

MEASURE 37: PAYING PEOPLE FOR WHAT WE TAKE

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In 2004 the voters of Oregon enacted Measure 37, an initiative requiring state and local governments to compensate landowners when burdensome regulations result in decreased property values. Incredibly, an Oregon judge struck it down in October 2005, claiming, among other things, that Oregon's citizens had no right to limit the powers of their elected officials.

This essay examines the events that led to, and resulted from, Oregon's enactment of Measure 37. In particular, it details the doctrine of regulatory takings, advocating the position that governments can "take" property without physically occupying it. The essay recounts the nightmare that is Oregon's land-use apparatus, and chronicles what led the state's voters to do something about it. Finally, the essay concludes by critiquing the unfortunate decision invalidating Measure 37, with emphasis on the court's argument that citizens are powerless to limit the authority of their own legislature.

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“It is wrong to use some constitutional provisions as springboards for major social change while treating others like senile relatives to be cooped up in a nursing home until they quit annoying us.”¹

I. INTRODUCTION

In October 2005, an Oregon circuit court struck down Measure 37, one of the state’s primary safeguards against government abrogation of the rights of property owners.² Enacted in 2004 by an initiative garnering more votes than any other in Oregon’s history,³ Measure 37 requires state and local governments to compensate owners when burdensome land-use regulations result in a diminution of their properties’ values. In declaring Measure 37 unconstitutional, Judge Mary Mertens James added her name to a long list of American jurists who have relegated property rights to the lowest rung on the constitutional ladder. Ordinary—although unfortunate—on this count, the decision is remarkably novel for its underlying theory—that the citizens of Oregon are precluded from cabinining the power of their elected officials.

For decades, in Oregon and across America, courts have neglected their duty to protect the rights that federal and state constitutions guarantee to owners of private property. Weary of improper deference to legislatures and the opaque convolution of multi-pronged tests, the people of Oregon took upon themselves the role abdicated by the judiciary and passed Measure 37. Less than a year later, a court has held this effort invalid by claiming that some government powers—including the power to regulate the use of private property—are not beholden to the consent of the governed. Under the court’s formulation, there exist facets of a sovereign that are impervious to the will of the people. Thus, imperiling not only the rights guaranteed to property owners by the Constitution, but also the very philosophical underpinnings of that Constitution.

This essay will chronicle the legal and political developments that led to and resulted from the passage of Oregon’s Measure 37. In Part II we will examine the concept of regulatory takings, and detail the doctrinal confusion and jurisprudential inefficacy that led Oregon’s voters to seek a different avenue by which to ensure their constitutional rights. Part III will

¹ *Silveira v. Lockyer*, 328 F.3d 567, 568 (9th Cir. 2003) (Kozinski, C.J., dissenting).

² *MacPherson v. Dep’t of Admin. Servs.*, No. 05C10444 (Marion County, Or. Cir. Ct. Oct. 14, 2005).

³ *See Ballot Measure 37: Breakdown of the Vote*, http://measure37.com/measure%2037/vote_breakdown.html (last visited Jan. 22, 2006) (providing statistics on votes for Measure 37 by district); *see also infra* note 111 and accompanying text (dispelling characterization of Measure 37 as an initiative popular only with political conservatives).

focus on Oregon's decades-long debate on the interaction of property rights and government regulation that culminated in Measure 37's 2004 victory. In Part IV we will survey legal challenges that have followed Measure 37's enactment, including the audacious decision that, for now, has rendered the statute invalid. In sum, we will show why Measure 37 is necessary, and why it is not unconstitutional.

II. THE CONCEPT OF REGULATORY TAKINGS

A. *Of Form and Substance*

Both the Oregon⁴ and United States Constitutions⁵ require governments to pay owners just compensation when the government takes private property. This rule applies not only to out-and-out transfers of title through eminent domain, but also to regulations that deprive owners of the economic value of their property while leaving them in possession of the land. The concept of regulatory takings reflects the common sense observation that governments should not be allowed to escape the duty to compensate simply through the legalistic trick of co-opting the *use* of land without seizing the actual *title* to the land. If governments must compensate property owners for actual *de jure* condemnations, so too should they compensate for *de facto* seizures effected through regulation. Recognizing the equivalence of these two forms of takings is based on a respect for substance over form, and rejects the kind of fealty to legal artifice Roscoe Pound famously described as "mechanical jurisprudence."⁶

Contrary to popular legal myth, regulatory takings law was not invented in the 1920s.⁷ The Michigan Supreme Court explained the concept considerably earlier, in 1874:

It is a transparent fallacy to say that this is not a taking of his property, because the land *itself* is not taken, and [the owner] utterly excluded from it, and because the title, nominally, still remains in him, and he is merely deprived of its beneficial use, which is not the property, but simply an incident of property. Such a proposition . . . cannot be rendered sound, nor even respectable Of

⁴ OR. CONST. art. I, § 18.

⁵ U.S. CONST. amend. V.

⁶ Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908).

⁷ See generally *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 325–26 (2002) (noting the Supreme Court's recognition of regulatory takings in *Pennsylvania Coal v. Mahon*, 260 U.S. 393 (1922)); see also Robert Brauneis, "The Foundation of Our 'Regulatory Takings' Jurisprudence": *The Myth and Meaning of Justice Holmes's Opinion in Pennsylvania Coal Co. v. Mahon*, 106 YALE L.J. 613, 615 (1996) (chronicling the evolution of Takings Clause jurisprudence); Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 CORNELL L. REV. 1549, 1553–55 (2003) (tracing early takings cases and arguing that modern scholars "misunderstand nineteenth-century state regulatory takings law"); Kris W. Kobach, *The Origins of Regulatory Takings: Setting the Record Straight*, 1996 UTAH L. REV. 1211, 1213 (1996) (noting that the first recognition of regulatory takings took place in the early nineteenth century); William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 783 (1995) (examining historical application of the just compensation principle).

what does property practically consist, but of the incidents which the law has recognized as attached to the title, or right of property? Is not the idea of property in, or title to lands, apart from, and stripped of all its incidents, a purely metaphysical abstraction, as immaterial and useless to the owner as “the stuff that dreams are made of?” Is it not a much less injury to him, if it can injure him at all, to deprive him of this abstraction, than of the incidents of property, which alone render it practicably valuable to him? And among the incidents of property in land, or anything else, is not the right to enjoy its beneficial use . . . the one most real and practicable idea of property, of which it is a much greater wrong to deprive a man, than of the mere abstract idea of property without incidents? [U]se . . . constitutes, in fact, all that is beneficial in ownership, except the right to dispose of it; and this latter right or incident would be rendered barren and worthless, stripped of the right to the use. Property does not consist merely of the right to the ultimate particles of matter of which it may be composed,—of which we know nothing,—but of those properties of matter which can be rendered manifest to our senses, and made to contribute to our wants or our enjoyments.⁸

To regard private property simply as physical matter, rather than in terms of the rights that comprise, and are incident to, its ownership, empties the concept of property of its relevance and meaning. As the Michigan Court recognized, property is not merely a tangible thing.⁹ It is “a basic trait of the human personality, for which achievements and acquisitions are means of self-fulfillment.”¹⁰ Property is part of a familiar triad—along with life and liberty—that has as its essence the right to self-actualization. The reason that a traditional condemnation requires compensation is that it unfairly deprives a person, without her consent, of the right to use her faculties as she sees fit. Regulatory takings are no different.¹¹

There is another, more practical problem with regulatory takings. While the outright condemnation of property is usually a well-publicized, visible event resulting in public deliberation over policy, regulatory takings are more disguised. They allow political leaders to shift the cost of burdensome programs onto isolated (and often politically unpopular) groups, rather than onto the general public. As the New York Court of Appeals characterized it, taking away the value of a person’s property “under the guise of an exercise

⁸ *Grand Rapids Booming Co. v. Jarvis*, 30 Mich. 308, 320–21 (1874); *accord Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166, 177–78 (1871).

⁹ See Adam Mossoff, *What Is Property? Putting the Pieces Back Together*, 45 ARIZ. L. REV. 371, 434–36 (2003) (describing the decision in *Pumpelly* and arguing for an integrated theory of property including the rights of exclusion, acquisition, use, and disposal).

¹⁰ RICHARD PIPES, *PROPERTY AND FREEDOM* 286 (1999). See also THOMAS G. WEST, *VINDICATING THE FOUNDERS* 37–70 (1997) (discussing the historical and modern interpretations of property including property rights as a necessary condition of all other freedoms).

¹¹ See Claeys, *supra* note 7, at 1566–74 (noting that James Madison believed, in principle, that even partial regulations are as direct and offensive to the natural property rights of citizens as takings without fair compensation). Governmental action that unequally restricts the rights of select property owners without compensation “is not a ‘regulation’ of right, but rather an ‘abridgment,’ ‘invasion,’ or ‘violation’ of right.” *Id.* at 1572–73; see also Paul J. Otterstedt, *A Natural Rights Approach to Regulatory Takings*, 7 TEX. REV. L. & POL. 25, 74–75 (2002) (developing a four part test for determining the paradigm of natural law, whether any given governmental action constitutes a taking requiring just compensation).

of the police power” commits the additional wrong of “forc[ing] the owner to assume the cost of providing a benefit to the public without recoupment.”¹² Although society at large might benefit from the regulation, society is not required “to share the cost of the benefit Instead, the accident of ownership determines who shall bear the cost initially.”¹³ This is not only unfair to the party singled out,¹⁴ but it also means that “the ultimate economic cost of providing the benefit is hidden from those who in a democratic society are given the power of deciding whether or not they wish to obtain the benefit despite the ultimate economic cost.”¹⁵ This allows government to conceal the true social cost of government regulations, and since the public is unaware, “it is not likely to have any objection to the ‘cost-free’ benefit.”¹⁶

This reality of regulation means that courts face a dilemma when applying regulatory takings theory. Government regulates the use of property all the time, and legitimately so. Distinguishing those regulations that are tantamount to condemnation from those that are not is the challenge of regulatory takings law. Although early courts regarded these groups of regulations as categorically distinct, the Supreme Court’s decision in *Pennsylvania Coal Co. v. Mahon* declared that the difference between compensable and noncompensable regulation was one of *degree* and not of kind.¹⁷ Regulation will always diminish the value of property in some way or other, but this alone does not require compensation, the Court opined. Only when a regulation “goes too far” is it effectively a condemnation.¹⁸

Mahon is an imperfect opinion. Most importantly, the *Mahon* theory of regulatory takings assumes that all government coercion is of the same type, and rejects the notion that police power regulations can be qualitatively distinguished from other government actions. As Richard Epstein and others have convincingly argued, police power regulations rightly understood—that is, laws that protect individuals’ rights to use their land and their faculties without interference from others—should never require compensation at all, whereas regulations that provide public goods to society in general should always require compensation.¹⁹ *Mahon*, however, recognized only one type

¹² *Fred F. French Investing Co. v. City of New York*, 350 N.E.2d 381, 387 (1976) (internal citation omitted).

¹³ *Id.*

¹⁴ See *VanHorne v. Dorrance*, 28 F. Cas. 1012, 1015 (C.C. Pa. 1795) (No. 16,857) (“Every person ought to contribute his proportion for public purposes and public exigencies; but no one can be called upon to surrender or sacrifice his whole property, real and personal, for the good of the community, without receiving a recompense in value. This would be laying a burden upon an individual, which ought to be sustained by the society at large.”); accord *Armstrong v. United States*, 364 U.S. 40, 49 (1960) (“The Fifth Amendment’s guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”).

¹⁵ *Fred F. French Investing Co.*, 350 N.E.2d at 387.

¹⁶ *Id.*

¹⁷ 260 U.S. 393, 416 (1922).

¹⁸ *Id.* at 415.

¹⁹ See RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 107–60 (1985); Lynda J. Oswald, *Cornering the Quark: Investment-Backed Expectations and*

of regulation and held that at some point a regulation's burden on private property becomes so severe that compensation is required.

Despite this considerable flaw, *Mahon* at least recognized that the compensation requirement cannot be evaded by simply disguising as a regulation what is in substance a condemnation. To contend, as some do, that the concept of regulatory takings is illegitimate per se (on the grounds that property is always held subject to regulation) or that property is created by the state itself, and so the state may change the rules whenever it sees fit, is to commit, among other things, the formalistic fallacy of which Pound complained.²⁰

B. How Far Is Too Far?

A more immediate problem with *Mahon* is that the phrase "goes too far" could hardly be more vague. Courts trying to ascertain when a property owner is suffering under a regulation that "goes too far" have devised vague and complicated standards that, in practice, result in very few instances of property owners being compensated. In trying to decide when a regulation "goes too far," the Supreme Court has manufactured several such tests.

A special mode of analysis applies to "categorical" takings. In *Loretto v. Teleprompter Manhattan CATV Corp.*,²¹ the Court held that when a regulation authorizes the permanent physical invasion of property contrary to the owner's wishes, the regulation is a compensable taking, no matter how minute the economic impact.²² Likewise, in *Lucas v. South Carolina Coastal Council*,²³ the Court held that when a regulation "denies all economically beneficial or productive use of land,"²⁴ it constitutes a compensable taking.²⁵

Unfortunately, the marked reluctance to apply the *Lucas* and *Loretto* categorical rules mediates the Court's deployment of them.²⁶ A ready

Economically Viable Uses in Takings Analysis, 70 WASH. L. REV. 91, 143 (1995) (recognizing that use of eminent domain requires compensation, but use of police power might not).

²⁰ See, e.g., J. Peter Byrne, *Ten Arguments for the Abolition of the Regulatory Takings Doctrine*, 22 ECOLOGY L.Q. 89, 136 (1995) (concluding that the regulatory takings doctrine lacks justification); Andrew W. Schwartz, *Reciprocity of Advantage: The Antidote to the Antidemocratic Trend in Regulatory Takings*, 22 UCLA J. ENVT'L. L. & POL'Y 1, 1 (2004) ("[T]hrough the expansion of the doctrine of 'regulatory takings,' the democratic regulation of economic affairs is in some jeopardy.").

²¹ 458 U.S. 419 (1982).

²² *Id.* at 441.

²³ 505 U.S. 1003 (1992).

²⁴ *Id.* at 1015.

²⁵ When a regulation falls into neither category, it is assessed under the *Penn Central* standards, discussed at length *infra* this section.

²⁶ Cases relying on *Loretto's* categorical rule are rare, though a few have resulted from the regulation of mobile home parks in California. In many cities, these laws require owners of mobile home parks to accept new tenants selected by tenants who move out, whether or not the owners approve of the new tenancy. In *Hall v. Santa Barbara*, 833 F.2d 1270, 1276-77 (9th Cir. 1986), the Ninth Circuit held that such laws effected a taking under *Loretto*, because they implicated "physical invasion." *Id.* at 1283 (citing *Loretto*, 458 U.S. at 434). On this point, see also *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979) ("In this case, we hold that the 'right to exclude,' so universally held to be a fundamental element of the property right, falls

example is *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency* (*Tahoe-Sierra*).²⁷ A series of putatively temporary building moratoria in effect for over twenty years forbade the plaintiff landowners from constructing anything at all on their land.²⁸ Under *Lucas*, a law that forbids all construction is a categorical taking. And in the case of *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*,²⁹ the Court held that even if a regulatory taking is temporary, it still requires compensation.³⁰ *Tahoe-Sierra*, therefore, ought to have combined two clear rules: a *Lucas*-style total deprivation and a *First English*-style temporary taking. Yet the Court held that the Lake Tahoe moratorium did *not* require compensation, because it was only temporary, analogous to a “normal delay[] in obtaining building permits.”³¹ Thus, according to the Supreme Court, temporary takings require compensation; total takings require compensation; temporary total takings, though, do not.

Such inconsistency is a symptom of the primary truth underlying regulatory takings law, one that the Court itself acknowledged in *Tahoe-Sierra*.³² Namely, land-use regulations are such a common element of the modern regulatory state that taking seriously the just compensation requirement would cripple a major part of government’s daily operations. Simply put, government routinely takes so much from so many that it cannot *afford* to comply with the Fifth Amendment.³³ In Justice Stevens’ words, a principled just compensation requirement,

would undoubtedly require changes in numerous practices that have long been considered permissible exercises of the police power. As Justice Holmes warned in *Mahon*, “[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.” A rule that required compensation for every delay in the use of property would render routine government processes prohibitively expensive or encourage hasty decision-making. Such an important change in

within this category of interests that the Government cannot take without compensation.”). But in *Yee v. City of Escondido*, 503 U.S. 519, 532 (1992), the Court held that *Loretto* did not apply, because by “voluntarily open[ing] their property to occupation by others,” the renters had lost any “right to compensation based on their inability to exclude particular individuals.” *Id.* at 531.

²⁷ 535 U.S. 302 (2002).

²⁸ *Id.* at 312–14.

²⁹ 482 U.S. 304 (1987).

³⁰ *Id.* at 319 (“Invalidation of the ordinance . . . after this period of time, though converting the taking into a ‘temporary’ one, is not a sufficient remedy to meet the demands of the Just Compensation Clause.”).

³¹ *Tahoe-Sierra*, 535 U.S. at 329.

³² See J. David Breemer, *Temporary Insanity: The Long Tale of Tahoe-Sierra Preservation Council and Its Quiet Ending in the United States Supreme Court*, 71 *FORDHAM L. REV.* 1, 23–51 (2002) (explaining that *Tahoe-Sierra* is only tenuously based on prior Supreme Court takings precedent).

³³ See *MacPherson v. Dep’t of Admin. Servs.*, No. 05C10444, slip op. at 12 (Marion County, Or. Cir. Ct. Oct. 14, 2005) (holding that because Measure 37 “requires the government to pay if it wants to enforce . . . land use regulations,” it limits the state’s plenary power and is, therefore, unconstitutional). See also *infra* Part IV(A) for a discussion of this argument.

the law should be the product of legislative rulemaking rather than adjudication.³⁴

Justice Stevens' view ignores that just compensation is a constitutional requirement that guarantees a fundamental right. It is not a discretionary matter, and the Court has abandoned its one real duty if it fails to enforce the Constitution, even when doing so would require changes in longstanding government practices. The Court did not allow the fact that "numerous practices [had] long [been] considered permissible" to stand in the way of its decisions in *Brown v. Board of Education*³⁵ or, more recently, in *United States v. Booker*.³⁶ Yet this is the primary rationalization for its holding in *Tahoe-Sierra*: Because government cannot afford to pay, it is not required to pay.

As timid as the Court has been in applying its supposedly categorical takings rules, its record in cases falling outside those confines has been even worse. When a regulation cannot be characterized as a *Lucas* or *Loretto* categorical taking, the Court applies what is commonly called the "*Penn Central* test," although this analysis has neither the clarity nor the rigor required of a true legal test.³⁷ In *Penn Central Transportation Co. v. New York City* (*Penn Central*), the Court invoked "essentially ad hoc, factual inquiries"³⁸ to determine when a regulation "goes too far." Such inquiries assess three factors: 1) the economic impact of the regulation on the claimant, 2) the extent to which the regulation has interfered with distinct investment-backed expectations, and 3) the character of the governmental action.³⁹

That the Supreme Court *has never compensated a property owner* under the *Penn Central* standards suggests that this supposed test is a phantasm.⁴⁰ This evaluation is supported by the vagueness of the enumerated factors,⁴¹ and courts' seeming compulsion to ignore one of the factors—economic impact—in favor of the other two. At bottom, the *Penn*

³⁴ *Tahoe-Sierra*, 535 U.S. at 335 (quoting *Mahon*, 260 U.S. at 413) (internal citation omitted).

³⁵ 349 U.S. 294, 299 (1955) (requiring the end of the long held policy of segregated schools).

³⁶ 125 S. Ct. 738 (2005).

³⁷ *Penn Cent. Transp. Co. v. New York City* (*Penn Central*), 438 U.S. 104 (1978). Such an assessment is not novel; Justice O'Connor has agreed that "*Penn Central* does not supply mathematically precise variables, but instead provides important guideposts that lead to the ultimate determination whether just compensation is required." *Palazzolo v. Rhode Island*, 533 U.S. 606, 634 (2001).

³⁸ *Penn Central*, 438 U.S. at 124.

³⁹ Steven J. Eagle, *Planning Moratoria and Regulatory Takings: The Supreme Court's Fairness Mandate Benefits Landowners*, 31 FLA. ST. U. L. REV. 429, 449 (2004) (citing *Penn Central*, 438 U.S. at 123–24).

⁴⁰ See John E. Fee, *Unearthing the Denominator in Regulatory Taking Claims*, 61 U. CHI. L. REV. 1535, 1536 (1994) (discussing the courts' use of the *Lucas* test for regulatory takings); see also David F. Coursen, *The Takings Jurisprudence of the Court of Federal Claims and the Federal Circuit*, 29 ENVTL. L. 821, 823 (1999) (discussing the differences between the ad hoc and balancing test approaches in regulatory takings).

⁴¹ See R.S. Radford, *Regulatory Takings Law in the 1990's: The Death of Rent Control?*, 21 SW. U. L. REV. 1019, 1022 (1992) ("In keeping with what had become a long tradition, however, none of these terms were ever defined, either in *Penn Central* or in any subsequent case.").

Central analysis fundamentally centers on considerations of “fairness,” a standard no less vague than “goes too far.” As William P. Barr, et al., write,

Inconsistency was inevitable. Regulations that cause massive economic harm to the owner are held not to go too far, whereas others with only a slight impact are found to constitute regulatory takings.

As a result, the regulatory takings cases have fallen back to a three-factor, ad hoc test that tries to get at the idea of fairness to the owner. . . . It is inherently vague and subjective. As it turns out, the Court has usually not considered it unfair or unjust to force owners to bear fairly heavy burdens, at least if the owner is rich.⁴²

No matter how severe the economic impact of a regulation, so long as it falls short of a total deprivation under *Lucas*, the other two *Penn Central* factors—interference with investment-backed expectations, and the character of the governmental action—have typically been found to cut off a litigant’s hope of recovery.

Although it originated as one element among many, the investment-backed expectations factor quickly became the primary obstacle to recovery. Such was the case in *Palazzolo v. State ex rel. Tavares*, wherein the Rhode Island Supreme Court held that Mr. Palazzolo was due no compensation because the regulations at issue had been in existence when he acquired his property.⁴³ In *Palazzolo* and in other cases, courts devised a “notice rule,” holding that it was not reasonable for a property owner to invest in property that was subject to an existing regulatory scheme; thus, there could be no taking no matter how severe the impact of the regulations as applied to the property in question.⁴⁴

Compounding matters, the “character of the governmental action” element has also failed to play a meaningful role in *Penn Central* analyses except in the most extreme cases. *Loretto* based its categorical rule on this factor, holding that “when the ‘character of the governmental action’ is a

⁴² William P. Barr et al., *The Gild that Is Killing the Lily: How Confusion over Regulatory Takings Doctrine is Undermining the Core Protections of the Takings Clause*, 73 GEO. WASH. L. REV. 429, 484 (2005) (footnotes omitted).

⁴³ *Palazzolo v. State ex rel. Tavares*, 746 A.2d 707, 715–17 (R.I. 2000), *aff’d in part, rev’d in part sub nom. Palazzolo v. Rhode Island*, 533 U.S. 606 (2001).

⁴⁴ See *Palm Beach Isles Assocs. v. United States*, 208 F.3d 1374, 1378–79 (Fed. Cir. 2003), *rev’d* 231 F.3d 1354 (Fed. Cir. 2000) (noting that the Court of Federal Claims held that plaintiff knew the permits would be needed to develop the land so the plaintiff did not have any reasonable investment-backed expectation for developing the property). The “notice rule” is not the only way in which courts have used the “reasonableness” invention to render *Penn Central* impotent. For a thorough review of the devolution of the “investment backed expectations” theory, see R. S. Radford & J. David Breemer, *Great Expectations: Will Palazzolo v. Rhode Island Clarify the Murky Doctrine of Investment-Backed Expectations in Regulatory Takings Law?*, 9 N.Y.U. ENVTL. L.J. 449 (2001). Although the rigid application of the notice rule was repudiated by the Supreme Court in *Palazzolo v. Rhode Island*, 533 U.S. 606, 626–27, lower federal and state courts have been reluctant to abandon such a convenient rationale for denying compensation. See, e.g., J. David Breemer & R. S. Radford, *The (Less?) Murky Doctrine of Investment-Backed Expectations After Palazzolo, and the Lower Courts’ Disturbing Insistence on Wallowing in the Pre-Palazzolo Muck*, 34 Sw. U. L. Rev. 351 (2005).

permanent physical occupation of property, our cases uniformly have found a taking to the extent of the occupation.”⁴⁵ In *Eastern Enterprises v. Apfel*, a plurality of the Court found that the “unusual” character of the government action at issue (relating to a federal law imposing retroactive financial liability to provide retirement benefits for coal miners) demonstrated that the regulation effected a taking.⁴⁶ These anomalies aside, however, “character” analysis almost universally devolves into a vague ascertainment of “fairness.” A regulation only “goes too far” if it “implicates fundamental principles of fairness” that the Court regards as “underlying the Takings Clause.”⁴⁷

Vague standards, subjective balancing of interests, and an almost perfect record of judgments denying compensation suggest that *Penn Central* does not offer meaningful or reliable constitutional protection for property owners. In practice, *Penn Central* has functioned mainly as a tool for ensuring that the constitutional mandate to compensate dispossessed property owners is not allowed to obstruct government’s persistence in “adjusting the benefits and burdens of economic life.”⁴⁸

C. The Illusion of Compensation

In the decades since *Penn Central*, courts systematically have denied compensation for regulations that deprive property owners of their right to use their property. Some examples approach absurdity. In *San Remo Hotel v. City and County of San Francisco*,⁴⁹ the California Supreme Court denied compensation when a city ordinance prohibited a long-term residential hotel from transforming its rooms to facilitate short-term tourist uses unless the hotel paid a \$567,000 fee.⁵⁰ Since converting rooms for tourist use would reduce the number of long-term rooms available to serve as low-cost housing, the ordinance served the city’s goal of preventing homelessness while avoiding the politically unpopular move of increasing taxes. In other words, the city’s hotel conversion ordinance forced “some people alone” to bear the public burden of the homeless problem that in justice should have been “borne by the public as a whole.”⁵¹ The ordinance essentially confiscated rooms of residential hotels and then required the tenants to pay a ransom for their return.⁵²

Nevertheless, the California Supreme Court denied compensation on the grounds that the city’s ordinance was merely “[a] burden placed broadly and nondiscriminatorily on changes in property’s use.”⁵³ Applying the

⁴⁵ *Loretto*, 458 U.S. at 434.

⁴⁶ 524 U.S. 498, 537 (1998).

⁴⁷ *Id.* at 537. The problem is that fundamental concepts of fairness are not especially implicated by the Takings Clause, but instead by the Due Process Clause, as Justice Kennedy pointed out in his separate opinion in *Apfel*, 524 U.S. at 544–45.

⁴⁸ *Penn Central*, 438 U.S. 104, 124 (1978).

⁴⁹ 41 P.3d 87 (Cal. 2002).

⁵⁰ *Id.* at 95.

⁵¹ *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

⁵² *San Remo*, 41 P.3d at 128 (Brown, J., dissenting).

⁵³ *Id.* at 109 (majority opinion).

toothless “rational basis” standard of review,⁵⁴ the court found “that the housing replacement fees bear a reasonable relationship to loss of housing” resulting from a hotel converting to tourist use.⁵⁵ The notion that compensation is required for land-use regulations that provide public goods by depriving property owners of their right to use land was seen as no more than a “personal theory of political economy” which should not be “impos[ed] . . . on the people of a democratic state.”⁵⁶ And even the notion that a regulation that “goes too far” constitutes a taking suffered the court’s scorn. It quoted approvingly from Justice Brandeis’ dissent in *Mahon*, concluding that “[i]n the many difficult cases that have followed, it has generally been the Brandeis view that has prevailed.”⁵⁷ That view certainly prevailed in *San Remo*.⁵⁸

The case of *Landgate v. California Coastal Commission*⁵⁹ is, if possible, even more extreme. In *Landgate*, the California Supreme Court rejected the claim of a property owner who had been denied *all* use of his land by a final decision of the California Coastal Commission. When the owner sued, the Commission’s order was overturned on the grounds that the Commission lacked any jurisdiction to interfere with the owner’s lawful use of his land. The process took two years, and the landowner thereafter returned to court seeking the constitutionally guaranteed remedy of compensation for the complete denial of any use of his property over this period. Under *First English*, the claim should have been ironclad.

The California Supreme Court saw it otherwise. The court denied compensation on the grounds that the situation was merely “a regulatory mistake resulting in [a] delay” of the owner’s right to use the land.⁶⁰ According to the *Landgate* court, only if the mistake “is of a particular constitutional type—the passage and enforcement of a law or regulation that deprives property of all value” does it require compensation.⁶¹ But if a land-use regulation or decision is “part of a reasonable regulatory process designed to advance legitimate government interests,” then an “erroneous” denial of the use of the land under such a regulatory process is not compensable, no matter how severe the resulting burden, or how long the “mistake” might last.⁶²

In Oregon, the courts’ reluctance to protect property owners against onerous regulations is exacerbated by rules obstructing access to judicial review. These include severe standing requirements and a limit on the evidence that a reviewing agency can hear when a citizen complains about

⁵⁴ *Id.* at 103.

⁵⁵ *Id.* at 107.

⁵⁶ *Id.* at 110.

⁵⁷ *Id.* at 108.

⁵⁸ After the California Supreme Court decision, the case was amended and brought in federal court, eventually making its way to the U.S. Supreme Court. *San Remo Hotel v. City and County of San Francisco*, 125 S. Ct. 2491 (2005). The Court, focusing on procedural issues (namely, preclusion), denied relief to the property owners.

⁵⁹ 953 P.2d 1188 (Cal. 1998).

⁶⁰ *Id.* at 1195.

⁶¹ *Id.* at 1197.

⁶² *Id.*

the effect a regulation has on her property.⁶³ Under Oregon's land-use planning law, Senate Bill 100 (SB 100),⁶⁴ an owner who believes she has been wrongly denied the use of her property may challenge the regulation before a Board of Appeals, but the Board may only rely on the evidence presented at the original hearing on a proposed land-use decision.⁶⁵ Owners who, for whatever reason, did not attend the original hearing can find that they are procedurally blocked from introducing any evidence to show that the regulation is unconstitutional.⁶⁶

Even when a property owner has her day in court, she will find that the court will apply a deferential standard of review that stacks the deck against her.⁶⁷ Worse still, the standards Oregon courts use in considering regulatory takings claims are, if anything, even more vague than the *Penn Central* analysis (which the Oregon courts have rejected).⁶⁸ In *Dodd v. Hood River County*, the Oregon Supreme Court held that a regulation effects a taking under the state constitution *only* when it deprives the owner of *all* economic use of the subject property. If the regulation "allows a landowner *some substantial beneficial use* of his property, the landowner is not deprived of his property nor is his property 'taken.'"⁶⁹ Such a loss, if any, is "damnum absque injuria."⁷⁰

Dodd and its progeny⁷¹ left Oregon's property owners with even weaker judicial protection from regulatory takings than is offered by the Supreme Court. It was in the context of this near-abdication of judicial responsibility that Oregonians turned to the political process to secure for themselves the rights supposedly guaranteed by the Fifth Amendment. The eventual result was Measure 37.

⁶³ See Sara C. Galvan, *Gone Too Far: Oregon's Measure 37 and the Perils of Over-Regulating Land Use*, 23 YALE L. & POL'Y REV. 587, 591–92 (2005) (discussing Oregon's land-use laws and courts' failure to protect landowners with judicial remedies).

⁶⁴ 1973 OR. LAWS 127 (codified as amended at OR. REV. STAT. § 197.005 (2003)). For a comprehensive discussion of SB 100, see *infra* Part III.A.

⁶⁵ See OR. REV. STAT. § 197.763(1), 197.835(3) (2003) (setting forth procedural requirements that govern land-use appeals to the Land Use Board of Appeals); see also OR. REV. STAT. § 197.835(2)(a)–(3) (2003) (confining review of decisions to the record and limiting review of decisions to the issues raised before the local hearings).

⁶⁶ OR. REV. STAT. §§ 197.763(1) (2003).

⁶⁷ See, e.g., *Norvell v. Portland Metro. Area Local Gov't Boundary Comm'n*, 604 P.2d 896, 899 (Or. Ct. App. 1979) ("[T]he time has come for Oregon courts to defer more to other branches of government in the area of land use law.").

⁶⁸ For a full treatment of this difference between Oregon and federal law, see Tara J. Schleicher, Comment, *A Tale of Two Courts: Differences Between Oregon's Approach and the United States Supreme Court's Approach to Fifth Amendment Takings Claims*, 31 WILLAMETTE L. REV. 817, 847 (1995) ("Instead of applying the *Penn Central* factors to regulatory takings claims, the Oregon courts apply only the per se 'all economically viable use' rule.").

⁶⁹ *Id.* at 182.

⁷⁰ *Id.* at 614 (quoting *Fifth Ave. Corp. v. Washington County*, 581 P.2d 50, 60 (Or. 1978)).

⁷¹ See, e.g., *League of Oregon Cities v. State*, 56 P.3d 892, 906 (Or. 2002) (interpreting Oregon's takings clause to invalidate Measure 7's two or more changes to the Oregon Constitution); *Boise Cascade Corp. v. Board of Forestry*, 935 P.2d 411, 419–20 (determining that a temporal restriction fails to rise to the level of a taking).

III. MEASURE 37 (AND WHY OREGON NEEDS IT)

A. Oregon's Regulatory Nightmare

In 1973, the Oregon legislature enacted a comprehensive statewide growth management and land-use planning system.⁷² As the first such planning scheme in the United States, SB 100 was intended as a model for the nation.⁷³ In a perverse sense, it served its purpose—SB 100 was such a disaster that the rest of the country had no choice but to take notice.⁷⁴ One account summarized some of the problems:

[T]he state never adopted a land use plan or program to ensure economic growth of the business community. Second, the state never adopted a land use program which identifies the farm and forest resource land which truly merits “conservation”, it simply mandated that almost every rural acre be “preserved” regardless of its productivity, and banned most non-farm and non-forest uses on such acreage. Third, the state provided little in the way of plan or program for urban growth; on the contrary, it imposed barrier after barrier to growth.⁷⁵

In addition to these problems was the lack of any mechanism for compensating property owners injured by the regulations. Although there was a companion bill to SB 100 that would have mandated compensation for regulatory takings, it failed to become law.⁷⁶ The putative remedy was to amend SB 100 to require a legislative committee to conceive a program for compensating burdened landowners.⁷⁷ Unsurprisingly, no such program was

⁷² For contemporary thoughts on SB 100's implementation, see Gov. Tom McCall, *Address at the Opening of Oregon's 57th Legislative Assembly* (Jan. 8, 1973), <http://arcweb.sos.state.or.us/governors/McCall/legis1973.html> (last visited Jan. 22, 2006) (describing statewide land-use planning as an attempt to prevent “grasping wastrels of land” in the form of “[s]agebrush subdivisions and coastal ‘condo mania’”).

⁷³ See ROBERT V. PERCIVAL ET AL., *ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY* 776 (3d ed. 2000) (explaining the components and requirements of Oregon's “far-reaching” statewide growth management program).

⁷⁴ Not one state initiated a regulatory system based on SB 100's model. BILL MOSHOFSKY, *REGULATORY OVERKILL* 17–18 (2004); see also WAYNE A. LEEMAN, *OREGON LAND, RURAL OR URBAN? THE STRUGGLE FOR CONTROL* 32–33 (1997) (explaining the impossibility of setting statewide goals to be implemented locally).

⁷⁵ MOSHOFSKY, *supra* note 74, at 10 (internal citation omitted).

⁷⁶ S.B. 849, 57th Leg., Reg. Sess. (Or. 1973), was developed by an advisory committee of planners, economists, developers, and realtors, but was never enacted. See CITY CLUB OF PORTLAND, *MEASURE 7 AND COMPENSATION FOR THE IMPACTS OF GOVERNMENT REGULATION* 18 [hereinafter CITY CLUB REPORT], available at http://www.pdxcityclub.org/pdf/Measure7_2002.pdf.

⁷⁷ Section 24(4) of S.B. 100, 57th Leg., Reg. Sess. (Or. 1973) stated:

Study and make recommendations to the Legislative Assembly on the implementation of a program for compensation by the public to the owners of lands within this state for the value of any loss of use of such lands resulting directly from the imposition of any zoning, subdivision or other ordinance or regulation regulating or restricting the use of such lands. Such recommendations shall include, but not be limited to, proposed methods for the valuation of such loss of use and proposed limits, if any, to be imposed upon the amount of compensation to be paid by the public for any such loss of use.

ever developed, let alone implemented.⁷⁸ Similarly, interim legislative committees with aims of fashioning measures to protect property rights failed to produce anything.⁷⁹ In recognition of this futility, a 1976 initiative sought to repeal SB 100, but it was rejected.⁸⁰

SB 100 empowered Oregon's Land Conservation and Development Commission (LCDC) to establish "Land Use Goals," and required local governments to zone all private land in conformity with those goals.⁸¹ However, as Oregon's land-use system evolved, it became clear that two of the goals—Goal 5 and Goal 14—trumped all others. Goal 5 required the preservation of "open space," and Goal 14 aimed to "contain" urbanization.⁸² Other goals became mere tools to realize the anti-growth aspirations of numbers 5 and 14.⁸³ This focus ultimately deprived many landowners of the right even to build homes on their properties, in the name of preserving "natural areas" and wildlife habitat.⁸⁴ The effects on property values were harsh. Owners of residential lots commonly found their values diminished by ninety percent.⁸⁵

Local governments have been smashing successes in reaching the goals of preserving open space and containing "sprawl." As a result, local governments have realized similar and perverse success in artificially increasing the scarcity of housing and the crowding of cities.⁸⁶ Consequently, Goal 5 is not only bad policy (and a significant abridgement of property rights); Goal 5 also contravenes state laws requiring that governments obtain "conservation easements" by "purchase, agreement or donation, but not by exercise of the power of eminent domain, unless specifically authorized by law."⁸⁷ In achieving conservation aims by using Goal 5 instead of "purchase, agreement, or legislative authorization of eminent domain," government agencies obtained the public use of private property via the "free" mechanism of land-use regulation. Governments have been given, at best, the authorization to impose the costs of public benefits on a few private property owners. At worst, they have a veritable license to steal.

After years of living under this unjust and untenable framework, Oregonians demanded remedial action from their elected officials. Responding in 1995, the Senate and House approved SB 600.⁸⁸ This bill

⁷⁸ See MOSHOFSKY, *supra* note 74, at 35.

⁷⁹ CITY CLUB REPORT, *supra* note 76, at 18.

⁸⁰ *Id.* at 19. In 1978, another ballot measure was introduced, this time to simply modify SB 100. One such modification declared that "adversely affected private land owners" would be entitled to just compensation. This measure failed as well. *Id.*

⁸¹ OR. REV. STAT. §§ 197.235–197.245 (2003); OR. ADMIN. R. 660-015-0000(1)–(10) (2005), available at http://www.oregon.gov/LCD/goals.shtml#The_Goals.

⁸² See MOSHOFSKY, *supra* note 74, at 36.

⁸³ *Id.* at 68.

⁸⁴ *Id.* at 64.

⁸⁵ *Id.* Moshofsky points out that Goal 5 is "not aimed at preventing air or water pollution." *Id.* As such, the "basic objective of Goal 5 is provide public benefits, not prevention of harm." *Id.*

⁸⁶ See *generally* Reason, Sprawl Brawl, <http://reason.com/bisprawl.shtml> (last visited Jan. 22, 2006) (linking to commentaries on both sides of the sprawl debate).

⁸⁷ OR. REV. STAT. § 271.725 (2003).

⁸⁸ S.B. 600, 68th Leg., Reg. Sess. (Or. 1995).

required state and local governments to compensate landowners who lost more than ten percent of the value of their property because of regulations directed at preserving wildlife habitat, maintaining open space, or advancing other aesthetic purposes that by statute are to be achieved via conservation easements.⁸⁹ But Governor John Kitzhaber vetoed the bill, explaining incredibly at a news conference that such regulations were necessary to preserve the view of the Rose Garden, a civic attraction of sorts in Portland. “We can all enjoy this view because it has been protected,” Kitzhaber said. “No building can be built so as to obstruct it. *There is no doubt that comes at a private cost.* But the public benefit is overwhelming—and it is overwhelmingly supported by Oregonians.”⁹⁰ The governor’s statement revealed the true purpose of Oregon’s land-use planning system—obtaining public benefit at private expense. The veto of SB 600, and the official explanation for the veto, infuriated Oregonians.⁹¹

In 1998, Oregonians adopted Ballot Measure 56, requiring local governments (and, later, state governments) to notify property owners prior to actions that might cause a decrease in property values.⁹² While this measure did serve as a minor deterrent to elected officials not keen on making such unpopular public notifications, it was neither the needed medication nor the appropriate dose. Oregon’s land-use system had become a labyrinth of unreasonably restrictive regulations that made no allowance for the costs and burdens imposed on property owners.⁹³ The government owned—or exerted regulatory control amounting to ownership upon—most of the state’s land.⁹⁴ According to the state’s own calculations, all but two percent of land in Oregon is off-limits to development entirely or subject to such severe restrictions that development is impracticable.⁹⁵

Touted as “smart growth,” the state’s land-use regulatory regime has in reality resulted in no growth, which in turn has led to a stifled economy, reduced tax revenues, and skyrocketing housing costs, to list but a few of the unfortunate consequences.⁹⁶ These are maladies in the macro sense, but

⁸⁹ See OREGONIANS IN ACTION, LOOKING FORWARD (July/Aug. 1995).

⁹⁰ Jeff Mapes, *Kitzhaber Chops Down “Ecotake” Bill*, OREGONIAN, July 14, 1995, at D1.

⁹¹ See *id.* (describing the hostile reception by property rights activists to the governor’s veto of the bill at a public ceremony).

⁹² Codified at OR. REV. STAT. § 227.186 (2003).

⁹³ See LEEMAN, *supra* note 74, at ix, x (explaining that Oregon’s land-use system impeded economic progress and failed to achieve its goals).

⁹⁴ See MOSHOFSKY, *supra* note 74, at 37 (“Under the broad authority given it in Senate Bill 100, LCDRC radically expanded government involvement in the use of rural land. It moved from an incentive-based program to encourage landowners to keep land in agriculture, to a mandatory regulatory program that placed draconian restrictions on over 96% of all rural private land . . .”).

⁹⁵ Peyton Knight, *Property Rights: Measure 37 to the Rescue*, CHRONWATCH, Jan. 4, 2005, <http://www.chronwatch.com/content/contentDisplay.asp?aid=12140> (last visited Jan. 22, 2006).

⁹⁶ The cost of permission to build is among the leading reasons for increasing home costs in the United States. See FRIEDRICH HAYEK, THE CONSTITUTION OF LIBERTY 224–25 (1960) (“[Regulations] will always limit the scope of experimentation and thereby obstruct what may be useful developments. They will normally raise the cost of production or, what amounts to the same thing, reduce over-all productivity [T]heir over-all cost is almost always underestimated and . . . one disadvantage in particular—namely, the prevention of new developments—can never be fully taken into account.”); Edward L. Glaeser et al., *Why Have*

the effects for some have been much more personal. Perhaps the most infamous story is that of Dorothy English, the 93-year-old widow who became the symbol of Oregon's regulatory abuse during the eventual Measure 37 campaign.⁹⁷ Mrs. English has owned land in Multnomah County for over fifty years. At the time she and her husband bought the property in 1953, they intended to divide the land, selling a portion to provide retirement income, and giving the remainder to their children. The regulations in existence at the time of their purchase permitted this division. But with the advent of SB 100 and its attendant goals, such an effort now is against the law. Onerous land-use regulations "ruined our lives," she explained simply.⁹⁸ For Dorothy English and the rest of Oregon, encroachment on their constitutional rights had clearly "gone too far."

B. The Birth of Measure 37

By 2000, a breaking point had been reached.⁹⁹ Frustrated with the unresponsiveness of regulatory agencies, state and local governments, and the courts, Oregonians took it upon themselves to include a compensation requirement in Oregon's regulatory apparatus. They passed Measure 7, a ballot measure amending the state's Constitution to require compensation for landowners where regulations resulted in restrictions on use or diminution in property value.¹⁰⁰ Governments could avoid paying compensation quite easily—they could just waive the regulation at issue.¹⁰¹ Opponents of the Measure sued immediately to invalidate it.¹⁰² The trial court issued a temporary injunction in December 2000, preventing Measure 7 from immediately taking effect.¹⁰³ The case made its way eventually to the Oregon Supreme Court, which concluded that Measure 7 was unconstitutional.¹⁰⁴

The Court's opinion can only be characterized as an exercise in desperation. It held that Measure 7 violated the state constitution's "separate vote" rule. This rule dictates that when a new law amends more than one part of the constitution, a separate vote is required for each substantive

Housing Prices Gone Up?, AM. ECON. REV. (2004), available at <http://post.economics.harvard.edu/hier/2005papers/HIER2061.pdf>. See generally LEEMAN, *supra* note 74, at 18 (claiming conservation, though not necessarily bad, has costs in terms of fewer resources which leads to stagnation).

⁹⁷ See Knight, *supra* note 95.

⁹⁸ *Id.*

⁹⁹ Anger among voters ran both deep and wide. See Sara C. Galvan, *supra* note 63, at 588 (explaining that Measure 37 passed because "the legislature and the courts stopped listening to the people of Oregon").

¹⁰⁰ For a comprehensive list of resources on Measure 7, see *Oregonians in Action, Measure 7 Lawsuit Argued in Oregon Supreme Court*, <http://www.wweek.com/html2/leada112800.html> (last visited Jan. 22, 2006).

¹⁰¹ *Id.*

¹⁰² *McCall v. Kitzhaber*, No. 00C19871 (Marion County, Or. Cir. Ct. Feb. 22, 2001), *rev'd sub nom.* *League of Oregon Cities v. State*, 56 P.3d 892 (Or. 2002).

¹⁰³ *Id.*

¹⁰⁴ *League of Oregon Cities*, 56 P.3d at 649.

amendment, even if they are grouped in a single bill.¹⁰⁵ Measure 7, though, only amended Article I, Section 18 of the Oregon Constitution, addressing private property and eminent domain. But the Oregon Supreme Court found that it also amended the state's free speech clause¹⁰⁶ because of one provision holding that governments were not required to compensate for regulations affecting pornographic bookstores. The opinion reasoned that under Measure 7, state and local governments could

decline to pay just compensation . . . to a property owner because that owner engages in a particular type of expressive activity, namely, the sale of some forms of pornography. Stated differently . . . [Measure 7] operates to permit the state and local governments to choose not to pay such a property owner, unless that owner were to change the content of the expressive material sold on the property in question—essentially placing a price tag upon the property owner's right of free expression. Consequently . . . [Measure 7] changes—indeed, limits—the scope of the rights currently guaranteed by Article I, section 8 [the Free Speech Clause].¹⁰⁷

The opinion and its tortured rationale served only as a temporary setback for Oregon's electorate and, indeed, caused it to redouble its efforts to reclaim property rights in the state. Some of the efforts were quite specific in nature. In 2003, the House and Senate passed Oregon House Bill 3631,¹⁰⁸ which simply would have allowed Dorothy English to realize her original vision for her property. The bill enjoyed strong bipartisan support. But even this small gesture too closely approximated a concession that the regulatory system was fallible. Governor Ted Kulongoski vetoed the bill.¹⁰⁹

Despite the failures of Measure 7 and House Bill 3631, Oregon's voters did not relent. In 2004 they passed an initiative almost identical in effect to Measure 7—Measure 37. Measure 37 simply implements the “compensation” requirement that the Legislature expected in 1973 was to be a part of the regulatory system it adopted in SB 100. It requires government to pay compensation for loss of use or value caused by a land-use regulation or, alternatively, to waive the regulation and avoid the payment.

As a statutory initiative, Measure 37 is immune from the separate-vote provision of the Oregon Constitution that, however speciously, proved fatal to Measure 7. It was also wildly popular with the electorate. Despite opposition groups outspending Measure 37's proponents at a rate of three-to-one, and despite nearly every newspaper in Oregon editorializing against

¹⁰⁵ OR. CONST. art. XVII, § 1 (“When two or more amendments shall be submitted in the manner aforesaid to the voters of this state at the same election, they shall be so submitted that each amendment shall be voted on separately.”).

¹⁰⁶ *Id.* at art. I, § 8 (“No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right.”).

¹⁰⁷ *League of Oregon Cities*, 56 P.3d at 909.

¹⁰⁸ H.B. 3631, 72nd Leg., Reg. Sess. (Or. 2003).

¹⁰⁹ The governor expressed his intent to veto the bill and laid out his reasons for doing so in a letter to the Senate. Letter from Ted Kulongoski, Oregon Governor, to Oregon Senate (July 23, 2003), available at http://egov.oregon.gov/Gov/pdf/letters/letter_072303.pdf.

it,¹¹⁰ Measure 37 ended up receiving more “yes” votes than any initiative in Oregon history.¹¹¹ Undaunted, opponents continued to attack the Measure in the media (and, as we will discuss, in the courtroom). Environmental activists prophesized doomsday scenarios of rampant industrialization, widespread pollution, and the destruction of farmland.¹¹² Of course, these predictions were wildly overblown. Measure 37 contains a number of exceptions, removing from its ambit regulations preventing common-law nuisances and those protecting public safety.¹¹³ Under these exceptions, many federal and state constraints—including environmental laws—remain unaffected by Measure 37.

Measure 37’s common sense approach is not acceptable to many in the environmental lobby, or to entrenched government interests. Much of the 2005 legislative session focused on Senate Bill 1037, which was the Senate’s first attempt to blunt the effectiveness of Measure 37.¹¹⁴ Proposed by Senator Charlie Ringo, Senate Bill 1037 sought to create a mandatory process for filing and processing Measure 37 claims that would have made it difficult, and in some cases impossible, for property owners to assert their rights.¹¹⁵ The bill also aimed to preclude the Measure’s application in vast portions of the state.¹¹⁶ In the end, though, Bill 1037 was not adopted.

Interestingly, another measure did become law. Senate Bill 82 established a task force to undertake a comprehensive thirty-year review of Oregon’s land-use planning program.¹¹⁷ The task force will be allotted \$600,000 over the next three years to gather information and assess the effectiveness of Oregon’s current regime. In remarks before signing the bill, Governor Kulongoski finally acknowledged that Oregon’s land-use system is flawed: “What began as a visionary program in 1973 has become more and

¹¹⁰ See Knight, *supra* note 95 (discussing how opponents of Measure 37 spent more money during their campaign).

¹¹¹ See Ballot Measure 37: Breakdown of the Vote *supra* note 3; see also Dep’t of Land Conservation and Dev., Measure 37 Information (depicting areas where Measure 37 passed) <http://www.lcd.state.or.us/LCD/measure37.shtml> (last visited Jan. 22, 2006) (dispelling the characterization of Measure 37 as an initiative popular only with political conservatives, liberal Multnomah County passed Measure 37—even though it voted overwhelmingly for John Kerry, in favor of a tax increase, and rejected an amendment to ban gay marriage); see Jennifer Langston, *Implications of Oregon Property Law Still Unclear*, SEATTLE POST-INTELLIGENCER, Feb. 25, 2005, at B5 (discussing claims filed against Measure 37).

¹¹² See, e.g., Take a Closer Look Committee, No on 37, <http://www.takeacloserlookoregon.com> (last visited Jan. 22, 2006); Langston, *supra* note 111, at B5.

¹¹³ Such an allowance, in fact, is consistent with a proper understanding of the distinction between valid police-power regulations and regulations merely providing public goods at private expense. See *supra* notes 13–20 and accompanying text.

¹¹⁴ See Laura Oppenheimer, *Property Rights Compromise Bill is Expected to Die in State Senate*, OREGONIAN, Aug. 3, 2005, at B9 (discussing issues that could defeat the passage of Senate Bill 1037).

¹¹⁵ S.B. 1037, 73d Leg., Reg. Sess. (Or. 2005).

¹¹⁶ *Id.*

¹¹⁷ S.B. 82, 73d Leg., Reg. Sess. (Or. 2005). See Dep’t of Land Conservation and Dev., Governor Signs Senate Bill 82, http://www.lcd.state.or.us/LCD/30_year_review.shtml (last visited Jan. 22, 2006) (describing the proposed review under Senate Bill 1182 and listing the duties the task force will carry out in conducting its review).

more complex with more regulations, resulting in more controversy and with less flexibility to meet changing conditions.”¹¹⁸

It remains to be seen whether the admissions of the Governor and the Department are followed by tangible reform. Some are not willing to wait and find out. Seemingly flaunting Measure 37’s requirements, the Portland Area Metropolitan Service District recently announced its “Nature in Neighborhoods” program,¹¹⁹ which allows for the creation of government overlays on 80,000 acres of privately owned land. Special interest groups were, if anything, even less patient. Several of these groups, including 1000 Friends of Oregon, returned to the well that has so often slaked the metaphorical thirst of opponents of property rights: they sued to invalidate Measure 37.

IV. MEASURE 37 LITIGATION

A. MacPherson v. Department of Administrative Services

Surprising nobody, Measure 37’s opponents sought to invalidate the initiative in court as soon as it was passed. As of July 2005, two high-profile cases had been filed challenging various aspects of Measure 37. The first was initiated on January 14, 2005, by plaintiffs Hector MacPherson and 1000 Friends of Oregon.¹²⁰ The complaint alleged several constitutional shortcomings. Among these voluminous claims, which seemingly implicate every provision of the Oregon and United States Constitutions, are assertions that Measure 37 1) treats similarly-situated landowners differently, in violation of the equal protection guarantees of the Oregon Constitution, 2) delegates legislative power to state agencies and local governments in violation of separation-of-powers principles, 3) unconstitutionally waives sovereign immunity, suspends the operation of laws, benefits religious institutions, and burdens freedom of expression, 4) violates procedural and substantive due process rights protected by the Fourteenth Amendment to the United States Constitution, and 5) unconstitutionally limits the state’s police power.¹²¹ None of the allegations have any real merit.

Nevertheless, on October 14, Marion County Circuit Court Judge Mary Mertens James declared Measure 37 unconstitutional. Her decision, much like the Oregon Supreme Court’s decision invalidating Measure 7, strains credulity. The foundation of Judge James’ opinion is her theory that Measure

¹¹⁸ Dep’t of Land Conservation and Dev., *supra* note 117.

¹¹⁹ Metro Nature in Neighborhoods, Nature, <http://www.metro-region.org/pssp.cfm?ProgServID=122> (last visited Jan. 22, 2006).

¹²⁰ MacPherson v. Dep’t of Admin. Servs., No. 05C10444 (Marion County, Or. Cir. Ct. Oct. 14, 2005). 1000 Friends of Oregon is a non-profit charitable organization, founded in 1975 by Governor Tom McCall and Henry Richmond, aiming, in its own words, to “protect our quality of life through the conservation of farm and forest lands, protection of natural and historic resources, and promotion of more compact and livable cities.” Homepage, 1000 Friends of Oregon, <http://www.friends.org/> (last visited Jan. 22, 2006).

¹²¹ Plaintiffs’ Opening Summary Judgment Brief, *MacPherson*, No. 05C10444 (Marion County, Or. Cir. Ct. Mar. 31, 2005).

37 impairs the “plenary power” of the State of Oregon.¹²² In the decision, Judge James frames what she believes to be the central issue:

The question raised by Measure 37 is whether the legislature (or here, the people acting through the initiative process) may impose limits on the legislative body’s ability to use this power to regulate.¹²³

Judge James immediately tips her hand as to what her answer will be:

[T]here is no provision in the Oregon Constitution that would permit such a limitation, and the Supreme Court has noted that a legislative body may not limit or contract away its authority to exercise power. Thus, if Measure 37 prohibits the legislative body from exercising its plenary power to regulate for public welfare, health, or safety, it is an unconstitutional curtailment of legislative power.¹²⁴

Ultimately, Judge James holds that “because Measure 37 currently imposes limitations on government’s exercise of plenary power to regulate land in Oregon, it is unconstitutional.”¹²⁵ That is to say—simply and incredibly—that the people of Oregon are prohibited from telling their elected officials what to do.

With due regard to the dangers of hyperbole, this may be among the most preposterous legal theories ever promulgated by an American court. To begin with, while it is true that the police (or plenary) power is an attribute of sovereignty (or, more accurately, is a term synonymous with sovereignty¹²⁶), under the American system of government, sovereignty is not vested in the *legislature* at all, but in *the people*. As Alexander Hamilton explained in *Federalist* 78, a legislature exercises only the authority that has been delegated to it by the people; the legislature’s authority is therefore “subordinate” to, and “derivative” of, the sovereignty of the people.¹²⁷ In the words of the early American legal commentator St. George Tucker, “[T]he sovereignty of the people, and the responsibility of their servants are principles fundamentally, and unequivocally established . . . [and] cannot be transgressed without offending against that greater power from whom all authority among us, is derived; to wit, the PEOPLE.”¹²⁸

Since the people give the legislature its powers, they always retain the authority to set the terms on which those powers may be exercised. Measure

¹²² *MacPherson*, No. 05C10444, slip op. at 10–12.

¹²³ *Id.* at 11.

¹²⁴ *Id.* (internal citations omitted).

¹²⁵ *Id.* at 12.

¹²⁶ *See, e.g.*, *The License Cases*, 46 U.S. (5 How.) 504, 583 (1847) (“[W]hat are the police powers of a State? They are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions.”).

¹²⁷ *THE FEDERALIST* NO. 78, at 468–69 (Alexander Hamilton) (Clinton Rossiter ed., 1961); *see also* Nathan N. Frost et al., *Courts Over Constitutions Revisited: Unwritten Constitutionalism in the States*, 2004 UTAH L. REV. 333, 343–45 (2004) (detailing early state court decisions establishing judicial review of legislative acts).

¹²⁸ St. George Tucker, *appendix to 1 WILLIAM BLACKSTONE*, 1 COMMENTARIES, app. A, 4 (St. George Tucker ed., 1803) (emphasis in original).

37 is simply an example of the people declaring the terms on which *their* police power may be exercised on their behalf by their deputies, the legislature. As Oregon courts repeatedly have held, “[t]he obvious purpose of the initiative power is to allow the people to legislate directly—their powers, then, should be co-extensive with the legislature.”¹²⁹

The famous case of *Stone v. Mississippi*¹³⁰ is based on this understanding. In *Stone*, the state of Mississippi granted a charter to a corporation to operate lotteries for twenty-five years. Two years later, though, the state constitution was amended to prohibit lotteries.¹³¹ The corporation sued, contending that the contracts clause of the federal Constitution prohibited the revocation of their charter. The Supreme Court ruled unanimously against the corporation, holding that the legislature had no independent sovereign authority to give away or abandon the regulatory authority because that authority does not belong to a disembodied, autonomous legislature; it belongs to the people:

[T]he power of governing is *a trust committed by the people to the government*, no part of which can be granted away. The people, in their sovereign capacity, have established their agencies for the preservation of the public health and the public morals, and the protection of public and private rights. These several agencies can govern according to their discretion, if within the scope of their general authority, while in power; but they cannot give away nor sell the discretion of those that are to come after them, in respect to matters the government of which, from the very nature of things, must “vary with varying circumstances.”¹³²

For the *MacPherson* decision to be correct, legislative authority would have to exist *independent of the people*. This is a proposition *Stone* explicitly rejects, and one that offends the American concept of just government dating from the nation’s founding and enduring to the present day. What *Stone* does stand for is the proposition that the police power belongs to the people, and that they, not the legislature, are the masters of that power.

The opinion invalidating Measure 37, and the theory upon which it rests, appear even more dubious after examining Oregon’s history in enacting initiatives. Oregonians have adopted many initiatives over the years that constrain the exercise of legislative powers, and the courts not once (until now) have suggested that in so doing have Oregonians intruded on powers that do not belong to them. The most ready example of such an initiative is a limit on taxation in article XI, section 11(b) of the state constitution, a provision that most certainly sets the terms on which the legislature may act.¹³³

¹²⁹ *Amalgamated Transit Union Div. 757 v. Yerkovich*, 24 Or. App. 221, 230 (1976) (citing *Rose v. Port of Portland*, 162 P. 498 (Or. 1917)).

¹³⁰ 101 U.S. 814 (1879).

¹³¹ *Id.* at 814–15.

¹³² *Id.* at 820 (emphasis added) (citing *Trustees of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 628 (1819)).

¹³³ OR. CONST. art. XI, § 11(b); see *Martin v. City of Tigard*, 72 P.3d 619 (Or. 2003) (“Article XI, section 11(b), is a constitutional provision that the voters adopted by initiative petition that sets

Clearly, such measures are not unconstitutional simply because they may make it more difficult for the legislature to do what it might want; democracy rests on the idea that the people have the power to do that. To wit, in 1998, Measure 58 instituted a requirement forcing the state to give adoptees copies of their birth certificates.¹³⁴ Like Measure 37, Measure 58 required state officials to exercise their powers in certain ways. Measure 11, to take another example, created section 137.700 of the Oregon Revised Statutes. This section controls how the state may exercise its police powers by setting mandatory minimum sentences for certain felony offenses. Both Measure 58 and Measure 11 were statutory in nature, as opposed to constitutional amendments, clearly refuting the idea that the police power can only be limited via constitutional amendment.¹³⁵ These examples are useful in illustrating a fundamental point: any suggestion that a legislature's powers are immune from the people's control is untenable, both as a matter of constitutional law and as a tenet of political philosophy. The initiative power exists precisely so that the people may decide how *their* police power may be used by their elected deputies.

Before moving on to the *MacPherson* decision's various other holdings, it is worth noting that Measure 37 actually in no way deprives the legislature of the power to regulate the use and development of land. Rather, it merely requires that, in some of the cases in which the legislature chooses to use this power, it must compensate property owners for the economic consequences. The court's argument that it is somehow unconstitutional to make a government entity choose among priorities is ludicrous. If a legislature finds that it cannot afford to pay compensation, that no more deprives it of its legitimate authority than does any other procedural requirement imposed on a state actor. Indeed, in *United States v. Winstar Corp.*,¹³⁶ a case the *MacPherson* plaintiffs cite themselves, Justice Souter rejected just this argument when he wrote that "[t]he answer to the Government's contention that the State cannot barter away certain elements of its sovereign power is that a contract to adjust the risk of subsequent legislative change does not strip the Government of its legislative sovereignty."¹³⁷ Neither does Measure 37. At bottom, the *MacPherson* decision is not based on a legal or constitutional argument, but on a simple complaint: "The public simply cannot afford to pay Measure 37 claims."¹³⁸ Such an assertion is a good argument for discipline, not for escaping one's responsibilities.

While the police power holding is the most egregious flaw in the *MacPherson* opinion, it is not the only one. This is partly because most of the other holdings have as their ultimate basis the police power argument

dollar limits upon taxes that government imposes upon real property.").

¹³⁴ OR. REV. STAT. § 432.240 (2003); see *Does 1, 2, 3, 4, 5, 6, & 7 v. State*, 993 P.2d 822, 836 (Or. Ct. App. 1999) (upholding Measure 58 as constitutional).

¹³⁵ *MacPherson*, No. 05C10444, slip op. at 10 (Marion County, Or. Cir. Ct. Oct. 14, 2005).

¹³⁶ 518 U.S. 839 (1996).

¹³⁷ *Id.* at 889.

¹³⁸ Plaintiffs' Opening Summary Judgment Brief at 7, *MacPherson*, No. 05C10444. The court explicitly adopts this rationale in its decision. *MacPherson*, No. 05C10444, slip op. at 8.

recounted above. In holding that Measure 37 violates the Oregon Constitution's Equal Privileges and Immunities guarantee,¹³⁹ Judge James addresses the fact that Measure 37 treats owners who bought their properties prior to the effective date of a regulation—like Dorothy English—differently than those who bought after a regulation was in place:

Here, the classes are defined by when a property owner subject to land use regulations obtained the property: those that obtained their property before the land use regulations became effective (pre owners), and those that obtained their properties afterward (post owners).¹⁴⁰

Judge James thus reasons that pre-owners obtain benefits to which post-owners are not entitled.¹⁴¹ This is correct, for post owners are not covered by Measure 37's protections.¹⁴² What is not correct is her finding that this violates constitutional equal protection guarantees. She does acknowledge, correctly, that this class distinction is not a "suspect" one warranting strict scrutiny.¹⁴³ Refuting the plaintiffs' argument on this point,¹⁴⁴ Judge James applies a rational basis review to determine whether the distinction between pre- and post-owners is reasonably related to a legitimate state interest.¹⁴⁵ Judge James, however, then reverts to her police power holding, arguing circularly that compensating landowners is not a legitimate state interest "[b]ecause Measure 37 impedes the exercise of the police power."¹⁴⁶ Like a house built on a weak foundation, the remainder of this argument (focusing on the difference in treatments of pre- and post owners) crumbles due to its faulty base.

Undoubtedly the most ironic holding of the *MacPherson* opinion regards the federal Due Process Clause of the Fourteenth Amendment. Judge James writes, stunningly, that Measure 37 violates the Due Process Clause by not providing adequate procedures by which owners of properties next to land benefiting from the Measure can launch challenges against its application.¹⁴⁷ For example, the court argues, a property owner accustomed to having wildlife frolicking on his land might be irreparably harmed when, under Measure 37, a regulation is lifted on an adjacent property. For, the court continues, if that parcel's owner is allowed to build a home, the commotion of the building might drive away the wildlife, depriving the first owner of his enjoyment. Without a proper mechanism to protect these owners, Judge James asserts, federal due process will be violated.¹⁴⁸ Thus, the absurdity comes full circle, and the court denies constitutional guarantees to aggrieved landowners who have been seeking them in vain for

¹³⁹ OR. CONST. art. I, § 20.

¹⁴⁰ *MacPherson*, No. 05C10444, slip op. at 13.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.* ("The class distinction is not, however, suspect.").

¹⁴⁴ See Plaintiffs' Opening Summary Judgment Brief at 25, *MacPherson*, No. 05C10444.

¹⁴⁵ *MacPherson*, No. 05C10444, slip op. at 14.

¹⁴⁶ *Id.* at 13.

¹⁴⁷ *Id.* at 19–22.

¹⁴⁸ *Id.* at 20–21.

decades, instead conjuring protections out of thin air for the very people who most ardently oppose fundamental property rights.

B. Crook County v. All Electors

The reasoning behind the *MacPherson* decision is so untenable that—even in a court system unfriendly to the rights of property owners—it is hard to imagine it being upheld on appeal. But a reversal of *MacPherson*, while certainly welcome (and correct), would far from end the legal wrangling over Measure 37. Another challenge currently in progress is the case of *Crook County v. All Electors*.¹⁴⁹ This case involves an issue less flashy than those in *MacPherson*, but one that nonetheless will have a significant impact on Measure 37's scope if and when the statute is reinstated.

The question in *Crook County* is whether a local government's decision to waive the application of a land-use regulation pursuant to Measure 37 becomes a right that “runs with the land,” and therefore transfers to subsequent purchasers of the property. In February 2005, Crook County adopted a local ordinance implementing Measure 37.¹⁵⁰ Subsection 12 of this ordinance states that waivers *are* transferable to subsequent owners; that is, the benefit of the waiver belongs to the property itself, not just the party that owned the land at the time the waiver was granted.¹⁵¹ Immediately upon passing of the ordinance, Crook County attorneys filed a petition for judicial examination of the ordinance's legality.¹⁵² The Oregon Attorney General's office weighed in, issuing a letter of advice opining that Measure 37 waivers are not transferable.¹⁵³ Such waivers, the letter explains, are personal to the original owner of the waiver.¹⁵⁴

Measure 37 does not explicitly address the transferability issue. Yet the argument is strong that transferability is necessary to realize the underlying intent of the law. Measure 37 waivers—granted by governments in lieu of paying compensation—allow an owner to use her property in any way that was permitted at the time she acquired the land. Once a local government decides not to apply a regulation to a parcel, it follows that it attests to the legality of those uses. This is because the waivers operate not to “make legal” uses that otherwise were illegal, but instead to remove barriers to use that were burdensome enough to begin with to warrant compensation. Subsequent purchasers obtain the property free from these barriers, and with the right to engage in the original use that the waived regulation sought to curtail. To increase the regulations on land the instant title is transferred, therefore, undermines the very rationale of Measure 37.

¹⁴⁹ No. 05CV0015 (Crook County, Or. Cir. Ct. Oct. 25, 2005).

¹⁵⁰ Crook County, Or., Ordinance 153, amend. 1 (Feb. 3, 2005).

¹⁵¹ *Id.*

¹⁵² See OR. REV. STAT. § 34.710 (2003) (allowing county government to petition the courts for a determination of whether an ordinance is constitutionally or statutorily valid).

¹⁵³ Letter from Stephanie Striffler, Special Counsel to the Attorney General, the Dep't of Justice, to Lane Shetterly, Director, Or. Dep't of Land Conservation and Dev. (Feb. 24, 2005), available at <http://www.oregon.gov/LCD/docs/measure37/m37dojadvice.pdf>.

¹⁵⁴ *Id.* at 3.

Any other interpretation of Measure 37 validates increasingly onerous restrictions on the use of a parcel over time. If waivers are not transferable, then governments can employ a “rope-a-dope” strategy whereby they approve a use today in lieu of paying compensation, knowing that once the property is sold (or even passed on through inheritance) the original restriction can be reimposed and the fight, so to speak, may resume. Measure 37’s effect thus would be blunted within a generation. Property values would suffer, as potential buyers would have to weigh the desirability—or even the possibility—of obtaining their own waiver if they were to purchase land. Obviously this consideration would be priced into the market, and not in a manner favorable to property owners. This clearly was not the intent of the voters in enacting Measure 37.

V. CONCLUSION

For too long, courts and legislatures have treated property rights as a nuisance of the sort Judge Kozinski references in the quote that opens this essay. This treatment ignores two (admittedly incongruous) facts. The first is that the Constitution establishes no hierarchy of cherished rights. Every right guaranteed by our nation’s charter is equally worthy of defense. The second of these truths is that if there *is* a hypothetical first-among-equals in the Bill of Rights, the right to security in the ownership and use of private property might be it. In 1775, colonial statesman Arthur Lee alluded to this sentiment, famously stating that “The right to property is the guardian of every other right, and to deprive the people of this, is in fact to deprive them of their liberty.”¹⁵⁵ Lee was right, for it is on a person’s property that she is most free to speak, worship, and pursue freely the other aims incident to liberty.

The acknowledged father of the Constitution, James Madison, was acutely aware of the ramifications for a government that abrogated the right to be secure in one’s property. He wrote that “Government is instituted to protect property of every sort; as well that which lies in various rights of individuals, as that which the term particularly expresses. This being the end of government, that alone is a just government, which impartially secures to every man, whatever is his.”¹⁵⁶ Madison’s concept of a just government is done grave injustice by the political and jurisprudential dereliction that led Oregon’s citizens to seek to secure their rights via Measure 37.

In so reclaiming the ideals of Lee and Madison, and even the Constitution itself, Oregon’s enactment of Measure 37 is a notice to governments across the nation. Oregonians are no longer willing to have their constitutionally guaranteed rights sacrificed in the name of paeans to a vague public good, and citizens of other states are beginning to follow suit. A nearly identical bill, though ultimately unsuccessful, was introduced this

¹⁵⁵ ARTHUR LEE, AN APPEAL TO THE JUSTICE AND INTERESTS OF THE PEOPLE OF GREAT BRITAIN, IN THE PRESENT DISPUTE WITH AMERICA 14 (4th ed. 1775), *quoted in* JAMES W. ELY, THE GUARDIAN OF EVERY OTHER RIGHT 26 (1992).

¹⁵⁶ JAMES MADISON, *Property*, in THE PAPERS OF JAMES MADISON, vol. 1, ch. 16, doc. 23 (William T. Hutchinson et al., eds., 1962).

year in the Montana legislature;¹⁵⁷ and in the State of Washington—which trails only Oregon itself as an abuser of land-use regulations—citizens are working to put a similar initiative on the ballot.¹⁵⁸ Other states, including Texas¹⁵⁹ and Wisconsin,¹⁶⁰ are also considering the path chosen by Oregon’s voters. American citizens are on their way to answering for themselves the question raised by Justice Holmes’s opinion in *Mahon*, and are putting an end to a regulatory takings regime that has gone too far.

¹⁵⁷ See American Society of Landscape Architects, Montana, <http://www.asla.org/Members/govtaffairs/licensure/map/montana.html> (last visited Jan. 22, 2006) (providing information on proposed bill H.B. 594).

¹⁵⁸ See Eric Pryne, *Will Property-Rights Revolt Reverberate Beyond Oregon?*, SEATTLE TIMES, Apr. 12, 2005, at A1, available at http://seattletimes.nwsources.com/html/localnews/2002237025_measure10m.html.

¹⁵⁹ See Stephen Schiebal, *Landowners’ Group Co-opts Greens’ Turf*, AUSTIN AMERICAN-STATESMAN, May 9, 2005, at A1, available at <http://www.statesman.com/news/content/shared/tx/legislature/stories/05/9takings.html> (stating that House Bill 2833 would force local governments to pay landowners when certain environmental regulations reduce a property’s value by more than 25%).

¹⁶⁰ See Steven Walters, *Budget Panel Votes to Kill ‘Smart Growth’*, MILWAUKEE JOURNAL-SENTINEL, May 11, 2005, at B3, available at <http://www.jsonline.com/news/state/may05/325409.asp> (noting that in May, the Wisconsin Legislature’s Joint Finance Committee voted to repeal the State’s “smart growth” law. A final decision on the fate of the law, which severely restricts development of private property, had not been made.).