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# Public Entrenchment through Private Law: Binding Local Governments

Christopher Serkin†

*Anti-entrenchment rules prevent governments from passing unrepeatable legislation and ensure that subsequent governments are free to revisit the policy choices of the past. However, governments—and local governments in particular—have become increasingly adept at using private law mechanisms like contracts and property conveyances to make binding precommitments into the future. Simultaneously, courts and state legislatures in recent years have reduced the availability of core de-entrenching tools, like eminent domain, that have traditionally allowed governments to recapture policymaking authority from the past. These changes threaten to shift democratic power intertemporally. This Article develops a typology of mechanisms for public entrenchment through private law and private rights, as well as core anti-entrenchment protections embedded in the law. It then develops a framework for evaluating entrenchment concerns, comparing the costs of decreased flexibility against the benefits of increased reliance. Viewed through this framework, some recent changes in the law appear particularly problematic, from restrictions on eminent domain, to the rise of development rights, and creative forms of municipal finance like selling assets instead of incurring debt.*

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## INTRODUCTION

In a democracy, governments are not allowed to bind future governments.<sup>1</sup> Ordinary legislation cannot be made unrepeatable, and future governments are free to revisit the policy choices of their predecessors.<sup>2</sup> The prohibition against entrenchment, as it is called in the academic literature, is meant to ensure that each government can be democratically responsive to its own electorate and is not bound by the preferences of the past.<sup>3</sup> In fact, however, exceptions are widespread.<sup>4</sup> This Article identifies and examines an increasingly important mechanism for propelling policy into the future, anti-entrenchment rules notwithstanding: governments' use of private law and private rights to make binding intertemporal precommitments.

At its heart, the prohibition on entrenchment implicates the very reach of government power and the nature of democratic accountability.<sup>5</sup> Analyzing entrenchment purely as a matter of political theory, however, misses an important legal dimension to the topic. This Article argues that entrenchment through private law and private rights is actually commonplace, that it is subject to certain structural protections that preserve flexibility for future governments, but that recent changes—like limits on eminent domain—threaten to tip the

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<sup>1</sup> See Julian N. Eule, *Temporal Limits on the Legislative Mandate: Entrenchment and Retroactivity*, 1987 Am Bar Found Rsrch J 379, 381–82, 391–93.

<sup>2</sup> See Eric A. Posner and Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 Yale L J 1665, 1667 (2002) (defining entrenchment).

<sup>3</sup> A separate, but equally robust, justification for anti-entrenchment rules applies to a parliamentary system. In England, the absolute power of the sovereign requires that no sovereign can be bound by the decisions of a previous sovereign. See, for example, Eule, 1987 Am Bar Found Rsrch J at 392 (cited in note 1) (“If Parliament is to remain supreme, it must necessarily retain the power to make *or unmake* any law.”).

<sup>4</sup> Examples from the literature include bicameralism, staggered-term agency appointments, and the Constitution itself. See William N. Eskridge Jr and John Ferejohn, *The Article I, Section 7 Game*, 80 Georgetown 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 a mechanism for reducing political responsiveness of agency officials); 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.”); Tom Ginsburg and Eric A. Posner, *Subconstitutionalism*, 62 Stan L Rev 1583, 1586 (2010) (“[I]deas of entrenchment are central to the notion of constitutions.”).

<sup>5</sup> Thomas Jefferson, for example, was deeply concerned with the limits of a government's ability to constrain future governments. See Letter from Thomas Jefferson to James Madison (Sept 6, 1789), reprinted in Paul Leicester Ford, ed, 5 *The Writings of Thomas Jefferson* 115, 121–22 (G.P. Putnam's Sons 1895); Michael W. McConnell, *Why Hold Elections? Using Consent Decrees to Insulate Policies from Political Change*, 1987 U Chi Legal F 295, 295 n 2. See also Jacob E. Gersen, *Temporary Legislation*, 74 U Chi L Rev 247, 254 (2007) (citing and describing Jefferson's views that constitutions should sunset every generation).

scales of an often hidden but otherwise carefully balanced equilibrium between stability and flexibility. This Article ultimately proposes a utilitarian calculus for evaluating the appropriateness of entrenchment in any given context, balancing the benefits of private parties' reliance on government precommitments against the costs of reduced flexibility in the future. The additional complexity is institutional: the calculation occurs in a context in which governments are likely to discount, if not ignore, the costs to the future. Simply recognizing the functional tradeoff highlights the importance of procedural and substantive protections to safeguard the future from policy preferences of the past.

Private law provides governments, and local governments in particular, with a number of legal tools that functionally approximate unrepeatable legislation. To take just three examples from the many that follow, entering into a long-term public-private partnership can bind future governments to the terms of a contract,<sup>6</sup> conveying servitudes like conservation easements can entrench a conservation agenda,<sup>7</sup> and using tax increment financing to fund public infrastructure can commit a local government to predetermined spending priorities far into the future.<sup>8</sup> Once the problem of entrenchment is expanded to include private law mechanisms, formal anti-entrenchment rules migrate to one end of a much broader spectrum.<sup>9</sup> The breadth of that spectrum reveals that the problem of entrenchment is both more ubiquitous and more varied than people have generally acknowledged.<sup>10</sup>

This Article therefore first develops a typology of the ways in which a government can use private law or operate through private actors to entrench a particular policy, agenda, or set of priorities.<sup>11</sup> The broad forms include contractual entrenchment (entering into long-term procurement contracts or development agreements), property entrenchment (alienating resources or creating vested rights), financial entrenchment (incurring debt or setting future spending

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<sup>6</sup> See Part II.A.2.

<sup>7</sup> See Christopher Serkin, *Entrenching Environmentalism: Private Conservation Easements over Public Land*, 77 U Chi L Rev 341, 343-45 (2010).

<sup>8</sup> See Richard Briffault, *The Most Popular Tool: Tax Increment Financing and the Political Economy of Local Government*, 77 U Chi L Rev 65, 67-69 (2010).

<sup>9</sup> For an argument that entrenchment exists on a spectrum, see Serkin, 77 U Chi L Rev at 366 (cited in note 7).

<sup>10</sup> For a notable exception, see Posner and Vermeule, 111 Yale L J at 1700-03 (cited in note 2) (arguing that many different government actions are entrenching).

<sup>11</sup> I use the term "typology" for all of the excellent reasons discussed by Fred Bloom. See Frederic M. Bloom, *Information Lost & Found*, 100 Cal L Rev \*24 n 161, \*34 n 213 (forthcoming 2011) (on file with author).

priorities), and physical entrenchment (permitting either the development or destruction of resources that limit policy options in the future). In its descriptive sections, this Article defines these various forms of entrenchment and, equally important, provides real-world examples of each.

These forms of entrenchment are also subject to certain protections that prevent government precommitments from binding future governments too tightly. So while a sophisticated property conveyance can in fact entrench a conservation agenda by relying on background private law rules, the public trust doctrine limits what the government can convey away at the outset, and the availability of eminent domain can give a subsequent government the opportunity to change course later. As it turns out, the forms of entrenchment identified in this Article usually exist in remarkable equipoise with these and a number of other anti-entrenchment doctrines.

That, however, is changing. In recent decades, local governments in particular have become more creative at finding ways to entrench their policy decisions.<sup>12</sup> Simultaneously, anti-entrenchment protection has been scaled back, creating more opportunities for government lock-in.<sup>13</sup> People's failure even to recognize the entrenchment problems that these changes create means that the law is shifting quickly out of balance.

Eminent domain provides the most obvious example. In response to concerns about perceived condemnation abuse, many states have recently adopted eminent domain reform, curtailing—sometimes in dramatic fashion—the ability of governments to take property for public use.<sup>14</sup> The debate over such reforms has focused almost entirely on the appropriate expansion or limitation of property rights.<sup>15</sup> This Article argues, however, that eminent domain serves another important purpose. In addition to its traditional role in facilitating land acquisition—and reasonable minds can disagree about how

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<sup>12</sup> See Part II.

<sup>13</sup> See Parts III.A.1 and III.A.2.

<sup>14</sup> See Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo*, 93 Minn L Rev 2100, 2114–20 (2009) (reviewing state responses).

<sup>15</sup> See, for example, Audrey G. McFarlane, *Rebuilding the Public-Private City: Regulatory Taking's Anti-subordination Insights for Eminent Domain and Redevelopment*, 42 Ind L Rev 97, 98–99 (2009) (“At the core of the opposition [to eminent domain] are earnest and deeply held beliefs about individual property rights.”); Daniel H. Cole, *Why Kelo Is Not Good News for Local Planners and Developers*, 22 Ga St U L Rev 803, 803 (2006) (“Justice O'Connor's hyperbolic dissent inflamed property rights advocates, media pundits, and state and federal legislators, who assailed *Kelo* as the death knell for private property rights.”); Julia D. Mahoney, *Kelo's Legacy: Eminent Domain and the Future of Property Rights*, 2005 S Ct Rev 103, 105 (“[T]he legacy of *Kelo* could be inadequate or even counterproductive protections of property rights.”).

robust that role should be—eminent domain is an essential tool for buying back control over choices made by earlier governments. This may explain why property rights, uniquely among constitutionally protected interests, receive only liability rule protection.<sup>16</sup> Ignoring this role of eminent domain impoverishes the debate over its appropriate limits and allows courts and legislatures to restrict its use more than they should.

Arguing that some government actions have become too entrenching requires a way of evaluating how binding governments' private law precommitments should be. There is no real mystery why government actors may want to tie the hands of future governments. A government might be able to induce a private party to provide some service—cleaning up an environmental spill, building a prison, providing affordable housing—in exchange for favorable regulatory treatment in the future.<sup>17</sup> That bargain may be struck only if the government can make its reciprocal promise binding. Or, under an optimistic vision of public decisionmaking, if a government identifies what it views as good policy, then it may try to lock it in to prevent political mischief from subverting that policy in the future.<sup>18</sup>

Under a less optimistic view of the government, however, entrenched policies are more likely themselves to be the result of special-interest-group rent-seeking.<sup>19</sup> Moreover, entrenchment creates opportunities for intertemporal agency problems as governments impose costs on the future in exchange for immediate gains. This Article's normative sections therefore examine, in general form, the principal reasons for entrenchment and the central problems that it presents. Fundamentally, entrenchment creates benefits from reliance on government precommitments, but it creates a risk that a government will trade off future flexibility for short-term gains.

This analysis is deeply intertwined with the nature of the political process and with likely political failures. To narrow the discussion to a manageable size—if still just barely—this Article addresses

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<sup>16</sup> Theorists have struggled with the question why property rights are not protected like other interests in the Bill of Rights. See, for example, Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* 15–18 (Harvard 1985) (arguing that property rights should be treated like other constitutionally protected rights); C. Edwin Baker, *Property and Its Relation to Constitutionally Protected Liberty*, 134 U Pa L Rev 741, 782–85 (1986) (arguing the opposite). Perhaps they are not inferior rights but must simply give way to the structural role of eminent domain in preserving future governments' flexibility.

<sup>17</sup> For two such examples, see note 267.

<sup>18</sup> See McConnell, 1987 U Chi Legal F at 295 (cited in note 5) (“Lawmakers always have dreamed of making their decisions irrevocable.”).

<sup>19</sup> See Daniel R. Fischel and Alan O. Sykes, *Governmental Liability for Breach of Contract*, 1 Am L & Econ Rev 313, 316 (1999).



entrenchment primarily in local governments. This diverges notably from previous academic work on the subject, which has focused almost entirely on legislative entrenchment at the state or, more often, the federal level.<sup>20</sup> In much of the previous academic writing, the principal hypothetical driving the analysis is Congress entrenching the death penalty or abortion policy.<sup>21</sup> In contrast, the examples here involve precommitments concerning land use, funding for municipal services, or municipal debt. While these may be less dramatic (and admittedly less fraught) examples than abortion or the death penalty, they are also commonplace and therefore of more than theoretical significance.

Part I defines entrenchment and sets out the scope of the project. Part II identifies the conceptual sources of entrenchment in private law and provides real-world examples from local governments. Importantly, it identifies a specific trajectory in the law as governments have become more adept at finding ways to entrench their policy decisions and courts have become increasingly willing to enforce various forms of precommitments. Part III completes the Article's descriptive analysis, discussing the various forms of entrenchment protection already existing in the law. Part IV develops a framework for evaluating entrenchment concerns, identifying entrenchment's costs and benefits. Part V then proposes a specific utilitarian calculus for entrenchment and offers some specific policy prescriptions.

## I. ENTRENCHMENT: WHAT AND HOW

Entrenchment affects the ability of a government to respond to the will of its constituents and therefore implicates core democratic values.<sup>22</sup> Whether it strengthens or weakens them is a matter of temporal perspective. Allowing a government to decide for itself not only what policies to adopt but also how binding they will be on the future is democracy enhancing. It increases the power of a government to respond to constituents' preferences by adding a

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<sup>20</sup> See, for example, David Dana and Susan P. Koniak, *Bargaining in the Shadow of Democracy*, 148 U Pa L Rev 473, 473–74 (1999); Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 Georgetown L J 491, 496–98 (1997); Eule, 1987 Am Bar Found Rsrch J at 383 (cited in note 1); Paul W. Kahn, *Gramm-Rudman and the Capacity of Congress to Control the Future*, 13 Hastings Const L Q 185, 188–90 (1986).

<sup>21</sup> See, for example, John C. Roberts and Erwin Chemerinsky, *Entrenchment of Ordinary Legislation: A Reply to Professors Posner and Vermeule*, 91 Cal L Rev 1773, 1775–76 (2003); Adrian Vermeule, *Common Law Constitutionalism and the Limits of Reason*, 107 Colum L Rev 1482, 1494–95 (2007); Heidi S. Alexander, Note, *The Theoretic and Democratic Implications of Anti-abortion Trigger Laws*, 61 Rutgers L Rev 381, 392–93 (2009).

<sup>22</sup> See note 5.

temporal component to government decisions.<sup>23</sup> Not only can a majority decide whether to fund a library, it can also determine library funding into the future. But it comes with an offsetting loss. Increasing the power of a government to propel its choices into the future decreases the power of future governments to decide policy for themselves. Allocating democratic power intertemporally is therefore a zero-sum game. The more power the earlier government has to entrench its decisions, the less power later governments have to make their own.

Much of the literature on entrenchment operates at this conceptual level.<sup>24</sup> Theorists of democracy argue about what entrenchment means for self-determination. Michael McConnell succinctly sums up the majority perspective: “Future lawmakers have just as much power to depart from the decisions of their forebears as their forebears had to make the decisions in the first place.”<sup>25</sup> McConnell provocatively takes the argument to its logical extreme and argues that if policy choices are taken away from future governments, then there is no point bothering with elections at all.<sup>26</sup>

Doctrinally, this much is clear: core anti-entrenchment rules prevent governments from passing formally unrepealable legislation.<sup>27</sup> In fact, however, governments have many more opportunities to make binding precommitments than people generally realize (or at least than people have previously catalogued and categorized). Entering into contracts, incurring debt, and alienating property all have the effect of limiting the range of options available to governments in the future. Indeed, by conscripting private law and private parties, governments can deploy an array of devices that create precommitments more binding than public law would ever allow.

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<sup>23</sup> See Posner and Vermeule, 111 Yale L J at 1672 (cited in note 2) (“[E]ntrenchment powers give Congress a more refined tool for controlling [temporal] effects.”).

<sup>24</sup> See notes 20–21.

<sup>25</sup> McConnell, 1987 U Chi Legal F at 296 (cited in note 5).

<sup>26</sup> See *id.* at 300. McConnell’s point is rhetorical but made with great effect in the context of consent decrees:

The conduct of the executive branch, no less than the legislative, is intended to be politically accountable. That is why we hold elections for President. If changes in policy have already been ruled out by binding and irrevocable agreements with private parties, then there is no point in holding them.

*Id.*

<sup>27</sup> See *United States v Winstar Corp.*, 518 US 839, 872–73 (1996) (describing entrenchment doctrine as a “centuries-old concept”); Roberts and Chemerinsky, 91 Cal L Rev at 1775 (cited in note 21) (“Are [laws that ‘flatly prohibit’ future repeal] constitutional? The conventional wisdom is that they are not, because one legislature cannot bind a future legislature.”); Klarman, 85 Georgetown L J at 506 (cited in note 20) (“[I]f today’s majority enacts a statute, which by its terms is unrepealable, then it has illegitimately extended its present sovereignty into the future.”).

As insightful as McConnell and others have been about the problem of entrenchment, they do not provide the tools for deciding what other kinds of government actions actually run afoul of anti-entrenchment concerns. This Part defines the scope of the problem. It sets out a broad definition of entrenchment and explains the Article's focus on local governments and private law.

### A. Defining Entrenchment

The term “entrenchment” is used in various ways in the legal and political science literature.<sup>28</sup> The narrowest definition includes only legislation made formally unrepealable by the legislation itself.<sup>29</sup> This definition—common in recent legal scholarship—is particularly useful for distilling the central normative problem with entrenchment in its strongest form: whether one government can make decisions in a way that removes the ability of subsequent governments to make different decisions. It misses, however, functional equivalents of entrenchment that nevertheless present the same general concern. In ancient Greece, for example, laws were not formally entrenched in the sense that they could not be repealed, but the Locrians required that the proponent of any legal change make his proposal with a noose around his neck.<sup>30</sup> If the change was voted down, then its advocate would be hanged on the spot. Not surprisingly, in two hundred years, only one law was ever changed.<sup>31</sup> Although the Locrian practice did not constitute formal entrenchment under a narrow definition, the lock-in effect is clear enough. The literature that focuses only on unrepealable legislation

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<sup>28</sup> See, for example, Roberts and Chemerinsky, 91 Cal L Rev at 1778 (cited in note 21) (“[Entrenchment] covers both repeal and amendment of earlier legislation.”); Posner and Vermeule, 111 Yale L J at 1667 (cited in note 2) (defining entrenchment as “statutes or internal legislative rules that are binding against subsequent legislative action in the same form”); Dana and Koniak, 148 U Pa L Rev at 529 (cited in note 20) (defining entrenchment as “a legal hierarchy in which the will of a past legislature trumps the will of a present legislature”). Julian Eule distinguishes between four kinds of entrenchment. See Eule, 1987 Am Bar Found Rsrch J at 384–85 (cited in note 1). “[A]bsolute entrenchment” exists when “the right of repeal is denied for all time, under any conditions, and by whatever procedure.” Id at 384. “[P]rocedural entrenchment” involves “an attempt not to bind the future irrevocably, but to prescribe the ‘manner and form’ by which the promulgated directives can be changed.” Id at 384–85. “[T]ransitory entrenchment” prevents “alteration for a specified period of time only,” while “preconditional entrenchment” allows change “only on the occurrence of a preordained event.” Id at 385.

<sup>29</sup> See Posner and Vermeule, 111 Yale L J at 1667 (cited in note 2) (defining entrenchment to include only this core legislative type of entrenchment).

<sup>30</sup> See Melissa Schwartzberg, *Athenian Democracy and Legal Change*, 98 Am Polit Sci Rev 311, 322 (2004). Thanks to Saul Zipkin for bringing to my attention this fascinating historical account.

<sup>31</sup> See id (noting that Demosthenes praised the Locrian solution as promoting unamendable features in their laws).

can hide the ubiquity of entrenchment concerns and, ironically, trivialize the fundamental problem.

This Article therefore adopts a broader definition of entrenchment, one that can include the Greeks' threat of death for legal reformers and more. As the term is used here, an action is entrenching to the extent that it limits the policy choices available to future governments. In principle, this definition is sufficiently broad to encompass every single act that a government undertakes. Planting a tree is entrenching if it limits the ability of a government to site a street lamp. Actions today always affect the options available in the future, and this definition threatens to make the category of entrenchment uninteresting in its banality.<sup>32</sup> But that is the point. Sometimes entrenchment is banal. Government decisions always impact future flexibility. The problem of entrenchment is therefore not just the problem of unrepeatable legislation; it requires wrestling with the entrenching effect of everything that a government does.

Under this definition, entrenchment always exists on a continuum. Government actions are always either more or less entrenching. Formally unrepeatable legislation is at one end of the spectrum.<sup>33</sup> At the other end is planting a tree, passing a road budget, or undertaking some of the other routine functions of local governments. Even these have some entrenching effect, as they alter the preexisting regulatory (or physical) landscape. Indeed, the status quo is entrenching simply because it is the status quo.<sup>34</sup> But governments can change course through the ordinary political process or by undertaking relatively trivial de-entrenching actions, like cutting down the tree.

Recognizing the breadth of the problem changes the question from whether entrenchment should be allowed in the extreme, stylized examples that pervade the literature to a more nuanced and,

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<sup>32</sup> Some might wonder why this Article retains the word "entrenchment" to refer to such a broad category. Little turns on the name. It could just as easily be termed "removal of future flexibility." The reason to retain the term is simply to invoke the sophisticated extant literature on entrenchment, which has fleshed out the same underlying concerns.

<sup>33</sup> Even this is not entirely immutable; revolution or other dissolution of the government can still wipe the slate clean.

<sup>34</sup> See Lisa Heinzerling, *Environmental Law and the Present Future*, 87 Georgetown L J 2025, 2067 (1999) ("The status quo achieves a kind of presumption or priority simply because it is the status quo. In this way, too, our current actions can reach into the future, and even into the next generation."); Adrian Vermeule, *The Constitutional Law of Congressional Procedure*, 71 U Chi L Rev 361, 406 (2004) ("[I]t may be more difficult for the legislative majority to repeal an earlier minoritarian enactment than it would have been to vote it down in the first instance, even if the enactment has only been law for a brief period."). See also Russell Korobkin, *The Endowment Effect and Legal Analysis*, 97 Nw U L Rev 1227, 1236 (2003) ("[I]ndividuals tend to prefer the status quo state of the world, all other things being equal.").

frankly, more difficult question: *How much* entrenchment should be allowed?<sup>35</sup> Entrenchment concerns are not restricted to some stylized (and currently nonexistent) form of formally unrepealable legislation, but rather are at issue in a broad array of government actions that have the effect of limiting—more or less—future governments' policy choices.<sup>36</sup>

The point bears repeating because the rest of this Article hinges on it: everything that a government does has some effect on the future and is therefore entrenching, as this Article uses the term. Of course, this does not mean that every government action is somehow problematically or impermissibly entrenching. Instead, it demonstrates the need for a more comprehensive theory of entrenchment that provides a way of assessing whether the entrenching effects of various government precommitments go too far—and what protections should therefore be in place.

## B. Local Governments and Private Law

Given this Article's expansive definition of entrenchment, a comprehensive catalogue of the problem addressing all levels and branches of government would be truly vast. This Article therefore concentrates on local governments in order to make the project more manageable in scope. This focus is atypical in discussions of entrenchment, which are usually about hot-button national issues.<sup>37</sup> Nevertheless, local governments have tended to be the most creative about both making precommitments binding on the future and escaping earlier governments' precommitments.<sup>38</sup>

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<sup>35</sup> Eric Posner and Adrian Vermeule's exchange with John Roberts and Erwin Chemerinsky focused primarily on the former question: whether entrenchment should be permissible. Compare Posner and Vermeule, 111 *Yale L J* at 1666 (cited in note 2) (arguing that the rule against entrenchment is constitutionally unfounded and is no more objectionable than many other policy instruments that legislatures use to affect the future), with Roberts and Chemerinsky, 91 *Cal L Rev* at 1777 (cited in note 21) (contending that Posner and Vermeule's argument that entrenchment should be permissible is wrong as a matter of constitutional law and undesirable as a matter of policy).

<sup>36</sup> Michael Klarman distinguishes between the entrenching character of "today's majority exercising sovereignty over the present in a way that unavoidably affects the future and today's majority seeking direct control over the future in a manner that is unnecessary to implementing its complete control over the present." Klarman, 85 *Georgetown L J* at 505 (cited in note 20).

<sup>37</sup> See notes 20–21.

<sup>38</sup> This may be true, in part, because local governments lack the ability to precommit constitutionally. A state, and even the federal government, can entrench its most urgent precommitments in its constitution. A local government has no such power. Even the content of municipal charters is not binding on future local governments. See, for example, *Williams v City Council of West Point*, 68 Ga 816, 816 (1882) ("[O]ne council cannot, by ordinance, bind itself and its successors to a given line of policy, or prevent free legislation by them in matters of municipal government."); Conn Gen Stat Ann § 7-188(a) (setting out a similar limit).

Local governments are also a particularly useful focus because their actions are often capitalized into property values, providing important political feedback that is more direct and easier to detect than at the state or federal level.<sup>39</sup> Consider, for example, the effect of a beautiful, privately owned, undeveloped field near some homes. The presence of the field may increase the value of the neighboring property to a certain extent, but the risk that the field will eventually be developed will also be reflected in those property values. That is, any increase in nearby property values resulting from proximity to the field is discounted by the likelihood that the field will be developed. If the field were somehow perpetually conserved, however—if it were a park or subject to conservation easements—then the value of neighboring property would increase even more.<sup>40</sup> Sometimes, then, entrenchment serves to capitalize into property values the long-term effects of government policies and decisions. Beneficial precommitments will increase property values today, and adverse precommitments will have the opposite effect. Both come with immediate political consequences.<sup>41</sup> This is by no means a perfect mechanism. It works only to the extent that precommitments are, in fact, capitalized into property values. Nevertheless, that such a mechanism exists at all means that the costs and benefits of entrenchment are presented with particular clarity at the local level.

In addition to entrenchment by local governments, this Article is also concerned with entrenchment exclusively through private law, or at least through private actions. As this Article is about law, and not about political theory or psychology, its focus is on the ways in which private rights constrain governments. There are, of course, many other sources of entrenchment that are beyond the scope of this Article, like the Constitution itself.<sup>42</sup> Individual constitutional provisions—notably, the Takings and Contracts Clauses—are responsible for the entrenching character of some of the private rights described below,

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<sup>39</sup> For a discussion of how and why property values apply differently in state and federal governments, see Christopher Serkin, *Big Differences for Small Governments: Local Governments and the Takings Clause*, 81 NYU L Rev 1624, 1661–65 (2006).

<sup>40</sup> See, for example, Thomas R. Hammer, Robert E. Coughlin, and Edward T. Horn IV, *The Effect of a Large Urban Park on Real Estate Value*, 40 J Am Inst Planners 274, 276–77 (1974) (studying the effect of parkland on nearby property values); Mark R. Correll, Jane H. Lillydahl, and Larry D. Singell, *The Effects of Greenbelts on Residential Property Values: Some Findings on the Political Economy of Open Space*, 54 Land Econ 207, 211 (1978) (finding that “there is a \$4.20 decrease in the price of a residential property for every foot one moves away from the [green space]”).

<sup>41</sup> See William A. Fischel, *The Homevoter Hypothesis: How Home Values Influence Local Government Taxation, School Finance, and Land-Use Policies* 39–57 (Harvard 2001).

<sup>42</sup> See Dorf, 77 Geo Wash L Rev at 1637–44 (cited in note 4). See also Jeremy Waldron, *Law and Disagreement* 258 (Oxford 1999) (describing constitutions as forms of precommitment).

and individual constitutional provisions are considered in the context of those specific rights.<sup>43</sup> But the Constitution itself as a form of entrenchment is a separate topic.<sup>44</sup> Entrenchment can come from other sources as well, including courts, technological path dependency, psychological effects, and informal norms.<sup>45</sup> The same caveat applies there as well. Courts, and the inertial quality of the status quo, are explicitly addressed only insofar as they are responsible for the entrenching effect of private law precommitments. An entirely separate treatment would be needed to account for the entrenching character of other institutions.

This Article also puts aside entrenchment arising purely from political pressure (though it does consider the political economy of entrenchment in general and of the various forms of entrenchment protection). Some actions are entrenching simply because changing them imposes significant political costs.<sup>46</sup> Undoubtedly, this is an extremely important category, but it is too broad to be usefully considered here. Not only does it include obvious sources of political popularity and unpopularity (whatever the reason), but it also includes actions by local governments that predictably create special interest groups mobilized to defend the status quo, like rent control ordinances<sup>47</sup> and, perhaps, historic preservation.<sup>48</sup> The category also includes procedural rules that make change hard. Indeed, Senate cloture rules are a standard example of entrenchment.<sup>49</sup> The procedures themselves are theoretically amenable to change through the ordinary political process, though, so it is political pressure alone that keeps them in place. These are all very important, but by reserving them for future research, this Article can focus more closely

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<sup>43</sup> See Part II.B and text accompanying notes 211–15.

<sup>44</sup> See generally Jed Rubenfeld, *Freedom and Time: A Theory of Constitutional Self-Government* (Yale 2001). See also Alison L. LaCroix, *Temporal Imperialism*, 158 U Pa L Rev 1329, 1331 n 3 (2010) (citing sources).

<sup>45</sup> See Clayton P. Gillette, *Lock-In Effects in Law and Norms*, 78 BU L Rev 813, 817–21 (1998) (considering the various sources of lock-in); see generally LaCroix, *Temporal Imperialism*, 158 U Pa L Rev 1329 (cited in note 44) (discussing the temporal reach of judicial decisions).

<sup>46</sup> See Vermeule, 71 U Chi L Rev at 406 (cited in note 34). See also Posner and Vermeule, 111 Yale L J at 1696–97 (cited in note 2).

<sup>47</sup> See, for example, Craig Gurian, *Let Them Rent Cake: George Pataki, Market Ideology, and the Attempt to Dismantle Rent Regulation in New York*, 31 Fordham Urban L J 339, 363–64, 389–91 (2004).

<sup>48</sup> See Alexander J. Reichl, *Historic Preservation and Progrowth Politics in US Cities*, 32 Urban Aff Rev 513, 516–19 (1997).

<sup>49</sup> See, for example, Posner and Vermeule, 111 Yale L J at 1694 (cited in note 2). See also Tom Udall, *The Constitutional Option: Reforming the Rules of the Senate to Restore Accountability and Reduce Gridlock*, Harv L & Pol Rev (Jan 9, 2011), online at <http://hlprounline.com/2011/01/the-constitutional-option-reforming-the-rules-of-the-senate-to-restore-accountability-and-reduce-gridlock/> (visited Feb 11, 2011).

on local government actions that rely on private law (or private conduct) to constrain the future.

## II. SOURCES OF ENTRENCHMENT

Government entrenchment through private law takes many forms. This Part introduces and catalogues the primary sources of entrenchment. The following categories are not entirely distinct from each other, however. A particular government action can be entrenching in multiple ways. A typology nevertheless brings some conceptual clarity to the topic. Developing categories of entrenchment also reveals an important trend toward increased entrenchment in local government actions, a trend that is not apparent when the doctrines are viewed piecemeal.

As a descriptive matter, this Part demonstrates that governments have developed increasingly powerful tools over the years for locking in policy choices, perhaps responding to interlocal competition or heightened political polarization (possibilities that are considered below).<sup>50</sup> At the same time, courts have become more deferential to government precommitments. The project here is positive: identifying the forms of, and expanded opportunities for, entrenchment in local governments. Normative questions are reserved for Parts IV and V.

### A. Contractual Entrenchment

The first and most obvious source of entrenchment through private law involves local governments entering into contractual precommitments that bind future governments.<sup>51</sup> These can take a number of forms.

#### 1. Promises to regulate or to forbear.

At the far end of the spectrum of entrenching government actions are promises or contracts for specific regulatory treatment in the future—or at least they would be at the far end of the entrenchment spectrum if they were permissible. A local government might try to promise that it will not downzone property in the future

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<sup>50</sup> See Part III.D.

<sup>51</sup> See Jody Freeman, *The Private Role in Public Governance*, 75 NYU L Rev 543, 667 (2000) (“In an era of contracting out, enforceable contracts form the connective tissue between public and private actors; as such, they promise to be important vehicles of policy making.”); Gillian Hadfield, *Of Sovereignty and Contract: Damages for Breach of Contract by Government*, 8 S Cal Interdisc L J 467, 467 (1999) (identifying tension “between the power of government to bind itself and future governments in contract and the freedom of a democratically elected legislature to override the acts of a prior legislature in response to evolutions in judgment, information, or politics”).



or that it will grant a variance if a developer applies for one, but such obligations have traditionally been unenforceable, at least to the extent that they limit future governments' core regulatory powers.<sup>52</sup> The inalienable powers doctrine (sometimes called the reserved powers doctrine) prevents a government from contracting away its police powers.<sup>53</sup> This should not be particularly surprising since committing to any particular legal regime in the future is conceptually indistinguishable from unrepeatable legislation insofar as it prespecifies the application of future law.

What is surprising is that the law's attitude toward such promises became notably more permissive during the twentieth century. While a promise not to regulate remains largely unenforceable, a promise to compensate in the event of a change in the law may be upheld.<sup>54</sup> As the Court of Claims succinctly summarized in *Gerhardt F. Meyne Co v United States*,<sup>55</sup> the government "cannot enter into a binding agreement that it will not exercise a sovereign power, but it can say, if it does, it will pay you the amount by which your costs are increased."<sup>56</sup> This marks a change from the traditional rule, as the law now permits a form of liability rule protection for promises about future regulations.<sup>57</sup>

In the last few decades, legal reform has taken the enforceability of government contracts one step further, replacing slow doctrinal evolution with statutory authority for development agreements. Starting in the late 1970s with California, a number of states adopted legislation allowing local governments to bargain away their zoning

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<sup>52</sup> See, for example, Stewart E. Sterk, *The Continuity of Legislatures: Of Contracts and the Contracts Clause*, 88 Colum L Rev 647, 675–77 (1988) (reviewing the history of police-power rules); Stewart E. Sterk, *Publicly Held Servitudes in the New Restatement*, 27 Conn L Rev 157, 172 (1994) ("The notion that the police power is inalienable arose in the Supreme Court's interpretations of the Contracts Clause of the Federal Constitution."). See also Samuel R. Olken, *Charles Evans Hughes and the Blaisdell Decision: A Historical Study of Contract Clause Jurisprudence*, 72 Or L Rev 513, 543–44 (1993) (describing the bases for the inalienable powers doctrine). For a more detailed consideration of this issue, see text accompanying notes 209–19.

<sup>53</sup> See Part III.B.1. In the land use context, such promises are likely to be considered illegal contract zoning. See, for example, *Byrd v Martin, Hopkins, Lemon and Carter, PC*, 564 F Supp 1425, 1427–29 (WD Va 1983).

<sup>54</sup> The requirement that such promises be unmistakable has been the source of frequent litigation, including in the famous case of *United States v Winstar Corp*, 518 US 839, 875 (1996).

<sup>55</sup> 76 F Supp 811 (Ct Cl 1948).

<sup>56</sup> *Id* at 815.

<sup>57</sup> See Guido Calabresi and A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 Harv L Rev 1089, 1092 (1972). Indemnification provisions in local government contracts are sometimes limited by state law. Consider, for example, W.A. Drew Edmondson, Opinion 06-11, 36 Op Okla Atty Gen 76, 81 (Apr 14, 2006) (describing constitutional limits on use of indemnification provisions that immunize vendors for their own wrongful actions).

power.<sup>58</sup> Through state enabling statutes, local governments can offer an enforceable promise to provide certain regulatory treatment in the future in exchange for prespecified benefits. A developer, for example, might promise to provide roads and other infrastructure, as well as public goods like a park or a school, in exchange for a local government's commitment to change the applicable zoning ordinance.<sup>59</sup>

Strikingly, in this one context at least, property owners may be entitled to specific performance against a local government. Normally, a contract cannot irrevocably bind the hands of future governments.<sup>60</sup> It can, at most, make changing course expensive. But development agreements are different, as they can, at least in some circumstances, provide developers with injunctive relief.<sup>61</sup> The entrenching effect has therefore clearly passed what traditional anti-entrenchment rules would permit, marking another place where opportunities for entrenchment have increased in recent decades.

## 2. Long-term procurement contracts, franchises, and proprietary contractual obligations.

Long-term government contracts that are proprietary instead of public—that is, contracts less explicitly concerned with future regulatory power—can also have significant entrenching effects.<sup>62</sup>

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<sup>58</sup> See Brian W. Blaesser, *Discretionary Land Use Controls: Avoiding Invitations to Abuse of Discretion* 330–31 & n 5, 351–53 (West 2010); Steven P. Frank, *Yes In My Backyard: Developers, Government and Communities Working Together through Development Agreements and Community Benefit Agreements*, 42 Ind L Rev 227, 241–42 (2009).

<sup>59</sup> See, for example, Judith Welch Wegner, *Moving toward the Bargaining Table: Contract Zoning, Development Agreements, and the Theoretical Foundations of Government Land Use Deals*, 65 NC L Rev 957, 1014–15 (1987); David L. Callies and Julie A. Tappendorf, *Unconstitutional Land Development Conditions and the Development Agreement Solution: Bargaining for Public Facilities after Nollan and Dolan*, 51 Case W Res L Rev 663, 664–65 (2001).

<sup>60</sup> See, for example, *Byrd*, 564 F Supp at 1429; 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, 155 (1998). According to Richard Seamon, the rule has its origins in this country in the nineteenth century but derives from the English sovereign immunity maxim that “the King can do no wrong.” Seamon, 43 Vill L Rev at 160–61 (cited in note 60). The Tucker Act, 24 Stat 505 (1887), codified as amended at 28 USC § 1491, formalized this limitation in remedies against the federal government in 1887, limiting the remedy for breach of contract to damages adjudicated in the Court of Claims. See *United States v Jones*, 131 US 1, 18 (1889). Similar rules apply to the states, though the source of the rule varies state by state. See, for example, *Texas Natural Resource Conservation Commission v IT-Davy*, 74 SW3d 849, 855–56 (Tex 2002); *Erickson Oil Products v State*, 516 NW2d 755, 760–62 (Wis App 1994).

<sup>61</sup> See Callies and Tappendorf, 51 Case W Res L Rev at 687–89 (cited in note 59) (citing cases); Wegner, 65 NC L Rev at 1029–38 (cited in note 59) (discussing remedies for noncompliance with development agreements).

<sup>62</sup> See David A. Super, *Rethinking Fiscal Federalism*, 118 Harv L Rev 2544, 2624 (2005) (“A legislature ... can give discretionary or even frivolous expenditures constitutional status by

Governments have become increasingly sophisticated about using such contracts to capture immediate benefits and lock in policy for the future.<sup>63</sup>

Consider, for example, the City of Chicago's decision in 2008 to lease thirty-six thousand of its parking meters (and the right to collect fees from those meters) to a private company for seventy-five years for a one-time payment of \$1.16 billion.<sup>64</sup> This deal makes it all but impossible for a subsequent city government to decide, for example, to do business with a different company or, more profoundly, to use parking policy to try to affect broader social issues.<sup>65</sup> These kinds of changes—and, indeed, perhaps countless others—may be foreclosed, or at least made prohibitively expensive, by the parking meter contract. The city may find itself in breach of contract if it attempts to adopt creative parking responses to economic issues or transportation problems.<sup>66</sup>

The point goes beyond parking. Procurement contracts often involve long-term relationships with contractors for large-scale public

incorporating them into contracts. If the state contracts with a private party to make payments in future years, the Contracts Clause would prevent it from reneging even if it had lost interest in that project.”). For the distinction between governmental and proprietary obligations, see Janice C. Griffith, *Local Government Contracts: Escaping from the Governmental/Proprietary Maze*, 75 Iowa L Rev 277, 379–80 (1990).

<sup>63</sup> See Jon D. Michaels, *Privatization's Pretensions*, 77 U Chi L Rev 717, 739–40 & n 83 (2010); Freeman, 75 NYU L Rev at 552 (cited in note 51):

The scope of activities for which government agencies contract with private providers . . . appears moreover to have expanded. Not only do private providers furnish social services such as health care, and fulfill local government responsibilities such as waste collection and road repair; they also increasingly perform such traditionally public functions as prison management.

<sup>64</sup> See Julie A. Roin, *Privatization and the Sale of Tax Revenues*, 95 Minn L Rev 1965, 1994–96 (2011) (discussing the parking meter transaction). For a summary of the deal, see Dan Mihalopoulos and Hal Dardick, *Parking Meter Deal OK; Rates Going Up*, Chi Trib C25 (Dec 5, 2008).

<sup>65</sup> For an overview of the kinds of issues that parking meters can implicate, see Matthew Roth, *Emotional Debate over New Parking Meters at Marathon SFMTA Hearing*, Streetsblog SF (June 18, 2010), online at <http://sf.streetsblog.org/2010/06/18/emotional-debate-over-new-parking-meters-at-marathon-sfmta-hearing> (visited Jan 4, 2011):

The SFMTA was accused of using meters to dismantle the middle class, to make drivers feel like parasites, to repress poor people, to institute a regressive tax, to do away with a good tradition of free parking, to increase the risk of rape because people will have to park further from their homes, and to generally destroy the quality of life and well being of San Franciscans.

<sup>66</sup> See Roin, 95 Minn L Rev at 2011–12 (cited in note 64):

The Chicago parking contract similarly . . . guarantee[s] the number of parking spaces and their hours of operation. . . . The contractual language is drafted broadly enough that it might give pause to politicians thinking about expanding public transportation or rezoning plans that might draw commercial traffic away from areas where the Concessionaire has parking meter rights.

construction projects, with service providers for outsourced municipal services, and the like.<sup>67</sup> Increasingly, a government may choose to finance public buildings—low-income housing, prisons, government facilities—by outsourcing the development to a private company while entering into a long-term lease.<sup>68</sup> Or a government can commission infrastructure development—toll roads, landfills—by allowing a private company to collect fees into the future.<sup>69</sup> To the extent these contracts are enforceable, they can entrench government priorities, such as what kinds of buildings to develop, which public services to provide, who should provide them, and what terms will govern.<sup>70</sup> In sum, the increased use of procurement contracts and public-private partnerships creates private contractual obligations that increasingly affect the policy options for future governments.<sup>71</sup>

### 3. Consent decrees.

A particularly strong form of contractual precommitment comes in the form of consent decrees. Although not typically viewed as private contracts, they are nevertheless contractual in character, representing private agreements between the government and a private counterparty to settle litigation.<sup>72</sup> As part of structural reform litigation, a government will sometimes enter into a consent decree

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<sup>67</sup> See, for example, Celeste Pagano, *Proceed with Caution: Avoiding Hazards in Toll Road Privatizations*, 83 St John's L Rev 351, 352 (2009) (discussing the privatization of a toll road); National Council for Public-Private Partnerships, *Great Falls Wastewater Treatment Plant*, online at <http://www.ncppp.org/cases/greatfalls.shtml> (visited Jan 4, 2011) (describing the privatization of water facilities); Jody Freeman, *The Contracting State*, 28 Fla St U L Rev 155, 155–56 (2000). See also Michaels, 77 U Chi L Rev at 721 n 9 (cited in note 63).

<sup>68</sup> See Richard Briffault, *Foreword: The Disfavored Constitution: State Fiscal Limits and State Constitutional Law*, 34 Rutgers L J 907, 919–20 (2003) (describing lease financing). See also Sharon Dolovich, *State Punishment and Private Prisons*, 55 Duke L J 437, 457 & n 65 (2005) (describing transactions for creating prisons).

<sup>69</sup> There is a long history of such contracts. For a review of some early litigation, see text accompanying notes 178–80. Collective bargaining agreements are another example, though they are discussed below in the context of financial entrenchment. See text accompanying notes 147–52.

<sup>70</sup> See Freeman, 28 Fla St U L Rev at 157 (cited in note 67) (noting the ability of contracts to “bind governments to the bad bargains of their predecessors”). Not all contracts are equally entrenching. A one-time purchase of property may have some long-term financial consequences, but the contract itself has very limited effect into the future.

<sup>71</sup> See *id.* at 162 (“The devolution of authority from federal to state and local governments has contributed to the rise of contracting out, as lower levels of government turn to private actors in order to help execute their new responsibilities.”).

<sup>72</sup> See Frank H. Easterbrook, *Justice and Contract in Consent Judgments*, 1987 U Chi Legal F 19, 20 (noting that a consent decree’s “force comes from the parties’ agreement, not from the law that was the basis of the suit”); McConnell, 1987 U Chi Legal F at 301 (cited in note 5) (“The enforceability of a consent decree follows logically from its nature as a hybrid between a litigated judgment and a contract.”).

with an advocacy group, essentially agreeing to reform government practices in certain enumerated ways set forth in the document. Typical cases involve school desegregation, environmental protection, prison reform, or provision of certain government benefits.<sup>73</sup> The consent decree then becomes a binding obligation—and, importantly, one that is specifically enforceable by a court.<sup>74</sup>

Consent decrees are particularly interesting because governments may welcome institutional-reform litigation. The litigation process allows government actors to agree to politically unpalatable policy changes.<sup>75</sup> A consent decree therefore may not embody the negotiated compromise over a genuine dispute but instead lock in the results of collaboration between the government and a particular interest group.<sup>76</sup> Moreover, the consent decree then becomes largely immune from efforts by subsequent government actors to modify or repeal it.<sup>77</sup>

## B. Property Entrenchment

Just like contracts, the private law of property can bind governments into the future, though typical examples involve more complex transactions than straightforward bilateral agreements. There are three broad forms of entrenchment through property rights to consider: creating property rights, conveying servitudes, and alienating important resources.

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<sup>73</sup> For an excellent survey, see McConnell, 1987 U Chi Legal F at 311–15 (cited in note 5). It remains a live issue. See, for example, *Horne v Flores*, 129 S Ct 2579, 2590 (2009).

<sup>74</sup> See *Flores*, 129 S Ct at 2594 (“Injunctions of this sort bind state and local officials to the policy preferences of their predecessors and may thereby improperly deprive future officials of their designated legislative and executive powers.”) (quotation marks omitted). For a discussion, see McConnell, 1987 U Chi Legal F at 317 (cited in note 5) (“Real issues of democratic accountability are at stake.”); Easterbrook, 1987 U Chi Legal F at 40 (cited in note 72) (“Tomorrow’s officeholder may conclude that today’s is wrong, and there is no reason why embedding the regulation in a consent decree should immunize it from reexamination.”).

<sup>75</sup> See McConnell, 1987 U Chi Legal F at 301 (cited in note 5) (“[O]ne of the evils to be guarded against is the collusive settlement—government lawyers settling a suit on favorable terms to the opposing party because they expect that successive administrations may be less sympathetic to its cause.”).

<sup>76</sup> See Easterbrook, 1987 U Chi Legal F at 34 (cited in note 72) (“It is impossible for an agency to promulgate a regulation containing a clause such as ‘My successor cannot amend this regulation.’ But if the clause appears in a consent decree, perhaps the administrator gets his wish to dictate the policies of his successor.”).

<sup>77</sup> See McConnell, 1987 U Chi Legal F at 297 (cited in note 5) (identifying cases holding “that executive officials in one Administration can set policy today and bind their successors to comply with it tomorrow, by settling a lawsuit on those terms”).

## 1. Creating property rights.

The first and perhaps most obvious form of entrenchment comes from the creation of property rights. The vested rights doctrine is the best example.<sup>78</sup> Once a developer has taken sufficient steps to develop her property, her development rights are said to vest and are then protected against subsequent regulatory change.<sup>79</sup> Vesting rules usually involve the issuance of a permit by the government and some amount of reliance by the developer on the permit.<sup>80</sup> One government can therefore entrench a development agenda vis-à-vis specific property by allowing development rights to vest, either by issuing permits or forgoing some new regulation until after development has begun, depending on the law of the jurisdiction. This can immunize the development from many forms of subsequent regulation.<sup>81</sup> Of course, once the development has been completed, it then receives takings protection from regulatory change as an existing use, but this problem is taken up below in the context of physical entrenchment.<sup>82</sup>

The vested rights doctrine is notoriously murky and difficult to navigate.<sup>83</sup> It varies by state, with at least three different substantive approaches dominating the landscape.<sup>84</sup> But a number of states in the last few decades have passed legislation defining earlier and more certain vesting dates, which provide greater protection to property owners.<sup>85</sup> Expanding the vested rights doctrine in this way creates

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<sup>78</sup> Vested rights can be seen as the property law analogue to contractual development agreements. See Lyle S. Hosoda, Comment, *Development Agreement Legislation in Hawaii: An Answer to the Vested Rights Uncertainty*, 7 U Hawaii L Rev 173, 187, 191 (1985).

<sup>79</sup> See John M. Armentano, *Zoning and Land Use Planning*, 28 Real Est L J 259, 259 (2000) (“When a property owner’s right to develop a project has ‘vested,’ regulatory changes will not be able to affect it, without implicating due-process concerns.”).

<sup>80</sup> See Brad K. Schwartz, Note, *Development Agreements: Contracting for Vested Rights*, 28 BC Envir Aff L Rev 719, 721–22 (2001) (describing early-vesting and late-vesting states).

<sup>81</sup> See Christopher Serkin, *Existing Uses and the Limits of Land Use Regulations*, 84 NYU L Rev 1222, 1242–61 (2009) (surveying constitutional protection for existing uses in the Takings Clause and the Due Process Clause).

<sup>82</sup> See Part II.D.1.

<sup>83</sup> See Armentano, 28 Real Est L J at 259 (cited in note 79) (“The anachronistic law pertaining to ‘vested rights’ . . . is fraught with difficulties for developers and ambiguities that often make it difficult to ascertain with any degree of certainty when development rights actually have vested and when the often very large expenditures they have made can be protected.”). See also Gregory Overstreet and Diana M. Kirchheim, *The Quest for the Best Test to Vest: Washington’s Vested Rights Doctrine Beats the Rest*, 23 Seattle U L Rev 1043, 1063 n 105 (2000) (collecting sources).

<sup>84</sup> There are the majority and minority common law rules, plus the statutory reforms that a number of states have adopted. See Overstreet and Kirchheim, 23 Seattle U L Rev at 1060–69 (cited in note 83) (surveying the legal landscape). Some have singled out Washington as providing yet another approach. See *id.* at 1069–74.

<sup>85</sup> See E.A. Prichard and Gregory A. Riegler, *Searching for Certainty: Virginia’s Evolutionary Approach to Vested Rights*, 7 Geo Mason L Rev 983, 991 (1999) (“Beginning in the

increased opportunities for entrenchment. The decisions by one government—to grant a permit, to wait to act, or to otherwise allow private rights to vest—create property rights that run against subsequent governments.

Additionally, increased recognition of “new property” means that the vested rights doctrine can entrench a greater panoply of public entitlements than just buildings and development.<sup>86</sup> Courts have effectively propertized certain government benefits, which means that a government that confers such benefits can lock them in for the future as well.<sup>87</sup> Pension benefits are a good example. Under a traditional but now outdated view, pensions were merely a benefit that could be conferred or withheld at the discretion of the state.<sup>88</sup> Over time, though, a pension statute came to be viewed as part of a public employee’s contract with the state or local government. As such, an employee could obtain a contractually vested property right in her pension benefits.<sup>89</sup> Therefore, creating a pension now has the effect of limiting future governments’ ability to modify those financial obligations. The effect on future governments is stark and frequently observed during budget crises,<sup>90</sup> a point considered below in the context of financial entrenchment.

Local governments may even have some control over what counts as property in first place. One of the more interesting recent treatments of the general problem comes from Katrina Wyman’s

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early 1970s, the judicial view on the vested rights question in Virginia progressively moved to favor property rights.”). The most significant expansion of the vested rights doctrine undoubtedly comes from vested rights legislation. See Overstreet and Kirchheim, 23 *Seattle U L Rev* at 1066–69 (cited in note 83) (describing statutes); Terry D. Morgan, *Vested Rights Legislation*, 34 *Urban Law* 131, 134 (2002) (“Most vested rights statutes define an even earlier vesting rule.”).

<sup>86</sup> See Charles Reich, *The New Property*, 73 *Yale L J* 733, 734–37 (1964) (describing the category of new property). Today, “new property” is “new” only in the way that Disney World’s 1970s attraction “Tomorrow Land” represents the future or in the way that “modern” art is contemporary.

<sup>87</sup> See, for example, *Poole v City of Waterbury*, 831 A2d 211, 214–16 (Conn 2003) (finding vested rights in retiree health insurance benefits); *Municipality of Anchorage v Gentile*, 922 P2d 248, 257–58 (Alaska 1996) (finding vested rights in retiree medical benefits).

<sup>88</sup> See, for example, *Dodge v Board of Education of City of Chicago*, 5 NE2d 84, 88 (Ill 1936).

<sup>89</sup> See, for example, *Bauers v City of Lincoln*, 586 NW2d 452, 463 (Neb 1998); Eugene McQuillin, 3 *The Law of Municipal Corporations* §§ 12.144, 12.144.05 (West 3d ed 2001) (describing the history of the treatment of pension rights).

<sup>90</sup> See, for example, Roger Lowenstein, *Looking for the Next Crisis?*, *NY Times* Mag 9 (June 27, 2010); Mary Williams Walsh, *In Budget Crisis, States Take Aim at Pension Costs*, *NY Times* A1 (June 20, 2010); Timothy Logue, *Pension Crisis Could Be Even Worse in Pennsylvania*, *Del County Daily Times* (Apr 14, 2010), online at <http://www.delcotimes.com/articles/2010/04/14/news/doc4bc52c8c0d30d132270494.txt> (visited Jan 4, 2010). This point is considered further in the discussion of financial entrenchment. See text accompanying notes 153–55.

study of New York City taxi medallions.<sup>91</sup> Originally, medallions were mere licenses, revocable by the government.<sup>92</sup> Today, they are significant assets, valuable because of their scarcity. In recent auctions, individual medallions have sold for hundreds of thousands of dollars.<sup>93</sup> According to Wyman, by maintaining scarcity and conveying medallions through auctions and other market transactions, New York City may inadvertently have transformed them into constitutionally protected property interests, making the entire regime highly resistant to change.<sup>94</sup> If the city decided today that it wanted to increase the supply of taxis by dispensing with the medallion requirement, or if it merely wanted to double or triple the number of medallions, it might not be able to do so without compensating current medallion holders.<sup>95</sup> In other words, by encouraging the creation of property rights in the medallions, the government may have entrenched a regulatory approach to an entire industry.

## 2. Creating future interests and servitudes.

In addition to the potential for entrenchment emanating from ownership and property rights generally, property law's system of formal conveyances provides opportunities for more fine-grained entrenchment. Consider, first, the sale of property to the government in a defeasible fee. For example, a government seeking to create a new park may purchase property from a private owner in fee simple determinable.<sup>96</sup> The deed might convey the property to the government so long as the property is not put to any other use.<sup>97</sup>

<sup>91</sup> See Katrina M. Wyman, *Is Bentham Right? The Case of New York City Taxi Medallions* \*8–15 (unpublished manuscript, Dec 2008) (on file with author).

<sup>92</sup> See id at \*9.

<sup>93</sup> See id at \*13–15.

<sup>94</sup> See id at \*21–22. Specifically, she argues that they receive due process protection, though perhaps not protection under the Takings Clause.

<sup>95</sup> See Wyman, *Is Bentham Right?* at \*19–20, 32–36 (cited in note 91). Wyman suggests that due process protection may be quite thin, and that the Takings Clause may not apply at all. At least one court agrees. See *Minneapolis Taxi Owners Coalition, Inc v City of Minneapolis*, 572 F3d 502, 509–10 (8th Cir 2009) (rejecting constitutional protection for taxi licenses). Nevertheless, the extent of constitutional protection for medallions in New York remains up for grabs.

<sup>96</sup> The bane of all first-year property students, defeasible fees are fees subject to conditions in the title. They include the fee simple determinable, the fee simple subject to condition subsequent, and the fee simple subject to an executory limitation. See Cornelius J. Moynihan and Sheldon F. Kurtz, *Introduction to the Law of Real Property: An Historical Background of the Common Law of Real Property and Its Modern Application* 45–47, 231–33 (West 4th ed 2005).

<sup>97</sup> See, for example, *Carstens v City of Wood River*, 163 NE 816, 816 (Ill 1928) (“Said tract of land is conveyed to and accepted by said village of Wood River for park purposes, the same to be maintained as a park for said village, to be governed and controlled by the ordinances of said village for said purposes.”); *Department of Public Works v City of Los Angeles*, 4 Cal Rptr 531, 534 (Cal



Notice that the effect is similar to an ordinance directing that the land be used as a park in perpetuity. Enacted as public law, such an ordinance would of course be unenforceable. But conveyed by a private party, as part of a formal limitation on title, a defeasible fee locks government land into a perpetual use, enforceable through the threat of forfeiture if the government pursues a different agenda for the property.

It is commonplace for governments to own property in defeasible fees.<sup>98</sup> Arguably, however, these situations do not raise real entrenchment concerns, because a private party (the grantor) is doing the entrenching, not the government. In other words, this implicates traditional concerns about dead-hand control but not deeper political concerns about entrenchment.<sup>99</sup> But it is hard to know whether the government is complicit in deciding the terms of the conveyance. A government interested in entrenching the use of property may actually invite the more limited conveyance instead of acquiring the property in fee simple absolute. And, whatever the intent, the end result is the same: the government owns property subject to a requirement that it be put to a particular use. If the government wants to change the use, it can do so only by forfeiting the property (or through condemnation, of which more later).<sup>100</sup> The entrenching effect is apparent, even if the government's role can be difficult to discern.

The reverse is also entrenching: when a government conveys property to a private party in fee simple determinable, conditioned on some ongoing use of the property. Recent cases demonstrate how creative governments have become in this regard. The most interesting is *Salazar v Buono*.<sup>101</sup> There, in response to Establishment Clause concerns about the use of a cross as a war memorial on federal land, Congress conveyed title to the site to a private group. Congress conveyed it as a defeasible fee, however, requiring the owner to continue using the property as a war memorial.<sup>102</sup> This effectively removed from subsequent governments the ability to take a different

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App 1960) (“The conveyance was ‘upon condition’ that the lands be used exclusively as a public park, and ‘upon further condition’ that the name Griffith Park be retained by the City.”).

<sup>98</sup> See *Griffis v Davidson County Metropolitan Government*, 164 SW3d 267, 272 (Tenn 2005); *Basye v Fayette R-III School District Board of Education*, 150 SW3d 111, 114 & n 1 (Mo App 2004) (examining the status of a title for property conveyed in 1892 to a school board in a defeasible fee limiting the use of the lot to “school purposes”).

<sup>99</sup> For a discussion of dead-hand control, see text accompanying notes 300–06.

<sup>100</sup> See text accompanying note 177.

<sup>101</sup> 130 S Ct 1803 (2010). See also *Mount Olivet Cemetery Association v Salt Lake City*, 164 F3d 480, 484–85 (10th Cir 1998) (describing the conveyance of a cemetery in fee simple determinable).

<sup>102</sup> See Department of Defense Appropriations Act of 2004 § 8121, Pub L No 108-87, 117 Stat 1054, 1100 (2003).

view of the Establishment Clause or to otherwise permit alternative speech on the site. It is now in private hands, but held in a way that all but ensures its ongoing use as a war memorial.<sup>103</sup> Notice that this is different from an outright sale because the government has kept the property in its policy tentacles after the transfer. The problem here is that the government is able to assert continued control over the use of the property in a way that limits how the private owner can use the property in the future.

Attentive property lawyers will no doubt recognize that the entrenching character of this conveyance is more dubious than it may at first seem. A subsequent government can always choose to release its reversionary interest, thereby effectively granting the private owner fee simple title to the property.<sup>104</sup> While this would not restore the property to the government's control, it would at least relinquish all government constraints embedded in the defeasible fee. Even this is no complete solution, however. The limitation in the title may well serve to constrain private use of the property, because even asking the government for a release can be costly (in time, energy, and money). As a result, such encumbrances may well remain in place and may continue to affect the use of the property, even if a subsequent government would theoretically be willing to waive its enforcement right.<sup>105</sup>

Servitudes can sometimes serve a similar function. A case quite similar to *Buono, First Unitarian Church of Salt Lake City v Salt Lake City Corp.*,<sup>106</sup> involved selling to the Church of Jesus Christ of Latter-Day Saints a portion of Salt Lake City's main street, over which the city retained an easement. According to allegations at the time, the sale arose out of a desire by the church to regulate the behavior and dress of people on the public square in front of its church in downtown Salt Lake City.<sup>107</sup> To accommodate the church's concern without violating free speech rights, Salt Lake City simply sold the property to the church, reserving a public easement so that the public could enter the property. The goal was apparently to allow the public the same kinds of access to the property that it enjoyed before the

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<sup>103</sup> Shortly after the Supreme Court issued its ruling upholding the property conveyance, the cross was stolen. See David Kelly, *Mojave Cross Is Missing; Theft Occurred Soon after Supreme Court Ruled in Its Favor*, LA Times AA1 (May 12, 2010).

<sup>104</sup> Even if the government retains a right of reentry or a possibility of reverter, either can be waived, thus reuniting fee simple ownership in the grantee. See Moynihan and Kurtz, *Introduction to the Law of Real Property* at 134, 139–40 (cited in note 96).

<sup>105</sup> Consider *Mount Olivet Cemetery Association*, 164 F3d at 485 (involving litigation over a century-old fee simple determinable requiring that the property be used as a cemetery).

<sup>106</sup> 308 F3d 1114 (10th Cir 2002).

<sup>107</sup> See Heather May, *Plaza Fight Ends with a Whimper*, Salt Lake Tribune A1 (Dec 30, 2005).

sale, but subject to the church's ability to regulate conduct and speech.<sup>108</sup> Years of litigation followed, the ins and outs of which have been well documented in the press and in scholarly accounts.<sup>109</sup> The entrenchment point, however, is this: property formalism gave the government at least a plausible mechanism for divesting itself of regulatory control over property while retaining public access.<sup>110</sup> As a private conveyance, this arrangement was immunized from subsequent changes in the city's policy preferences, subject only to reacquisition, which would probably require eminent domain.

An even more creative use of servitudes has recently appeared in the dedication of conservation easements to entrench antidevelopment policies. As described in detail in an earlier work, at least one local government has conveyed conservation easements over publicly owned land to a private, third-party conservation group.<sup>111</sup> The arrangement is unusual because the government retains ownership of the underlying property but intentionally severs and conveys away the development rights. This ensures that the property is preserved in perpetuity in a way that the public law would never permit. It is nearly the functional equivalent of passing an unrepealable zoning ordinance designating certain property as undevelopable.

### 3. Alienating important assets.

Finally, the simple act of alienating property can be entrenching, too.<sup>112</sup> In fact, any sale or conveyance of public property into private hands has some entrenching effect. It removes from public control a resource that otherwise would have been available to future

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<sup>108</sup> *First Unitarian Church of Salt Lake City*, 308 F3d at 1118–19, 1122.

<sup>109</sup> See *Utah Gospel Mission v Salt Lake City Corp.*, 425 F3d 1249, 1263 (10th Cir 2005) (holding that the sale did not violate the Establishment Clause). See also David A. Thomas, *Whither the Public Forum Doctrine: Has This Creature of the Courts Outlived Its Usefulness?*, 44 *Real Prop Trust & Est L J* 637, 713–16 (2010); John C. Crees, *The Right and Wrong Ways to Sell a Public Forum*, 94 *Iowa L Rev* 1419, 1428, 1436–38 (2009); Erin Brower, Case Note, *Utah Gospel Mission v Salt Lake City Corp.*, 38 *Urban Law* 184, 184 (2006).

<sup>110</sup> See Timothy Zick, *Property as/and Constitutional Settlement*, 104 *Nw U L Rev* 1361, 1362–66 (2010).

<sup>111</sup> See Serkin, 77 *U Chi L Rev* at 343–45 (cited in note 7) (describing the acquisition of land by the town of Marlboro, Vermont, and the subsequent conveyance of a conservation easement to a nonprofit group to ensure its future conservation).

<sup>112</sup> See Hendrik Hartog, *Public Property and Private Power: The Corporation of the City of New York in American Law, 1730–1870* 45 (Cornell 1989) (characterizing New York City's eighteenth-century waterfront grants to private parties as abandonment of future planning power). In the same passage, Hartog provides a powerful quote from historian Josef Konvitz about the entrenching character of property disposition: "Perhaps the government simply anticipated New York's growth by abandoning in advance any influence over it." *Id.*, quoting Josef W. Konvitz, *Cities & the Sea: Port City Planning in Early Modern Europe* 65 (Johns Hopkins 1978).

governments.<sup>113</sup> Such sales are not usually problematic, however, and it is difficult to get too exercised over the potentially entrenching character of routine sales of government assets. But the story is different when the resource is closely tied to a particular government program, policy, or objective.<sup>114</sup>

While selling a generic parcel of land to a private owner is unlikely to constrain future governments in any meaningful way, some kinds of resources might: water systems, developable property, natural habitats, parking meters, municipal buildings, airports, highway infrastructure—the list goes on.<sup>115</sup> If a government relinquishes control over a resource that will be difficult or impossible to replace, and that is required for some other public goal—providing recreational facilities, controlling development, preserving local wildlife—it limits the policy options available for future governments.<sup>116</sup>

The sale of municipal assets has been on the rise in recent years in response both to fiscal demands and an increased push for privatization generally.<sup>117</sup> This form of entrenchment is therefore also increasing, as governments sell off more assets that relate to core municipal functions.<sup>118</sup>

#### 4. Dedicating public land.

A final example of entrenchment through property conveyances is the dedication of public land. If someone dedicates property in fee simple to public use, and the public accepts the dedication, the property is then held exclusively for that public use in a version of public trust. The dedication can take the form of a private grant to the

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<sup>113</sup> In theory, acquiring property can also be entrenching to the extent that it will be difficult for subsequent governments to divest themselves of certain property, like environmentally contaminated land. A less obvious example is New York City's acquisition of abandoned property in the 1970s through in rem foreclosure proceedings. See David Reiss, *Housing Abandonment and New York City's Response*, 22 NYU Rev L & Soc Change 783, 787–89 (1997). The effect was a surplus of municipally owned property that took years to unload.

<sup>114</sup> It is also different if the resource is sufficiently valuable, but that is better treated as financial entrenchment, and so is considered below. See Part II.C.2.

<sup>115</sup> See, for example, Thomas Blackwell, *Privatizing Water Has Pros and Cons*, Southern Illinoisan (Nov 19, 2009), online at [http://www.thesouthern.com/news/local/article\\_aaff26c4-d4c9-11de-bf5e-001cc4c03286.html](http://www.thesouthern.com/news/local/article_aaff26c4-d4c9-11de-bf5e-001cc4c03286.html) (visited Jan 4, 2011) (describing Illinois municipalities that have privatized municipal water and sewer systems); Jennifer Lin, *City Plan to Sell Vacant Properties Waits on the Market*, Phila Inquirer B1 (Apr 27, 2010) (describing the privatization of water supplies). See also text accompanying note 64.

<sup>116</sup> Consider Super, 118 Harv L Rev at 2624 (cited in note 62) (“[I]f the state sells a needed asset—such as a state office building—with the intent of leasing it back, future legislatures will have little choice but to continue to lease that or a similar asset.”).

<sup>117</sup> See text accompanying notes 134–38.

<sup>118</sup> See note 115.

government for public purposes.<sup>119</sup> It can also take the form of a municipality itself dedicating property to some public use, like a park, in which case the government cannot thereafter unilaterally remove the designation.<sup>120</sup> At that point, the property cannot be put to any other use without an act of the state legislature.<sup>121</sup>

The entrenching character of such dedications has not been lost on political observers. In a 2009 editorial advocating a particular rezoning project in Coney Island, the *New York Times* wrote: “The city wants to buy out [one property owner] and rezone the nine-acre outdoor amusement district as parkland. That would powerfully deter future administrations from damaging this civic treasure, since only the State Legislature can undo parkland zoning.”<sup>122</sup>

### C. Financial Entrenchment

Financial entrenchment occurs whenever a government usurps for its own use the taxing and spending authority of future governments.<sup>123</sup> Issuing municipal bonds is the clearest and most common form of financial entrenchment. By paying for municipal infrastructure with a bond, a government is, in essence, prespending future tax revenue. The entrenchment concern is not restricted to debt, however. Anything that serves to starve the beast—to use the conservative movement’s tax metaphor—limits the money available to future governments and therefore constrains future policy choices.<sup>124</sup>

<sup>119</sup> See, for example, *Star Island Associates v City of Saint Petersburg Beach*, 433 S2d 998, 1003 (Fla App 1983).

<sup>120</sup> See, for example, *Spires v City of Los Angeles*, 87 P 1026, 1026–27 (Cal 1906); *Lazore v Board of Trustees of Village of Massena*, 594 NYS2d 400, 402 (NY App 1993) (“[A] parcel may become a park either through express provision, such as restrictions in a deed or legislative enactment, or by implied acts, such as a continued use of the parcel as a park or by certain acts of [the municipality].”); *Hall v Fairchild-Gilmore-Wilton Co.*, 227 P 649, 651 (Cal App 1924).

<sup>121</sup> See, for example, *Friends of Van Cortlandt Park v City of New York*, 750 NE2d 1050, 1055 (NY 2001); *Commonwealth v City of Corbin*, 264 SW2d 263, 264 (Ky App 1954), discussing *Southeastern Greyhound Lines v City of Lexington*, 186 SW2d 201, 202 (Ky App 1945).

<sup>122</sup> Editorial, *A Plan for Coney Island*, NY Times A18 (July 13, 2009).

<sup>123</sup> See Briffault, 34 Rutgers L J at 917 (cited in note 68) (“[T]he ability to shift the costs forward may also induce elected officials to incur too much debt. The benefits of the project financed by the debt will be received immediately, while the costs of paying off the debt are deferred into the future.”). For a fascinating treatment of financial entrenchment in the context of the budget process, see Rebecca M. Kysar, *Lasting Legislation*, 159 U Pa L Rev 1007, 1056–63 (2011).

<sup>124</sup> Proposition 13, California’s controversial limit on property taxation adopted by referendum, has just such an effect. See Cal Const Art XIII A, § 1. For a discussion, see Briffault, 34 Rutgers L J at 929–33 (cited in note 68) (discussing Proposition 13 and other state constitutional limits). See also Laurie Reynolds, *Taxes, Fees, Assessments, Dues, and the “Get What You Pay For” Model of Local Government*, 56 U Fla L Rev 373, 392–93 (2004) (“By putting the spending and taxation limits in state statutes and constitutions, the voters have tied the hands of

Financial entrenchment in the real world therefore takes one of three primary forms: (1) incurring debt, (2) monetizing future income streams (including selling off valuable assets), and (3) directing future expenditures.<sup>125</sup> Although each arises in a different context, they all present fundamentally similar entrenchment concerns.

### 1. Municipal debt.

Municipal debt is a long-recognized example of financial entrenchment.<sup>126</sup> By floating a bond, a government can obtain money to spend on some program or project today while shifting many of the costs on to the future. At its core, a municipal bond amounts to an intertemporal tax transfer from the future, allowing the present government to make financial choices, the effect of which will continue for the duration of the bond.<sup>127</sup> A government can allocate resources to a particular public policy—a new school, park, or infrastructure of any kind—and burden future governments with the obligation to pay.

The entrenching character of municipal debt is best observed through a historical lens. In the early part of the nineteenth century, many municipalities engaged in fierce competition to attract railroads and new instrumentalities of commerce.<sup>128</sup> Cities tried hard to make

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politicians and implicitly asserted the inadequacy of political checks as the proper response to government financial excesses.”).

<sup>125</sup> An additional category might involve simply taking inordinate financial risks in an effort to secure immediate benefits. See, for example, Gretchen Morgenson, *Exotic Deals Put Denver Schools Deeper in Debt*, NY Times A1 (Aug 6, 2010). That is put aside here.

<sup>126</sup> See C. Dickerman Williams and Peter R. Nehemkis Jr, *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.”). At a high enough level of generality, the entrenching character of debt obligations is not entirely distinct from the contract analysis described in Part II.A. After all, incurring debt is entrenching only to the extent that debt obligations are, in fact, enforceable.

<sup>127</sup> See Nancy C. Staudt, *Constitutional Politics and Balanced Budgets*, 1998 U Ill L Rev 1105, 1141 (“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.”). This intertemporal aspect of debt is well known in broader bankruptcy literature. See, for example, Lee C. Buchheit, G. Mitu Gulati, and Robert B. Thompson, *The Dilemma of Odious Debts*, 56 Duke L J 1201, 1204–08 (2007) (describing the “intergenerational tension” in debt).

<sup>128</sup> See Briffault, 34 Rutgers L J at 911–12 (cited in note 68); Clayton P. Gillette, *Local Redistribution, Living Wage Ordinances, and Judicial Intervention*, 101 Nw U L Rev 1057, 1063 (2007). See also Richard C. Schragger, *Cities, Economic Development, and the Free Trade Constitution*, 94 Va L Rev 1091, 1136 (2008) (“Restraints on city power were thought necessary in large part because the state and local political processes had become infected by the railroads, which could play one municipality off another in the interlocal competition for track location.”). For a different account of southern states and their post-Reconstruction debt, see Stewart E. Sterk and Elizabeth S. Goldman, *Controlling Legislative Shortsightedness: The Effectiveness of Constitutional Debt Limitations*, 1991 Wis L Rev 1301, 1310–12 (demonstrating that political graft was responsible for debt limits in the South).

themselves hubs for trade, pledging vast sums of money to railroads and other private enterprises in order to make it happen.<sup>129</sup> For most, it turned out to be an unhappy story, leaving communities with crushing debt burdens and no new means of servicing their obligations.<sup>130</sup> In entrenchment terms, the earlier governments had impoverished their successors, imposing fiscal straitjackets far into the future. At the time, states responded with robust new forms of anti-entrenchment protection—debt limits, bond election requirements, and the like—all of which are considered below.<sup>131</sup> Nevertheless, debt levels have again increased dramatically over the last twenty years.<sup>132</sup> Today, in the wake of the recent financial crisis, many people are foretelling a new municipal debt crisis.<sup>133</sup> If it occurs, it will be the result of earlier governments incurring too many obligations to repay debt into the future.

## 2. Restricting future income.

The difference between municipal debt, on the one hand, and a government selling off valuable assets in exchange for an upfront payment, on the other, is one of baseline only.<sup>134</sup> Like debt, selling assets generates cash that can be used today while depleting resources

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<sup>129</sup> See Briffault, 34 Rutgers L J at 911 (cited in note 68); Gillette, 101 Nw U L Rev at 1063 (cited in note 128).

<sup>130</sup> See Briffault, 34 Rutgers L J at 911 (cited in note 68) (“Many firms that had borrowed from the states were unable to repay their loans, and many infrastructure projects failed to generate projected revenues. The states had great difficulties meeting their obligations to their creditors.”). See also Sterk and Goldman, 1991 Wis L Rev at 1308–10 (cited in note 128) (describing the results of debt in New York).

<sup>131</sup> See Parts III.B and III.C.

<sup>132</sup> See, for example, Chris Edwards, *State and Local Government Debt Is Soaring*, Tax & Budget Bull No 37, 1 (Cato Institute July 2006), online at [http://www.cato.org/pubs/tbb/tbb\\_0706-37.pdf](http://www.cato.org/pubs/tbb/tbb_0706-37.pdf) (visited Jan 4, 2011) (recording the near doubling of debt owed by state and local governments between 1990 and 2005).

<sup>133</sup> See, for example, Janet Morrissey, *Municipal Bonds: The Next Financial Landmine?*, Time (May 24, 2010), online at <http://www.time.com/time/business/article/0,8599,1991062,00.html> (visited Jan 4, 2011); Steven Malanga, *America's Municipal Debt Racket*, Wall St J A17 (June 14, 2010).

<sup>134</sup> See Roin, 95 Minn L Rev at 29–30 (cited in note 64). See also Super, 118 Harv L Rev at 2624 (cited in note 62):

[W]hile a state could pay the bills for construction of a sports stadium, convention center, or bridge as they come in, issuing bonds for the project postpones most or all of the outlays into future budget years.

To much the same effect, if the state sells a needed asset—such as a state office building—with the intent of leasing it back, future legislatures will have little choice but to continue to lease that or a similar asset.

that would otherwise be available in the future.<sup>135</sup> This has become an increasingly common tool in municipal finance.<sup>136</sup>

If a local government has a valuable income-producing asset—parking meters, toll roads, airports, water rights—it can monetize that future income stream and thereby deprive future governments of income that they otherwise would have received.<sup>137</sup> In other words, a government can exchange the promise of future income for a lump sum payment today. In theory, the value of the two should be roughly the same.<sup>138</sup> But even when that is true, alienating the asset is entrenching because the present government can allocate the full value of the asset up front, instead of allowing subsequent governments to use the income as it comes in.

Similarly, offering tax breaks to induce development can limit future income.<sup>139</sup> The trend here tracks closely the history of municipal

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<sup>135</sup> Selling assets is not always entrenching. If the government merely exchanges one valuable asset for another, like using the proceeds of the sale to facilitate other revenue-generating activities, then future governments are no worse off for the earlier sale.

<sup>136</sup> See Ed Brock and Brian Sedlak, *Selling Public Assets Generates Fast Cash*, Am City & County 12 (Apr 1, 2007) (“By selling public assets, local and state governments are raising funds and paying down debts without increasing taxes. The strategy was first applied to toll roads, and now parking garages and state lotteries are up for sale or lease to private investors.”). Consider Katie Benner, *Wall Street to Cities: Wanna Sell That Bridge?*, Fortune (June 11, 2010), online at [http://money.cnn.com/2010/06/11/news/economy/privatization\\_public\\_infrastructure.fortune/index.htm](http://money.cnn.com/2010/06/11/news/economy/privatization_public_infrastructure.fortune/index.htm) (visited Jan 4, 2011):

Every few years, market chatter about a coming wave of privatizations swells into a sea of noise and anticipation. Inevitably, the wave crashes, and private investors are usually foiled . . . . Now private buyers are in talks for public assets yet again. But this time, there’s reason to believe that more deals could transpire.

<sup>137</sup> See Brock and Sedlak, *Selling Public Assets*, Am City & County at 12 (cited in note 136) (describing assets sold by Illinois to raise money). In a publicly available memorandum outlining alternatives for Harrisburg, Pennsylvania, for dealing with its financial problems, the law firm of Cravath, Swaine & Moore LLP identified the following assets available to Harrisburg to sell: “Parking facilities; City Island, including all sports facilities; Broad Street Market; Water utility and systems; Land under parking facilities; Sewerage utility and systems; Resource Recovery Facility; City-owned museums; and Historic artifacts.” Memorandum from Cravath, Swaine & Moore LLP to City Council Members, *Evaluation of Alternatives Available to the City of Harrisburg to Address Its Current Financial Situation* \*169–70 (Mar 31, 2011), online at <http://remote.cravath.com/Harrisburg.pdf> (visited July 24, 2011).

<sup>138</sup> For a discussion of federal sales of assets, which are often for less than fair value and to the detriment of taxpayers, see Harold J. Krent and Nicholas S. Zeppos, *Monitoring Governmental Disposition of Assets: Fashioning Regulatory Substitutes for Market Controls*, 52 Vand L Rev 1705, 1707 (1999) (“Inefficiency, interest group influence, and graft abound. The government has donated valuable resources to preferred claimants, allocated scarce broadcast and oil rights resources by lottery, and sold both public land and the rights to the minerals beneath to private entities at a fraction of the market price.”).

<sup>139</sup> See Sterk and Goldman, 1991 Wis L Rev at 1317 (cited in note 128) (“Long-term tax exemptions can be just as effective, if not more effective, as a mechanism that enables legislatures to defer payments for current benefits.”); Samuel Nunn, *Regulating Local Tax Abatement Policies: Arguments and Alternative Policies for Urban Planners and Administrators*,



debt. Tax abatements were commonplace, and a common source of abuse, in the nineteenth century.<sup>140</sup> In many states, this led to constitutional amendments and other restrictions that reduced the availability of tax abatements to bind future governments.<sup>141</sup> More recently, however, states have reversed course, and tax abatements are again a standard tool for stimulating local economic development.<sup>142</sup>

Even today, the enforceability of tax abatements against future governments remains up for grabs in the case law.<sup>143</sup> In those jurisdictions (and in those circumstances) where tax abatements are enforceable, however, their entrenching character is clear. The only functional distinction between tax abatements and either municipal debt or monetized income streams is the form of the benefit to the entrenching government; the effect on the future is the same. All told, governments today have ever-expanding tools at their disposal to limit money available to the future.

### 3. Directing future expenditures.

Directing future expenditures is another form of the same phenomenon. Orthodox anti-entrenchment rules suggest that it should be impossible for a government to precommit to any prespecified level of spending. A promise to fund a library is not binding on the future. Some sophisticated mechanisms have recently emerged, however, allowing governments to make such precommitments.

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22 Policy Stud J 574, 581 (1994) (“[F]uture citizens may face foregone revenues from today’s tax abatements.”).

<sup>140</sup> See Sterk and Goldman, 1991 Wis L Rev at 1317–18 (cited in note 128).

<sup>141</sup> See *id.* For examples of uniformity provisions enacted in the nineteenth century, see, for example, Kan Const Art XI, § 1 (originally enacted 1861) (“[T]he legislature shall provide for a uniform and equal basis of valuation and rate of taxation of all property subject to taxation.”); Mo Const Art X, § 3 (originally enacted 1875) (“Taxes may be levied and collected for public purposes only, and shall be uniform upon the same class or subclass of subjects within the territorial limits of the authority levying the tax.”). See also, for example, Pa Const Art VIII, § 5 (originally enacted 1874) (“All laws exempting property from taxation, other than the property above enumerated shall be void.”).

<sup>142</sup> See Nunn, 22 Pol Stud J at 574 (cited in note 139). See also Sterk and Goldman, 1991 Wis L Rev at 1316–21 (cited in note 128) (describing the history of government abuse of tax abatements that led to constitutional reforms but noting their increased use in recent years).

<sup>143</sup> Compare *City of Louisville v Fiscal Court of Jefferson County*, 623 SW2d 219, 224 (Ky 1981) (striking down a contract providing a twenty-year tax abatement to a property owner); *Lykes Brothers v City of Plant City*, 354 S2d 878, 880 (Fla 1978) (“[M]unicipal contracts promising not to impose taxes, or granting tax exemptions, are ultra vires and void in the absence of specific legislative authority.”), with *In re Cromwell Towers Redevelopment Co v City of Yonkers*, 359 NE2d 333, 337 (NY 1976) (upholding a tax abatement for low- and moderate-income housing despite the city’s attempt to renege); *City of Shelbyville v Bedford County*, 415 SW2d 139, 145–46 (Tenn 1967) (upholding a contract providing favorable tax treatment).

Tax increment financing (TIF) is the best, but by no means the only, example.<sup>144</sup>

TIFs are a relatively new invention that allow governments to fund infrastructure and other development without incurring general obligation debt.<sup>145</sup> Using a TIF, a government can issue bonds funded by any increase in property tax revenue in the specific TIF area. TIFs essentially allow a community to finance redevelopment by pledging a portion of future increases in the local or sublocal tax base.<sup>146</sup> Despite the word “tax” in the name, TIFs are actually a spending program. They amount to a local, geographic earmark that can last for decades, entrenching the revenue stream into the future. In other words, a TIF allows a government to precommit to spending future property tax revenues.

Another way local governments can direct future expenditures is by entering into collective bargaining agreements with their public employees.<sup>147</sup> This is something of a hybrid of financial, contractual, and property entrenchment. Concessions by one government on wages, hours, and other terms of employment will be binding against subsequent governments for the duration of the agreement (subject to

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<sup>144</sup> Another example is a public-private partnership in which a private entity finances a project, like a prison, and the government enters into a long-term lease for the facility. At the expiration of the lease, the government might then assume ownership for some nominal payment. See Clayton P. Gillette, *Direct Democracy and Debt*, 13 J Contemp Legal Issues 365, 376 (2004), citing *Montano v Gabaldon*, 766 P2d 1328, 1330 (NM 1989). The form of the transactions can differ, and many have their origins in tax avoidance. See David Karasko, *IRS Rules on Abusive Tax Shelters*, 26 Ann Rev Bank & Fin L 209, 211 (2007) (describing the IRS designation of “lease-in/lease-out” transactions, a financing mechanism promoting as a capital funding method in which “a tax-exempt entity [such as a government] leased an asset to a private company which then immediately leased the asset back to the issuer and received a tax benefit,” as an abusive tax shelter). Another example is “subject-to-appropriation” debt, which typically involves a bond issued by a public authority, backed by a state promise to repay in the event that the public authority cannot. See Briffault, 34 Rutgers L J at 920–21 (cited in note 68). Although such obligations are nonbinding and are only moral obligations, the threat to a state’s bond rating is sufficiently significant that the obligation is almost certain to be repaid. See *id.* at 923.

<sup>145</sup> A TIF is a method of public finance in which “investment capital is raised from the issuance of redevelopment agency bonds to be repaid out of increased property tax receipts from the project itself, as new construction is added to the tax rolls.” See George Lefcoe, *After Kelo, Curbing Opportunistic TIF-Driven Economic Development: Forgoing Ineffectual Blight Tests; Empowering Property Owners and School Districts*, 83 Tulane L Rev 45, 47 (2008).

<sup>146</sup> For an excellent theoretical account of TIFs, see Briffault, 77 U Chi L Rev at 83–94 (cited in note 8). For a description of the mechanics of TIF financing, see Julie A. Goshorn, Note, *In a TIF: Why Missouri Needs Tax Increment Financing Reform*, 77 Wash U L Q 919, 926–28 (1999).

<sup>147</sup> See generally S. Barry Paisner and Michelle R. Haubert-Barela, *Correcting the Imbalance: The New Mexico Public Employee Bargaining Act and the Statutory Rights Provided to Public Employees*, 37 NM L Rev 357, 361–63 (2007) (describing the history of public employment law). For a discussion of the political nature of municipal collective bargaining, see Leo Troy, *Are Municipal Collective Bargaining and Municipal Governance Compatible?*, 5 U Pa J Labor & Empl L 453, 454–55 (2002).

some limitations discussed below). In many cities, obligations under collective bargaining agreements can create an institutionalized public sector bureaucracy that can be difficult for subsequent governments to undo.<sup>148</sup> The financial (and political) lock-in can be financially crippling.<sup>149</sup>

This is not to suggest that it is inherently problematic to enter into such agreements if the benefits to the entrenching government—in the form of higher quality and more productive workers, for example—outweigh the expected costs.<sup>150</sup> The stability of public sector jobs can be seen as something of a substitute for cash wages and might be efficient for both parties.<sup>151</sup> But the tradeoff is clear, and future governments will bear a significant portion of the costs in the form of municipal salaries and post-employment benefits.<sup>152</sup>

Pension benefits are similar. As noted above, public employees can obtain vested contractual rights in pension benefits, so that pension commitments made by one government are immune from change—or at least downward change—by another.<sup>153</sup> In fact, the ability to shift those costs to the future has given rise to increasingly creative devices to hide the true costs of pension obligations and divert the political costs to the future as well. These include offering retroactive pension increases without recognizing added future costs and using skim funds to siphon off pension funds to divert to other

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<sup>148</sup> Not that there is anything inherently wrong with that. Tenure is an example of entrenchment in this way, too, and while it undoubtedly imposes costs into the future, it arguably secures sufficient benefits in the present—in the ability to attract faculty candidates and provide diminished compensation in exchange for increased job security—that it is worth the tradeoff.

<sup>149</sup> See, for example, Michael W. McConnell and Randal C. Picker, *When Cities Go Broke: A Conceptual Introduction to Municipal Bankruptcy*, 60 U Chi L Rev 425, 467 (1993) (describing a municipal bankruptcy in which the city “pointed to unaffordable union contracts as a key source of its financial difficulties”); Troy, 5 U Pa J Labor & Empl L at 561–74 (cited in note 147) (describing the fiscal costs of collective bargaining agreements in municipal bankruptcies or financial crises). Lock-in can also impede reform. See Martin H. Malin, *The Paradox of Public Sector Labor Law*, 84 Ind L J 1369, 1379–80 (2009) (describing collective bargaining agreements with teachers’ unions as impediments to school reform).

<sup>150</sup> See John H. Langbein, *The Supreme Court Flunks Trusts*, 1990 S Ct Rev 207, 211 (“[E]mployers offer plans for reasons of economic advantage, in the competition to attract and retain employees.”).

<sup>151</sup> Id (“Fringe benefits substitute for cash wages.”).

<sup>152</sup> One dramatic example of this effect is the use of “rubber rooms” by the New York City Department of Education. The Department of Education was burdened with thousands of teachers who could not be put in a classroom but who also could not be fired easily. The response was to create rubber rooms—essentially holding rooms for teachers to sit in day after day and do nothing. See Steven Brill, *The Rubber Room: The Battle over New York City’s Worst Teachers*, *New Yorker* 30, 32 (Aug 31, 2009) (reporting that many teachers spend two to five years in such rooms while proceedings against them continue).

<sup>153</sup> See text accompanying note 89.

spending priorities.<sup>154</sup> The financial consequences of pension obligations can hamstring future governments just as surely as municipal debt.<sup>155</sup>

#### D. Physical Entrenchment

Physical entrenchment bears sufficient resemblance to entrenchment through property rights that it needs to be addressed, though it is not technically a form of private law. Property entrenchment operates through the protection of incorporeal entitlements created and recognized through the private law. Physical entrenchment, by contrast, is entirely corporeal. Instead of abstract rights limiting future governments, the sources of entrenchment here are physical changes that are not easily undone. These can take the form of building up or tearing down.

##### 1. Development.

Because of the law's protection of existing uses, any actual development limits the options available to future governments to regulate the use of property.<sup>156</sup> Indeed, it is a common refrain that the protection for existing land uses makes zoning little more than a codification of existing patterns of development, rather than a progressive and forward-looking form of land use planning.<sup>157</sup> Nevertheless, the extent to which specific development decisions impose physical limits on subsequent changes in government policy varies, depending on how hard the land use is to change. Such physical limitations are particularly entrenching, as the term is used here, to the extent that physical development locks in policies or other ancillary commitments beyond the simple fact of the building.

Obvious examples include siting a stadium or other large-scale commercial development, especially where there are few likely alternative uses for the building. New York City's decision to support

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<sup>154</sup> See Mary Williams Walsh, *Government Rule Makers Looking at Pensions*, NY Times C8 (July 11, 2008).

<sup>155</sup> See Justin Cummins and Meg Luger Nikolai, *ERISA Reform in a Post-Enron World*, 39 John Marshall L Rev 563, 569 (2006) ("Notably, the swelling public pension obligations have, in effect, bankrupted the City of San Diego and put numerous other state and local governments on that path in Illinois, New York, Ohio, West Virginia, and elsewhere.").

<sup>156</sup> See Serkin, 84 NYU L Rev at 1223–25 (cited in note 81).

<sup>157</sup> See *id.* at 1225. See also Patrick J. Rohan, 7 *Zoning and Land Use Controls* § 41.01[2] at 41-7 (Matthew Bender 2010) ("If the goal of [zoning] regulations was to ensure uniformity of all uses in a particular district, dissimilar existing uses would detract from that purpose as much as new uses.").

a new basketball stadium in Brooklyn is a paradigmatic example.<sup>158</sup> By allowing the stadium to be built, the city will all but eliminate a subsequent government's ability to revisit the current administration's approach to economic development. Even if a subsequent government decides that the original policy was wrongheaded and that stadiums are not good for economic development, the existence of the stadium will have physically entrenched the earlier judgment (subject to bulldozing, of course, which is its own kind of de-entrenching mechanism).<sup>159</sup> Similarly, a decision by a municipality to permit development for a certain kind of industry—like Detroit's aggressive support of the auto industry by facilitating development of new factories,<sup>160</sup> or New York's recent efforts to support biotech by developing laboratory space<sup>161</sup>—may physically entrench the policy decision to support that industry. The point for entrenchment analysis is not just that the built environment is difficult to change, but that this very difficulty can be used to lock in specific policies or priorities.

The shape and capacity of municipal infrastructure can also be entrenching. Developing excess capacity—roads, wastewater, traffic controls—can make it harder for future governments to resist development pressures.<sup>162</sup> Or, on the flip side, building infrastructure with limited capacity can make it harder and more expensive to develop in the future.<sup>163</sup> It is like a form of exclusionary growth control, but one that is actually more difficult and expensive to change than a zoning ordinance.

## 2. Destruction.

Tearing down or destroying a protectable resource—such as historic buildings or a valuable habitat—will prevent future governments from being able to change course and protect it.<sup>164</sup> The

<sup>158</sup> For a review of the complicated project and the litigation it spawned, see Charles V. Bagli, *Atlantic Yards Wins Appeal to Seize Land*, NY Times A1 (Nov 25, 2009).

<sup>159</sup> Consider James L. Wescoat Jr, *Introduction: Three Faces of Power in Landscape Change*, in James L. Wescoat Jr and D.M. Johnson, eds, *Political Economies of Landscape Change* 1, 2–4 (Springer 2008).

<sup>160</sup> See Zachary Gorchow, *Detroit Council Grants Tax Break for GM Plant*, Detroit Free Press 3 (Sept 30, 2008).

<sup>161</sup> See Joseph De Avila, *Biotech Facility Gets off Ground at Brooklyn Terminal*, Wall St J A21 (May 21, 2010).

<sup>162</sup> See Conn Gen Stat Ann § 8-2(a) (West) (including infrastructure capacity in the list of factors to weigh when deciding on cluster development). See also Robert H. Freilich, *Adequate Public Facilities Ordinances*, 2 SE11 ALI-ABA 581, 583 (1999).

<sup>163</sup> See David Schleicher, *The City as a Law and Economic Subject*, 2010 U Ill L Rev 1507, 1511–13.

<sup>164</sup> This could even include permitting pollution in an area, making it inhospitable for subsequent residential development.

point is an obvious one, but its lure for local governments is important to understand. Governments, presumably, are not in the business of destroying potentially valuable property simply on a lark. Instead, and importantly for present purposes, the destruction of resources can be undertaken specifically to prevent a subsequent government from extending protection.

Imagine a pro-development city that wants to stimulate redevelopment of its downtown. It therefore wants to promise developers that its prodevelopment policies will remain in place in the future and that it will continue to support modernizing and gentrifying its old housing stock. It cannot, of course, promise to forgo burdensome regulations in the future, but it can dramatically decrease the likelihood of historic preservation by facilitating the removal of buildings or even neighborhoods that would otherwise have been likely candidates for historic protection given a different political climate in the future.<sup>165</sup> Such behavior is hardly farfetched and is, in fact, easy to find in private decisionmaking, as when a developer destroys an old building to prevent a historic designation, fills in wetlands to beat new environmental protection, or clear-cuts a forest to prevent endangered species from moving in.<sup>166</sup>

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Table 1 captures key examples from the categories of entrenchment.

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<sup>165</sup> For discussion of the doctrines preventing a government from promising future regulatory treatment, see Part III.B.

<sup>166</sup> See Ralph Michael Stein, *Buildings That Go Crash in the Night: A Special Problem in Historic Preservation Law*, 16 Real Est L J 242, 243 n 5 (1988) (describing conversations with attorneys in which they confessed that intentional destruction or modification of buildings to prevent designation as a historical landmark is a common practice). See also Joey Arak, *Historic Chinatown Buildings Demolished to Avoid Landmarking?*, Curbed NY (May 13, 2010), online at [http://ny.curbed.com/archives/2010/05/13/historic\\_chinatown\\_buildings\\_demolished\\_to\\_avoid\\_landmarking.php](http://ny.curbed.com/archives/2010/05/13/historic_chinatown_buildings_demolished_to_avoid_landmarking.php) (visited Jan 4, 2011); Jonathan H. Adler, *Money or Nothing: The Adverse Environmental Consequences of Uncompensated Land Use Controls*, 49 BC L Rev 301, 318, 319–22, 330 (2008).

TABLE 1. FORMS OF ENTRENCHMENT

Mechanism	Examples
(1) Contract	<ul style="list-style-type: none"> <li>• Promises to forbear</li> <li>• Procurement contracts</li> <li>• Development agreements</li> </ul>
(2) Property	<ul style="list-style-type: none"> <li>• Creating property rights</li> <li>• Future interests and servitudes</li> <li>• Alienating assets</li> </ul>
(3) Finance	<ul style="list-style-type: none"> <li>• Debt</li> <li>• Monetizing assets</li> <li>• Setting spending</li> </ul>
(4) Physical	<ul style="list-style-type: none"> <li>• Developing infrastructure</li> <li>• Destruction of valuable resources</li> </ul>

### III. PROTECTION FROM ENTRENCHMENT

Both the Constitution and core tenets of democratic theory prevent formal entrenchment—that is, making ordinary legislation unrepeatable.<sup>167</sup> Other doctrines serve a similar if less obvious function by limiting the various forms of entrenchment through private law. Although not usually conceptualized as entrenchment protection, these doctrines, taken together, can usefully be construed as ensuring that governments are limited in their capacity to remove decisionmaking authority from future governments.

As a first cut, protection against entrenchment can operate either *ex post* or *ex ante*. The latter includes both substantive and procedural protections that either prohibit certain government actions outright or impose procedural requirements to limit some of the risks that entrenchment presents.<sup>168</sup> Once again, the value of considering these various doctrines together is in finding surprising commonality in disparate-seeming doctrines and in revealing a trend in the law toward expanded opportunities for entrenchment. As protection from entrenchment is scaled back, government precommitments become even more binding.

The distinction between *ex ante* and *ex post* protections is not as clean as it might appear. The existence of *ex post* protections can

<sup>167</sup> See Posner and Vermeule, 111 *Yale L J* at 1665 (cited in note 2); Richard Albert, *Constitutional Handcuffs*, 42 *Ariz St L J* 663, 667 (2010).

<sup>168</sup> The distinction between procedural and substantive anti-entrenchment rules borrows heavily from David Dana and Susan Koniak, who identify similar doctrines that are protective of sovereignty. See Dana and Koniak, 148 *U Pa L Rev* at 485–86 (cited in note 20). The distinction between property and liability rules obviously comes from Calabresi and Melamed, 85 *Harv L Rev* at 1092 (cited in note 57).

powerfully deter entrenching actions *ex ante*. In fact, the principal effect of de-entrenching mechanisms can be on the *ex ante* incentives of the government to make precommitments in the first place, and of private parties to rely on them. The strongest forms of *ex post* protection are even functionally indistinguishable from prohibiting government actions in the first place.<sup>169</sup> Nevertheless, separating these protections brings some conceptual clarity to the breadth of responses to entrenchment concerns.

#### A. Ex Post Entrenchment Protection

As a practical matter, *ex post* de-entrenching mechanisms are the broadest form of entrenchment protection and therefore the most important. They provide governments with tools for escaping previous governments' precommitments. The existence of *ex post* protections does not entirely eliminate the entrenching effect of government actions because they can be costly to exercise (economically and politically).<sup>170</sup> The extent of entrenchment therefore varies with the cost of using these de-entrenching mechanisms. The more expensive it is for a government to de-entrench itself, the less flexibility subsequent governments have.<sup>171</sup>

##### 1. Breach.

Given the potentially entrenching effect of long-term contracts, an important de-entrenching mechanism for subsequent governments is the ability to breach preexisting contractual obligations. Governments are seldom subject to specific performance as a remedy for breach of contract.<sup>172</sup> With only few exceptions, public contracts are enforced against governments with a liability rule instead of a property rule, and damages are typically limited to reliance instead of expectation damages.<sup>173</sup> That is, a government can often avoid its contractual precommitments by paying money—and less money than a private party would have to pay.

The exceptions to liability rule protection are expanding, however. As described above, the rise of development agreements provides a new opportunity for governments to enter into contracts

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<sup>169</sup> See Part III.B.

<sup>170</sup> See Thomas W. Merrill, *The Economics of Public Use*, 72 *Cornell L Rev* 61, 77 (1986) (describing "due process costs" of eminent domain).

<sup>171</sup> For more on the calibration question, see Part IV.

<sup>172</sup> See Easterbrook, 1987 *U Chi Legal F* at 37 (cited in note 72) ("By and large even authorized contracts may not be specifically enforced against governments.").

<sup>173</sup> See Fischel and Sykes, 1 *Am L & Econ Rev* at 354 (cited in note 19); Seamon, 43 *Vill L Rev* at 156 (cited in note 60).



for future regulations that can be enforced through specific performance.<sup>174</sup> Likewise, some kinds of tax abatement programs, especially those authorized by state enabling statutes to encourage low- and moderate-income housing, are specifically enforceable.<sup>175</sup> This dramatically increases the entrenching character of these government precommitments.

Even when contract remedies against the government are limited to damages, the ability to breach is no panacea for entrenchment concerns because it applies only to contracts in which some future performance is required of the government. It allows a government to de-entrench procurement and service contracts in which the government has an ongoing duty to pay. But it provides little relief from the entrenching effect of vested contractual rights, like franchises.<sup>176</sup>

## 2. Eminent domain.

Eminent domain is the ultimate de-entrenching safety valve because it creates flexibility across a wide swath of entrenching devices. Vested development rights, for example, can be taken through eminent domain, as can servitudes and future interests. If an earlier government conveyed away conservation easements over property it owned or acquired property in a defeasible fee, a subsequent government can use eminent domain to reunify ownership.<sup>177</sup> Similarly, if a government entrenches a policy decision by selling a valuable asset, then a subsequent government can always revisit that decision by compelling a sale back.

The power of eminent domain to de-entrench earlier government decisions extends beyond interests in real property. Contractual obligations can also be undone through condemnation—for example, by removing contractual rights given to licensees or franchisees.<sup>178</sup> One of the first litigated cases involved a toll-bridge franchise granted by

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<sup>174</sup> See note 61 and accompanying text.

<sup>175</sup> See *In the Matter of Cromwell Towers Redevelopment Co v City of Yonkers*, 359 NE2d 333, 337 (NY 1976).

<sup>176</sup> The entrenching effect of a contract that the government has already performed is at least partly the result of sunk costs. Rationally or not, a subsequent government may be unwilling to change course if it means “wasting” money already spent on the project. See Serkin, 84 NYU L Rev at 1270 n 228 (cited in note 81) (discussing sunk costs).

<sup>177</sup> See Serkin, 77 U Chi L Rev at 359–60 (cited in note 7).

<sup>178</sup> See, for example, *In re Opening of Twenty-Second Street Opening*, 102 Pa 108, 115 (1883) (upholding Pennsylvania’s right to condemn a corporation’s property despite a preexisting statute granting the corporation a franchise that included perpetual immunity against the government opening streets in its cemetery).

the State of Vermont in 1795 over the West River.<sup>179</sup> Subsequently, in 1839, the state passed a statute allowing for the creation of new “highways,” even where doing so would involve taking an existing franchise. Shortly thereafter, the Town of Brattleboro approved the location for a new highway that passed over the toll bridge. In other words, Brattleboro sited the free, public road over the toll bridge. Pursuant to the state statute, this involved the power of eminent domain and required the town to pay compensation to the bridge owners for the value of their franchise.<sup>180</sup> But the existence of the franchise—a vested contract right—was no bar to the state’s power to condemn, the plaintiff’s claims notwithstanding.<sup>181</sup>

Condemnation of contracts is hardly commonplace, and it implicates a complex interaction with the Contracts Clause.<sup>182</sup> Nevertheless, all contracts with the government are subject to the government’s power of eminent domain. As the Supreme Court explicitly held in 1934, “The reservation of this necessary authority of the State is deemed to be a part of the contract.”<sup>183</sup> And, indeed, the case law is speckled with examples of governments condemning contractual obligations.<sup>184</sup>

Other incorporeal property rights—taxi medallions, employment benefits, and the like—are also subject to eminent domain, limiting the entrenching effect of property rights and contracts generally. Ultimately, then, eminent domain provides an opportunity for subsequent governments to buy back decisionmaking authority over preexisting precommitments. Its availability substantially limits entrenchment concerns, at least to the extent it is more than theoretically available.

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<sup>179</sup> See *West River Bridge Co v Dix*, 47 US (6 How) 507, 530 (1848).

<sup>180</sup> Act Relating to Highways § 1 (Nov 19, 1839), in *The Revised Statutes of the State of Vermont* 553–54 (Chauncey Goodrich 1940). Tellingly, the proponents of the new road invoked entrenchment concerns in their proposal. In prescient language, their petition argued,

[T]he legislature in the infancy of the State may have exercised a sound discretion in granting said toll-bridge, yet, in the present improved and thriving condition of the inhabitants, your petitioners are unable to discover any good reason why said grievance should longer be endured, or why the wealthy town of Brattleboro’ should not, as well as other towns much less able, sustain a free bridge across West River.

*West River Bridge Co*, 47 US (6 How) at 509.

<sup>181</sup> See *West River Bridge Co*, 47 US (6 How) at 536.

<sup>182</sup> See text accompanying notes 211 and 216.

<sup>183</sup> *Home Building and Loan Association v Blaisdell*, 290 US 398, 435 (1934).

<sup>184</sup> See, for example, *City of Cincinnati v Louisville and Nashville Railroad Co*, 223 US 390, 407 (1912); *Long Island Water Supply Co v Brooklyn*, 166 US 685, 692 (1897). For a general consideration of the problem, see John D. Echeverria, *Public Takings of Private Contracts*, Ecol L Q (forthcoming 2011), online at <http://ssrn.com/abstract=1782064> (visited Aug 31, 2011).

Here again, however, the tide is turning. Reforms following *Kelo v City of New London*<sup>185</sup> have restricted the power of eminent domain in many states, removing one of the core de-entrenching mechanisms from local governments' toolkits.<sup>186</sup> The effect on entrenchment is considered in detail in Part V. For now, it is enough to recognize these reforms as part of the trend toward increased entrenchment.

### 3. Bankruptcy.

Municipal bankruptcy serves a similar role by limiting financial entrenchment *ex post*. Chapter 9 of the Bankruptcy Code deals specifically with municipal bankruptcy, and some of its provisions apply different protections to public debtors than the rest of the Bankruptcy Code applies to private ones.<sup>187</sup> It turns out that entrenchment concerns are a central reason for having special provisions in the Bankruptcy Code applicable to municipalities.<sup>188</sup>

An interesting distinction from private bankruptcy, for example, is that courts do not have the authority in public bankruptcy to oversee municipal spending decisions.<sup>189</sup> Whereas private bankruptcy involves close judicial oversight of spending and spending priorities while an entity is in bankruptcy, municipal bankruptcy does not allow courts to invade municipal discretion over spending.<sup>190</sup> This, in effect, ensures that present municipal spending decisions receive priority—in the bankruptcy sense—over past debt.<sup>191</sup> A subsequent government can adopt its own spending priorities while in bankruptcy,

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<sup>185</sup> 545 US 469 (2005).

<sup>186</sup> See Somin, 93 Minn L Rev at 2105 (cited in note 14) (noting that, since *Kelo*, thirty-six states have enacted legislation restricting the use of eminent domain).

<sup>187</sup> See 11 USC §§ 109(c), 901–46. For a discussion of the special characteristics of municipal bankruptcy, see McConnell and Picker, 60 U Chi L Rev at 455–68 (cited in note 149). For a discussion of its predecessor statute, see generally Lawrence P. King, *Municipal Insolvency: The New Chapter IX of the Bankruptcy Act*, 1976 Duke L J 1157 (discussing Chapter 9).

<sup>188</sup> It is also explicable in light of the history of municipal bankruptcy, as well as the complex limits on state responses to municipal debt imposed by the Contracts Clause and on federal responses imposed by structural limits of federalism. See McConnell and Picker, 60 U Chi L Rev at 427–28 (cited in note 149). Some of the curious limits in Chapter 9 are therefore also explicable in light of constitutional limits (real or perceived) on federal responses to municipal debt. *Id.* at 450–54 (discussing the history of federal bankruptcy law).

<sup>189</sup> 11 USC § 904. See also McConnell and Picker, 60 U Chi L Rev at 434–35, 462–63 (cited in note 149); Omer Kimhi, *Reviving Cities: Legal Remedies to Municipal Financial Crises*, 88 BU L Rev 633, 650–54 (2008) (discussing Chapter 9 and its differences from corporate bankruptcy).

<sup>190</sup> See McConnell and Picker, 60 U Chi L Rev at 435 (cited in note 149), citing *City of East St. Louis v Zebley*, 110 US 321, 324 (1884).

<sup>191</sup> See McConnell and Picker, 60 U Chi L Rev at 435 (cited in note 149) (observing that the rule preventing federal courts from interfering with spending decision in municipal bankruptcy “gave current city expenditures absolute priority over payment of past obligations”).

notwithstanding the fact of its preexisting obligations. This is powerfully de-entrenching, indeed.

Collective bargaining agreements are also subject to an interesting form of ex post liability rule protection. In Chapter 9 bankruptcy, a municipality can sometimes abrogate collective bargaining agreements, becoming liable only for contract damages, which are treated as unsecured claims against the local government.<sup>192</sup> In other words, a municipality in bankruptcy may be able to avoid many of its employment obligations.<sup>193</sup>

In actual practice, municipal bankruptcy is not a silver bullet for avoiding financial entrenchment. In order to file under Chapter 9, a municipality must meet five threshold requirements that are far more stringent than those that apply to private debtors.<sup>194</sup> Chief among those is that the state must authorize a municipality to file for bankruptcy, and many states have been extremely reluctant to do so.<sup>195</sup> The number of municipal bankruptcies filed under Chapter 9 since its enactment is therefore very small.<sup>196</sup>

#### 4. Failure to enforce.

The most brazen de-entrenching mechanisms are those that allow governments simply to walk away from their commitments. Financial entrenchment again provides the clearest examples. Faced with their inherited crushing debt burdens, governments in the nineteenth century found various ways to avoid their predecessors' financial precommitments. For example, some governments—even state governments—simply refused to repay their debt.<sup>197</sup> More creatively, some municipalities dissolved themselves as independent jurisdictions,

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<sup>192</sup> Id at 467. McConnell and Picker find no strong justification—aside from inadvertence—for Congress's treatment of municipal collective bargaining agreements. It nevertheless serves a strong anti-entrenchment purpose.

<sup>193</sup> See Kimhi, 88 BU L Rev at 652 (cited in note 189) (“[T]he municipality may frustrate the unsecured creditors by paying them less than their full claims, while still continuing to render services to the residents.”).

<sup>194</sup> Id at 650 (“To enjoy bankruptcy protection, a locality must meet five threshold requirements, which are different (and more difficult) than the requirements other debtors face.”).

<sup>195</sup> See McConnell and Picker, 60 U Chi L Rev at 457 & nn 141–43 (cited in note 149). Bankruptcy will reduce a government's creditworthiness, making it more difficult and expensive to raise money in the future. Indeed, sinking a bond rating is its own form of entrenchment, and one that can have quite damning consequences.

<sup>196</sup> See id at 470.

<sup>197</sup> See Briffault, 34 Rutgers L J at 911 (cited in note 68) (identifying four states that disclaimed debt); Alberta M. Sbragia, *Debt Wish: Entrepreneurial Cities, U.S. Federalism, and Economic Development* 59–60 (Pittsburgh 1996) (describing the repudiation of municipal bonds and other debt in nineteenth century). This raised deep conceptual problems about creditors' remedies when governments refused to pay. For a rich history, see McConnell and Picker, 60 U Chi L Rev at 430–33 (cited in note 149).

only later to be reconstituted, their debts expunged.<sup>198</sup> In other instances, city officials resigned so that no one could levy taxes to pay off municipal debt.<sup>199</sup> This was effective because courts in some jurisdictions could not compel appointment of a receiver outside the ordinary electoral process in order to levy taxes.<sup>200</sup>

More generally, courts are sometimes reluctant to enforce government precommitments, and this can amount to de facto de-entrenchment. The most famous example involves the Charles River Bridge.<sup>201</sup> In 1785, Massachusetts conveyed a monopoly franchise to the Charles River Bridge Corporation to operate a toll bridge across the Charles River. The bridge was an enormous success. Indeed, it was such a success that Massachusetts subsequently granted a second charter to open a new bridge. This direct competition resulted in an immediate loss of revenue for the Charles River Bridge Corporation, which sued, alleging that the government had promised it exclusive rights for forty years. The Supreme Court disagreed and held that the earlier grant to the Charles River Bridge was not exclusive. For there to have been such exclusivity, it would have to have been more explicitly provided for in the language of the grant.<sup>202</sup>

Most people rightly view this case as establishing an early form of procedural protection by requiring government promises of exclusivity to be clear and unambiguous.<sup>203</sup> The Court essentially established a prospective rule channeling precommitments guaranteeing exclusivity into a specific form. From the perspective of the parties in the Charles River Bridge litigation, however, the case is better seen as providing property rule protection to the government. There is little doubt that both Massachusetts lawmakers and the private corporation believed the charter to be exclusive for forty years.<sup>204</sup> In effect, the Supreme Court created a rule of construction to allow the government to avoid the terms of its earlier promise. Courts are sufficiently wary of holding governments to binding obligations

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<sup>198</sup> Sbragia, *Debt Wish* at 60 (cited in note 197).

<sup>199</sup> See McConnell and Picker, 60 U Chi L Rev at 436 (cited in note 149), citing *Walkley v City of Muscatine*, 73 US 481 (1867).

<sup>200</sup> See McConnell and Picker, 60 U Chi L Rev at 436 (cited in note 149).

<sup>201</sup> See *Charles River Bridge v Warren Bridge*, 36 US (11 Pet) 420, 465 (1837).

<sup>202</sup> See *id* at 465.

<sup>203</sup> See, for example, Susan Rose-Ackerman and Jim Rossi, *Disentangling Deregulatory Takings*, 86 Va L Rev 1435, 1463–64 (2005); Jim Chen, *The Death of the Regulatory Compact: Adjusting Prices and Expectations in the Law of Regulated Industries*, 67 Ohio St L J 1265, 1297 & n 233 (2006); James W. Ely Jr, *Whatever Happened to the Contract Clause?*, 4 Charleston L Rev 371, 379–80 (2010).

<sup>204</sup> Charles Warren, *The Charles River Bridge Case*, 3 Green Bag 2d 78, 79 (1999).

that such judicial moves are hardly uncommon.<sup>205</sup> Following the case and others like it, private companies have good reason to worry about the enforceability of their contracts with the government.

In addition, some doctrines limit even what counts as breach by a government, allowing subsequent governments more flexibility. Consider, for example, a government contract with a private developer to build a new building. Subsequent regulations limiting access to construction vehicles over roads or public lands, changing local building codes, or imposing other new regulatory requirements that increase costs will usually not count as breach.<sup>206</sup> The greater the public harm at stake, the more leeway a government will have to act without even breaching the contract.<sup>207</sup>

## B. Ex Ante Prohibitions

While de-entrenching mechanisms like eminent domain serve to preserve flexibility ex post by allowing subsequent governments to avoid preexisting obligations, a number of doctrines function together to limit the kinds of entrenching actions governments can take in the first place. A legislature simply cannot pass unrepeatable legislation, and any effort to do so is void from the beginning. Although not often viewed in these terms, other doctrines serve fundamentally the same function. The inalienable powers doctrine and the public trust doctrine are the most conspicuous examples, though they are merely illustrative. There are other doctrines, too, that simply prevent governments from engaging in activities that are particularly entrenching.<sup>208</sup>

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<sup>205</sup> See Sterk, 88 Colum L Rev at 695 (cited in note 52) (“[T]he Supreme Court has long used rules of construction and interpretation of legislative contracts in ways that have absolved subsequent legislatures from unwanted burdens.”).

<sup>206</sup> This flexibility is an offshoot of the inalienable powers doctrine, described in Part III.B.1.

<sup>207</sup> Consider Wegner, 65 NC L Rev at 974 (cited in note 59) (“[G]overnment action in derogation of public contract rights may be justified, but only under circumstances that reflect an appropriate balance between the need to respond to police power concerns and the obligation to avoid public and private abuse of that power.”).

<sup>208</sup> For example, certain topics are off-limits for public collective bargaining agreements. In some states, courts have imposed strict limits on the subjects that can be negotiated with teachers, taking off the table issues relating to the school calendar, charter schools, and non-teaching duties. See Malin, 84 Ind L J at 1384–85 (cited in note 149). In general, issues of public policy are not within the scope of collective bargaining. See *School Committee of Boston v Boston Teachers Union*, 389 NE2d 970, 973–74 (Mass 1979); *Town of Burlington v Labor Relations Committee*, 454 NE2d 465, 469 (Mass 1983).

### 1. Inalienable powers and public trust.

As noted above, the inalienable powers doctrine prevents governments from bargaining away their regulatory powers. The limits of the doctrine are porous and often ill defined.<sup>209</sup> Nevertheless, its core function is to preserve subsequent governments' power to regulate for the health, safety, and welfare of their constituents.<sup>210</sup>

This doctrine has its roots in Contracts Clause jurisprudence.<sup>211</sup> Although the Contracts Clause ostensibly *limits* governments' ability to interfere with preexisting contracts, many early cases curtailed its applicability to government contracts by delineating powers that the government had no right to bargain away in the first place.<sup>212</sup> For example, *Stone v Mississippi*<sup>213</sup> involved a Contracts Clause challenge to a new state law outlawing the sale of lottery tickets.<sup>214</sup> The claim was brought by a company that had previously been given exclusive rights to conduct lotteries for twenty-five years. The Supreme Court rejected the claim against the government, holding that the state legislature, in granting the lottery franchise, did not have the ability to contract away its police power and, further, that any attempt to do so would not create rights protected by the Contracts Clause.<sup>215</sup>

In the nineteenth century, this was a relatively narrow limitation on government contracting, because courts had a constrained sense of police power regulations.<sup>216</sup> Only regulations specifically advancing the health, safety, welfare, or morals of the public were inappropriate

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<sup>209</sup> See Griffith, 75 Iowa L Rev at 284 (cited in note 62).

<sup>210</sup> See Sterk, 88 Colum L Rev at 697–99 (cited in note 52) (justifying inalienable powers doctrine on reasoning resembling that which underlies entrenchment concerns).

<sup>211</sup> US Const Art I, § 10, cl 1 (“No State shall . . . pass any . . . Law impairing the Obligation of Contracts.”). For an excellent history of Contracts Clause jurisprudence, see generally James W. Ely Jr, *The Protection of Contractual Rights: A Tale of Two Constitutional Provisions*, 1 NYU J L & Liberty 370 (2005).

<sup>212</sup> See, for example, *Beer Co v Massachusetts*, 97 US 25, 32–33 (1878) (rejecting a Contracts Clause challenge to a prohibition law by the owner of a state-granted liquor manufacturing franchise because the state could not contract away its power to legislate for health, safety, and morals); *Fertilizing Co v Hyde Park*, 97 US 659, 669–70 (1878) (rejecting a Contracts Clause challenge by the holder of a fertilizer franchise to new restrictions on transporting fertilizer because the franchise was necessarily issued subject to valid police power legislation). See also Sterk, 88 Colum L Rev at 675–79 (cited in note 52) (discussing cases).

<sup>213</sup> 101 US 814 (1880).

<sup>214</sup> *Id* at 814–16.

<sup>215</sup> *Id* at 820 (“The contracts which the Constitution protects are those that relate to property rights, not governmental.”). See also *Butchers' Union Slaughter-House and Live-Stock Landing Co v Crescent City Live-Stock Landing and Slaughter-House Co*, 111 US 746, 750–51 (1884) (same); *New York & New England Railroad Co v Bristol*, 151 US 556, 571 (1894); Ely, 1 NYU J L & Liberty at 377–78 (cited in note 211) (discussing these cases).

<sup>216</sup> See Ely, 1 NYU J L & Liberty at 378 (cited in note 211) (describing the relationship between police power and the Contracts Clause).

subjects for government contracts.<sup>217</sup> By the twentieth century, however, the general outlines of states' police powers expanded dramatically to include regulations advancing a broad conception of public welfare.<sup>218</sup> In practice, this meant that contracts with the government were subject to expansive inalienable powers.<sup>219</sup>

The public trust doctrine operates in fundamentally the same way. It defines certain categories of property that are held in trust for the public and that therefore cannot be sold, despite government attempts to do so.<sup>220</sup> Again, the boundaries of the doctrine are evolving and contested. Traditionally limited to navigable waters,<sup>221</sup> the public trust doctrine in many states expanded during the twentieth century to include access to beaches and even historic sites and environmental resources.<sup>222</sup> In effect, this doctrine circumscribes the opportunities for entrenchment through the sale of valuable or important resources.<sup>223</sup> These are two places, then, where opportunities for entrenchment have decreased, against the tide of most other legal changes.

Here, the porous boundary between *ex ante* anti-entrenchment protection and *ex post* protection is on stark display. For example, courts striking down Contracts Clause challenges to government regulations interfering with pre-existing contracts did so on grounds

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<sup>217</sup> *Id.*

<sup>218</sup> See *id.* at 378–79. See also Olken, 72 *Or L Rev* at 548 (cited in note 52) (“During the first two decades of the twentieth century the concept of inalienable police powers broadened as Court personnel changed and some of the more progressive justices included economic prosperity and progress as objectives within the sphere of public welfare.”); Meg Stevenson, *Aesthetic Regulations: A History*, 35 *Real Est L J* 519, 522–26 (2007) (discussing the inclusion of aesthetics as part of the general welfare).

<sup>219</sup> See Ely, 1 *NYU J L & Liberty* at 378–79 (cited in note 211) (“Once it became clear that legislative determinations of public welfare could override the security of agreements, the Contracts Clause would be dramatically reduced in constitutional significance.”).

<sup>220</sup> Joseph D. Kearney and Thomas W. Merrill, *The Origins of the American Public Trust Doctrine: What Really Happened in Illinois* *Central*, 71 *U Chi L Rev* 799, 800 (2004). For a consideration of public trust doctrine generally, see Robin Kundis Craig, *A Comparative Guide to the Eastern Public Trust Doctrines*, 16 *Penn St Envir L Rev* 1 (2007).

<sup>221</sup> See Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 *Mich L Rev* 471, 475 (1970).

<sup>222</sup> The public trust doctrine has “emerged from the watery depths [of navigable waters] to embrace the dry sand area of a beach, rural parklands, a historic battlefield, wildlife, archeological remains, and even a downtown area.” Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 *Iowa L Rev* 631, 649 (1986). See also Craig, 16 *Penn St Envir L Rev* at 21–24 (cited in note 220). For example, the New Jersey Supreme Court stated that the public trust doctrine should not be static but rather should evolve over time to meet the needs of the public. *Borough of Neptune City v Borough of Avon-by-the-Sea*, 294 A2d 47, 54–55 (NJ 1972).

<sup>223</sup> It serves other purposes as well. It also applies to the present government, perhaps preventing the creation of fractionated ownership rights. See Michael Heller, *The Gridlock Economy: How Too Much Ownership Wrecks Markets, Stops Innovation, and Costs Lives* 197–98 (Basic Books 2008).



that the original government did not have the power to enter into the contract in the first place.<sup>224</sup> These courts, in effect, were defining the limits of the government's power to contract, and for this reason the inalienable powers doctrine looks like a substantive *ex ante* limitation. Of course, the cases themselves were litigated after the fact, in effect allowing a subsequent government to escape the contractual precommitments of its predecessors. In this regard, the doctrine looks more like a de-entrenching mechanism. Fortunately, there is little at stake for the argument here in choosing where to locate the protection. The point remains: substantive entrenchment protection limits a government's ability to bind the future by carving out things the government simply may not do.

## 2. Debt limits.

Debt limits are another example of anti-entrenchment protection that prohibits overly entrenching government actions. In response to the municipal debt crisis in the nineteenth century described above, states intervened and created robust new forms of anti-entrenchment protection that limited the ability of local governments to incur debt. Chief among these were rules that prohibited municipalities from incurring debt beyond a certain level, often measured as a percentage of total assessed local property value.<sup>225</sup> These rules are sometimes justified explicitly as a response to entrenchment concerns.<sup>226</sup>

During the twentieth and twenty-first centuries, however, local governments have found increasingly creative ways to circumvent those debt limits.<sup>227</sup> A local government today can, for example, create a new special purpose government—such as a school or water district—which can then effectively start over because the special

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<sup>224</sup> See, for example, *Beer Co.*, 97 US at 32–33.

<sup>225</sup> Briffault, 34 Rutgers L J at 915–17 (cited in note 68) (surveying approaches to debt limits); Clayton Gillette, *Fiscal Home Rule*, 86 Denver U L Rev 1241, 1256 (2009) (describing the history of debt limits). See also Super, 118 Harv L Rev at 2606–07 (cited in note 62) (“[D]istrust of transient majorities and their lack of concern for the future was a key element of the Jacksonian fiscal constitution.”).

<sup>226</sup> See, for example, Briffault, 34 Rutgers L J at 918 (cited in note 68) (“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, 88 Colum L Rev at 720–21 (cited in note 52) (“[The] very existence of [constitutional provisions requiring voter approval to accrue debt] demonstrates that the attempt to develop institutional mechanisms to cope with the problem of legislative discontinuity has been longstanding.”).

<sup>227</sup> See Super, 118 Harv L Rev at 2607 (cited in note 62) (“As the abuses that gave rise to the Jacksonian provisions [limiting debt] faded from memory and an industrializing and urbanizing nation put more demands on its state and local governments, states relaxed some of the Jacksonian strictures.”).

purpose government's debt does not count against the municipality.<sup>228</sup> Similarly, debt used to finance income-producing projects is not counted toward a municipality's debt limits, so long as the debt is self-liquidating.<sup>229</sup> Other examples exist as well.<sup>230</sup> In short, local governments have become increasingly adept at avoiding the protections that states adopted in the nineteenth century specifically in response to entrenchment concerns. Here, again, opportunities for entrenchment are increasing.

### C. Procedural Protection

In addition to the outright prohibitions described in the previous section, a number of doctrines create specific procedural protections that reduce the greatest risks of entrenchment. For reasons developed below, entrenchment is particularly problematic to the extent a government can capture the benefits of a precommitment while externalizing the costs on to the future.<sup>231</sup> Relevant procedural protections, then, are those that force a government to internalize the long-term costs of its actions or at least to consider the effects of its actions on the future. Instead of preserving future flexibility directly, they decrease the risk of allowing governments to decide the strength of their precommitments for themselves. This is in contrast to de-entrenching mechanisms and substantive prohibitions, which determine how binding a government precommitment actually is.

Some procedural anti-entrenchment protections come in the form of procedural safeguards that channel potentially entrenching government actions into explicit and especially visible decisions. The best example is the bond election requirement. A number of state constitutions require a special election before a local government can float a bond.<sup>232</sup> By holding a single-issue election in which the terms of

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<sup>228</sup> See Joseph F. Gricar, Comment, *Municipal Corporations: Circumventing Municipal Debt Limitations*, 48 Mich L Rev 1016, 1016 (1950). See also, for example, *Lyon v Strock*, 118 A 432, 433 (Pa 1922) (school district); *Kennebec Water District v Waterville*, 52 A 774, 783 (Me 1902) (water district).

<sup>229</sup> Gricar, Comment, 48 Mich L Rev at 1016 (cited in note 228).

<sup>230</sup> See Charles W. Goldner Jr, *State and Local Government Fiscal Responsibility: An Integrated Approach*, 26 Wake Forest L Rev 925, 936 (1991) ("The special funds doctrine, use of overlapping political subdivisions, creation of special authorities, use of true leases and service contracts, and more recently, the use of lease-purchase financing, have all received judicial blessing."); Sterk and Goldman, 1991 Wis L Rev at 1330-33 (cited in note 128) (identifying similar ways of circumventing debt limits).

<sup>231</sup> See Part IV.A.

<sup>232</sup> See, for example, Mich Const Art IX, § 15 ("The state may borrow money for specific purposes in amounts as may be provided by acts of the legislature adopted by a vote of two-thirds of the members . . . serving in each house, and approved by a majority of the electors voting thereon at any general election."). See also Gillette, 13 J Contemp Legal Issues at 370

the bond are specifically laid out, the issue will have added political salience for local voters, who will be more likely to consider the costs of the bond into the future.<sup>233</sup> This is especially true in local governments where any increase in property taxes to service the bond is likely to be capitalized into property values.<sup>234</sup> Bond election requirements have lost much of their bite in recent years, however, because governments both have found ways around triggering them and can avoid their outcomes through various procedural machinations.<sup>235</sup>

Development agreements provide another good example of ex ante procedural protections. State legislation varies, but often requires public hearings and city council approval for any development agreement.<sup>236</sup> On paper, at least, this appears to be relatively robust procedural protection, geared specifically to address the threat of political malfunction. It increases the visibility of the decision and takes final authority out of the hands of smaller, parochial interests. There is debate, however, about how meaningful the procedural protections actually are, given the typical politics that surround development decisions.<sup>237</sup>

It is important to recognize that not every procedural requirement counts as meaningful anti-entrenchment protection. Procedural requirements are anti-entrenching only to the extent they require or encourage a government to consider the effect of its action on the future.<sup>238</sup> Sometimes, mere sunshine is enough; visibility is powerfully anti-entrenching if current voters expect to be shouldering the burdens of higher taxes in the future. But not every procedural requirement has this effect. The obligation to secure multiple bids in procurement contracts, for example, creates a meaningful procedural hurdle but provides only minimal protection against entrenchment.<sup>239</sup> It protects against fraud and ensures that the government enters into

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(cited in note 144) (stating that twenty-seven states have constitutional provisions requiring elections before a municipality can issue debt).

<sup>233</sup> See Gillette, 13 J Contemp Legal Issues at 372 (cited in note 144).

<sup>234</sup> See Fischel, *Homevoter Hypothesis* at 5–8 (cited in note 41) (discussing capitalization).

<sup>235</sup> See Gillette, 13 J Contemp Legal Issues at 375–80 (cited in note 144).

<sup>236</sup> 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).

<sup>237</sup> See Barbara L. Bezdek, *To Attain "The Just Rewards of So Much Struggle": Local-Resident Equity Participation in Urban Revitalization*, 35 Hofstra L Rev 37, 59 (2006) (arguing that procedural safeguards are inadequate).

<sup>238</sup> See Sterk, 88 Colum L Rev at 707 (cited in note 52). Otherwise—absent deliberation—procedural mechanisms like legislation reflect only majority rule or the aggregation of current citizens' preferences. *Id.*

<sup>239</sup> For a discussion of procurement contracts, see notes 67, 336–37 and accompanying text.

contracts on relatively favorable terms, but it does little or nothing to police whether the government is only purchasing the goods and services in the first place because the bulk of the costs can be shifted to the future.

There is another closely related caveat. Procedural requirements can themselves be a powerful source of entrenchment. At the local level, environmental review and local land use review processes, like New York City's Uniform Land Use Review Process<sup>240</sup> (ULURP), serve to protect the status quo. Whether they are a source of entrenchment or protection from entrenchment can simply be a matter of temporal perspective. But this Article is focused on the potential political malfunctions that can lead a government to discount or ignore the costs it is imposing on the future. Procedural requirements are anti-entrenching to the extent that they ensure some consideration of those future costs, and ULURP surely does.

The quintessential procedural requirement in this regard is the National Environmental Policy Act of 1969<sup>241</sup> (NEPA), and in particular its state counterparts.<sup>242</sup> They are information-forcing statutes, requiring governments to produce certain kinds of information about the long-term consequences of their actions.<sup>243</sup> At the very least, this heightens the visibility and therefore the political salience of environmental impacts into the future. To the extent that environmental harms are a form of physical entrenchment through destruction, NEPA provides procedural, ex ante anti-entrenchment protection. However, NEPA's requirements have been slowly eroding since the 1970s.<sup>244</sup> Today, governments have become sufficiently adept at navigating NEPA's requirements that they rarely have to prepare environmental impact statements, and NEPA's detractors label it

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<sup>240</sup> See Uniform Land Use Review Procedure, NYC Rules, title 62, §§ 2-01-2-10 (detailing procedural requirements, such as administrative approval and permits, for land and property improvements).

<sup>241</sup> Pub L No 91-190, 83 Stat 852, codified as amended at 42 USC §§ 4321-47.

<sup>242</sup> See New York State Environmental Quality Review Act, NY Envir Conserv Law § 8-0101 (McKinney); California Environmental Quality Act, Cal Pub Resources Code Ann §§ 21000-21177 (West). See also Valerie M. Fogleman, *Guide to the National Environmental Policy Act: Interpretations, Applications, and Compliance* 213-42 (Quorum 1990).

<sup>243</sup> A government must prepare an environmental impact statement (EIS) upon a finding of environmental impact. See 42 USC § 4332(C). See also William S. Eubanks II, *Damage Done? The Status of NEPA after Winter v. NRDC and Answers to Lingering Questions Left Open by the Court*, 33 Vt L Rev 649, 650 (2009) (describing the statute).

<sup>244</sup> See Bradley C. Karkkainen, *Toward a Smarter NEPA: Monitoring and Managing Government's Environmental Performance*, 102 Colum L Rev 903, 906-07 (2002).

“toothless.”<sup>245</sup> Its anti-entrenchment function is clear, but its effectiveness, increasingly, is not.

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Table 2 captures some of the examples from Parts II and III and also illustrates graphically what forms of anti-entrenchment protection apply.

TABLE 2. ENTRENCHMENT PROTECTION

Mechanism	Examples	Ex Post Protection	Ex Ante Prohibition	Procedural Protection
<b>Contract</b>	Promises to forbear	Breach; Failure to enforce	Inalienable powers	
	Procurement contracts	Breach	Inalienable powers	
	Development agreements	Eminent domain		Detailed in enabling statute
<b>Property</b>	Creating rights, future interests, and alienating assets	Eminent domain; Failure to enforce	Public trust	
<b>Finance</b>	Debt	Chapter 9	Debt limits	Bond elections
	Monetizing assets and directing future spending	Chapter 9		
<b>Physical</b>	Infrastructure	Rebuilding		
	Destruction			Environmental review

#### D. Entrenchment on the Rise

Together, Parts II and III demonstrate a clear, albeit not universal, trend toward greater opportunities for entrenchment. Local governments have become more creative at finding ways to circumvent traditional anti-entrenchment protection, while both courts and legislatures have scaled back core de-entrenching

<sup>245</sup> See, for example, Jim Chen, *Webs of Life: Biodiversity Conservation as a Species of Information Policy*, 89 Iowa L Rev 495, 517 (2004):

[T]he Court has so thoroughly circumscribed NEPA that the statute has come to exemplify “soft look” review in administrative law at large. So toothless are the Court’s admonitions that federal agencies should take a “hard look” at the environmental consequences of their decisions that no other interpretation of this phrase would be accurate.

mechanisms. From the increasing use of long-term contracts, sophisticated property conveyancing, and development agreements, to monetizing future income streams, statutorily defined vested rights, and recently enacted limits on eminent domain, governments have many more ways to make precommitments more binding into the future than they ever had before. The reason appears partly to be inadvertence and lack of attention to entrenchment concerns, and perhaps blindness to long-term costs. The trend is nevertheless clear enough that it is useful to ask, "Why now?"<sup>246</sup> Although it is difficult to know with certainty, two kinds of positive explanations seem particularly likely: increased interlocal competition and increased volatility in local preferences. Both possibilities are considered briefly in turn, and they serve as a useful segue into a more theoretical inquiry about the costs and benefits of entrenchment.

### 1. Interlocal competition.

Entrenchment may be on the rise from increased competition between local governments for mobile capital and high-valued uses.<sup>247</sup> Local governments and local officials generally try to attract businesses and residents that contribute more in property taxes than they consume.<sup>248</sup> Wealthy empty nesters, commercial office space, and some kinds of light industry, for example, are all likely to be net winners for a community. Their contribution to the local property tax base outstrips the costs they impose, whether in consumption of services, congestion, environmental impacts, or some other currency.<sup>249</sup> These uses (and users) are in contrast to poor families with multiple school-age children or classic LULUs (locally unwanted land uses) like hazardous waste facilities or drug treatment centers. Typically, these are believed by government officials to consume more resources or impose greater harms than the benefits that they contribute through property taxes or in-kind benefits.<sup>250</sup> As a result, local governments compete with one another over the high-valued uses and seek to keep out the low-valued ones.

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<sup>246</sup> I have to thank Greg Alexander for pushing me to think more closely about this issue.

<sup>247</sup> See *The Second War Between the States*, Bus Wk 92 (May 17, 1976), quoted in Peter D. Enrich, *Saving the States from Themselves: Commerce Clause Constraints on State Tax Incentives for Business*, 110 Harv L Rev 377, 401 & n 125 (1996).

<sup>248</sup> See Christopher Serkin, *Local Property Law: Adjusting the Scale of Property Protection*, 107 Colum L Rev 883, 900 & n 76 (2007); Richard Briffault, *The Local Government Boundary Problem in Metropolitan Areas*, 48 Stan L Rev 1115, 1134 (1996).

<sup>249</sup> See Schragger, 94 Va L Rev at 1148-49 (cited in note 128); Vicki Been, "Exit" as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine, 91 Colum L Rev 473, 512-13 (1991).

<sup>250</sup> See Serkin, 107 Colum L Rev at 900 (cited in note 248).

That competition takes many forms. The classic account is the famous Tiebout hypothesis, which suggests that local governments compete with each other for residents by offering different combinations of services and property taxes.<sup>251</sup> But the competition has increasingly taken more aggressive and more creative forms as well. Offers to assemble land for a developer, combined with tax breaks and other forms of direct and indirect incentives, are the stock and trade of public-private bargaining. Still, as noted above, one of the principal risks that any developer or investor in a municipality faces is the risk of regulatory change. It may well be, then, that as interlocal competition over mobile capital and desirable residents has increased, so too has the demand for new tools for competing, like the ability to make binding precommitments into the future. Indeed, at least some of the recent changes in the law—like the invention of development agreements—are explicable in precisely these terms.<sup>252</sup>

## 2. Volatility in preferences.

An alternative explanation for the rise in entrenchment is increased volatility in policy preferences. When policy preferences are relatively stable over time, any particular government may have little motivation to try to control the future. But if policy preferences are volatile, so that the work of one government is more likely to be undone by the next, then the incentive to create binding policy precommitments goes up, too.<sup>253</sup>

It is, of course, a recurring theme of national politics that political polarization is increasing.<sup>254</sup> The transition from George Bush to Barack Obama was marked by dramatic reversals in domestic and foreign policy.<sup>255</sup> Indeed, it is these kinds of national issues that have

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<sup>251</sup> See Charles Tiebout, *A Pure Theory of Local Public Expenditures*, 64 *J Pol Econ* 416, 419–20 (1956). Of course, the Tiebout hypothesis is principally concerned with sorting, explaining how efficiencies are created as residents sort themselves into communities that share similar preferences. See *id.* at 418.

<sup>252</sup> See Schwartz, Note, 28 *BC Envir Aff L Rev* at 720 (cited in note 80) (“A development agreement is a solution to the inherent uncertainty in the development process and a means by which developers can protect their investment.”).

<sup>253</sup> See W. Mark Crain and Timothy J. Muris, *Legislative Organization of Fiscal Policy*, 38 *J L & Econ* 311, 321 (1995) (“[D]ivided government or reversals in party control tend to discourage interest-group demands because once enacted, laws are less likely to survive beyond the term of the regime currently in power.”).

<sup>254</sup> See Dana Baldassarri and Andrew Gelman, *Partisans without Constraint: Political Polarization and Trends in American Public Opinion*, 114 *Am J Socio* 408, 410 (2008).

<sup>255</sup> See, for example, Ved P. Nanda, *International Law Implications of the United States’ “War on Terror,”* 37 *Denver J Intl L & Policy* 513, 515–33 (2009) (discussing President Barack Obama’s quick reversal of President George Bush’s counterterrorism policies); Michael J. Kelly, *Charting America’s Return to Public International Law under the Obama Administration*, 3 *J Natl*

dominated previous writing on the entrenchment problem.<sup>256</sup> As it turns out, the same problem is repeated at the local level, too, though the sources of policy volatility are somewhat less obvious.

While national politics have become increasingly polarized, state and local politics are an entirely different beast. In fact, in recent years, so-called red states have generally grown redder, and blue states bluer, suggesting greater intrastate stability in policy preferences.<sup>257</sup> The same is true at the local level, where local governments have also become more politically homogenous over time.<sup>258</sup> This trend toward increased political homogeneity, coupled with the nonpartisan nature of many local issues (and elections), suggests that local governments are safe from the polarization infecting national politics.<sup>259</sup>

It is not just political polarization that can lead to policy variance over time, however. In fact, at the local level, the more likely cause will be real or perceived demographic shifts. Newcomers herald a threat of new policies and priorities, even if their general political proclivities are consistent with current residents', and an existing government may well seek to entrench its decisions in the face of demographic change. Furthermore, there are reasons to think that the pressure of demographic changes on local policy preferences may be increasing.

First, and most obviously, domestic migration can quickly alter the population of a community. While domestic mobility rates in the aggregate have declined throughout the twentieth century, patterns of internal migration have resulted in significant transitions in many parts of the country, especially the Sunbelt.<sup>260</sup> Even if mobility is on the

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Sec L & Policy 239, 244 (2009) (discussing President Barack Obama's reversal of President George Bush's Guantanamo Bay policies); Scott Shane, Mark Mazzetti, and Helene Cooper, *Obama Reverses Key Bush Security Policies*, NY Times A16 (Jan 22, 2009); Scott Wilson, *Obama Reverses Bush Policy on Stem Cell Research: The Ban on Federal Funding Is Lifted*, Wash Post A10 (Mar 10, 2009) (pointing out that the executive order removing the ban "marks the third time in [Obama's] administration that Obama has reversed Bush-era policies"). Of course, not all of these early reversals have stuck.

<sup>256</sup> See, for example, Posner and Vermeule, 111 Yale L J at 1694–1701 (cited in note 2) (describing the entrenchment effects of legislation regarding the definition of marriage, federal budget deficits, and the Senate's cloture rule).

<sup>257</sup> See William A. Galston, *Political Polarization and the U.S. Judiciary*, 77 UMKC L Rev 307, 312–15 (2008) (citing evidence for deeper polarization within the states).

<sup>258</sup> Bill Bishop, *The Schism in U.S. Politics Begins at Home*, Austin Am-Statesman A1 (Apr 4, 2004) ("[P]olitical segregation in U.S. counties grew by 47 percent from 1976 to 2000.").

<sup>259</sup> Cindy Simon Rosenthal, *Local Politics: A Different Front in the Culture War*, 3 Forum 1, 4 (2005), online at <http://www.bepress.com/forum/vol3/iss2/art5> (visited Jan 9, 2011). There may be an important exception for land use issues where conflict between pro-growth developers and anti-growth residents appears to be on the rise. Consider Kenneth A. Stahl, *The Artifice of Local Growth Politics: At-Large Elections, Ballot-Box Zoning, and Judicial Review*, 94 Marq L Rev 1, 19–46 (2010) (offering case studies examining political polarization in local growth politics).

<sup>260</sup> See US Census Bureau, *Annual Geographical Mobility Rates, By Type of Movement: 1947–2009* table A-1 (2010), online at <http://www.census.gov/population/socdemo/migration/tab->



decline nationally, certain regions, states, or communities facing increased demographic pressures may well drive demand for greater policy control into the future. This is undoubtedly exacerbated by new patterns of foreign migration into smaller towns and suburbs.<sup>261</sup>

Generational shifts are the second reason policy variance may be increasing. The political power of baby boomers in local governments may well be at or even past its zenith.<sup>262</sup> Control over local governments is therefore shifting away from baby boomers, who have largely dominated local politics for years.<sup>263</sup> Suspicion that the next generation does not share their values and priorities may therefore motivate baby boomers to lock in policies before their power disappears entirely.

It is difficult to know with certainty what is behind the increase in opportunities for local entrenchment, but both interlocal competition and increased policy variance appear to be likely candidates. Regardless of their explanatory power, these observations also provide a lens through which to analyze the more conceptual costs and benefits of local precommitments, a topic taken up next.

#### IV. ENTRENCHMENT: WHY AND WHEN

Given the examples in Part II, it appears that governments frequently act in ways that limit future governments' choices. How much is too much? Formally unrepealable legislation is impermissible. But government actions that are the close functional equivalent appear to be uncontroversial. Are they really? Fundamentally, it should depend on whether the benefit to a government from entering into a binding precommitment exceeds the costs that it is imposing on

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a-1.pdf (visited Mar 22, 2011) (demonstrating mobility rates). See also Lynda L. Butler, *The Pathology of Property Norms: Living within Nature's Boundaries*, 73 S Cal L Rev 927, 954-55 (2000); Joseph P. Ferrie, *Internal Migration*, in Susan B. Carter, et al, eds, 1 *Historical Statistics of the United States: Earliest Times to the Present*, 1-489, 1-492 (Cambridge 2003) (describing the western and southern migration of whites since the 1940s and the northern migration of African Americans during the same period).

<sup>261</sup> See B. Lindsay Lowell and Micah Bump, *The New Settlers: Characteristics of Immigrant Minority Population Growth in the Nineties*, 9 Georgetown Pub Pol Rev 1, 2-3 (2004) (demonstrating that immigrants are moving to rural states and small local communities where they had not previously settled); Muzaffar A. Chishti, *Enforcing Immigration Rules: Making the Right Choices*, 10 NYU J Legis & Pub Pol 451, 464 (2007) (finding that the rate of foreign immigration has increased, with the majority of immigrants now settling in the suburbs, as opposed to the traditional gateway urban areas).

<sup>262</sup> See Luis Estevez, *When Baby Boomers Retire*, 84 Pub Mgmt 3, 4 (Oct 2004) (suggesting that baby boomers are currently in the majority of leadership positions at the local level); P. Michael Pauls, *New and Valuable: University Partnerships*, 89 Pub Mgmt 18, 18 (Nov 2007).

<sup>263</sup> See Ralph Blumenthal, *Unfilled City Manager Positions Hint at Future Government Gap*, NY Times A1 (Jan 11, 2007) (describing the demographic gap in leadership positions in municipal government).

the future. Or, more specifically, as this Part shows, it should depend on whether inducing reliance on a government precommitment is more valuable than the harm that is likely to result from a loss of flexibility in the future.

Admittedly, there are a number of different ways to talk about the relative costs and benefits of entrenchment. Entrenchment, at the end of the day, implicates core democratic values, and it may be that limits on the temporal scope of government actions are implied by the nature of sovereignty. It would be possible to frame the question differently and ask, for example, whether a government has acted in a way that inappropriately co-opts sovereignty from the future. Or, one could focus on the legislative process itself and examine the effect of entrenchment on the incentives of government actors and the internal dynamics of governments.<sup>264</sup> There are, in other words, multiple normative accounts that could be developed here.

This Part puts these broad political theory concerns largely to the side. The analysis that follows takes a very different—and largely utilitarian—tack. It focuses as specifically as possible on the concrete costs and benefits of a government locking policy into the future. There are situations in which allowing a government to make a binding precommitment will objectively benefit the public, and other situations in which it will do the opposite. This Part seeks to provide an overall framework for evaluating entrenchment, first by identifying its costs and benefits, and then by exploring how to compare them. This approach also generates some immediate doctrinal payoffs. By way of foreshadowing, Part V puts this Part's analytical framework to the test and offers some illustrative takeaways.

#### A. The Costs and Benefits of Entrenchment

The ability to entrench a policy can create significant public benefits, principally in the ability to induce reliance by private parties, but it also comes with substantial risks that deals will go bad or that policy preferences will change. In the face of these competing considerations, it is easy but empty to suggest that government precommitments should be enforceable to the extent that the benefits outweigh the costs. The real analytical work comes from identifying specifically what those costs and benefits really are, how they should

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<sup>264</sup> See, for example, Gersen, 74 *U Chi L Rev* at 262–79 (cited in note 5) (providing an account of the legislative incentives surrounding temporary legislation); Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 *Harv L Rev* 657, 681–91 (2011). See also generally Eskridge and Ferejohn, 80 *Georgetown L J* 523 (cited in note 4).

be compared, and whether governments should be trusted to make the comparison.

### 1. Costs.

The overriding cost of entrenchment is, quite simply, the loss of future flexibility.<sup>265</sup> To be precise, the cost of entrenchment is the opportunity cost created by the entrenching government action; it is the difference between the value of the entrenched policy and the preferred policy in the future. Entrenchment is no problem in this Article's utilitarian framework if future governments would stay the course even if change were costless.

The loss of flexibility can therefore create costs in three distinct scenarios: when the world turns out differently than the government anticipated, when subsequent governments' preferences change over time, or when a government deliberately imposes costs on the future to reap some immediate benefit.<sup>266</sup> For example, imagine that a government seeks to induce a private developer to incur the clean-up costs for some brownfield development in exchange for favorable zoning treatment in the future.<sup>267</sup> That bargain might turn out to be a bad one for the government. New residential development nearby, the presence of newly endangered species, or discoveries about the adverse health effects of lingering contamination may alter the cost to the public of living up to its earlier precommitment. The promising

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<sup>265</sup> The importance of flexibility is well known. Consider Freeman, 75 NYU L Rev at 667 (cited in note 51) ("Tension inevitably develops between the desire to provide sufficient contractual specificity to enable meaningful monitoring and the temptation to leave terms flexible enough to allow adaptations in light of changing conditions."). But see David Super, *Against Flexibility*, 96 Cornell L Rev \*22-35 (forthcoming 2011), online at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1675225](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1675225) (visited Mar 24, 2011) (arguing that flexibility imposes costs of its own).

<sup>266</sup> See Serkin, 77 U Chi L Rev at 351-54 (cited in note 7).

<sup>267</sup> Examples like this are legion. In Beverly, Massachusetts, the city partnered with Boston-based Cummings Properties to transform a former industrial site into a retail and office park. See Emma Johnson, *Fields of Vision: New England States Revitalize Potentially Toxic Properties*, 72 J Prop Mgmt 12, 13 (Nov/Dec 2007). The developer spent \$65 million cleaning up the site in exchange for a ten-year tax abatement and a special designation for the site to make it eligible for beneficial state tax treatment as well. See *id.*; Regina Raiford, *Industrial Revolutions*, 94 Buildings 28, 30-31 (Apr 2000); Ada Louise Huxtable, *Refitting "The Shoe,"* Wall St J A20 (Oct 2, 1997). Also, through the Massachusetts Brownfields Initiatives law, Cummings signed an agreement with the state that allowed them to clean up the site without bearing the risk of future legal liability. See Huxtable, *Refitting "The Shoe,"* Wall St J at A20. See also Mass Gen Laws Ann ch 21E, § 3(A)(j)(1) (West 2010) (permitting the commonwealth to enter into agreements foreclosing future liability for brownfield management if the agreements are in the public interest). For another example, see Betsy Giusto, *Edgewater: The Power of Public-Private Partnerships*, 6 Econ Dev J 30, 30-33 (Winter 2007) (describing a public-private partnership to redevelop an industrial site in Webster, Texas, that involved municipal rezoning of the property to permit the planned unit development).

government may, in other words, have simply guessed wrong about the cost of its promise. Were it possible to go back in time and ask the original government actors—or their constituents—whether they still favor entering into the obligation in light of this new information, they presumably would say no.

Alternatively, policy preferences may shift over time, even if the world turns out as expected. That is, even with perfect foresight, the original government would still select the same policy. The problem is simply that preferences have changed. The government in the future is not the same as the government in the past, and the plans and priorities of its constituents may well have shifted.

Finally, the deal may have been a bad one from the outset, reflecting a naked giveaway to a private developer, but with the costs borne in the future. In these cases, there is simply a disagreement between the policy preferences at two different times.

In each scenario, the government in the future is stuck with the costs of the earlier government's actions. That later government may well want to adopt a different set of policies, whether a different zoning ordinance, a different level of debt, or any of the other myriad policies that an earlier government can in fact entrench through private law. The cost, then, is the marginal difference between the entrenched policy decision and the preferred policy decision later on.

## 2. Benefits.

The principal benefit of government precommitments and their resulting entrenchment is the ability to induce reliance.<sup>268</sup> At the most general level, stability in government policy can allow private citizens to organize their lives around expectations about future regulations. The more stability there is, the more people can make investments of time and money in reliance on their expectations about the future. This theoretical benefit is entirely consistent with the positive claim made above that entrenchment may be increasing in response to interlocal competition over mobile capital.<sup>269</sup>

There are important reasons, sounding in moral hazard, to doubt the appropriateness of broadly immunizing property owners from the

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<sup>268</sup> Posner and Vermeule identify and catalogue a broader set of benefits. Several, though, are versions of reliance. Posner and Vermeule, 111 *Yale L J* at 1670–73 (cited in note 2). Those benefits that are not versions of reliance are more directly concerned with the internal dynamics of political decisionmaking, a consequence explicitly set aside in this Article. See text accompanying note 264.

<sup>269</sup> See Part III.D.

risk of regulatory change.<sup>270</sup> Regardless of whether and to what extent stability is an appropriate goal for a regulatory regime as a general matter, it can undoubtedly create benefits in specific situations. If a government wants someone to extend credit, provide long-term goods or services, or otherwise act in reliance on a government precommitment, then that obligation must somehow be binding in the future.<sup>271</sup>

To frame the point in the negative instead of the positive: the inability of a government to make binding precommitments can make it difficult and more expensive for governments to secure benefits from private parties. If the government cannot bind itself, then promisees will have to discount the value of government promises, raising the prices that the public has to pay.<sup>272</sup> This, of course, translates directly into higher costs to the public. In the brownfield development example above, unless the developer has some assurance of receiving zoning benefits down the road, it may well be unwilling to incur the upfront cleanup costs as part of the bargain, even though the arrangement would have been beneficial to both parties.<sup>273</sup>

The same problem arises whenever a government would benefit from a private party relying on some governmental promise that may or may not be enforceable.<sup>274</sup> If a government wants to induce a private

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<sup>270</sup> This implicates a more general inquiry into legal transitions and the extent to which it is appropriate to protect people from the costs of regulatory change. For an argument against such protection, see Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 Harv L Rev 509, 551–52 (1986). For an account of reliance as justifying protection, see Joseph William Singer, *The Reliance Interest in Property*, 40 Stan L Rev 611, 711–32 (1988).

<sup>271</sup> See Serkin, 107 Colum L Rev at 929–30 (cited in note 248). A more general version of this point invokes courts as key players in creating the stability necessary for public–private bargains. See William M. Landes and Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J L & Econ 875, 877–79 (1975). See also Gersen, 74 U Chi L Rev at 279 n 119 (cited in note 5).

<sup>272</sup> See Serkin, 107 Colum L Rev at 915 (cited in note 248). See also Michaels, 77 U Chi L Rev at 743 (cited in note 63) (noting that the government’s ability to avoid a contract “raise[s] the price of the contract, particularly with respect to contracts for complex services . . . that require substantial initial investments of resources, training, and capital outlays”); Gersen, 74 U Chi L Rev at 281 (cited in note 5) (“Indeed, long-term bargains may incorporate a greater risk of legislative defection. However, this risk of future repeal or policy adjustment will simply be incorporated into the price interests are willing to pay for legislation in the current period.”); Sterk, 88 Colum L Rev at 699 (cited in note 52) (“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.”).

<sup>273</sup> See text accompanying note 267. See also Posner and Vermeule, 111 Yale L J at 1671–72 (cited in note 2) (describing the benefit to government of inducing reliance).

<sup>274</sup> In the private context, this arises whenever one party must make a significant investment before the full benefits of the contract are even apparent. Then, parties may well want to precommit to behave in a manner that may turn out to be inefficient in order to achieve greater efficiency overall. It can include any situation in which there is a “principal-agent relationship in which the agent is relatively risk-averse and there is a delay between the agent’s

party to provide a public benefit or make some other investment that requires upfront expenditures and slow repayment, then its precommitments must be enforceable, at least to some extent.<sup>275</sup> Sometimes, of course, a handshake is enough, but the value of the precommitment to the private party rises and falls with its certainty.

While it is easy enough to identify the generic form of entrenchment's costs and benefits, the more difficult analytical work remains: exploring how to compare them in the context of local governments. This raises three interrelated problems. The first is political: Should local governments be trusted to decide whether and how to entrench plans and policies? The second is quite conceptual: How should immediate benefits and future costs be compared intertemporally? The third is more prescriptive: How can the benefits of entrenchment be maximized while minimizing the cost? The first two are taken in order, and the third constitutes Part V.

## B. The Politics of Entrenchment

At the most general level, there is nothing unique about trading off present benefits against the loss of choice in the future. Any obligation to future performance—borrowing money, extending or accepting a dinner invitation—means losing flexibility to make other plans, or at least incurring costs to change those plans. People nevertheless make such commitments all the time, presumably because they are making guesses about their preferences in the future or are trading off some immediate reward against repayment down the road.

In the context of private precommitments—say, a long-term bilateral contract between individuals or corporations—the risk of bad bets about the future generally falls on the parties themselves. The law reasonably presumes that both parties will internalize the long-term costs and benefits of the bargain. If a party believes that the benefits of a precommitment outweigh its long-term costs, a court should not interfere (subject, presumably, to the usual kinds of contract defenses like unconscionability).<sup>276</sup> There are, of course, reasons to doubt that parties to contracts are always making rational

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exertion of effort and the realization of value." Kevin E. Davis, *The Demand for Immutable Contracts: Another Look at the Law and Economics of Contract Modifications*, 81 NYU L Rev 487, 499 (2006), citing Christine Jolls, *Contracts as Bilateral Commitments: A New Perspective on Contract Modification*, 26 J Legal Stud 203, 211 (1997).

<sup>275</sup> Third-party reliance can take a more systemic form, too. Instead of inducing third-party reliance in any specific way, entrenchment can enable more efficient Tiebout-style sorting and can therefore unlock property values. See Serkin, 107 Colum L Rev at 895 (cited in note 248).

<sup>276</sup> See, for example, *Baltimore & Ohio Southwestern Railway v Voigt*, 176 US 498, 505 (1900).

bargains in the context of future obligations.<sup>277</sup> But the fact that a bargain turns out to have been a costly mistake does not generally implicate freedom of contract or allow parties to walk away from their debts. Bad deals are bad deals; there are winners and losers, but the law generally holds people to their promises.

The important question for entrenchment, then, is whether and to what extent the same analysis applies to government precommitments.<sup>278</sup> If the analogy to private contracts holds, then government actors should be able to precommit to law or policy in the future.<sup>279</sup> They should, in other words, be trusted to understand and rationally weigh the costs and benefits of their actions. In theory, the answer depends on the source of the costs. Governments and government actors are in the same position as private parties when the risk they face is the world turning out differently than expected. Governments make bad bets just like private actors do. But these cases are, in practice, indistinguishable from those in which a government precommitment represents an anachronistic policy commitment or, worse, a deliberate effort to shift costs into the future.

Ultimately, then, government entrenchment should be treated differently from private precommitments because of the possibility—indeed, the likelihood—of political malfunction in the context of intertemporal commitments.<sup>280</sup> Government actors face particular problems representing the interests of the future, and indeed may have an incentive not to try at all. This is a familiar observation about agency costs, but dressed up here in a specific and not entirely familiar

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<sup>277</sup> As one article explains, “The difficulty, which both cognitive psychologists and down-to-earth estate planners have noticed, is that human persons often forget that they inhabit a changing world. They tend, perhaps systematically, to underestimate the likelihood that inflexible provisions for the future, including use restrictions, will fail to suit evolving circumstances.” Adam J. Hirsch and William K.S. Wang, *A Qualitative Theory of the Dead Hand*, 68 *Ind L J* 1, 25 (1992) (citing sources).

<sup>278</sup> In an interesting treatment, Stewart Sterk and Elizabeth Goldman refer to the problem as one of “legislative discontinuity.” See Sterk and Goldman, 1991 *Wis L Rev* at 1324 (cited in note 128). They provide an extended treatment of the difference between the continuity of individuals and legislatures that applies equally to the analysis here. See *id.* at 1324–29.

<sup>279</sup> Posner and Vermeule have, in fact, made precisely this suggestion. See Posner and Vermeule, 111 *Yale L J* at 1688–90 (cited in note 2) (analogizing statutes to contracts, in the sense that both bind future actors, and noting that voters have selected Congress to make decisions for them).

<sup>280</sup> See, for example, Fischel and Sykes, 1 *Am L & Econ Rev* at 316 (cited in note 19):

[G]overnment as a contracting party is not equivalent to the private actor. Voluntary exchange between private parties is presumptively beneficial. The same cannot be said for exchange between private and governmental actors. As the vast public choice literature demonstrates . . . much governmental action is best understood as the outcome of successful rent seeking that benefits well-organized interest groups at the expense of the public at large, and contracting with the government can be just another form of rent-seeking behavior.

form, because there are two layers of agency costs operating simultaneously.

### 1. Interest group pressure.

Because governments are agents, there is always the risk that they may not be acting in the best interests of their constituents even at the time they adopt a law or policy.<sup>281</sup> As public choice theorists have demonstrated, government officials may be motivated by their own self-interest instead of the best interests of their constituents or the community. This form of agency malfunction is already well understood.<sup>282</sup> The stakes go up dramatically, however, if the decision is then entrenched against subsequent regulatory change.<sup>283</sup> Special interests already have an incentive to rent seek from the government. But if government decisions—regulatory forbearance, tax benefits, and so on—can also be immunized from change, then the value of rent-seeking also increases, which will induce even more aggressive special-interest-group pressure.

This would not be conceptually problematic if the stakes rise for all affected interest groups. While entrenchment creates the possibility of perpetual benefits, it also creates the reciprocal possibility of perpetual costs. Affected groups on the other side should, in theory, be more mobilized, too. In many contexts, however, this relies on an unrealistically rosy assessment of the political process. Despite the potential increase in the cost of a government decision, there are many times when no meaningful interest group is likely to organize on the other side of an issue. At the time of the precommitment, the costs may not be sufficiently apparent, the issue may be too esoteric, or the affected interest groups simply too diffuse or apathetic to generate much in the way of political opposition.<sup>284</sup>

In the absence of entrenchment, the political process provides some remedy for these problems. Once the real costs of a government decision are known, once the burden of a government decision or policy is actually being felt, affected people can then mobilize and

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<sup>281</sup> See Part IV.B.2.

<sup>282</sup> See, for example, Fischel and Sykes, 1 *Am L & Econ Rev* at 328 (cited in note 19).

<sup>283</sup> For a thoroughgoing account of the problem in the context of regulatory contracts, see Dana and Koniak, 148 *U Pa L Rev* at 495–502 (cited in note 20) (noting especially that industry capture can occur in the process of regulating that same industry).

<sup>284</sup> See, for example, Super, 118 *Harv L Rev* at 2621 (cited in note 62):

One of the best ways of overcoming political opponents is to keep them from realizing that their interests are at risk or, if that fails, to spread the costs of the initiative widely enough that few will find it worth their while to protest. Pushing the costs of a program into the future is an excellent way of achieving both goals.



seek a change. This is quite common at the local level.<sup>285</sup> But if the decision is entrenched against change, there is no subsequent political remedy. The battle, having once been lost, cannot be refought, even if one side had not really been on the field.

Entrenchment can have additional systemic effects on interest group incentives. The possibility of revisiting decisions in the future may in fact prevent interest groups from overreaching in the policy concessions that they initially seek from the government. The expected value of any government benefit today must be discounted by the likelihood of repeal in the future, a likelihood that may increase as governmental benefits to a special interest group increase. By aiming too high, an interest group increases the risk of the government subsequently changing course.<sup>286</sup> Clearly, one should not make too much of this point. Government decisions are often sufficiently sticky, even without any form of entrenchment identified here, that interest groups lobby hard for significant concessions or highly favorable treatment up front. Nevertheless, if government decisions can be effectively entrenched into the future, even that thin constraint disappears. In short, there is good reason to worry that entrenched policies will be the product of special-interest-group pressure and not reflect genuinely good bargains for the public.

## 2. Intertemporal agency costs.

This familiar agency problem is even more pronounced in the context of public entrenchment because government actors are temporary agents for principals who also change over time.<sup>287</sup> Even if government officials believed they were acting in the best interests of their future constituents when they entered into a precommitment, it would be hard for them to anticipate who those constituents will be, let alone what their preferences will be in the future.<sup>288</sup> Later on,

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<sup>285</sup> See *Margolis v District Court*, 638 P2d 297, 306 (Colo 1981) (upholding the power of Colorado's citizens to review rezoning decisions of municipal governments through referendum elections). See also Jonathan S. Paris, Note, *The Proper Use of Referenda in Rezoning*, 29 Stan L Rev 819, 823–24 (1974).

<sup>286</sup> The recent health care debate is an example of this, in which opponents threatened that the passage of certain proposals would lead to a concerted repeal effort by future Congresses. See Stephen Ansolabehere and James M. Snyder Jr, *Money and Institutional Power*, 77 Tex L Rev 1673, 1703 (1999).

<sup>287</sup> See, for example, Michaels, 77 U Chi L Rev at 732–33 & n 56 (cited in note 63) (noting the intergenerational problem of agency costs); Sterk, 88 Colum L Rev at 660 (cited in note 52) (“[T]he principals of the legislature-as-agent shift over time.”).

<sup>288</sup> See Sterk, 88 Colum L Rev at 708–09 (cited in note 52) (“[H]uman frailty limits the capacity of any decisionmaker . . . to appreciate the preferences of those to come and the moral claim the unborn exert upon the living.”); Serkin, 77 U Chi L Rev at 353 (cited in note 7).

deferring to the earlier government's decision is, in some sense, reifying the preferences of a polity that no longer even exists.

The decision to enter into a precommitment should involve evaluating—at least implicitly—the tradeoff between the benefit of inducing reliance today and the loss of flexibility in the future. If the government's end of the bargain is not due until sometime after the next election, however, then current politicians may externalize the costs of the regulatory giveaway on to future politicians. Imagine that rezoning a brownfield for residential development, for example, is politically unpopular. In theory, deferring the legislation and instead promising to rezone the property in the future should also be unpopular. In reality, though, the political costs may be shifted into the future if the rezoning does not become salient to most constituents until it is more imminent. A promise to rezone sometime in the future simply may not arouse voter attention, let alone ire, the way an immediate rezoning sometimes will.

This may be true either because voters' interest and attention is more likely to be tuned in where the effects of a decision are more imminent, or simply because voters' preferences change over time. Today's constituents may value development on the brownfield; tomorrow's may not.<sup>289</sup> But if politicians anticipate leaving office before any of the possible costs come home to roost, a precommitment today may generate few of the political pressures that actually line up against the decision, albeit across generations.<sup>290</sup>

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<sup>289</sup> The obligation of current governments to take into account the costs to the future remains a contested theoretical issue with enormous stakes, particularly in the environmental arena. For some leading treatments, see Richard L. Revesz and Michael A. Livermore, *Retaking Rationality: How Cost-Benefit Analysis Can Better Protect the Environment and Our Health* 10 (Oxford 2008); Louis Kaplow, *Discounting Dollars, Discounting Lives: Intergenerational Distributive Justice and Efficiency*, 74 U Chi L Rev 79, 80–82 (2007); Cass R. Sunstein and Arden Rowell, *On Discounting Regulatory Benefits: Risk, Money, and Intergenerational Equity*, 74 U Chi L Rev 171, 174 (2007). This Article assumes that it is appropriate to take future interests into account, but is agnostic regarding the difficult questions about discount rates and other points of contention between Richard Revesz and Cass Sunstein, in particular. Compare Revesz and Livermore, *Retaking Rationality* at 117, with Sunstein and Rowell, 74 U Chi L Rev at 172–73, 181. See also Eric A. Posner, *Agencies Should Ignore Distant-Future Generations*, 74 U Chi L Rev 139, 139–42 (2007) (distinguishing between intertemporal equity and efficiency and suggesting a steep discount rate).

<sup>290</sup> Some might object to this whole discussion because agency costs are hardly unique to governments. Indeed, precommitments by corporate officers may raise some of the same sets of issues, if the costs of some precommitment or promise can be shifted far out into the future. In fact, however, corporations come with the additional protection that their ultimate responsibility to maximize shareholder value ensures a continuity of interests over time that governments do not share. Consider Ronald Cass, *Privatization: Politics, Law, and Theory*, 71 Marq L Rev 449, 483 (1988) (“Public enterprises . . . seldom possess a single or a clear goal.”).

Of course, the likelihood of a government shifting costs into the future is at least partly dependent on political conditions. Politicians who, for whatever reason, expect to serve extremely long terms cannot pass costs on to future politicians as easily. In small local governments, with few demographic pressures and relatively stable preferences, the opportunity for local politicians to externalize costs on to the future also appears relatively small. Homeowners dominate many suburban and small-town governments. They not only wield considerable control over local decisionmaking, but they are also generally united in their interest in preserving local property values.<sup>291</sup> There is little opportunity to shift costs into the future if those costs are capitalized into property values.<sup>292</sup> And even if that is not true—even if the market is not so sensitive to the long-term policy commitments of local governments—residents themselves may well anticipate bearing the future costs of government actions because homeowners move less often than others.<sup>293</sup> In communities with less stable populations and preferences—larger municipalities, or towns or suburbs facing demographic shifts—this political feedback largely disappears.

### 3. Preventing future political malfunction.

Arguably, the politics of entrenchment can cut both ways. Entrenching decisions can be the product of political malfunction, but they can also be used to limit future political malfunctions. For example, political conditions today might be majoritarian and democratically responsive. But, faced with the possibility of a new economic or political powerhouse coming into town—a developer, or a chain store with a sophisticated land use apparatus—a local government may well seek to prevent special-interest-group capture in the future by acting to entrench decisions today.<sup>294</sup>

In its general form, this motivation is entirely consistent with traditional examples from personal or private precommitments. Why does someone lock his cigarettes in a drawer?<sup>295</sup> If he knows today that

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<sup>291</sup> See Fischel, *Homevoter Hypothesis* at 4 (cited in note 41); Serkin, 107 Colum L Rev at 945 (cited in note 248).

<sup>292</sup> See Fischel, *Homevoter Hypothesis* at 39–57 (cited in note 41) (discussing capitalization).

<sup>293</sup> See *id.* at 15 (discussing homeowners as a dominant political force); Lee Anne Fennell and Julie A. Roin, *Controlling Residential Stakes*, 77 U Chi L Rev 143, 144 (2010) (“[A]lthough local governments may want to control the size and shape of residential stakes, existing stakeholders currently control local government policy.”).

<sup>294</sup> This resembles the justification for poison pills and other antitakeover devices in corporate law that are designed to protect current shareholders from future attempts to capture shareholders’ voting power.

<sup>295</sup> The image more typically invoked to convey this idea is Odysseus lashing himself to the mast. See Adam M. Samaha, *Dead Hand Arguments and Constitutional Interpretation*, 108 Colum

smoking is not in his best interests, can he not count on his future selves to make the same rational calculation?<sup>296</sup> The answer, of course, is no. He may well lock the cigarettes away, sell the television, hide the credit cards, or throw away the cake in a moment of strength, rightly anticipating future moments of weakness. This is directly analogous to using entrenchment to prevent future government actions that almost everyone opposes but that, because of political malfunctions like collective action problems, monitoring costs, agency capture, and the like, might actually be hard to stop.<sup>297</sup>

It can also be the product of less benign efforts simply to assert policy preferences into the future, however. Imagine that a government owns (or has regulatory authority over) an undeveloped and environmentally sensitive piece of land that some interest group nevertheless wants to develop. The government can, of course, choose simply not to permit the property to be developed on its watch. This will reserve the same choice to future governments: permit development or not. So why might a government go one step further and seek to entrench its preference for conservation?

One likely explanation comes from mistrust of future policies and preferences. If the government today could count on future governments to recognize and appreciate the value of conservation, then it would expect those future governments not to develop or otherwise harm the property either (unless conditions truly changed so that conservation was no longer appropriate or necessary). Attempts to entrench conservation—perhaps by conveying conservation easements—therefore manifest an implicit assumption that future governments cannot be trusted to protect the property adequately.<sup>298</sup> The government today is essentially asserting that it is

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L Rev 606, 655–56 & n 198 (2008), citing Jon Elster, *Ulysses and the Sirens: Studies in Rationality and Irrationality* (Cambridge 1979).

<sup>296</sup> Levinson, 124 Harv L Rev at 672 (cited in note 264). See also Derek Parfit, *Reasons and Persons* 158–63 (Oxford 1984). Jeremy Waldron offers a nuanced account that uses as one example a drinker giving his car keys to a friend at a party. Waldron, *Law and Disagreement* at 259 (cited in note 42). As this example makes clear, the precommitment can simply be to allocate future decisionmaking authority to someone else—a sober friend, the courts, and so forth. For general purposes here, little turns on the distinction, but Waldron's nuanced treatment demonstrates even more heterogeneity in the category of entrenchment.

<sup>297</sup> These are some of the typical causes of principal–agent problems in the context of government decisionmaking. See, for example, Matthew C. Stephenson and Howell E. Jackson, *Lobbyists as Imperfect Agents: Implications for Public Policy in a Pluralist System*, 47 Harv J Legis 1, 20 (2010) (“[I]ncomplete information and imperfect monitoring may create a principal–agent problem between lobbyists and the constituencies they represent and advise.”).

<sup>298</sup> See, for example, Waldron, *Law and Disagreement* at 221–22 (cited in note 42):

[The attitude of constitutional entrenchment] is best summed up as a combination of self-assurance and mistrust: self-assurance in the proponent's conviction that what he is putting forward really is a matter of fundamental right . . . ; and mistrust, implicit in his view that

likely to be better at appreciating the “real” value of conservation than future governments and is using entrenchment to lock that valuation into the future.

Unfortunately, it can be difficult, if not impossible, to tell whether a government action is preventing a political malfunction in the future or is an intergenerational power grab. One government’s policy judgments may simply differ from the next one’s. Predictable demographic changes may lead to foreseeable shifts in preferences, but these are hardly political “malfunctions.” Governments undoubtedly engage in good faith efforts to lock in policies in order to prevent what they perceive to be political malfunctions in the future, but this is largely indistinguishable from efforts to lock in policy simply for the sake of preventing change. Indeed, this impulse is consistent with the idea that the desirability of entrenchment increases with the variance in policy preferences over time.<sup>299</sup> Therefore, despite the theoretical appeal, preventing future political malfunction is not a benefit that justifies entrenchment in the real world because it is too hard to distinguish from a naked attempt to assert preferences into the future.

In conclusion, there are good reasons to worry that governments will not weigh the costs and benefits of entrenchment appropriately. With the possibility of agency malfunction, government actors may well make promises that generate disproportionate future harm, given the immediate gain. Before offering solutions, however, a prior question remains: How should these costs and benefits be compared intertemporally?

### C. Comparing Entrenchment’s Costs and Benefits Ex Ante

Allowing a government to make binding precommitments can generate benefits for that government, but can also impose costs into the future. Superficially, this looks like a version of any bilateral interaction where parties have different preferences. If the benefits at Time 1 outweigh the costs at Time 2, then the entrenching action should be permitted, and otherwise not. The problem here is that the parties—the entrenching and the subsequent governments—never exist simultaneously. This creates a somewhat complex choice about

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any alternative conception that might be concocted by elected legislators next year or in ten years’ time is so likely to be wrong-headed or ill-motivated that *his own* formulation is to be elevated immediately beyond the reach of ordinary legislative revisions.

A slightly less paternalistic account acknowledges that future governments may actually appreciate the conservation if it prevents certain political fights from forming in the first place. In this way, conservation can function like a shark repellent in corporate law, keeping the sharks from even taking an interest. See Serkin, 77 U Chi L Rev at 350 (cited in note 7).

<sup>299</sup> See Part III.D.

the temporal perspective to adopt when evaluating an entrenching government action.

There is a burgeoning academic literature on the problem of intergenerational equity.<sup>300</sup> Typically, this focuses on obligations that current generations owe to the future. For entrenchment, the temporal perspective is reversed: How should today's generations value the preferences of the past? This puts a surprising twist on the problem of intergenerational equity and presents a neat conceptual problem in thinking about how to compare costs and benefits across time.

It is possible to interpret anti-entrenchment rules to mean simply that the law prioritizes the preferences of the present over those of the past. But this proves either too much or too little. Taken literally, it would mean that precommitments could never bind future governments. That is both doctrinally and normatively implausible, as even medium-term contracts would therefore be unenforceable, to name just one consequence. But, taken less than literally, it reveals nothing about how to decide when a precommitment takes too much away from the future.

It is therefore helpful to consider the problem in the more familiar context of the law of wills and trusts. One of the deep theoretical issues animating that area of law is the ability of a testator to control the disposition of her property after her death (dubbed "dead hand control"<sup>301</sup>). Gregory Alexander, in evaluating the history of the dead hand in nineteenth-century trust law, described how early theorists objected to dead-hand control on grounds that it restrained alienability. Any restriction imposed on property today reduces people's freedom in the future to do with it what they want. As people grew more sophisticated in their thinking about the problem, however, they began to recognize that limiting dead-hand control actually increased the alienability of property from the perspective of the beneficiary but restricted it from the perspective of the grantor (or settlor).<sup>302</sup> That is, increasing dead-hand control removes power from beneficiaries, but decreasing dead-hand control removes power from the grantor.<sup>303</sup> This, of course, is the same fundamental conflict that entrenchment presents: increasing the power of an earlier government to entrench its policies decreases the power of subsequent governments to decide policy for themselves.

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<sup>300</sup> See note 289.

<sup>301</sup> Lewis M. Simes, *Public Policy and the Dead Hand* 3 (Michigan Law 1955).

<sup>302</sup> See Gregory S. Alexander, *The Dead Hand and the Law of Trusts in the Nineteenth Century*, 37 *Stan L Rev* 1189, 1198 (1985).

<sup>303</sup> See Hirsch and Wang, 68 *Ind L J* at 19–20 (cited in note 277).

Over the course of hundreds of years, courts have frequently had to decide, in the context of trusts and estates, whether to uphold a testator's property-use restriction that living beneficiaries want to invalidate.<sup>304</sup> If a testator leaves Blackacre to her heirs so long as no liquor is served on the premises, should that restriction be enforced against a beneficiary who wants to open a wine bar? In its general form, the problem arises whenever a grantor encumbers property to reflect a set of preferences at odds with those of the beneficiaries. A beneficiary might prefer to serve wine, sell the family homestead, spend the corpus of her inheritance, or otherwise use her property in a way that conflicts with what the grantor preferred.<sup>305</sup> What to do?

One misleading way to view tradeoffs is as a static example where the goal is simply to give the legal entitlement to the party who values it more. In the conflict between testators and beneficiaries, one might be tempted to think that the stronger preference should win out. If it is more important to the testator that a restriction on property remain in place than it is to the beneficiary that the restriction be lifted, then the restriction should be enforced, and otherwise not.<sup>306</sup> The grantor may not really have cared about the sale of liquor, and the beneficiary may desperately want to open a bar.

In fact, however, failing to enforce some dead-hand restriction over property has no meaningful effect on the welfare of the testator who is, after all, dead. It is not welfare enhancing to follow the preferences of someone who has no welfare to be enhanced. Therefore, the problem of dead-hand control cannot be resolved by reference to the relative strength of the particular parties' actual preferences. The living beneficiary has preferences; the dead testator does not.

The utilitarian concern with dead-hand control, then, is the systemic effect on future testators. Indeed, one of the strongest justifications for respecting dead-hand control is an extension of the principal justification for testamentary freedom more broadly: it encourages industry and thrift during life.<sup>307</sup> If people knew that their wishes for their property would not be enforced after death, then they

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<sup>304</sup> See, for example, *Shapira v Union National Bank*, 315 NE2d 825, 832 (Ohio Ct Com Pleas 1974) (upholding a will requiring the beneficiary to marry a Jewish woman); *In re Estate of Brown*, 528 A2d 752, 755 (Vt 1987) (refusing to terminate a trust despite the wishes of the beneficiaries).

<sup>305</sup> Hirsch and Wang, 68 Ind L J at 19 (cited in note 277).

<sup>306</sup> Id at 20 ("[A] use restriction is of efficient duration where the marginal benefit to the testator of extending the restriction . . . equals the marginal benefit to the beneficiary and to society of terminating the restriction.").

<sup>307</sup> Id at 7–8; Josh Tate, *Perpetual Trust and the Settlor's Intent*, 53 U Kan L Rev 595, 624 (2004) (citing sources).

would have little incentive to accumulate and preserve wealth toward the end of their lives. Testamentary freedom and dead-hand control offset those pressures. By increasing the marginal value of property retained at the time of death, people have an added incentive to accumulate and to save.

This relates directly to the problem of entrenchment. A subsequent government—occupying a position similar to a beneficiary in a testamentary trust—has no opportunity to go back in time to bargain with an earlier government (analogous to the grantor) over the temporal scope of a plan or policy.<sup>308</sup> But as the analogy to dead-hand control makes clear, the issue should not be resolved by asking whether the precommitment was worth more to the entrenching government than getting out of the precommitment is worth to the government seeking to escape its restrictions. The concern, instead, is with the systemic effects in the future if governments either can or cannot entrench laws and policies. In other words, the problem should not be viewed *ex post*, comparing the value of the entrenchment to the original and the subsequent government, but instead *ex ante*, focusing on the effect on future governments.<sup>309</sup>

The key is to recognize that every government is simultaneously a present and future government *vis-à-vis* others in time. That is to say, a government inherits earlier governments' precommitments but benefits from being able to make precommitments of its own. The question, in the abstract, should then be how much power government actors, in general, want to have to control the future, knowing that it means accepting the thick cords of preexisting obligations.<sup>310</sup>

Framing the question this way might seem to recreate the problem at one higher level of abstraction. When different government actors have different preferences about the ability to bind the future, whose should win, the past's or the present's? In fact, though, this framing suggests some general outline of the limits of

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<sup>308</sup> This inability to bargain is a central justification for treating wills and testamentary trusts differently than traditional contracts and gratuitous promises. See Richard A. Posner, *Gratuitous Promises in Economics and Law*, 6 *J Legal Stud* 411, 413–14 (1977).

<sup>309</sup> Consider Gillette, 78 *BU L Rev* at 830–31 (cited in note 45) (describing the benefits to current legislators of adhering to past bargains, such as a reputation for reliability that would allow the legislator to exact higher rents); Dana and Koniak, 148 *U Pa L Rev* at 518 (cited in note 20) (“To deter capture and compromise contracts, it is necessary for the parties to believe at the time the contract is formed that a court would be able to tell whether the contract reflects capture or compromise more than opportunism protection.”).

<sup>310</sup> This could be framed in terms of some Rawlsian veil of ignorance: If a government did not know whether it was the entrenching or the entrenched government, would it, in the abstract, embrace the enforceability of a particular precommitment? See John Rawls, *A Theory of Justice* 12 (Belknap 1971). See also Adrian Vermeule, *Veil of Ignorance Rules in Constitutional Law*, 111 *Yale L J* 399, 399 (2001).



entrenchment, even if precise line drawing will necessarily remain elusive. There is presumably some level of government control over the future that virtually all government actors would want. Every government benefits from the power to enter into some kinds of contracts or issue some amount of debt, even if it means being bound by predecessors' actions in those regards. More generally, every government actor would like to be able to generate the benefits of inducing third-party reliance, at least where the costs are not too high. But when are the costs too high?

Trusts and estates is again a useful place to turn to begin to answer the question. Scholars in that field have recognized that there is no "right" answer to the problem of dead-hand control.<sup>311</sup> Increasing alienability for the settlor decreases it for the beneficiaries. But the law also appears to recognize that the value of dead-hand control decreases over time while its costs inevitably rise.<sup>312</sup> That is, a testator may care deeply that property remains in the family for the next fifty years, less so for the following fifty, and be relatively indifferent to the fifty after that. Simultaneously, the interests of beneficiaries in freeing themselves from dead-hand control increase as the world and people's preferences and expectations change.<sup>313</sup> In the law of trusts, the rule against perpetuities is the awkward compromise designed to address these competing pressures. It sets a temporal limit—admittedly byzantine—on the provisions of a trust.<sup>314</sup> As such, it equilibrates the competing interests of settlors and beneficiaries.<sup>315</sup>

The rule against perpetuities is a rule no modern theory should emulate, but it nevertheless provides a useful outline for viewing the competing pressures in entrenchment.<sup>316</sup> Interpreting it broadly, it

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<sup>311</sup> Gregory Alexander refers to the choice as one of "naked preference." Alexander, 37 *Stan L Rev* at 1193 (cited in note 302), citing Cass Sunstein, *Naked Preferences and the Constitution*, 84 *Colum L Rev* 1689 (1984).

<sup>312</sup> See, for example, Kirsten Rabe Smolensky, *Rights of the Dead*, 37 *Hofstra L Rev* 763, 789–91 (2009) ("[A] decedent's interests (and perhaps the importance of those interests) decrease over time, while the interests of a living person can increase or decrease over time.").

<sup>313</sup> For the definitive treatment of this issue and a proposal giving beneficiaries the right to terminate perpetual dynasty trusts, see Jesse Dukeminier and James E. Krier, *The Rise of the Perpetual Trust*, 50 *UCLA L Rev* 1303, 1327, 1341–42 (2003).

<sup>314</sup> It is, of course, not a fixed temporal limit, but requires merely that contingent interests either vest or fail within the perpetuities period (twenty-one years from the death of a life in being at the time of the conveyance).

<sup>315</sup> *Cy pres* provides a good example of an ex post de-entrenching mechanism that could also serve as a valuable analogy. See Alberto B. Lopez, *A Revaluation of Cy Pres Redux*, 78 *U Cin L Rev* 1307, 1310 (2010).

<sup>316</sup> It is also a rule in transition. Despite the rule's durability, the American Law Institute has recently adopted a new restatement of donative transfers that quite fundamentally transforms the rule against perpetuities. See Restatement (Third) of Property: Wills and Other Donative Transfers § 27.1, comment a (Tentative Draft no 6 2010).

stands as an outer bound on dead-hand control, recognizing that the benefits of restricting the future decrease as time passes, and that the costs inevitably increase. Notice, then, that the competing interests of testators and beneficiaries are not necessarily locked in a zero-sum game. The rule against perpetuities thus aims toward the goal of maximizing the value of alienability—protecting the testator’s freedom when it is more valuable to her, but eventually protecting the beneficiaries’ control over the property when it becomes more valuable to them.

The nature of the inquiry in trusts and estates is not whether dead-hand control is permissible, but instead how much dead-hand control to permit. The same is true of entrenchment. As this Article has demonstrated, entrenchment is not static or some singular feature of government actions that either is present or not. Instead, entrenchment exists on a spectrum.<sup>317</sup> All government actions are entrenching to some extent. The real inquiry, then, is how much entrenchment to permit.

## V. RECALIBRATING ENTRENCHMENT PROTECTION

Having identified the ubiquity of entrenchment through private law, the forms it takes and the protections in place, and the costs and benefits that it can create, this Part offers some tentative prescriptions. It should be apparent from the preceding discussion that no single legal rule can respond adequately to the problem of entrenchment. The extent to which governments should be allowed to bind the future depends on the benefits the government is trying to create, the costs at stake to the future, and whether political malfunctions are likely to distort how governments compare them. This cannot be assessed in the abstract. Nevertheless, it is possible to develop an overall conceptual framework for evaluating entrenchment, and then to apply it to some particularly contested and evolving areas of law.

### A. The Limits of Entrenchment

When are government precommitments too entrenching? That question framed the beginning of this Article, but it can now be restated: What are the precommitments that every government will want the power to make, and what are the policy restrictions that no government should want to inherit?

It is important to have modest expectations about the content of any specific conclusion. One problem is that many government

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<sup>317</sup> See text accompanying notes 9–10.

decisions are like forks in the road, and each path is entrenching. Building out infrastructure to a certain capacity is a physically entrenched growth control, but not investing in infrastructure might have an even stronger entrenching effect. Opening a municipal hazardous waste facility might be physically entrenching (for centuries), but forgoing that income stream might impose an equally tight financial straitjacket on the future. Both action and inaction can be entrenching, and building up procedural hurdles and *ex ante* prohibitions in these situations may not prevent entrenchment, but may instead simply shift it to a different form. It would put a thumb on the scale of inaction instead of action, which can also constrain the future.

A related problem is that the difference between an entrenching government action and a de-entrenching one is often just temporal perspective. A government that incurs pension liabilities shifts payment obligations on to the future. But if a subsequent government seeks to de-entrench those obligations—through bankruptcy or some other form—that will make it far more difficult for subsequent governments to induce reliance by public employees, presumably translating into some combination of higher wages and less qualified employees. Current discussions of municipal pension liabilities often include an implicit criticism of earlier governments for making unaffordable precommitments. But reversing those precommitments creates its own costs for future governments, whose employment promises are then worth less. There is a *damned-if-you-do, damned-if-you-don't* aspect to the entrenchment problem in such situations. The only absolute certainty is that, no matter what, governments will continue to guess wrong about the future.

Fundamentally, though, public entrenchment is a problem because of the opportunity for intertemporal cost shifting. As examined in Part IV, a government that simply guesses wrong about the future occupies a position no different from private actors making bad bets.<sup>318</sup> The need for de-entrenching mechanisms increases with the likelihood that a government is discounting—or even anticipatorily rejecting—the interests of future generations.<sup>319</sup> Importantly, though, all government actions present that risk to some extent. It is all but impossible to distinguish between a bad guess about the future and a decision that is at least partly the result of ignoring the interests of the future.

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<sup>318</sup> See text accompanying notes 278–79.

<sup>319</sup> See text accompanying notes 264, 288, and 290.

The outer limits of entrenchment now begin to take shape. As a first pass, governments' power to preclude subsequent policy changes should be as limited as possible. Private precommitments that are immune from change look functionally equivalent to unrepealable legislation. No matter the strength of a subsequent government's preferences, no matter how badly it wants to change, such private precommitments lock in the preferences of the past. On the other side, every government will want some capacity to induce at least some private reliance. A world without binding contracts or vested rights would be an unappealing legal quicksand of instability and flux. In general, then, de-entrenching mechanisms should be available whenever possible, but should not be too easy for subsequent governments to exercise.

Of course, some government actions cannot be undone, and they are not necessarily inappropriate because of it. Entrenchment through physical destruction is a good example. There are times when governments should permit destruction—and indeed times when they must—and the only choice is between which resource to destroy. Where de-entrenching tools like eminent domain are not available, *ex ante* protections should be in place, either prohibiting an entrenching action in the first place or at least imposing significant procedural protections to minimize the risks of political malfunction.

This is not a call for the strongest possible form of anti-entrenchment protection in every case, however. Entrenchment protection itself is not free. Instead, entrenchment should be calibrated to generate the most benefit at the least cost. Conceptually, public precommitments should be enforced to an extent that maximizes their net benefits, bearing in mind both the benefits of reliance and the potential costs imposed on future governments. This implicates a complex interaction between procedural protections and *ex post* de-entrenching mechanisms.

The lower the likelihood of political failure—either because of procedural protections or because of the local political context—the less the need for substantive entrenchment protection. Indeed, in the absence of any risk of political malfunction, there would be no reason to treat governments differently from private actors. But procedural protections can be very expensive. They consume money, time, and limited voter attention, and even at their most robust will never entirely eliminate the possibility of government decisionmakers discounting or ignoring the future. At the same time, de-entrenching mechanisms preserve future flexibility but impose costs of their own, principally from the diminished ability to generate reliance on government precommitments. Adjusting the strength of de-entrenching tools will determine the extent of those costs.

The actual costs and benefits at stake cannot be determined in the abstract. The following sections therefore demonstrate how entrenchment could be calibrated in specific contexts. The examples that follow are simply examples, and the analysis is illustrative instead of definitive. People may well disagree with some of the animating empirical claims and intuitions. Nevertheless, disagreements on those grounds simply help to identify where subsequent work should focus to calibrate entrenchment differently.

## B. Vested Rights and Eminent Domain

Vested development rights are a useful case study for calibrating entrenchment protection.<sup>320</sup> Vested rights confer important benefits in the form of third-party reliance. The opportunity to vest development rights may induce developers to buy into a municipality and then to make efficient investment decisions without the distorting effect of some threatened regulatory change. On the other hand, the stronger the vested rights, the harder it is for a subsequent government to decide that property should not be developed, or to otherwise adopt different development and land use policies. Of course, the strength of the vested right depends fundamentally on how easy it is for a subsequent government to remove. Eminent domain is the principal mechanism for de-entrenching vested rights, and adjusting compensation is the most straightforward way of calibrating its strength.

If eminent domain is very expensive for subsequent governments to undertake, an owner will be more willing to rely on her vested development rights.<sup>321</sup> This is true both because the government is unlikely to seize the rights in the first place—the cost is too high—and because, if the government does take them, then the owner will be well compensated. Conversely, if eminent domain becomes too cheap, then it will be harder to induce reliance on the development rights. Developers holding weakly protected development rights might inefficiently race to develop their property or might simply forgo altogether buying into a community.<sup>322</sup>

Adjusting compensation also affects the costs of entrenchment. The more future governments have to pay, the less flexibility they have to prevent development on the site. Alternatively, if compensation is

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<sup>320</sup> See Part II.B.

<sup>321</sup> It may well be that reliance on vested development rights means having the confidence to *not* develop, allowing the developer to take her time and not race to lock in a particular use. See Serkin, 84 NYU L Rev at 1278–79 (cited in note 81).

<sup>322</sup> David A. Dana, *Natural Preservation and the Race to Develop*, 143 U Pa L Rev 655, 668–95 (1995) (describing race to invest).

sufficiently inexpensive, governments can change course quite easily, subject, of course, to political costs, considered below.<sup>323</sup> Cheap liability rule protection therefore means that entrenchment imposes relatively few intertemporal costs on future governments, but also generates few benefits from third-party reliance.

The correlative nature of these costs and benefits does not necessarily make the project of calibrating entrenchment futile. First, private parties may not need to be fully insured against the risk of regulatory change to be induced to rely on vested development rights. A risk-averse developer may well demand some form of protection against eminent domain, for example, but—given the shape of typical indifference curves—may not need to be made fully whole to generate most of the benefits of vested rights. That is, protection from a significant wipeout (say, the first \$500,000 of compensation) is more important to a risk-averse owner than protection of the full value of the property (say, the last \$500,000).

Conversely, governments are likely to be relatively insensitive to the costs of eminent domain up to a point, after which their responsiveness will rise dramatically. For some government actors, it may be that fiscal costs do not translate directly into political costs below a certain threshold, but that their salience increases significantly as the financial cost goes up. In other words, a local official may be relatively indifferent to a \$100,000 tab but paralyzed by a \$1 million one, and the change between the two is stepwise, not linear. Or it may just be that local government actors are also risk averse, and so the prospect of a significant loss is disproportionately greater than the prospect of a small one.<sup>324</sup> Whatever the cause, whenever this is true, the harm of lock-in will increase disproportionately at the higher ends of compensation. That is to say, the most significant entrenching effects will often come at higher levels of compensation.

Theoretically, then, compensation should be set to maximize the net benefits of entrenchment, which means permitting entrenchment to the point that each additional dollar in compensation creates less benefit in third-party reliance than harm to future governments. More colloquially, you can increase the size of the pie by making it

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<sup>323</sup> See note 325 and accompanying text.

<sup>324</sup> See Serkin, 81 NYU L Rev at 1666–68 (cited in note 39). Much academic literature assumes that governments are entirely risk neutral. See, for example, Loren Brandt, Hongbin Li, and Joanne Roberts, *Banks and Enterprise Privatization in China*, 21 J L, Econ, & Org 524, 528 (2005); Michael Abramowicz, *Perfecting Patent Prizes*, 56 Vand L Rev 115, 151 (2003); Lewis A. Kornhauser, *On Justifying Cost–Benefit Analysis*, 29 J Legal Stud 1037, 1042 n 13 (2000).

expensive, but not too expensive, for the government to change course.

The exclusive focus on compensation here obviously disguises the enormous complexity in determining the full costs to a future government of exercising a de-entrenching mechanism like eminent domain. Compensation's effect on political opposition is dynamic, so that lower compensation, in some cases, might increase the political costs of eminent domain if it causes condemnees to lobby harder to resist government actions.<sup>325</sup> At the very least, the sensitivity of government actors to fiscal costs will vary depending on the size and character of the government. Some government actors are likely to be insensitive to fiscal costs, and others quite the opposite.<sup>326</sup> But the general point remains: in many situations, offering less than complete protection can maximize the overall benefit of many government precommitments, at least from the perspective of entrenchment.

Notice that this offers some important lessons for eminent domain. It is by now a routine complaint that condemnation awards fail to compensate owners fully for the loss of their property.<sup>327</sup> Just compensation, measured by a property's fair market value, does not generally compensate for consequential damages and subjective value.<sup>328</sup>

Those who have defended current compensation practices usually do so on either administrative or practical grounds. They argue that additional damages are either too hard or costly to measure, or they worry about the deterrent effect on government actions if the government is required to pay higher compensation.<sup>329</sup> Entrenchment, however, provides an important theoretical justification for less than full compensation, at least in some cases. The entrenchment calculus calls for balancing the ability to induce reliance on government

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<sup>325</sup> See Lawrence Blume and Daniel L. Rubinfeld, *Compensation for Takings: An Economic Analysis*, 72 Cal L Rev 569, 591–92 (1984).

<sup>326</sup> See Serkin, 81 NYU L Rev at 1668 (cited in note 39).

<sup>327</sup> Lee Anne Fennell, *Taking Eminent Domain Apart*, 2004 Mich St L Rev 957, 958–59 (identifying the “uncompensated increment”); Christopher Serkin, *The Meaning of Value: Assessing Just Compensation for Regulatory Takings*, 99 Nw U L Rev 677, 700–01 (2005) (describing approaches to compensation); Yun-chien Chang, *An Empirical Study of Compensation Paid in Eminent Domain Settlements: New York City 1990–2002*, 39 J Legal Stud 201, 226 (2010) (finding that compensation is generally below fair market value). But see Katrina Miriam Wyman, *The Measure of Just Compensation*, 41 UC Davis L Rev 239, 244 (2007) (suggesting that the just compensation standard need not provide full compensation).

<sup>328</sup> See Serkin, 99 Nw U L Rev at 734 (cited in note 327). But see Nicole Stelle Garnett, *The Neglected Political Economy of Eminent Domain*, 105 Mich L Rev 101, 121–23 (2006) (finding enhanced compensation under a federal statute providing relocation assistance for displaced property owners), citing Uniform Relocation Assistance and Real Properties Acquisition Act, Pub L No 91-646, 84 Stat 1894, codified as amended at 42 USC § 4630 (1971).

<sup>329</sup> Serkin, 99 Nw U L Rev at 705–06 (cited in note 327).

precommitments on the one hand, with preserving future flexibility on the other. In the face of these competing goals, and assuming something less than perfect *ex ante* procedural protection, the optimal outcome may often be something short of full compensation.<sup>330</sup>

Focusing on the de-entrenching role of eminent domain also casts a new light on recent efforts at eminent domain reform. Following the Supreme Court's controversial 2005 decision in *Kelo*, most states have adopted new limits on local governments' power to take property.<sup>331</sup> Some measures have been cosmetic, but others have been quite restrictive.<sup>332</sup> Eminent domain is less available today than it was even a few years ago.<sup>333</sup>

The problem, fundamentally, is that debates over eminent domain reform have focused on the impact of condemnation only on private property.<sup>334</sup> Typically, states have tried to rebalance governments' power to assemble property with owners' property rights. This has largely overlooked the important structural role that eminent domain can play in limiting the temporal reach of government actions. In other words, through sheer lack of attention, eminent domain reform has significantly limited a core de-entrenching mechanism. Ignoring this consequence may make once-routine government actions—like the sale of municipal property, or the granting of a franchise or license—inappropriately entrenching because the actions are now much more difficult for subsequent governments to undo.

This is not to suggest that entrenchment concerns are or should be the central justification for eminent domain. There are many values besides entrenchment at stake. However, ignoring the effect of eminent domain reform on government entrenchment undervalues eminent domain's key role in preserving flexibility into the future.

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<sup>330</sup> See text accompanying note 327. This is even more so given the political costs of eminent domain, no matter how small the fiscal costs. See Merrill, 72 Cornell L Rev at 77 (cited in note 170) (discussing the "due process costs" of eminent domain); Christopher Serkin and Nelson Tebbe, *Condemning Religion: RLUIPA and the Politics of Eminent Domain*, 85 Notre Dame L Rev 1, 34 (2009).

<sup>331</sup> See Castle Coalition, *50 State Report Card: Tracking Eminent Domain Reform Legislation Since Kelo*, online at <http://castlecoalition.org/about/component/content/2412?task=view> (visited Jan 12, 2011) (surveying legislative changes). See, for example, Mich Comp Laws § 213.23 (2011); Minn Stat § 117.025 (2010).

<sup>332</sup> For a review, see Somin, 93 Minn L Rev at 2113–16 (cited in note 14).

<sup>333</sup> See *id.* at 2101 (noting that forty-three states have enacted post-*Kelo* reform legislation to curb eminent domain).

<sup>334</sup> See *id.* at 2120.



### C. Breach of Contract and Development Agreements

A similar analysis applies to breach of contract. Under a variety of doctrines, governments can frequently avoid contractual obligations by paying less than what private parties would have to pay. As with just compensation for eminent domain, these reduced damages awards find surprising justification in entrenchment concerns.

In procurement contracts, for example, multiyear contracts are always subject to the availability and appropriation of funds in the future.<sup>335</sup> That is to say, a subsequent government can always choose not to appropriate money to fund the procurement contract. Similarly, governments are required to include a “termination for convenience” clause in procurement contracts, allowing them to cancel the contract unilaterally.<sup>336</sup> When governments fail to include one expressly, courts will often imply one.<sup>337</sup> In both cases, the government is not entirely off the hook. It will have to pay for the reasonable value of any costs incurred, but it need not pay for the full performance value of the contract.<sup>338</sup> A government breaching a procurement contract is generally liable for reliance, not expectation damages.<sup>339</sup>

Importantly, this may be all that is necessary to maximize the value of many government contracts, especially given a significant risk

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<sup>335</sup> Consider Model Procurement Code § 3-503(1) (ABA 2000). The commentary to the 2000 revisions states that the revisions “are intended to clarify that multi-year contracts are a common method of procurement, and that contract durations need not be tied exclusively to fiscal years.” Model Procurement Code § 3-503, comment 1.

<sup>336</sup> See Freeman, 28 Fla St U L Rev at 164–65 (cited in note 67) (“Indeed, despite their apparent similarity to commercial contracts, procurement contracts consistently favor government in a number of ways, by permitting termination for convenience, for example, and by limiting the remedies available to private contractors in the event of government breach.”); McConnell, 1987 U Chi Legal F at 308 (cited in note 5) (“Every procurement contract entered by the federal government contains a ‘termination for convenience’ clause.”). Procurement contracts are also subject to enormously detailed ex ante procedural requirements. Because these involve the selection of a private contractor, and not the procedures for determining whether to undertake the policy in the first place, these are not usefully construed as anti-entrenchment devices.

<sup>337</sup> See Harold J. Krent, *Reconceptualizing Sovereign Immunity*, 45 Vand L Rev 1529, 1567 n 150 (1992), citing *G.L. Christian and Associates v United States*, 312 F2d 418 (Ct Cl 1963) and *United States v Corliss Steam-Engine Co*, 91 US 321 (1875). See also 64 Am Jur 2d Public Works and Contracts § 163 (2001) (finding that courts are willing to imply termination for a convenience clause as matter of procurement policy). But see *Torncello v United States*, 681 F2d 756, 772 (Ct Cl 1982) (refusing to enforce termination for a convenience clause where no contingency arose subsequent to the government’s entering into the contract).

<sup>338</sup> In theory, reliance damages and expectation damages can be the same. But reliance damages here are computed by looking only at what the private party has actually spent. See text accompanying note 339.

<sup>339</sup> Model Procurement Code § 3-503(3). See also Abraham L. Wickelgren, *Damages for Breach of Contract: Should the Government Get Special Treatment?*, 17 J L, Econ, & Org 121, 134 (2001).

of political malfunction.<sup>340</sup> Again, some level of compensation is undoubtedly needed to encourage risk-averse counterparties to contract with governments in the first place. It is hard to imagine how a government could function without the ability to enter into some binding and enforceable contracts. But it may not have to pay full expectation damages for breach in order to secure most of the available contractual benefits. When private parties contract, of course, the law generally defers to their judgments about the extent of the precommitments they want to make and imposes a level of damages that will theoretically allow parties to maximize the value of their contracts.<sup>341</sup> But the possibility of political malfunction on the front end—imposing a disproportionate share of the costs of the contract on the future—means that governments should, in many cases, have more opportunities than private parties to change course. Entrenchment concerns therefore justify the lower damage awards that often apply to government contracts.

This analysis also raises a new concern about development agreements, which have gained both academic and political favor as a tool for attracting development.<sup>342</sup> The specific benefits are obvious. Developers of large projects are understandably skittish about making significant investments in property—such as developing infrastructure or developing the first phases of a multiphase project—if there is a risk that the government will subsequently become inhospitable to the developers' long-term plans.<sup>343</sup> The threat of zoning changes, increased fees, or other demands can make a developer wary about investing in the first place.<sup>344</sup> Local governments can decrease those investment

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<sup>340</sup> See Hadfield, 8 S Cal Interdisc L J at 532 (cited in note 51) (concluding on economic and moral grounds that government liability for breach of contract should be limited to reliance damages).

<sup>341</sup> See Charles J. Goetz and Robert E. Scott, *Liquidated Damages, Penalties and the Just Compensation Principle: Some Notes on an Enforcement Model and a Theory of Efficient Breach*, 77 Colum L Rev 554, 558 (1977) (“As long as the compensation adequately mirrors the value of performance, this damage rule is ‘efficient.’ It induces a result superior to performance, since one party receives the same benefits as performance while the other is able to do even better.”); Hanna Chung, Comment, *Smaller Exchanges, Larger Regimes: How Trading in Small, Interdependent Units Affects Treaty Stability*, 10 Chi J Intl L 825, 836 (2010) (“[C]ontract damages focus on forcing the breacher to internalize the costs to the aggrieved party, so that the breacher only breaches when it is equal or better for both parties to the contract.”).

<sup>342</sup> See Frank, 42 Ind L Rev at 241–42 (cited in note 58); Callies and Tappendorf, 51 Case W Res L Rev at 665 (cited in note 59); Schwartz, 28 BC Envir Aff L Rev at 720 (cited in note 80).

<sup>343</sup> See Armentano, 28 Real Est L J at 259 (cited in note 79):

The development process can be long, difficult, and costly. Developers often must incur substantial expenses before they can be assured that they will be able to complete their projects. Changes in local government officials, revisions to applicable zoning rules, and community opposition all can affect the destiny of a particular project.

<sup>344</sup> See Serkin, 107 Colum L Rev at 902 (cited in note 248).

risks in a variety of ways, but one of the most powerful and direct is to enter into a development agreement, providing an enforceable promise not to modify the regulatory treatment of property for some fixed amount of time into the future.

Unlike other government contracts, however, development agreements can sometimes be enforceable through specific performance.<sup>345</sup> This is likely to be more protection than developers need and may therefore be unnecessarily entrenching.<sup>346</sup> Offering compensation in the event of regulatory change will provide protection, too, while leaving a subsequent government greater freedom to change course. As a general matter, it is difficult to see why development agreements should be enforced through specific performance instead of damages. In many, if not most, cases, the latter should be enough, and could more appropriately and carefully balance the developer's need for certainty with the government's need for flexibility.<sup>347</sup>

#### D. The Public Trust and Inalienable Powers Doctrines

The public trust doctrine is one of the principal sources of substantive *ex ante* entrenchment protection. Its contours are notoriously ambiguous. The Supreme Court identified a federal floor in *Illinois Central Railroad v Illinois*,<sup>348</sup> famously invalidating the conveyance of a significant portion of the Chicago harbor to the Illinois Central Railroad.<sup>349</sup> The Court found that such navigable waters were held in trust for the public and that a government therefore had no power to convey them away. More interesting than this floor, however, has been the expansion of the public trust doctrine

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<sup>345</sup> See note 61 and accompanying text.

<sup>346</sup> There is, for example, a literature on unrepealable contracts, identifying specific contractual settings in which the availability of efficient breach (or *ex post* liability rule protection more generally) diminishes the joint benefits the parties could otherwise have expected to receive. See, for example, Davis, 81 NYU L Rev at 494 (cited in note 274) (discussing scenarios where "in order to induce efficient behavior at an early stage in their relationship ('*ex ante*') the parties must sign a contract that commits them to behaving inefficiently at a later stage ('*ex post*')").

<sup>347</sup> This will depend on the value of the development, elasticity in regional property markets (that is, the availability of substitutable property for the developer), and the opportunities available to the government to make substitute concessions, among other factors. On the other side of the equation, the costs of the development agreement will depend on the likelihood that a subsequent government will actually want to adopt a different land use regulation within the period covered by the development agreement. In a small municipality with little mobility and stable preferences over time, a development agreement may present far fewer risks than it does in a rapidly growing suburb or urban center.

<sup>348</sup> 146 US 387 (1892).

<sup>349</sup> *Id.* at 463–64.

in many states. For example, a number of states have expanded it to apply specifically to environmentally sensitive lands.<sup>350</sup>

Entrenchment provides a potential justification for this expansion. One litmus test should be whether conveying the property from public to private hands risks destruction of the underlying resource. Where destruction is at stake, a subsequent government will not have the opportunity to reacquire the property later—not even through eminent domain—and the conveyance of the property may therefore irretrievably impoverish the future.<sup>351</sup> But where destruction is not a risk, and eminent domain is available as a remedy, expanding public trust makes much less sense, at least viewed in terms of entrenchment.

A similar analysis applies to the inalienable powers doctrine. Conveying away the ability to regulate for the health, safety, and welfare of the public is like selling core public trust property; the threat it poses to the future is generally too great to permit. Entrenchment analysis, however, highlights the importance of allowing governments to indemnify private parties for the costs of regulatory change. Ex post property rules, or ex post applications of the inalienable powers doctrine, make it difficult—sometimes prohibitively difficult—for a government to induce reliance on its precommitments. Developers and investors may not need promises of future regulatory treatment to be specifically enforceable, but they may require a secure promise of compensation for future adverse decisions.

Entrenchment also provides an additional justification for the rule that the power of eminent domain is itself inalienable.<sup>352</sup> A government cannot give up its power to condemn property. As applied to eminent domain, the inalienable powers doctrine preserves future flexibility both directly and indirectly: directly by preventing governments from handing over their regulatory power, and indirectly by preserving eminent domain as a de-entrenching mechanism for future governments.

#### E. Financial Entrenchment

As described in Part II, municipal governments have found increasingly sophisticated ways to avoid substantive debt limits and

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<sup>350</sup> See Craig, 16 Penn St Envir L Rev at 20–21 (cited in note 220) (cataloguing the public trust doctrine in eastern states).

<sup>351</sup> Public trust undoubtedly serves other goals as well. A government may well have an interest in preventing the kinds of collective action problems that can result from fractionated ownership of navigable waterways, for example. See Heller, *Gridlock Economy* at 26 (cited in note 223).

<sup>352</sup> See, for example, *West River Bridge Co v Dix*, 47 US (6 How) 507, 531–32 (1848). See also Sterk, 88 Colum L Rev at 672–73 (cited in note 52) (describing the doctrine).

bond election requirements.<sup>353</sup> Admittedly, it may be that these are changes for the good. At its best, municipal debt is actually a solution to a different kind of intertemporal externality problem. Certain investments that a local government undertakes will create positive externalities into the future, and debt simply aligns costs and benefits. Infrastructure development, for example, may require a significant upfront payment but create benefits for years. A government's floating a municipal bond to fund infrastructure development, then, allocates to the future the obligation to pay a fair share of the cost of the infrastructure, given the intertemporal dispersion of benefits.<sup>354</sup> Or, to put it differently, some kinds of investments create positive externalities into the future. Without some mechanism for spreading those costs into the future, too, governments may make too few such investments.<sup>355</sup>

The problem, of course, is the difficulty of determining up front whether the investments really are going to create positive benefits into the future, either because plans pan out badly—as with railroad investments in the nineteenth century<sup>356</sup>—or because future preferences are different. And there is always a chance that municipal debt reflects nothing more than a power grab, an effort to co-opt future income to make cash available today. People have therefore long understood the need for some kinds of constraints on municipal debt in order to prevent a government from mortgaging the future.<sup>357</sup>

The extensive, even if ultimately porous, limits on municipal debt make the contrast with other forms of financial entrenchment all the more striking. It is increasingly clear that the tools of municipal finance have outstripped legal protections against entrenchment. There are, for example, effectively no limits on a government's ability

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<sup>353</sup> See Part II.C.

<sup>354</sup> This is the theoretical justification for the rule that self-liquidating debt used to finance income-producing assets will not be included in municipal debt limits. See note 229 and accompanying text.

<sup>355</sup> How governments actually internalize costs and benefits is the subject of ongoing academic controversy. See, for example, Daryl Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U Chi L Rev 345, 350–52 (2000). While the mechanisms are undoubtedly complex, the claim here is simply that some kinds of projects generate such substantial intertemporal benefits that governments are likely to underinvest in them without some way of either spreading the cost over time or capturing those benefits.

<sup>356</sup> See text accompanying notes 128–30.

<sup>357</sup> See Sterk and Goldman, 1991 Wis L Rev at 1302 (cited in note 128) (arguing that constitutional debt limits have generally worked well). But see Gillette, 86 Denver U L Rev at 1257–58 (cited in note 225) (arguing that credit markets work better at constraining governments than formal limits).

to sell assets.<sup>358</sup> A government can radically impoverish the future by selling off future income streams.<sup>359</sup> Even more problematically, whatever constraints credit markets impose on municipal debt do not apply to the sale of assets; purchasers of municipal assets have little stake in future governments' ability to meet their financial obligations.

If anything, then, there is greater need for protection against some of these alternative forms of financial entrenchment than from traditional municipal debt. Here, recommendations are necessarily tentative, at best, but entrenchment analysis at least suggests some ways of thinking about the problem.

As with municipal debt, there are opportunities for imposing ex ante requirements before monetizing an income-producing asset. It is possible to imagine special election requirements, akin to bond election requirements, and substantive limits on the sale of assets valued above a certain percentage of local assessed property values. Of course, it is difficult to predict whether the protection that these measures provide would be worth their considerable cost, especially given how easily governments circumvent them in the context of municipal debt.<sup>360</sup> For purposes of this discussion, the form of the protection is much less important than recognizing the role that ex ante requirements can play in protecting against financial entrenchment.

This Article's analysis also suggests a broader range of options, however. To the extent that the concern is about burdens on the future, solutions can occur either ex ante or ex post. The principal de-entrenching mechanism for financial entrenchment is bankruptcy, but its utility for local governments has traditionally been quite limited.<sup>361</sup> States have been loath to authorize a municipality to enter bankruptcy, and governments themselves perceive enormous costs to doing so.<sup>362</sup> As a result, bankruptcy—like eminent domain—is sometimes more theoretically than practically available. Perhaps that should change.

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<sup>358</sup> There are some statutory requirements about open bidding that are geared to solving the intrageneration principal-agent problem, but nothing that limits a government's ability to decide whether to sell the assets in the first place.

<sup>359</sup> Julie Roin offers a more detailed and also more nuanced version of this same criticism. See Roin, 95 *Minn L Rev* at 2001–10 (cited in note 64).

<sup>360</sup> Alternatively, David Super has endorsed a rule that governments should be required to ignore the proceeds from asset sales when reconciling their budgets, as happens with the federal government. Super, 118 *Harv L Rev* at 2628 (cited in note 62) ("This rule does not prevent the current majority from selling off public assets to the detriment of future legislators, but it does prevent budget rules from providing an incentive to do so.").

<sup>361</sup> For a discussion of bankruptcy, see Part III.C.

<sup>362</sup> See note 195.

The greater the availability of a de-entrenching mechanism like bankruptcy, the less valuable the government precommitment is on the front end. This is an important tradeoff, evident in eminent domain and breach of contract as well. If it becomes easier for a government to discharge its debt in bankruptcy, then it will be harder to get third parties to extend credit, making municipal debt more expensive for governments. But it may well be that a meaningful threat of bankruptcy would force lenders and other counterparties—including labor unions representing municipal employees—to exert some *ex ante* discipline against financially entrenching actions. Bankruptcy provisions are also sufficiently protective of creditor interests that credit is unlikely to become unmanageably expensive or inaccessible, even if Chapter 9 were more readily available. In fact, it might actually enhance the constraining function of credit markets, which would presumably look beyond the formal categories of municipal transactions to their substantive effect on the government's creditworthiness. Calibrating the protection requires empirical work, but thinking about the problem in terms of entrenchment both reveals the commonality between municipal debt and other forms of financial entrenchment and suggests common solutions that can operate either *ex ante* or *ex post*.

#### CONCLUSION

There can be no doubt that local governments frequently make decisions, adopt policies, or otherwise take steps that significantly restrict the options available to future governments. Cataloguing them suggests a continuum of entrenchment and reveals deep connections between otherwise disparate-seeming areas of law. These forms of entrenchment, from contractual to physical and in between, combine to form a strong set of tools for affecting the future. Simultaneously, anti-entrenchment protection, in the form of outright prohibitions, *ex ante* procedural requirements, and *ex post* de-entrenching mechanisms, usually prevent the worst consequences of entrenchment while still allowing governments to capture the benefits of making precommitments binding into the future.

Ultimately, then, these forms of entrenchment, combined with various anti-entrenchment rules and doctrines, describe a complex balance between stability and flexibility. And they reveal that, in the abstract, entrenchment is neither good nor bad. Instead, entrenchment must be viewed in terms of the relative costs and benefits it creates, with special attention to the likelihood of political malfunction in various contexts. What emerges is a relatively nuanced set of tools in existing law that appear surprisingly well tailored to capturing the benefits of entrenchment while protecting the future.

This happy story has been changing, however, as local governments have become increasingly adept at circumventing anti-entrenchment protections. New and creative ways of financing public goods and services, alienating property, and precommitting to land use regimes all avoid the important safeguards that apply to more traditional forms of entrenchment. Simultaneously, limits on eminent domain threaten to contract an important structural safeguard that has traditionally been the anti-entrenchment backstop. Imposing these profound limits on eminent domain and other doctrines without carefully considering the effects on entrenchment is likely to result in a pronounced shift in democratic power from the future to the present—a shift that may turn out to be unduly costly in the end.