appeals of that decision.[52] TransGas therefore had no opportunity to obtain vested development rights, and the City never had to use, or even threaten to use, eminent domain. Nevertheless, the dynamic is clear enough and would be easy to replicate. A city seeking to immunize development plans from regulatory

49. *See* Matthew Schuerman, *TransGas Maverick Adam Victor Hits City Hall Where It Hurts*, N.Y. OBSERVER, Mar. 6, 2005, *available at* http://www.observer.com/node/50472.

50. *See id.*

51. *See* Hugh Son, *Plan Would Stop Plant By Rezone Not So Fast, Critics Say*, N.Y. DAILY NEWS, Apr. 29, 2005, *available at* http://articles.nydailynews.com/2005-04-29/local/18294987_1_rezoning-affordable-housing-greenpoint.

52. *See* Samuel Newhouse, *Appellate Division Dismisses TransGas Plans for Brooklyn Power Plant*, BROOKLYN DAILY EAGLE, Jan. 12, 2011, *available at* http://www.brooklyneagle.com/categories/category.php?category_id=4&id=31063.

change can help a private developer obtain vested rights that will then run against subsequent governments.

### C. Critical Assets

Another form of entrenchment can arise from alienating public assets. Certain kinds of public resources are intimately bound up with policy decisions, and their sale can therefore significantly constrain subsequent governments' ability to chart a different course. Here, the examples become more speculative and include plans that would have locked in policy through asset sales, had they happened.

#### *1. Selling Parking Meters*

Recently, New York City contemplated selling one of its valuable income-producing assets: its parking meters (and the right to collect fees from them).[53] Modeled on a similar move by Chicago, the City is at least considering selling off a long-term right to the parking meters for a one-time payment of nearly five billion dollars.[54] Such a move would, of course, be financially entrenching. As one Chicago Alderman characterized the deal Chicago had struck: "It filled the budget gap for one year. . . . Now, we've lost our revenue stream for the next 70 or so years."[55]

Of course, eminent domain is no remedy for the lost income stream. The obligation to pay just compensation means that a government cannot simply avoid its future debt obligations or recapture lost income for free. Protection from such financial entrenchment requires a different set of tools and mechanisms—bankruptcy, and the like—and is therefore outside the scope of this Symposium.[56] But the sale of the parking meters raises a subsidiary set of entrenchment concerns relating to parking enforcement and parking policy.

The Chicago experience is telling. Shortly after Chicago conveyed away its parking meters, perceived failures in private operation of the parking

53. *See* David Seifman, *City Mulls $5B Meter Sell-Off*, N.Y. POST, Oct. 4, 2010, *available at* http://www.nypost.com/p/news/local/city_mulls_meter_sell_off_53FEAGOGzvBfxQuXDs5JZL.

54. For a summary of the Chicago deal, see Andrew Stern, *Chicago Leases Parking Meters for $1.16 Billion*, REUTERS, Dec. 2, 2008, *available at* http://www.reuters.com/article/bondsNews/idUSN0227950220081202.

55. Seifman, *supra* note 53.

56. It is, however, taken up in my longer treatment of related issues. *See* Serkin, *Public Entrenchment*, *supra* note 5.

system created an enormous political backlash.[57] Broken equipment and generally poor oversight led some Chicago politicians to call for a moratorium on parking enforcement until the private company could upgrade its operations.[58] But imagine if the City had gone a step further and decided that the sale itself was a mistake. Changing policy and returning the parking system to one of public accountability would then necessitate reacquiring the asset. Depending on the private owner's willingness to sell voluntarily, that may require eminent domain (or at least its threat).

More broadly, too, privatizing the parking meters may lock in (or foreclose) other policy options, depending on the terms of the contract. Parking policy, after all, is not just about meters and tickets. Offering free parking in certain places or during certain times of year can be a tool for stimulating shopping and commercial activity. Reducing the number of available parking spaces can be a kind of implicit tax on drivers and could therefore reduce the number of cars in the City. In short, parking systems can be a crucial link in a broader system of transportation and economic policy, and privatizing the meters can immunize that particular connection from subsequent policy change—at least in the absence of the power of eminent domain.

### *2. Moving Prisoners*

New York City has five different jails for its inmates. The largest, by far, is Rikers Island.[59] In the 1990s, New York's inmate population was on the decline and it decided to begin closing jails in the outer boroughs, including the Brooklyn House of Detention, and centralizing operations at Rikers.[60] The City anticipated benefitting from economies of scale, and neighbors of the Brooklyn facility were thrilled that the jail was closing.[61] Indeed, the jail was located in a small island of downtown Brooklyn that had steadfastly resisted the surrounding area's gentrification.[62]

Shortly after the Brooklyn House of Detention closed, development in the neighborhood picked up. New condos went up on all sides, new businesses moved in, and the area underwent a nearly immediate renaissance.

57. *See* Dan Mihalopoulos, *Company Piles Up Profits From City's Parking Meter Deal*, N.Y. TIMES, Nov. 20, 2009, at A29 (describing early failings).

58. *See id.* (describing moratorium on ticket writing).

59. *See An Overview of NYC DOC Facilities*, N.Y.C. DEP'T OF CORR., http://www.nyc.gov/html/doc/html/about/facilities_overview.shtml (last visited Apr. 18, 2011).

60. John Eligon, *City Moves to Reopen a Brooklyn Jail Shuttered in 2003, but Drops Plans to Expand It*, N.Y. TIMES, Aug. 12, 2010, at A26.

61. *Id.*

62. *See id.*

Indeed, it was so successful that City Comptroller William Thompson proposed selling the facility and converting it to condos (have fun imagining possible names for the building!).[63]

In 2010, the City decided to reopen the jail. Some buildings on Rikers Island were in bad disrepair, and transporting prisoners back and forth from Rikers Island proved difficult. The City felt that its best option was to reopen the vacant Brooklyn House of Detention over the strenuous objections of neighbors.[64] This was, of course, only possible because the City had decided not to sell the building. It had, in other words, resisted the potentially entrenching act of selling the building and instead had kept it vacant and unused for several years while it was experimenting with its new policies. But what if it had not? What if Comptroller Thompson had had his way?

The potential role of eminent domain in this scenario requires some unpacking. Its de-entrenching power is easy enough to see if the City had changed its mind about housing prisoners in between the time it sold the building and work had begun to demolish or retrofit it. In that case, the building would still have been there, ready to be reopened, and eminent domain would have restored the pre-sale status quo. Of course, if the facility were no longer there, siting a new facility becomes a routine land assembly (and LULU) problem. Eminent domain remains a tool for de-entrenching the earlier decision, but no more than many government policies that require building any new facility; the problem is the same whether it is a jail or garage. But the example again stops being routine if there is something special about the location of the existing House of Detention—it is near the courthouse and easily accessible by public transportation, for example. In that case, selling off the lot could limit detention policies for subsequent governments unless they had the power to reacquire the property.

Here, again, eminent domain never had to be considered because the City had retained the jail facility—wisely, it seems, in retrospect. But the example is still a good one. Some kinds of assets are simply difficult to replace after the City decides to sell them, like jails and landfills and others that require specific locations. A subsequent government may have no opportunity to revisit the policy decision that led to the sale of the asset without the ability to take back the underlying property.

63. *See* Elizabeth Hays, *Sell Shut Downtown Brooklyn Jail to Raise Cash, Bloomberg Urged*, N.Y. DAILY NEWS, Apr. 29, 2008, *available at* http://www.nydailynews.com/ny_local/brooklyn/2008/04/30/2008-04-30_sell_shut_downtown_brooklyn_jail_to_rais.html.

64. *Id.*

## III. EVALUATING EMINENT DOMAIN

Eminent domain plays an important but seldom observed role in preserving policy flexibility and democratic accountability. But what does this mean for eminent domain? It is impossible to develop a set of prescriptions without a more fully formed theory of stability in policymaking. It is, however, possible to gesture at the kinds of questions that need to be asked, and at how the appropriate reach of eminent domain depends on the answers.

Imagine a world in which policy had no inertial force. In this kind of science fictional alternate reality, the status quo would hold no sway, and governments could truly legislate as if on a blank slate every day. Though perhaps a halcyon vision for some, most people would find this a gross dystopia, a kind of Logan's Run of private rights.[65]

The problem, in its most general form, is that some measure of stability in legal regimes is necessary for people to rely on government policies. Reliance, in turn, is a prerequisite for inducing investments, creating psychological stability, reducing agency monitoring costs, and more. Policy friction, in other words, serves important interests. Calibrating eminent domain, then, should be attentive to these twin goals of preserving flexibility and inducing reliance on government precommitments.

From the perspective of entrenchment, what, then, should eminent domain look like? It should be available as a backstop when a government wants to change course. Without eminent domain, a government could use private rights—property conveyances, vested rights, physical development, and contractual obligations—to immunize policies from change. The private rights holders might be complicit in the effort. They might be developers seeking to vest their rights or companies seeking long-term benefits like parking meters, regardless of the cost to the public. But the rights holders might also be "innocent" third parties, private landowners who have no independent interest in the temporal reach of a government policy but who nevertheless seize good land use opportunities when they arise, or build in a way that takes advantage of existing roads, waterfront access, or regulatory conditions. In either case, private rights threaten to entrench government policies in the absence of eminent domain.

On the other hand, eminent domain cannot be so easy to use that its availability undermines private reliance on government precommitments.

65. *See* LOGAN'S RUN (Metro-Goldwyn-Mayer 1976). In this classic science fiction film, all people enter the "Carousel" at the age of thirty, where they believe they will be reborn as infants. In fact, they are simply killed, so that there are no old people on earth. The analogy here is that private rights would terminate automatically and prematurely so that no stale rights would exist.

If eminent domain were free or very easy to exercise, then it might make government policies too malleable. People would not build, and it could become prohibitively difficult to stimulate private investment. As a de-entrenching tool, eminent domain must therefore be widely available but sufficiently costly (politically and economically) for governments to exercise, so that private parties can be induced to rely on government commitments. Interestingly, the fair market value compensation requirement, coupled with the due process costs of eminent domain, generate outcomes that at least resemble an appropriate compromise between these two competing pressures.

Whether or not it is well calibrated today, it is at least important to recognize that the availability of eminent domain, at some price, is crucial to preventing entrenchment. Public policy decisions are not just reflected in legislative enactments and municipal ordinances. They are also captured in the inter-connected web of the built environment and vested contractual and property rights that often have more binding power than inherently mutable public laws. Eminent domain, therefore, serves an important role in preserving subsequent governments' ability to respond to the will of their constituents.