

PROPERTY PIECES IN COMPENSATION STATUTES: LAW'S  
EULOGY FOR OREGON'S MEASURE 37

BY

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*Compensation statutes (such as Oregon's Measure 37) attempt to elevate the importance of private property by insulating property value from any negative effects that land use regulations may have, typically by awarding compensation where property owners are required to suffer limitations in their land use choices. Although the efforts of compensation statutes may appear reasonable at first glance, a closer examination reveals difficulties in implementing such schemes. Using Measure 37 as a leaping point, this Article inquires into the relationship between compensation statutes and the property such legislation purports to protect. This Article compares the Measure to traditional property doctrines and property rights in property uses, focusing on the manner in which Measure 37 required a restructuring of property by reallocating property rights among competing claims. From a coherence perspective, this Article then argues that the "property" protected under Measure 37 created internal conflicts throughout the law, piecing property rights apart from property duties in land uses, rendering incoherent the bundle of existing property expectations.*

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It is not enough for the knight of romance that you agree that his lady is a very nice girl—if you do not admit that she is the best that God ever made or will make, you must fight. There is in all men a demand for the superlative, so much that the poor devil who has no other way of reaching it attains it by getting drunk.<sup>1</sup>

## I. INTRODUCTION

Outside of law, what we mean when we use the term “property” is by no means self-evident (and may not become altogether clear on closer examination, either).<sup>2</sup> For instance, even in our most unsophisticated explanations, we must admit that the pre-social world may be comprised of things, ideas, and processes, yet it is not comprised of “property.”<sup>3</sup> For purposes of this Article, it might suffice to say that property begins as an economic, instrumental, social, or personal construct, and becomes (if at all) a legal label to delineate a hegemony of rights among competing values and expectations. As the particular social values at issue undergo change, and as compromise in the competition shifts, “property” ultimately acquires meaning by attaching legal protection to such values. Although we need not go so far as Bentham’s epitaph for property without law,<sup>4</sup> his point is a good one: the meaning of property is contextual,<sup>5</sup> and law plays a special role in determining the confines of property’s context.

<sup>1</sup> 3 OLIVER WENDELL HOLMES, *Natural Law*, in THE COLLECTED WORKS OF JUSTICE HOLMES 445, 445 (S. Novick ed., 1995), originally printed in 32 HARV. L. REV. 40 (1918). Holmes went on to state that “it seems to me that this demand is at the bottom of the philosopher’s effort to prove that truth is absolute and of the jurist’s search for criteria of universal validity which he collects under the head of natural law.” *Id.* at 445–46.

<sup>2</sup> Thomas Grey recognizes that “specialists and theoreticians . . . have a multiplicity of widely differing answers, related only in that they bear some association or analogy, more or less remote, to the common notion of property as ownership of things.” Thomas C. Grey, *The Disintegration of Property*, in NOMOS XXII: PROPERTY 69, 71 (J. Ronald Pennock & John W. Chapman eds., 1980). For a discussion of the variety of differing views on property, see generally BRUCE A. ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* (1977) (discussing competing theories of when regulatory infringement upon property rights should trigger the compensation clause); William Michael Treanor, *The Armstrong Principle, the Narratives of Takings and Compensation Statutes*, 38 WM. & MARY L. REV. 1151, 1158–62 (1997) (reviewing exemplary narratives from proponents of property legislation); Joseph William Singer, *The Ownership Society and Takings of Property: Castles, Investments and Just Obligations*, 30 HARV. ENVTL. L. REV. 309 (2006) (discussing various models of property rights in the takings arena).

<sup>3</sup> “The term ‘property’ as used in the Taking Clause includes the entire ‘group of rights inhering in the citizen’s [ownership].’ It is not used in the ‘vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law.’” *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 83 n.6 (1980) (internal citations omitted).

<sup>4</sup> Bentham argued that “[p]roperty and law are born together, and die together. Before laws were made there was no property; take away laws, and property ceases.” JEREMY BENTHAM, *THE THEORY OF LEGISLATION* 113 (C.K. Ogden ed., 1931) (1882).

<sup>5</sup> As the Supreme Court has stated, “the word property is by no means limited, in all its variations, to actual tangible physical things. Its meaning must be determined from its context as illuminated by the

In an important sense, this is just an acknowledgment that each perspective on property is fundamentally a socially contingent construction competing for legitimacy in law. There are many such constructions, of course, spanning across great divides in process and foundation, each vying to find their own reflection in the bundle of rights<sup>6</sup> that comprises property. Yet, underlying each is the problem that, if we do not accept the circumstance of contingency, then according to Holmes, we must fight (or drink);<sup>7</sup> if we accept the contingency of property, then property jurisprudence essentially becomes a question of persuasion. Consistent with the contingency backdrop, we might surmise that property rights come to rest on the theory best able to hide the non sequitur and keep the bundle as coherent as possible.

Assuming the foregoing, the dilemma for law may be less the project of insuring the metaphysically *right* answers, and more the difficulty of avoiding constructions of property which cannot be adopted into law without causing too much unintentional damage to other rights,<sup>8</sup> whether they be property, personhood, equality, or even the freedoms on which such expectations rely. Such constructions understandably but characteristically ignore otherwise important values (such as social and other costs accounted for in existing regimes), in large part because the foundations of the offered perspective preclude recognition of the consequences *as costs*. Due to the pervasiveness of property rights in the legal system,<sup>9</sup> the lesson

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subject treated and the objectives sought.” *Superior Bath House Co. v. McCarroll*, 312 U.S. 176, 179–80 (1941).

<sup>6</sup> The metaphor’s image is a bundle of sticks in which each stick in the bundle represents a different right associated with property. . . . The rights most commonly identified with the property bundle include the right to exclude others, the right to possess, the right to use, and the right to alienate (or transfer or dispose of). Other rights that may be included in the property bundle are the rights to manage, receive income, be secure, and maintain quiet enjoyment.

Craig Anthony (Tony) Arnold, *The Reconstitution of Property: Property as a Web of Interests*: 26 HARV. ENVTL. L. REV. 281, 284-85 (2002).

<sup>7</sup> Given that Holmes portrayed this debate as the very “struggle for the life among ideas,” perhaps a fight is what is needed. OLIVER WENDELL HOLMES, *Law in Science and Science in Law: An Abridgement of a Speech Before the New York Bar Association, January 17, 1899*, in THE COLLECTED WORKS OF JUSTICE HOLMES, *supra* note 1, at 420–21.

<sup>8</sup> *Of course* changes in the law will cause some degree of damage. The question, however, is whether the character and extent of the damage is acceptable. In relying on “coherence,” I mean to refer to the notion that, “any given proposition or value is judged by how well it hangs together with the whole system of propositions or values to which we are committed.” MARGARET JANE RADIN, REINTERPRETING PROPERTY 30 (1993). Despite the possible appearances above, I do not intend that all propositions can be adjudged merely by whether they can meet a basic coherence with institutional constraints, which Radin condemns as “inconsistent pragmatis[m].” *Id.* However, given that I find indeterminacy analyses persuasive, and the critique pervasive, I also would note that I diverge from Radin on this point, as I find it more difficult to distinguish between an analysis of mere institutional coherence and one which fails coherence due to damage done to a constraint which is purportedly external.

<sup>9</sup> Many jurists have argued that property rights serve as a building block for all social norms. For instance, Justice Story explained:

The sacred rights of property are to be guarded at every point. I call them sacred, because, if they are unprotected, all other rights become worthless or visionary. What is personal liberty, if it does not draw after it the right to enjoy the fruits of our own industry? What is political liberty, if it imparts only perpetual poverty to us and all our posterity? What is the privilege of a vote, if the

from coherence should be an important consideration in matters of takings jurisprudence (just as it should be to anyone dealing with rights in property at some level of their program) where a failure to recognize the codependency of property and the system supporting property rights can cause more than the desired disruption.<sup>10</sup>

One recent development in property law—one which challenges the meaning of “property”—is the emergence of “compensation legislation.”<sup>11</sup> In a sense, compensation statutes appear as mere statutory embodiments of regulatory takings jurisprudence, preserving the property owner’s right to compensation against regulations which “go too far” in restricting the rights of owners to use their property.<sup>12</sup> However, compensation statutes diverge from takings jurisprudence in at least two important ways. The first explains the very existence of compensation legislation: takings jurisprudence has not provided categorical protection against land use regulations which only restrict development of property portions,<sup>13</sup> timing

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majority of the hour may sweep away the earnings of our whole lives, to gratify the rapacity of the indolent, the cunning, or the profligate, who are borne into power upon the tide of temporary popularity.

Joseph Story, *The Value and Importance of Legal Studies*, in *THE MISCELLANEOUS WRITINGS OF JOSEPH STORY* 503, 519 (William W. Story ed., 1852). See also Carol M. Rose, *Property as the Keystone Right?*, 71 NOTRE DAME L. REV. 329, 362 (1996) (discussing property as “the most important right in a liberal constitutional order”); JAMES W. ELY, JR., *THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS* 26 (1998) (“The right of property . . . is the guardian of every other right, and to deprive a people of this, is in fact to deprive them of their liberty.” (quoting ARTHUR LEE, *AN APPEAL TO THE JUSTICE AND INTERESTS OF THE PEOPLE OF GREAT BRITAIN, IN THE PRESENT DISPUTE WITH AMERICA* 14 (1775))).

<sup>10</sup> I have elsewhere argued that a radical environmental proposal to abandon property ownership altogether would cause such damage. See Keith H. Hirokawa, *Some Pragmatic Observations About Radical Critique in Environmental Law*, 21 STAN. ENVTL. L.J. 225 (2002). Here, the argument is applied to the categorical property protection program.

<sup>11</sup> See Nancie G. Marzulla, *State Private Property Rights Initiatives As a Response to “Environmental Takings,”* 46 S.C. L. REV. 613, 615 (1995) (noting that property owners are “aggressively seeking relief, passing laws that require prior assessment of the potential ‘takings’ implications of new rules” and “introducing bills that ease the litigation burden facing the state and the property owner by clarifying when compensable takings have occurred”).

<sup>12</sup> Regulatory takings jurisprudence represents the idea that the “takings” limitations of the Fifth Amendment to the U.S. Constitution are not to be “read literally,” and therefore not limited to physical intrusions of the state into private property, but rather recognize that an excessive regulation might go so far as to effectively appropriate private property to the public. *Penn Cent. Transp. Co. v. New York City (Penn Central)*, 438 U.S. 104, 142 (1978) (Rehnquist, J., dissenting).

<sup>13</sup> In *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602 (1993), the Court stated:

We reject Concrete Pipe’s contention that the appropriate analytical framework is the one employed in our cases dealing with permanent physical occupation or destruction of economically beneficial use of real property. While Concrete Pipe tries to shoehorn its claim into this analysis by asserting that “[t]he property of [Concrete Pipe] which is taken is in its entirety’ . . . we rejected this analysis years ago in *Penn Central* . . . where we held that a claimant’s parcel of property could not first be divided into what was taken and what was left for the purpose of demonstrating the taking of the former to be complete and hence compensable. To the extent that any portion of property is taken, that portion is always taken in its entirety; the relevant question, however, is whether the property taken is all, or only a portion of the parcel in question.

of development,<sup>14</sup> vertical development rights,<sup>15</sup> or, more generally, the uninhibited use of property “as the owner sees fit.”<sup>16</sup> Compensation statutes typically provide (in varying degrees) categorical protection for these pieces of property.<sup>17</sup>

The second, perhaps deeper, distinction between compensation legislation and takings jurisprudence appears as a difference in the construction of property itself. Under the Takings Clause, property rights in property uses result from a (sometimes intricate) calculus designed to benefit an owner with a protectable interest which does not, in its exercise, cause damage to the public health, safety, and welfare.<sup>18</sup> In contrast, compensation statutes allow property owners to build conceptual fences to match their physical ones, and the rights in compensation statutes typically extend to any hypothetical free use of property.<sup>19</sup> Yet, by freeing individual property owners from the antecedent needs of the property system supporting the rights in property uses, compensation statutes eviscerate the limitations inherent in a property right.<sup>20</sup> It is this latter divergence from takings jurisprudence—a divergence from property—that is examined in this Article.

To introduce the discussion, this Article focuses on Oregon’s Ballot Measure 37 (Measure 37),<sup>21</sup> adopted into Oregon law in 2004 by an initiative election<sup>22</sup> as a call for fairness, justice, and protection from governmental abuses, then challenged on much the same grounds.<sup>23</sup> Although not the first,<sup>24</sup> Measure 37 was a far

*Id.* at 643-644 (alterations in original) (internal citations omitted); *see also Penn Central*, 438 U.S. at 130 (“‘Taking’ jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated.”).

<sup>14</sup> *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency (Tahoe-Sierra)*, 535 U.S. 302, 334 (2002) (“[T]he ultimate constitutional question is whether the concepts of ‘fairness and justice’ that underlie the Takings Clause will be better served by one of these categorical rules or by a *Penn Central* inquiry into all of the relevant circumstances in particular cases. From that perspective, the extreme categorical rule that any deprivation of all economic use, no matter how brief, constitutes a compensable taking surely cannot be sustained.”).

<sup>15</sup> *See generally Penn Central*, 438 U.S. 104 (1978) (declining to find a taking based on the loss of vertical development rights alone).

<sup>16</sup> In *Penn Central*, the Court rejected as “quite simply untenable” the constitutional import of “the ability to exploit a property interest that they heretofore had believed was available for development . . . .” *Id.* at 130.

<sup>17</sup> *See* J. Peter Byrne, *Ten Arguments for the Abolition of the Regulatory Takings Doctrine*, 22 *ECOLOGY L.Q.* 89, 138 (1995); Nancie G. Marzulla, *State Private Property Rights Initiatives As a Response to “Environmental Takings,”* 46 *S.C. L. REV.* 613, 614–15 (1995).

<sup>18</sup> *See, e.g., Penn Central*, 438 U.S. at 144 (“A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be *injurious to the health, morals, or safety of the community*, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit.” (quoting *Mugler v. Kansas*, 123 U.S. 623, 668–69 (1887))).

<sup>19</sup> *See infra* Part II.A.

<sup>20</sup> *See infra* Part II.C.

<sup>21</sup> OR. REV. STAT. § 197.352 (2005).

<sup>22</sup> *See* ELECTIONS DIV., OFFICE OF THE SEC’Y OF STATE (OR.), NOVEMBER 2, 2004, GENERAL ELECTION ABSTRACT OF VOTES: STATE MEASURE 37, available at <http://www.sos.state.or.us/elections/nov22004/abstract/m37.pdf> (showing that 1,054,589 voted for and 685,079 voted against the measure). Measure 37 went into effect on December 2, 2004. *See MacPherson v. Dep’t of Admin. Servs.*, 130 P.3d 308, 312 (Or. 2006).

<sup>23</sup> On October 14, 2005, the Marion County Circuit Court invalidated the Measure on several constitutional grounds, including equal protection and violation of the plenary power of the state. *MacPherson v. Department of Administrative Services*, No. 05C10444, at 12 (Or. Cir. Ct. Oct. 14, 2005), available at <http://www.ojd.state.or.us/mar/documents/Measure37.pdf>. The Oregon Supreme

reaching example of compensation legislation by defining taking to include *any* negative effect on property value traceable to a regulatory restriction.<sup>25</sup> Couched in terms of “rights” and “fairness,” the Measure was deceptively<sup>26</sup> simple: governments may either waive land use regulations for particular property owners or compensate the owners for damages to their property values.<sup>27</sup>

In fact, Measure 37 enjoyed a short life. A public reaction to the Measure led to Oregon’s Measure 49, approved by the voters in 2007 to make substantial amendments to the scheme.<sup>28</sup> Yet, it is not the intention of this Article to dive too deeply into the political circumstances of Measure 37’s demise, or to provide an analysis of its successor. Rather, this Article looks to the Measure 37 experience to

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Court reversed this decision. *MacPherson*, 130 P.3d at 313. The State of Oregon maintains a website which serves to update on Measure 37 claims and litigation. Or. Dep’t of Justice, Pending Measure 37 Litigation, [http://www.doj.state.or.us/hot\\_topics/measure37litigation.shtml](http://www.doj.state.or.us/hot_topics/measure37litigation.shtml) (last visited Sept. 5, 2008).

<sup>24</sup> See, e.g., FLA. STAT. § 70.001 (2004) (requiring the government to compensate for losses that “inordinately burden” property use); LA. REV. STAT. ANN. §§ 3:3601 to 3:3602 (2003) (requiring the government to compensate for losses in value of 20 % or more); MISS. CODE ANN. §§ 49-33-1 to -19 (1999) (requiring the government to compensate for losses in value of 40 % or more); TEX. GOV’T CODE ANN. §§ 2007.002(5)(b)(2), 2007.024 (Vernon 2000) (requiring the government to compensate for losses in value of 25 % or more or to invalidate the action).

<sup>25</sup> The far-reaching provisions of Measure 37 had a profound and immediate effect on the popularity of compensation legislation. During the pendency of litigation, Measure 37 inspired a movement to refocus the vision of land use controls from neighborhood and community needs to protection of the individual in the ownership, possession, and use of private property. Disgruntled compensation advocates of the adjacent and nearby western states of Washington, Idaho, Arizona, and California quickly proposed their own compensation statutes, with the aid of property rights proponents from Oregon. Voters in these western states were immediately faced with ballot initiatives intended to strengthen property rights. See Proposition 207, Private Property Rights Protection Act, available at <http://www.countysupervisors.org/uploads/Prop%20207%20Explanation.pdf> (Arizona); Proposition 90, Government Acquisition, Regulation of Private Property, available at [http://www.sos.ca.gov/elections/vig\\_06/general\\_06/pdf/proposition\\_90/entire\\_prop90.pdf](http://www.sos.ca.gov/elections/vig_06/general_06/pdf/proposition_90/entire_prop90.pdf) (California); Proposition 2, An Initiative Limiting Eminent Domain When Used for Economic Development; Defining Land Use Law; and Permitting Just Compensation for Regulatory Takings, available at [http://www.idsos.state.id.us/elect/ints/06\\_ID\\_voters\\_pamphlet.pdf](http://www.idsos.state.id.us/elect/ints/06_ID_voters_pamphlet.pdf) (Idaho); Initiative Measure No. 933, Intent to Require Fairness When Government Regulates Private Property, available at <http://www.secstate.wa.gov/Elections/initiatives/text/i933.pdf> (Washington). Arizona’s initiative passed. See ARIZ. REV. STAT. ANN. §§ 12-1131 to -1138 (2007). For this analysis, particularly with reference to the parallel and related reaction to the United States Supreme Court’s decision in *Kelo v. New London*, 545 U.S. 469 (2005), see generally Patricia E. Salkin & Amy Levine, *Measure 37 and a Spoonful of Kelo: A Recipe for Property Rights Activists at the Ballot Box*, 38 URB. LAW. 1065 (2006).

<sup>26</sup> Although the assumption in this Article is that the “deception” may have been unintentional, it is aptly argued that the rhetorical devices employed by proponents of compensation legislation “do not play fairly.” See Salkin & Levine, *supra* note 25, at 1084 (“[O]pponents to regulatory takings initiatives must recognize that sponsors of such measures do not play fairly; they engage in heavy rhetoric, disseminated by paid advertisements and signature gathers; they represent the nature of their groups and positions deceptively; and it seems they likely that they sometimes use dubious techniques of campaign financing.”).

<sup>27</sup> OR. REV. STAT. § 197.352(8) (2005).

<sup>28</sup> On November 6, 2007, Oregon voters amended Measure 37 with the adoption of Measure 49, which was referred to the voters by the Oregon House and Senate as House Bill 3540. Measure 49 places significant restrictions on the reach of Measure 37. The text of Measure 49 is posted on the Oregon Secretary of State’s website. See Or. Secretary of State, Measure 49, Text of Measure, [http://www.sos.state.or.us/elections/nov62007/guide/m49\\_text.html](http://www.sos.state.or.us/elections/nov62007/guide/m49_text.html) (last visited Sept. 27, 2008) [hereinafter Measure 49 text].

understand why we might view compensation statutes as problematic: given the pervasiveness of property throughout the American legal system, the Measure 37 vision of property use could not be neatly incorporated into the legal system, and as a result, it is simply an enlightening example of law drafted without consideration for its ramifications in both the legal and rhetorical structures of property.

To understand the relationship between Measure 37 and property, this Article first glances at the text and operation of the Measure in Part II, contrasting the vision of property use offered in Measure 37 with the character of property use that is otherwise protected as a property right. It may be notable to state, at the outset, that Measure 37 was at least partially successful (if not more) in accomplishing the stated goals of its proponents. Part III of this Article then examines the impacts of the Measure against the intent of zoning and growth management programs, with particular attention given to the relationship between individual property rights and the reciprocal advantages protected in the existing property regime. The analysis presented in this Article suggests that whatever the aims of Measure 37, its design was unfortunate: first, Measure 37 restructured property, extracting property duties from the bundle of rights; and second, because property duties generally correlate to the property rights of others, the restructuring reallocated property pieces among competing claims in some surprising ways. This Article concludes that although Measure 37 may have accomplished the goal of providing its beneficiaries with a stronger property right than what was previously protected by the regulatory takings doctrine, the manner in which this right was obtained resulted in a series of anomalies in the meaning of “property” throughout the legal system.

## II. UNDERSTANDING OREGON'S MEASURE 37 AS RIGHTS WITHOUT PROPERTY

If the only apparent defect in property absolutism has been a lack of legal support, it would nonetheless qualify as a “hardy perennial.”<sup>29</sup> In Blackstone's oft-quoted words, “[t]here is nothing which so generally strikes the imagination and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.”<sup>30</sup> Although property absolutism is often condemned as incoherent, asocial, and “both dangerous and mythical,”<sup>31</sup> its claims in compensation legislation are premised not

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<sup>29</sup> Joan Williams, *The Rhetoric of Property*, 83 IOWA L. REV. 277, 282 (1998).

<sup>30</sup> 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 3 (Wayne Morrison ed., 2001) (1765–1769).

<sup>31</sup> Philip A. Talmadge, *The Myth of Property Absolutism and Modern Government: the Interaction of Police Power and Property Rights*, 75 WASH. L. REV. 857, 860 (2000). As Justice Talmadge states, the position of extreme property advocates “is based on an unsound view of property in Western political philosophy and historical fact. They mythologize the role of property when human beings were in the state of nature.” *Id.* at 861. For the same reasons, natural rights theories are considered “nonsense upon stilts.” 2 JEREMY BENTHAM, *Anarchical Fallacies*, in THE WORKS OF JEREMY BENTHAM 489, 523 (J. Bowring ed., 1983) (“*Right* . . . is the child of law; from *real* laws come *real* rights; from *imaginary* laws, from laws of nature, fancied and invented by poets, rhetoricians, and dealers in moral and intellectual poisons, come *imaginary* rights, a bastard brood of monsters.”); *id.* at 501 (“*Natural rights* is simple nonsense: natural and imprescriptible rights, rhetorical nonsense,—nonsense upon stilts.”).

on property rights, but instead on “a loftier, more peremptory ground . . . of constitutional morality and obligation.”<sup>32</sup>

Oregon’s Measure 37 incorporated this sense of property absolutism in its blatant and, in a sense, well-designed attack on the alleged unfairness of land use regulations. Against the Court’s effort to keep the bundle of rights intact, Measure 37 allocated different bundles, or perhaps different sticks, to different property owners.<sup>33</sup> Against the Court’s attempt to keep the bundle of rights coherent, Measure 37 provided categorical protection against any land use regulation that affects the value of property pieces.<sup>34</sup> Against the Court’s attempt to preserve a government able to respond to changing societal needs, the Measure elevated the importance of the individual’s desire to use property “in any way the owner sees fit.”<sup>35</sup> This new entitlement challenged the meaning of “property” and the rights of property use. This section examines Measure 37 and its attempted transformation of property, drawing by analogy upon capture to discern legitimate property expectations from claims based on constructs other than law.

#### A. The Text of Measure 37

Underlying Oregon’s Measure 37 was the reasonable assumption that every land use to which a property could conceivably be put contributes to the land’s value. Adding to that assumption the notion that such prospective values are (or should be) the basis for a property right, the Measure protected property rights by curtailing any governmental restriction of land use which “has the effect of reducing the fair market value of the property, or any interest therein.”<sup>36</sup> Measure 37 addressed governmental interference by targeting state and local land use control devices such as zoning designations, comprehensive growth planning and transportation controls, and subdivision and environmental regulations.<sup>37</sup> To the extent that a governmental agency attempted to enforce these regulatory schemes against an owner who acquired property prior to the adoption of the particular regulation, Measure 37 entitled an injured property owner to “just compensation” for any reduction in value attributable to the particular regulation.<sup>38</sup>

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<sup>32</sup> Frank I. Michelman, *A Skeptical View of ‘Property Rights’ Legislation*, 6 FORDHAM ENVTL. L. REV. 409, 414 (1995).

<sup>33</sup> See *infra* Parts II.A, II.C.

<sup>34</sup> See *infra* Parts II.A, II.C.

<sup>35</sup> See *infra* Parts II.A, II.C, III.A.

<sup>36</sup> OR. REV. STAT. § 197.352(1) (2005) (emphasis added).

<sup>37</sup> The Measure apparently applied to state statutes and administrative rules governing land use, as well as local planning, zoning, platting and transportation ordinances, and statutes and administrative rules regulating farming and forest practices. *Id.* § 197.352(11)(B). The Measure allowed local governments to enjoin nuisances and enforce regulations adopted for “the protection of public health and safety.” *Id.* § 197.352(3)(B).

<sup>38</sup> *Id.* § 197.352(4) (stating that “[j]ust compensation . . . shall be due the owner of the property if the land use regulation continues to be enforced against the property”). If the governmental entity failed to make payment on the claim, but continued to enforce the regulation after 180 days following the property owner’s claim, the property owner was entitled to an award of compensation, as well as fees and costs, in the circuit court. See *id.* § 197.352(6) (providing for “a cause of action for compensation under this section in the circuit court in which the real property is located,” and entitling the present owner to “reasonable attorney fees, expenses, costs, and other disbursements reasonably incurred”).



The Measure defined “just compensation” as “equal to the reduction in the fair market value of the affected property interest resulting from enactment or enforcement of the land use regulation as of the date the owner makes written demand for compensation.”<sup>39</sup> Although this definition may not appear novel, it becomes so in relation to the “property interest” that suffers the reduction—under the Measure, a claimant’s property interest arose as a right to develop property into any “use permitted at the time the owner acquired the property”<sup>40</sup> and was intended to include the vertical, horizontal, and timing dimensions of property as individually compensable and categorically protected. Moreover, the term “permitted” was not limited to those uses for which a permit was acquired or which were lawfully established (as in a lawful nonconforming use<sup>41</sup>), but only that the particular use was *not prohibited* at the time of acquisition.<sup>42</sup> Property owners were relieved of showing that the regulatory takings claim was ripe for adjudication,<sup>43</sup> as the mere adoption of a land use control caused the injury as defined in the Measure.<sup>44</sup>

Fairness is the key, and so claims could only be filed against regulations adopted *after* “the date of acquisition of the property by the owner or a family member of the owner who owned the subject property prior to acquisition or inheritance by the owner, whichever occurred first.”<sup>45</sup> By establishing the date of

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<sup>39</sup> *Id.* § 197.352(2).

<sup>40</sup> *Id.* § 197.352(8).

<sup>41</sup> A nonconforming right is allocated to land uses that were lawful at the time they were initially engaged (and used continuously since that time), but have since become unlawful by changes in the law. *See, e.g., City of Los Angeles v. Gage*, 274 P.2d 34, 40 (Cal. Ct. App. 1954) (defining a nonconforming use as “a lawful use existing on the effective date of the zoning restriction and continuing since that time in nonconformance to the ordinance”). In general, nonconforming uses are protected against immediate cessation, but are not entitled to an expectation of perpetual protection. *See, e.g., id.* at 43 (arguing that “[i]t would seem to be the logical and reasonable method of approach to place a time limit upon the continuance of existing nonconforming uses, commensurate with the investment involved and based on the nature of the use”).

<sup>42</sup> *See* OR. REV. STAT. § 197.352(8) (2005) (allowing for modification, removal, or not of a land use regulation such that application of the land use regulation “allow[s] the owner to use the property for a use permitted at the time the owner acquired the property”). Section 5 of the Measure provided a two-year statute of limitations, triggered by either the adoption of a land use control ordinance or the enforcement of a land use regulation against a development application, whichever is later. *See id.* § 197.352(5) (stating “[f]or claims arising from land use regulations enacted prior to December 2, 2004, written demand for compensation under subsection (4) shall be made within two years of December 2, 2004, or the date the public entity applies the land use regulation as an approval criteria to an application submitted by the owner of the property, whichever is later. For claims arising from land use regulations enacted after December 2, 2004, written demand for compensation under subsection (4) shall be made within two years of the enactment of the land use regulation, or the date the owner of the property submits a land use application in which the land use regulation is an approval criteria, whichever is later.”).

<sup>43</sup> *See Williamson County Reg’l Planning Comm’n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 195 (1985) (stating that when adequate procedure for seeking just compensation is provided by a State, “the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation”).

<sup>44</sup> *See* OR. REV. STAT. § 197.352(7) (2005) (“[N]or shall the failure of an owner of property to file an application for a land use permit . . . serve as grounds for dismissal, abatement, or delay of a compensation claim . . .”).

<sup>45</sup> *Id.* § 197.352(3)(E).

acquisition in a “family member,” the triggering date for a property interest required some historical analysis. The term “family member” was expansive, defined to include:

[T]he wife, husband, son, daughter, mother, father, brother, brother-in-law, sister, sister-in-law, son-in-law, daughter-in-law, mother-in-law, father-in-law, aunt, uncle, niece, nephew, stepparent, stepchild, grandparent, or grandchild of the owner of the property, an estate of any of the foregoing family members, or a legal entity owned by any one or combination of these family members or the owner of the property.<sup>46</sup>

If governments could (or would) not pay just compensation, Measure 37 offered an available alternative. In lieu of payment, the Measure stated that “the governing body . . . may modify, remove, or [choose] not to apply the land use regulation or land use regulations to allow the owner to use the property for a use permitted at the time the owner acquired the property.”<sup>47</sup> At first glance, it appears that Measure 37 allowed a local government to adopt a new regulation that re-established the prior land use regulations for the claimant’s property.<sup>48</sup> However, the Measure made clear that a waiver to a particular property owner did not repeal Oregon’s land use planning scheme as a whole, or even the regulations applicable to the vicinity of the claimant’s property.<sup>49</sup> Instead, the Measure operated independently from others’ interests in Oregon’s land use planning process.<sup>50</sup> A waiver left land use controls in place against other property owners, including neighbors, successors, and other persons ineligible to be claimants.<sup>51</sup>

Although a Measure 37 claim amounted to a request to forego implementing an otherwise harmonious plan (for instance, in which a local government intended to avoid the adjacent siting of incompatible land uses), decisions on Measure 37 claims could not be delayed, even for purposes of planning to avoid unnecessary or

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<sup>46</sup> *Id.* § 197.352(11)(A).

<sup>47</sup> *Id.* § 197.352(8). The term “owner” in the waiver section diverged from the “interest” for purposes of compensation, compelling the reading that the Measure allowed a property owner to a waiver of regulations adopted after her own acquisition of the property. *See id.* § 197.352(3)(E) (stating that just compensation would not be provided when land use regulations were “[e]nacted prior to the date of acquisition of the property by the owner or a family member of the owner who owned the subject property prior to acquisition or inheritance by the owner, whichever occurred first”). *See also* Smith v. State of Oregon, No. CV060239 (Or. Cir. Ct. Feb. 6, 2007), available at [http://www.doj.state.or.us/hot\\_topics/pdf/measure37/decision\\_randy\\_smith.pdf](http://www.doj.state.or.us/hot_topics/pdf/measure37/decision_randy_smith.pdf) (distinguishing relevant date for purposes of compensation versus waiver).

<sup>48</sup> OR. REV. STAT. §§ 197.350(8)–(10) (2005).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* § 197.352(9). (“A decision by a governing body under this act shall not be considered a land use decision as defined in Or. Rev. Stat. § 197.015(10).”) Among the alleged benefits were an isolation of its claimants from the involvement of NIMBY opposition, obstructionist neighborhood groups and other nay-sayers by limiting the review process from the claim. *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, 588–91 (2005) (discussing availability of administrative review as a justification for Measure 37).

<sup>51</sup> *Cf.* Edward J. Sullivan, *Year Zero: The Aftermath of Measure 37*, 36 ENVTL. L. 131, 146–50 (2006) (discussing the question of whether a waiver is transferable and noting the Oregon Attorney General’s opinion that “a waiver is personal to the present owner of the property and does not run with the land”).

unwanted impacts of the proposed land use.<sup>52</sup> Measure 37 claims did not call on governments to revise a comprehensive planning scheme to incorporate proposed uses in a single property or rectify potential contradictions between the claimant's proposal and the comprehensive plan; rather, an approved Measure 37 waiver set aside the existing plan by allowing a waiver of that scheme for the individual property.<sup>53</sup> The time limits for a Measure 37 claim insured that local governments were precluded from taking the time to engage in such planning, providing that "[j]ust compensation . . . shall be due the owner of the property if the land use regulation continues to be enforced against the property 180 days after" the property owner demands compensation.<sup>54</sup> After expiration of the time limit, the claimant was entitled to petition the court for approval of the claim, together with an award of fees.<sup>55</sup>

Beyond the "waive or pay" purposes of Measure 37 was confusion, conflict, and a stark distrust of the judicial management of property rights.<sup>56</sup> Measure 37 left open the central questions of whether its entitlements were transferable<sup>57</sup> and whether state law requirements would be subject to Measure 37 claims against

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<sup>52</sup> OR. REV. STAT. § 197.352(4) (2005).

<sup>53</sup> See, e.g., Rebecca L. Puskas, *Measure 37's Federal Law Exception: A Critical Protection for Oregon's Federally Approved Land Use Laws*, 48 B.C. L. REV. 1301, 1309 (2007).

<sup>54</sup> OR. REV. STAT. § 197.352(4) (2005).

<sup>55</sup> *Id.* § 197.352(6). The short time limit does not account for the difficulties a Measure 37 claim would present to the local planning agencies. As seen repeatedly in the courts, it may take months or even years for a planning authority to make a reasoned and justifiable decision regarding the highest and best use for properties within its jurisdiction. See, e.g., *Tahoe-Sierra*, 535 U.S. 302, 331–32 (2002) (holding that a 32 month moratoria on development did not constitute takings of property). In considering whether the public interest requires payment of a claim, the local government might otherwise review the basis for claim—the planning, zoning or other regulations which so annoy the claimant—to determine whether the public interest requires special treatment, or whether waiver is justified by the minimal impacts the divergence will have on the comprehensive scheme. See OR. REV. STAT. § 192.352 (2005). Of course, the Supreme Court has protected time as an element of sound land use planning in its rejection of a per se test for temporary takings. *Tahoe-Sierra*, 535 U.S. at 342.

<sup>56</sup> See Michael C. Blumm & Erik Grafe, *Enacting Libertarian Property: Measure 37 and its Implications*, 85 DENV. U. L. REV. 279, 358 (2007); Oregonians in Action, *Frequently Asked Questions*, <http://www.Measure37.com/measure%2037/faq.htm> (last visited Sept. 5, 2008) (urging Oregonians to be "ever vigilant" as to the effect of court decisions on property rights).

<sup>57</sup> See Oregonians in Action, *supra* note 56 (arguing that a waiver is transferable, despite the Measure's ownership limitation, and that transferability is a "new political theory"). If a property use was lawfully engaged based on a *waiver*, and the claimant subsequently sold the property, would the purchaser acquire a right to continue the land use? Would the purchaser's use be considered *lawfully* nonconforming, or would the new user be precluded from continuing an *unlawful* nonconforming use? More importantly, if a local government found that a waiver would subvert the public welfare, forcing it to compensate the land owner for the deprived use, does the government purchase the *rights* (say, the vertical development rights to construct a skyscraper), or could a successor (or even the claimant) then repeat the claim or make another claim premised upon the value lost from being restricted from a different use, such as a duplex in the first claim, a foundry in the second? See *Jackson County v. All Electors*, No. 05-2993-E-3(2), at 7 (Or. Cir. Ct. Jan. 19, 2007), available at [http://www.doj.state.or.us/hot\\_topics/pdf/measure37/order.pdf](http://www.doj.state.or.us/hot_topics/pdf/measure37/order.pdf) (finding that waiver is not transferable); *Mathis v. State*, No. CV060308, at 2 (Or. Cir. Ct. June 25, 2007), available at [http://www.doj.state.or.us/hot\\_topics/pdf/measure37/mathis\\_decision8907.pdf](http://www.doj.state.or.us/hot_topics/pdf/measure37/mathis_decision8907.pdf) (affirming that a waiver is not transferable). *But see* *Vanderzanden v. Land Conservation & Dev.*, No. 05C19565, at 4 (Or. Cir. Ct. Jan. 8, 2007), available at [http://www.doj.state.or.us/hot\\_topics/pdf/measure37/vanderzanden\\_decision\\_final.pdf](http://www.doj.state.or.us/hot_topics/pdf/measure37/vanderzanden_decision_final.pdf) (holding that to determine compensation, the court is required to assume transferability).

local governments.<sup>58</sup> In addition, the Measure appeared to raise nondelegation problems,<sup>59</sup> equal protection issues and ambiguities based on undefined terms.<sup>60</sup> The ambiguities in the Measure insured extensive litigation.

Irrespective of the legitimacy of such challenges, the property interests protected under the Measure raise concerns about the reach of the statute and the violence the Measure might have leveled against a property scheme which had already rejected the validity of such claims. In one sense, the violence might be seen as calculated and efficient, as Measure 37 filled the gap between established takings jurisprudence and absolute rights in property use. From the perspective of takings jurisprudence, however, the entitlements proposed in Measure 37 appear as an epic mismatch with a “fair” character of property. Measure 37 did not build on property law, it ignored it; it did not accommodate context and tradition in property protection, it rejected them.

*B. Understanding the Measure Through the Doctrine of Capture: Excusing a Claimant From Earning a Property Expectation*

To begin the analysis of the impacts of Measure 37, it may be helpful to compare the expectations protected in the Measure to the expectations otherwise recognized as property *rights*. One telling comparison is found in the Measure’s

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<sup>58</sup> Measure 37 specifically protected claimants from later-enacted “comprehensive plans, zoning ordinances, land division ordinances, and transportation ordinances,” but allows local governments to enforce regulations adopted for “the protection of public health and safety.” OR. REV. STAT. § 197.352(3)(B), (11)(B) (2005). The distinction, however, is unclear. Zoning regulations are only valid to the extent that they further the public health, safety and welfare. *Kroner v. City of Portland*, 240 P. 536, 539 (Or. 1925). Likewise, subdivision regulations typically require that a proposed development construct access and emergency access roads to serve the development, as well as sidewalks, and water and sewer provision, among other necessities for the public welfare. *See, e.g., Bd. Of County Comm’rs of Douglas County v. Bainbridge, Inc.*, 929 P.2d 691, 705–06 (Colo. 1996). Local governments struggled over whether Measure 37 allowed the conditioning of subdivisions with these health and safety concerns; some local governments fashioned justifications for applying subdivision regulations to Measure 37 claimants, despite the express inclusion of subdivision controls in the language of the measure. *See, e.g., MULTNOMAH, OR. COUNTY CODE § 27.510(B)(6)* (2005).

<sup>59</sup> The Measure provided that only “the governing body” may modify, remove, or not apply the target regulations. OR. REV. STAT. § 197.352(8) (2005). Because Oregon’s land use planning scheme is premised on state-mandated planning under sections 197.015, 197.090(1)(b), 197.155(1), and 197.250, the Measure appeared to delegate authority to local governments to waive state statutes, contrary to Oregon law. *See, e.g., OR. CONST. art. I, § 21; Advocates for Effective Regulation, Agripac, Inc. v. Eugene*, 981 P.2d 368, 379 (Or. Ct. App. 1999) (explaining that article I, section 21, of the Oregon Constitution has been construed to prohibit laws that delegate the power of amendment to another governmental entity).

<sup>60</sup> Measure 37 did not apply to “activities commonly and historically recognized as public nuisances under common law.” OR. REV. STAT. § 197.352(3)(A) (2005). The Measure did not specify whether this provision was intended to exempt only those activities which had been specifically identified as nuisances, or the more general category of nuisance, defined as “negligent, reckless or intentional invasions of plaintiff’s interests, or the operation of an abnormally dangerous activity.” *Raymond v. S. Pac. Co.*, 488 P.2d 460, 463 (Or. 1971). If the former, the court has reminded that nuisance does not arise from an identification of the *activity* causing the impacts, but from the rights invaded by the activity. *Id.*

treatment of so-called “vested rights” in land uses.<sup>61</sup> The advocates of Measure 37 sought “protection of their *right* to use their land as they could when they bought it.”<sup>62</sup> The obvious question is: what land use rights did the Measure’s claimants enjoy when they acquired their property? Of course, courts have long accepted property use as a fundamental attribute of ownership, holding that ownership generally comes with the right to make productive use of land.<sup>63</sup> On the other hand, the vested rights doctrine encompasses the notion that, although the bundle of rights attributable to property ownership includes the right to make *some* use of property, a property right does not vest in a *particular* land use based on property ownership alone.<sup>64</sup>

The doctrine of vested rights in land uses illustrates, in effect, how expectations in property uses are “captured” as encapsulated in the debate between the majority and dissenting opinions in *Pierson v. Post*.<sup>65</sup> In this well-known controversy, plaintiff Post was in pursuit of a fox. He was appropriately prepared for the hunt, having employed hounds of “imperial stature” (not just beagles).<sup>66</sup> Clearly, Post intended to reduce the fox to his control (and, in the meantime, rid the world of a notorious villain),<sup>67</sup> and engaged in the type of labor and investment that

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<sup>61</sup> “Vested rights” in the context of land use regulation refers to the point in the development process at which law becomes static; that point at which the ordinances and statutes in effect govern the completion of a development project, and are no longer subject to change. *See, e.g.*, *Quadrant Corp. v. Wash. Growth Mgmt. Hearings Bd.*, 110 P.3d 1132, 1140 (Wash. 2005). Some courts ground vesting in the equitable doctrine of estoppel. *See, e.g.*, *County of Kauai v. Pac. Life Ins. Co.*, 653 P.2d 766, 774 (Haw. 1982) (stating that the “doctrine of equitable estoppel is based on a change of position on the part of a land developer by substantial expenditure of money in connection with his project in reliance, not solely on existing zoning laws or on good faith expectancy that his development will be permitted, but on official assurance on which he has a right to rely that his project has met zoning requirements, that necessary approvals will be forthcoming in due course, and he may safely proceed with the project.”); *Fla. Cos. v. Orange County*, 411 So. 2d 1008, 1010 (Fla. Dist. Ct. App. 1982) (explaining that the doctrine of equitable estoppel will preclude a municipality from changing its regulations as they apply to a particular parcel of land when a property owner in good faith, upon some act or mission of the government, has substantially changed his position or has incurred such extensive obligations and expenses that it would be highly inequitable and unjust to destroy the right he acquired.).

<sup>62</sup> *Oregonians in Action, Marion County Judge Overturns Measure 37*, <http://oia.org/Measure37overturnPR.htm> (last visited Sept. 9, 2008) (emphasis added).

<sup>63</sup> *See, e.g.*, *Bielecki v. City of Port Arthur*, 12 S.W.2d 976, 978 (Tex. Comm’n App. 1929) (“A citizen has a lawful right to use his property for any purpose he may see fit, so long as such use does not operate to substantially injure the rights of others. A denial of the right of a citizen to so use his property is a deprivation of the property itself, hence falls within the protection afforded by the due process clauses of both State and Federal Constitutions.”); *Johnson v. Mount Ogden Enters., Inc.*, 460 P.2d 333, 336 (Utah 1969) (noting that “every person has a right to use his own property as he sees fit so long as that use does not invade the rights of his neighbor unreasonably and substantially”); *Serv. Realty Corp. v. Planning & Zoning Bd. of Appeals of Greenwich*, 109 A.2d 256, 258 (Conn. 1954) (stating that there exists a “common-law right of a man to use his land as he pleases, as long as the use does not create a nuisance”); *Mayer v. Grueber*, 138 N.W.2d 197, 204 (Wis. 1965) (“It is elementary that the owner of private property may make any use of it so long as he does not interfere with the rights of the public.”).

<sup>64</sup> *Palazzolo v. Rhode Island*, 533 U.S. 606, 627 (2001) (“The right to improve property, of course, is subject to the reasonable exercise of state authority, including the enforcement of valid zoning and land-use restrictions.”).

<sup>65</sup> 3 Cai. 175 (N.Y. Sup. Ct. 1805).

<sup>66</sup> *Id.* at 181–82 (Livingston, J., dissenting).

<sup>67</sup> *Id.* at 180 (Livingston, J., dissenting).

certified that intent.<sup>68</sup> The dilemma, of course, was that Post was ultimately unable to retire from a successful hunt, prize in hand, leaving the forest and farms safer from so arrogant a thief as this fox.<sup>69</sup>

In the scheme of things, we would be less familiar with this controversy had Post succeeded in the hunt. Likewise, we would not be concerned with the social cost of protecting Post's unfruitful labor had Post missed his shot and the fox escaped, or if the fox was taken by a natural predator (other than human). Rather, as Post grew ever closer to his intended prey, defendant Pierson sprung, caught, and killed the fox.<sup>70</sup> Even more insulting was Pierson's refusal to offer the fox to Post, who we imagine is now sweaty, ragged, and perhaps a bit dejected as he calculates the substantial investment and time lost into Pierson's hands. This case was ripe for a debate on fairness and in need of a rule.<sup>71</sup>

The task for the court was to identify a point at which labor and intent entitle one to a protectable property expectation. Specifically, the court questioned whether Post's pursuit was sufficient to vest a right that could be sustained against the saucy intruder.<sup>72</sup> After navigating the wisdoms expressed in the works of Puffendorf, Grotius, Bracton, and Barbeyrac (among others), the court siphoned a simple, communicative basis for property expectation known as capture.<sup>73</sup> Under this scheme, actions giving rise to property rights must manifest more than just a clear intent; in addition, actual capture, or infliction of a mortal wound without abandoning the hunt, is a necessary condition of possession. Stated differently, the mere pursuit (the "first seeing, starting, or pursuing") is not enough, even if taken to a point where a reasonable person would predict a likely capture.<sup>74</sup> Despite how uncourteous and unkind we may cast the interloper, the expectation of a property right vests upon control, and not upon labor or intent alone; rather, property expectations are legitimate at "the convergence of intent and fact, *animus possidendi* and *factum possidendi*."<sup>75</sup> As such, Post was without a remedy because he was without a property right—the fox was lost.

The dissenting opinion in *Pierson v. Post* illustrates the "fairness" questions arising in capture: rewarding an interloper with a protected expectation ignores the initial investment and labor expended in the pursuit.<sup>76</sup> According to the dissent,

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<sup>68</sup> *Id.* at 180–82 (Livingston, J., dissenting).

<sup>69</sup> *Id.* at 175.

<sup>70</sup> *Id.*

<sup>71</sup> See generally Bethany R. Berger, *It's Not About the Fox: The Untold History of Pierson v. Post*, 55 DUKE L.J. 1089 (2006) (describing the social and economic influences in the *Pierson* controversy).

<sup>72</sup> 3 Cai. R. at 175.

<sup>73</sup> *Id.* at 176–79 ("That is to say, that actual bodily seizure is not indispensable to acquire right to, or possession of, wild beasts; but that, on the contrary, the mortal wounding of such beasts, by one not abandoning his pursuit, may, with the utmost propriety, be deemed possession of him; since thereby the pursuer manifests an unequivocal intention of appropriating the animal to his individual use, has deprived him of his natural liberty, and brought him within his certain control.").

<sup>74</sup> *Id.* at 179.

<sup>75</sup> Abraham Drassinower, *Capturing Ideas: Copyright and the Law of First Possession*, 54 Clev. St. L. Rev. 191, 195 (2006).

<sup>76</sup> 3 Cai. R. at 180–81 (Livingston, J., dissenting) ("But who would keep a pack of hounds; or what gentleman, at the sound of the horn, and at peep of day, would mount his steed, and for hours together, 'sub jove frigido,' or a vertical sun, pursue the windings of this wily quadruped, if, just as night came on, and his stratagems and strength were nearly exhausted, a saucy intruder, who had not shared in the

legal principles should recognize the equity and effort of the pursuit itself, as a manifestation of intent, at least at the point where the efforts are reasonable.<sup>77</sup> The use of hunting dogs of imperial stature was offered as a factor to demonstrate the good faith intention to capture the fox, together with other circumstances tending to demonstrate the clear commitment to the hunt.<sup>78</sup> The dissent would have awarded an expectation to Post at a much earlier moment than actual control, perhaps during preparations for the hunt, perhaps on entry to the forest, but in any event prior to the time at which an interloper's appearance unjustly denies an expectation acquired through intent.<sup>79</sup> Of course, the dissenting opinion was not adopted, and "capture" as a means of first possession required a combination of labor and intent, in which the measure of labor was set in relation to completion of control, and capture was awarded with a protectable expectation.<sup>80</sup>

It has been appropriately argued that the doctrine of capture applies to the possession of land in the operation of adverse possession.<sup>81</sup> Under the doctrine of adverse possession, title is awarded to the trespassing possessor of property who, for a sufficient, continuous duration, makes an actual, open and notorious, hostile, and exclusive possession of another's property.<sup>82</sup> The doctrine of adverse possession essentially rewards the person who makes a productive "capture" of land,<sup>83</sup> and adds to the *Pierson* decision the importance that the intention of capture

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honors of labors of the chase, were permitted to come in at the death, and bear away in triumph the object of pursuit?").

<sup>77</sup> *Id.* at 182 (Livingston, J., dissenting).

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 178–79.

<sup>81</sup> For a more in-depth analysis of this idea, consider Carol Rose's now classic and thoughtful exploration of the elements of possession in the formation of a property right. Carol M. Rose, *Possession as the Origin of Property*, 52 U. CHI. L. REV. 73 (1985). Rose questioned the importance and meaning of first possession in acquiring a property right, surmising that possession is principled on the intersection of two theories of property rights: a Lockean labor theory and a contract theory. *Id.* at 73. Beginning with the desert-based idea that labor effects a right to possession in the fruits of labor, Rose determined that physical possession itself (the Lockean element) is insufficient to vest the right, as there must be some principle to distinguish between first possessors. *Id.* Accordingly, she suggested that the possessor must also perform some clear act which places the world on notice that a claim to possession is being made (the contractual, or consent element). *Id.* at 75–76.

Rose takes the doctrine into the acquisition of possessory rights in real property, suggesting that a communicative effect (communicating consent) of the overt act emerges as the trigger for the acquisition of the right of possession. *Id.* at 77–79. The communicative principle is no better illustrated than in the application of these principles to adverse possession. Of course, title passes only where notice to the owner is sufficient; a person who 'possesses' by sneaking onto property in the moonlight, or who otherwise fails to possess in an 'open and notorious' manner, fails to place the true owner on notice of the adverse claim. Under such circumstances, possession is merely unlawful and does not vest title to the possessor. *See id.* at 77–81 (offering several examples of sufficient forms of notice).

<sup>82</sup> *See, e.g.,* Nome 2000 v. Fagerstrom, 799 P.2d 304, 309 (Alaska 1990) (quoting *Smith v. Krebs*, 784 P.2d 124, 125 (Alaska 1989)).

<sup>83</sup> *See* Axel Teisen, *Adverse Possession—Prescription*, 3 A.B.A. J. 126, 127 (1917) (arguing that by doing work that is beneficial to the community, the adverse possessor is rewarded by title). For other policies behind adverse possession, see Lee Anne Fennell, *Efficient Trespass: The Case for "Bad Faith" Adverse Possession*, 100 NW. U. L. REV. 1037, 1059 (2006) (discussing "three main clusters of justifications: (1) those that focus on protecting the expectations or investments of the possessor; (2) those that focus on procedural values such as neatening up titles, reducing litigation, and generally

be openly manifested through acts which are sufficient to communicate a certain capture.<sup>84</sup>

A similar analysis applies to vesting the right to use property.<sup>85</sup> This is not because, like an owner of adversely possessed property, the Measure 37 claimant allowed her land to fester unused or unproductive for so long. Nor do the similarities suggest a reward to a third party (presumably, the interloping public in exercising its police power) for taking advantage of the long period of non-use (although there may be something to this argument). Rather, the principles on which a particular property use vests as a legitimate, protectable expectation bear an unmistakable resemblance to elements of the property expectation acquired under the doctrine of capture.

To begin the analysis of vested land use rights, students typically read about chicken and pig farms,<sup>86</sup> churches, subdivisions and mining operations, and the struggles that landowners suffer to implement their preferred land uses. Invariably, the landowner has made preparations for the use—by purchasing the property, securing financing, engaging in marketing, applying for development approvals and, in some cases, even commencing construction—but completion is intercepted by a newly-enacted land use regulation which prohibits (or impairs completion of) the particular use at issue. The question asked of students is: do the land owner's acts entitle her to protection against changes in the law? The question might be restated: has the owner effectively captured a valid expectation in the land use?

As in capture, the vesting doctrine does not protect a general intention, idea, or even plan to develop property. Rather, the doctrine requires a landowner to engage in some substantial act or acts in furtherance of the development plan.<sup>87</sup> To

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increasing the security of land holdings; and (3) those that focus on prodding the sleeping owner or rewarding the productive possessor").

<sup>84</sup> Intent is a problematic question in cases of adverse possession, and many courts have rejected the notion that the subjective state of mind of the possessor is at issue in determining whether the possession itself was sufficiently hostile. *See, e.g.*, *Chaplin v. Sanders*, 676 P.2d 431, 436 (Wash. 1984) (holding a possessor's state of mind is irrelevant). The relevant distinction between adverse possession and capture of wild animals appears to be in how to resolve the prior ownership in adverse possession against the "wild" status in capture. Assuming that the intent required to support capture of real property is the intent to possess the property itself, without resolving the issue of whether intent must also show the intent to dispossess another, the elements of adverse possession are underlain by an objective standard of intent by requiring that the possession essentially communicate the intent to own.

<sup>85</sup> Of course, the doctrine of capture is invoked for explanatory purposes here. The vesting doctrine is reported to have evolved from the due process clause of the Fourteenth Amendment. *See Grayson P. Hanes & J. Randall Minchew, On Vested Rights to Land Use and Development*, 46 Wash. & Lee L. Rev. 373, 385 (1989). Notably, the vesting doctrine has evolved from the rule that, with respect to use of property, the state generally does not "give any assurance, or come under an obligation, that its legislation upon that subject would remain unchanged." *Mugler v. Kansas*, 123 U.S. 623, 668–69 (1887).

<sup>86</sup> *See, e.g.*, *Clackamas County v. Holmes*, 508 P.2d 190, 191 (Or. 1973) (demonstrating a vested property right to complete construction of a chicken processing plant where a well was drilled for the project, special arrangements for electrical power and transformers had been made, a soil survey was done, and the landowners expenditures reached \$33,000); *Belvidere Township v. Heinze*, 615 N.W.2d 250, 254 (Mich. Ct. App. 2000) (concluding there was not a vested property right in a nonconforming use of a hog farm where the actions taken by the landowners were only preliminary in nature and failed to "change the substantial nature of the land").

<sup>87</sup> Even under the minority rule, such as that in the states of Washington and Texas, vesting occurs by the filing of a land use application; the right to use, triggering protection of a right to use land in a



acquire a valid expectation, and “vest” the right to complete the development, the doctrine requires the landowner to demonstrate substantial expenditures.<sup>88</sup> Substantial expenditures include the money, time, and/or labor necessary to further the development proposal, where enforcement of a new, unanticipated regulation would cause a “serious loss[,] rendering the improvements essentially valueless.”<sup>89</sup> In essence, the landowner must mix labor with the land and commit the land to the particular use, often by demonstrating a substantial change in the land itself.<sup>90</sup> As in the acquisition of a possessory interest, then, labor itself is a necessary condition to vest the right to a land use.

Of course, as in the doctrine of capture, labor alone is seldom a sufficient condition for purposes of vesting. Indeed, if vesting land uses were based only upon the initial engagement of labor to improve the property, it would be difficult to distinguish among those types of labor which are intended to capture any particular land use; not just *any* investment (such as purchasing the property), and not just *any* labor (such as constructing a fence, watering the lawn, clearing the land of invasive vegetation, or Nozick’s example of adding a can of tomato juice to it)<sup>91</sup> suggests that steps have been taken toward committing land to a particular land use. Rather (as an answer to the *Pierson* dissent), much of the initial investment is not lost or meaningless, despite the failure of the pursuit—Post can hunt another day with the same dogs, but simply must hunt for another fox. The doctrine only protects a landowner’s investment toward developing a *particular* land use against changes in the law occurring prior to completion of that development.

To further distinguish between labor which demonstrates the appropriate intent and labor which cannot be attributed to the claimed expectation, courts will also inquire into whether the landowner’s investment objectively demonstrated “good faith”—that the investments were made to commit the land to the proposed use, and that the landowner did not simply make hasty expenditures to avoid the

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certain way, vests only by a satisfactory communication of the intention to mix labor with the land, combined with action sufficient to commit the land to a particular productive land use. *See* WASH. REV. CODE § 58.17.033 (2006) (stating that a division of land is only subject to the “[ordinances] in effect . . . at the time . . . [of] application . . . .”); *Id.* § 19.27.095 (stating that land use permits will be considered under the “zoning or other land use control ordinances in effect on the date of application”); TEX. LOC. GOV’T CODE ANN. § 245.002(a) (Vernon 2005) (stating that land use permits are subject only to ordinances in effect at the time the original application was filed or the plan for development was filed with the agency).

<sup>88</sup> *See, e.g.,* Avco Cmty. Developers, Inc. v. S. Coast Reg’l Comm’n, 553 P.2d 546, 550–51 (Cal. 1976) (noting that “neither the existence of a particular zoning nor work undertaken pursuant to governmental approvals preparatory to construction of buildings can form the basis of a vested right to build a structure which does not comply with the laws applicable at the time a building permit is issued”).

<sup>89</sup> *See* Town of Orangetown v. Magee, 665 NE.2d 1061, 1064–65 (N.Y. 1996) (regarding a situation in which a town revoked a permit by changing the zoning code affecting a developer’s land after the developer had spent \$4 million on improvements).

<sup>90</sup> *See, e.g.,* County Council for Montgomery County v. Dist. Land Corp., 337 A.2d 712, 721 (Md. 1975) (reinstating zoning restriction despite plaintiffs’ economic investment in studies and plans for development and building permits). The substantial expenditure issue can be problematic, particularly for so-called “antiquated subdivisions.” *See, e.g.,* RC Enterprises v. Town of Patterson, 42 A.D.3d 542, 544 (N.Y. App. Div. 2007) (denying plaintiff’s alleged reliance on expenditures made some thirty years prior as a basis to vest the development).

<sup>91</sup> ROBERT NOZICK, ANARCHY, STATE AND UTOPIA 175 (1974).

reach of new regulations.<sup>92</sup> To justifiably rely on the substantial investment, the landowner must have sought and received a lawful land use approval for that particular development proposal to qualify for a vested right. Legitimate approvals might include plat approvals or building permits,<sup>93</sup> among others.<sup>94</sup> A landowner's expenditures prior to receiving the approval—such as the architectural and engineering drawings made in the preparation of a land use application—are not sufficient to establish a vested right, as they were not made in furtherance of any particular land use.<sup>95</sup>

The foregoing suggests that the doctrine of vested rights borrows substantially from capture, requiring actual capture (or a “mortal wound”) of the land use<sup>96</sup> or a character of investment which objectively indicates that the land is in fact committed to the proposal. Yet, if the analogy to capture helps to understand how property rights in property uses are acquired, it also marks the effective divergence from property rights in Measure 37. As noted, for Measure 37 claimants, rights in property uses were perfected upon the mere *acquisition* of property.<sup>97</sup> The title interest itself vested a right to any property use, subject only to land use controls in existence at that time.<sup>98</sup> Measure 37 thus prevented changes in land use regulations by vesting property owners with rights the owners *might* have enjoyed, had they engaged, proposed, designed, furthered, or otherwise invested in some particular land use prior to its being prohibited by subsequent zoning. Of course, no such investments, proposals, or other engagements were accomplished; otherwise, Measure 37 would not be needed. The Measure instead perfected an entitlement to engage land uses before even the mere beginnings of pursuit—like the acquisition

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<sup>92</sup> See, e.g., *County of Kauai v. Pac. Life Ins. Co.*, 653 P.2d 766, 774 (Haw. 1982) (noting that the general rule of equitable estoppel “is permeated by the good-faith requirement”). The court also inquires into the detriment to the landowner from compliance with the new regulations. *Id.* (citing *Life of the Land, Inc. v. City Council*, 606 P.2d 866, 902 (Haw. 1980)). Where compliance can be accomplished without undue harm, the policy basis for recognizing a right against such regulations loses its meaning. See *id.* at 776. For instance, in the case of phased developments, courts have limited the developers' vested rights from affecting parts of the project that had not begun construction at the time the new regulation went into effect. *Id.* at 775.

<sup>93</sup> See, e.g., *Hermosa Beach Stop Oil Coal. v. City of Hermosa Beach*, 103 Cal. Rptr. 2d 447, 460 (Cal. Ct. App. 2001) (requiring the developer to obtain “a valid building permit, or its functional equivalent”).

<sup>94</sup> However, a landowner may not rely on an unlawfully or mistakenly issued permit. See, e.g., *Corey Outdoor Adver., Inc. v. Bd. of Zoning Adjustments of Atlanta*, 327 S.E.2d 178, 182 (Ga. 1985) (denying estoppel where an unauthorized official issued the building permit); *Clark Stone Co. v. N.C. Dep't. of Env't & Natural Res.*, 594 S.E.2d 832, 842 (N.C. Ct. App. 2004) (ruling that a mistakenly issued permit did not create a vested right).

<sup>95</sup> See, e.g., *Snake River Venture v. Bd. of County Comm'rs, Teton County*, 616 P.2d 744, 751 (Wyo. 1980) (“[A] property has no vested right (which will withstand a later zoning regulation) in a development which is merely contemplated.”); *Sautto v. Edenboro Apartments*, 174 A.2d 497, 504 (N.J. Super. Ct. App. Div. 1961) (explaining that purchase price can be considered only where it is linked to a specific proposed use).

<sup>96</sup> An actual engagement of the use which is subsequently deemed contrary to the public welfare could be better termed a nonconforming use, and protected under the rights accruing under such circumstances. Although an analysis reasonably parallel to vested rights could be applied to Measure 37, particularly as addressed in the next section, this Article primarily concerns yet-unengaged land uses and protection afforded under regulatory takings.

<sup>97</sup> OR. REV. STAT. § 197.352(8) (2005).

<sup>98</sup> *Id.*

of hounds proposed by the *Pierson* dissent, except that under Measure 37, the metaphorical fox was protected against the world as “captured” property before Post even dreamed of the hunt.<sup>99</sup>

As a result, Measure 37 diverged from property rights in property uses not just because ownership of property is insufficient for purposes of vesting property rights, but also more generally by allowing vested rights where claimants had not yet engaged in any land uses or otherwise captured vested expectations in a particular use of land.<sup>100</sup> Given that the completion of any such uses would be speculative at best, and because Measure 37 vested compensable property interests in speculative land uses, the Measure protected a special type of property interest—one that does not translate well into property rights in property use. What is the expectation in an unengaged land use? The doctrine of vested rights answers this question against the *Pierson* dissent, recognizing that an initial investment is seldom determinative of a successful capture. As noted previously in discussion of the *Pierson* case, Post may have missed his final shot at the fox or run out of ammunition.<sup>101</sup> The Measure circumvented these reasonable possibilities, and as

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<sup>99</sup> The irony of Measure 37 is that the primary claims of “right” set forth by its advocates—“I can do what I want with my property” and speculative property value—are not well-supported by the alleged natural right basis for the claim. John Locke’s construction of the property right is a popular source. Locke promoted property as a “natural political right of individuals that preserved political liberty and fostered limited government.” DAVID A. SCHULTZ, *PROPERTY, POWER, AND AMERICAN DEMOCRACY* 169 (1992). The Lockean bundle itself was premised on the circumstance that “no body has originally a private Dominion, exclusive of the rest of Mankind.” JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 304 (Peter Laslett ed., Cambridge University Press 1970) (1690). Rather, the Lockean right is based on the “necessity” of a “means to appropriate them some way or other before they can be of any use, or at all beneficial to any particular Man.” *Id.* at 304–05.

Locke argued that the value of “things” in the world is the product of transformation; nine-tenths the value of property, he argued, is from the efforts of humans. *Id.* at 314. (“As much Land as a Man Tills, Plants, Improves, Cultivates, and can use the Product of, so much is his *Property*. He by his Labour does, as it were, inclose it from the Common.” *Id.* at 308.). Under the Lockean scheme, a property right is not automatic even in a given social setting, but *becomes* the character of certain things upon the transformative action of individuals in possession. He states that “every Man has a *Property* in his own *Person* . . . and the *Work* of his Hands,” which, when “mixed” with “[w]hatsoever then he removes out of the State of Nature” and “mixed his *Labour* with,” he has “joyned to it something that is his own, and thereby makes it his *Property*.” *Id.* at 305–06. This formulation of the Lockean derivation of property, from which we might trace a title interest directly to the common good, led Richard Epstein to propose a correction to this basis for property rights protection. RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 11–12 (1985) (“[I]f we correct [Locke’s] account of the original position to remove all traces of original ownership in common, then the soundness of his position is true, *a fortiori*.”). Hence, a right in Locke’s scheme was acquired by *removing* the things from the commons, a nice trick effectuated as a fruit of labor, the inalienable factor from which a just dessert arises.

Measure 37 was inconsistent with Locke’s property right basis—the vesting provisions of Measure 37 diverged from the Lockean justification in the attempt to secure property value *in advance* as an expectation of the value added to the land, prior to the actual labor of the improvement itself. Putting aside Locke’s characterization of nature and the world, it is clear that Locke did not argue that the right to the “nine-tenths” value does not vest without making the effort. Indeed, without the addition of value by transformation of land from its natural state, value is speculative and left to its natural state. There is no right to protect and no dessert to insure.

<sup>100</sup> See *supra* Parts II.A, II.B.

<sup>101</sup> See *supra* Part II.B.

such, excused its claimants from the intent, labor, and communication necessary to earn a property right in land uses.

*C. Understanding the Measure as Piecing Out Property Duties*

Measure 37 was intended to relieve land owners of land use regulations, and indeed, the loss of capture as a basis for allocating vested rights in land uses was a blow to Oregon's land use regulatory system. As discussed later, the ability of a community to meet new social, economic, and environmental challenges through land use regulations is aided substantially by the vested rights doctrine.<sup>102</sup> Yet, the capture element of property rights in property uses is arguably contingent, functional only within the context of a collective framework which implements land use controls. Put otherwise, there may be nothing magical about capture as a basis for property rights in property uses (except, perhaps, that it has played such an important role in the development of property expectations).<sup>103</sup> In this regard, the contingency of capture stands in stark contrast to those fundamental limitations on the enjoyment of property, the most relevant here of which is the "maxim of universal application" known as *sic utere tuo ut alienum non laedus* (do not use your property in manner to hurt another).<sup>104</sup> It is with respect to these property limitations, perhaps better described as *property duties*, that Measure 37 has its most pressing impact on property.

The problem raised herein is that Measure 37 rejected the notion that rights in private property uses are dependent on any such context for their validity: Measure 37 portrayed property as an expectation not just to use land, but also as an *unfettered* opportunity to make any productive use of the land.<sup>105</sup> Under Measure 37, land use regulations resulted in a "taking" of private property whenever the regulatory restriction precluded an owner from realizing the potential value of the property, such as by precluding some particular type of use or use of a physical portion of the property<sup>106</sup>—for instance, by prohibiting the operation of an

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<sup>102</sup> See *infra* Part III.

<sup>103</sup> As will be made clear, any conclusions from the notion of labor and vested rights as something other than deeply contained in property itself are, I believe, illusory. See *generally* Part III.A. Nevertheless, it is also apparent that the doctrine of vested rights in land uses has questionable, if any application outside of a regulatory system.

<sup>104</sup> *Lansburgh v. District of Columbia*, 11 App. D.C. 512, 522 (D.C. Cir. 1897) (quoting *Crowley v. Christensen*, 137 U.S. 86, 90 (1890)).

<sup>105</sup> See *supra* Part II.C.

<sup>106</sup> Under the Measure 37 analysis, where the benefit of a particular land use choice is denied an owner, and where the public derives a benefit from that denial, the choice of private land uses have been *appropriated* to the public. Of course, land use regulations rarely require a private landowner to open her gates and allow physical entry by others, and such regulations are typically found to violate the rights attendant to private property. See, e.g., *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 427 (1982) (finding a taking where a New York statute provided that a landlord must permit a cable television company to install its facilities upon his property without compensation). Where the alleged taking occurs only by the regulatory limitation of property uses, the property analysis more properly focuses on expectations, rather than physical boundaries. As Justice Rehnquist argued in his dissent, for takings analysis "[i]t is, of course, irrelevant that appellees interfered with or destroyed property rights that Penn Central had not yet physically used." *Penn Central*, 438 U.S. 104, 143 n.6 (1978) (Rehnquist, J., dissenting). See EPSTEIN, *supra* note 99, at 64 (stating that, in *Penn Central*, "[t]he air rights over the

industrial or commercial establishment in a residential area, preventing removal of rock and soil in a particular manner, refusing constructions of buildings above a certain height in a height-restricted area, prohibiting building in a stream setback area, limiting the division of property into additional lots, and so on.<sup>107</sup> Measure 37 established a right against such land use regulations. The argument goes, the enforcement of a land use restriction against one owner operates as a benefit to all others—so, prohibiting a rock quarry in a residential neighborhood decreases the value of the rock quarry property, but correspondingly increases the value of adjacent neighboring properties. Under the argument, the regulatory transfer of value from one owner to others constitutes a governmental intrusion and appropriation of private property to a public use. Government may make such an appropriation, but must compensate the owner for the public capture of those private property expectations.

The dilemma is that the Measure 37 formulation of property requires that we conceive of “property” merely as the sum of its pieces of potential market worth (in time, height, density, use, etc.). Of course, if we *can* preserve individual land use choices to the same degree that we can protect physical property boundaries, then property law could curtail the regulatory capture and redistribution of private land values. In principle, the rights of ownership can extend into property use by a simple transfer of the principles of physical occupation into the economics of property use. Yet, if we accept the idea of this transfer as sound, we may say something profound about rights in general and the attendant rhetoric, but we say nothing helpful about property rights in property use. The property conceived in Measure 37 appears radical and dramatic when we focus on meaning of property as determined by *both* the entitlements *and* limitations of property use: the construction of property which poses regulation as an interloper (rather than umpire) fails to explain the *limitations* of a property right, which is exactly what the “property” recognized in takings analysis aims to accomplish. The trouble with Measure 37’s construction of property, then, might be that it mistreated the nature of governmental action; more specifically, however, is that the construction did not accurately depict the nature of property rights in property use. Measure 37 rejected property duties, and in the process, effectively released private property from its contextual constraints.<sup>108</sup>

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existing building were property just as much as the air rights already occupied by the existing structure”); *id.* at 66 (“That the government has not taken physical possession of the land is neither here nor there.”). Of course, the *Penn Central* majority did not find the question of actual physical use irrelevant, but neither did the majority require the petitioner to demonstrate that the airspace above the terminal was physically occupied. What the majority found important, however, is not that the physical space be occupied (any more than the *Pierson* majority found that the fox be actually controlled) as much as that the petitioner’s actions be sufficient to capture the expectation in the land use. See *Penn Central*, 438 U.S. at 143.

<sup>107</sup> For these and other examples of claims filed under the Measure, see, for example, the analysis provided in SHEILA A. MARTIN & KATIE SHRIVER, DOCUMENTING THE IMPACT OF MEASURE 37: SELECTED CASE STUDIES, FINAL REPORT 3 (2006), available at [http://www.pdx.edu/media/i/m/ims\\_M37brainerdreport.pdf](http://www.pdx.edu/media/i/m/ims_M37brainerdreport.pdf), and SIGHTLINE INSTITUTE, TWO YEARS OF OREGON’S MEASURE 37: OREGON’S PROPERTY WRONGS 4 (2007), available at [http://www.sightline.org/research/sprawl/res\\_pubs/property-fairness/measure-37-report/two-years-m37-report](http://www.sightline.org/research/sprawl/res_pubs/property-fairness/measure-37-report/two-years-m37-report).

<sup>108</sup> Even property value is contingent upon the system in which rights to that construction of value arise. See *infra* notes 241–44 and accompanying text.

To grasp the idea of property duties, it is important to note that, although the idea of property is held in high regard, its enjoyment does not occur in a vacuum: the value of property requires a willing purchaser; its boundaries require the respect of others to refrain from uninvited entry; its fences require recognition of others' rights to their own; its stability requires a neighbor's maintenance of lateral support; its use requires that others' uses do not preclude the opportunities of their neighbors. As Joseph Singer appropriately notes, "[b]ecause others have property rights too, protection of property requires limits on property rights to ensure that one's legal rights are compatible with the rights of others."<sup>109</sup> In consideration of the sometimes competing, but always relevant litany of needs in property, it should be surprising to nobody that the very meaning of property relies on an understanding of the role that property protection would serve both to the individual and to other rights enjoyed throughout the collective. The strength of a property right in land use has always been subject to a complex struggle among relative expectations, where the ultimate purpose of law has been to determine how to structure the hegemony of values in conflict. Whose land use is an imposition, Boomer's or the Atlantic Cement Company's?<sup>110</sup> Who, then, is burdened with the duty to refrain from interfering with another's enjoyment? Of course, the property rights of both parties are limited in this analysis, even if only one party leaves the court feeling vindicated. Yet, these limitations, and the relativity of right among competing property owners and the common welfare, is the very project of property.<sup>111</sup>

Property has never strayed from this "simple theory"<sup>112</sup> on its foundation and limit, and the Supreme Court has guarded the basic *sic utere tuo ut alienum laedus* limitation on property rights. At the extreme end, the Court has indicated that "since no individual has a right to use his property so as to create a nuisance or otherwise harm others, the State has not 'taken' anything when it asserts its power to enjoin the nuisance-like activity."<sup>113</sup> In other words, categorical protection from land use regulations is not offered to private land use choices which have been removed from capturable expectations, the regulation of which is *damnum absque injuria*, simply not injury at all.<sup>114</sup> For purposes of this Article, this is no better

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<sup>109</sup> JOSEPH WILLIAM SINGER, ENTITLEMENT: THE PARADOXES OF PROPERTY 203 (2000).

<sup>110</sup> *Boomer v. Atl. Cement Co.*, 257 N.E.2d 870, 871–75 (N.Y. 1970), *aff'd*, *Kinley v. Atl. Cement Co.*, 349 N.Y.S.2d 199 (N.Y. App. Div. 1973) (holding that damages are appropriate when neighboring landowners sustained injury to property from dirt, smoke, and vibration emanating from cement plant).

<sup>111</sup> ACKERMAN, *supra* note 2, at 26 ("[T]he law of property considers the way rights to use things may be parceled out amongst a host of competing resource users.").

<sup>112</sup> *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 491 n.20 (1987).

<sup>113</sup> *Id.* (citing Joseph Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149, 155–61 (1971); Frank Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1235–37 (1967)).

<sup>114</sup> *See, e.g., Kroner v. City of Portland*, 240 P. 536, 539–40 (Or. 1925) ("The property of the plaintiffs is not taken. They have precisely the same estate that they had before. All that the people of Portland have said is that within certain districts certain businesses shall not be carried on, and the property situated therein shall not be used for such undertakings."); *Goldblatt v. Hempstead*, 369 U.S. 590, 592–93 (1962) ("If this ordinance is otherwise a valid exercise of the town's police powers, the fact that it deprives the property of its most beneficial use does not render it unconstitutional."); *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (upholding a zoning ordinance, excluding apartment houses, business houses, retail stores, and shops from a residential district); *Gorrie v. Fox*, 274 U.S. 603, 608

illustrated than in the Court's famous regulatory takings analysis in *Lucas v. South Carolina Coastal Council*.<sup>115</sup> Faced with a regulation which established a mandatory beach setback and rendered the owner's property without a commercially viable use,<sup>116</sup> the *Lucas* Court expressed concern about the "heightened risk that private property is being pressed into some form of public service under the guise of mitigating some serious public harm."<sup>117</sup> For the advocate of strong property rights, the *Lucas* decision is most notable for its holding that where a regulated landowner is left with no economically viable land uses, a total taking has occurred and the state is shouldered with the presumption of a public intrusion.<sup>118</sup> However, as it pertains to the meaning of property, it is more important that the *Lucas* Court recognized there can be no taking unless the claimant has a legitimate property right to begin with, and there can be no property right in a use which constitutes a nuisance or is otherwise prohibited in the background principles of state property law.<sup>119</sup>

The *Lucas* decision emphasizes that property is not comprised *only of rights*, at least not in the sense that a right to *a particular property use* is conferred without regard to the impacts of that use on others' interests. Indeed, it has long been a "settled principle" of social order that "every holder of property . . . holds it under the implied liability that his use of it may be so regulated, that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community."<sup>120</sup> In this regard, property rights are indistinguishable from "all . . . social and conventional rights":<sup>121</sup> property rights in property uses come with property duties,<sup>122</sup> and the

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(1927) (holding that an ordinance permitting city council to make exceptions to building lines did not deny due process); *Mugler*, 123 U.S. 623, 668–69 (1887) ("A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the State that its use by any one, for certain forbidden purposes, is prejudicial to the public interests.")

<sup>115</sup> 505 U.S. 1003 (1992).

<sup>116</sup> *Id.* at 1009.

<sup>117</sup> *Id.* at 1018.

<sup>118</sup> *Id.* at 1029–30.

<sup>119</sup> *Id.* at 1020–32.

<sup>120</sup> *Commonwealth v. Alger*, 61 Mass. (7 Cush.) 53, 84–85 (Mass. 1851); *Keystone Bituminous Coal Ass'n*, 480 U.S. 470, 491–92 (1987) ("Long ago it was recognized that all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community, and the Takings Clause did not transform that principle to one that requires compensation whenever the State asserts its power to enforce it." (citations omitted)). When the governmental action affects "the use and control of the property, rather than with its ownership," the state "may legitimately extend the application of the principle that underlies the maxim, *sic utere tuo ut alienum non laedas*, so far as may be requisite for the protection of the public." *Atl. Coast Line R.R. Co. v. City of Goldsboro*, 232 U.S. 548, 557–58, (1914); *Palmberg v. Kinney*, 132 P. 538, 541 (Or. 1913) ("All property is held by its owner subject to a reasonable exercise of the police power . . . to regulate the use of the property as not to impair the public health."); *State v. Jacobson*, 157 P. 1108, 1111 (Or. 1916) ("The right of a citizen both as to his property and liberty must at times be subordinated to the well-being of the community at large. Unquestionably the state has the right to interfere with the property and liberty of its citizens without making compensation to them for such interference of obstruction, provided the action is imperatively demanded in order to conserve or protect public health, welfare or prosperity.").

<sup>121</sup> *Alger*, 61 Mass. (7 Cush.) at 85.

relationship between property on the one hand, and the rights *and* the limitations on an owner's property use on the other, is essentially tautological.<sup>123</sup> It is, in the Court's words, "impossible that it should be otherwise."<sup>124</sup> Of course, property ownership itself might be meaningless without considering the owner's interests in maintaining property value, timely administrative review on development applications, and the use of property portions or horizontal or vertical development interests. As a result, it is not a meaningless exercise to inquire into the economic impacts of land use regulations on property owners. However, the Court has been careful in this inquiry to retain the fundamental balance in property between property duties and entitlements.<sup>125</sup>

Before the regulatory takings doctrine emerged as a means of protecting property rights, the Takings Clause of the Fifth Amendment was inapplicable to *regulations* of property use due to the "substantial authority upholding a State's broad power to impose appropriate restrictions upon an owner's *use* of his property."<sup>126</sup> In 1851, the Massachusetts Supreme Court distinguished eminent domain from regulatory restrictions, arguing that property uses are restrained, "not because the public have occasion to make the like use, or to make any use of the property, or to take any benefit or profit to themselves from it; but because it would be a noxious use, contrary to the maxim, *sic utere tuo ut alienum non laedus*."<sup>127</sup> Then, in 1887, the Court in *Mugler v. Kansas*<sup>128</sup> essentially ruled a takings theory "inadmissible" in a challenge to regulations prohibiting the manufacture of liquor, the enforcement of which dramatically diminished the value of the plaintiff's facility.<sup>129</sup> Under the ruling in *Mugler*, a mere limitation on the use of land—to

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<sup>122</sup> *Union Oil Co. of Cal. v. State Bd. of Equalization*, 386 P.2d 496, 500 (Cal. 1963) ("Ownership is not a single concrete entity but a bundle of rights and privileges as well as of obligations.").

<sup>123</sup> The objection to expressing property in this way appears to be that it might contravene the purposes of a background principles examination under the *Lucas* decision. 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, 520 (2001) ("This not only reduces *Lucas*' background principles inquiry to a tautology (if restrictions on property use exist, they *ipso facto* constitute background legal principles); it eliminates any possible showing that the subsequent application of restrictive regulations contravenes an owner's investment-backed expectations."). Yet, as a descriptive matter, the correlative rights analysis explains why the Court in *Palazzolo* was required to dismiss the state's argument to maintain the tautological relationship. See *infra* notes 199–205 and accompanying text.

<sup>124</sup> *Euclid*, 272 U.S. 365, 387 (1926). See also Myrl L. Duncan, *Property as a Public Conversation, Not a Lockean Soliloquy: A Role for Intellectual and Legal History in Takings Analysis*, 26 ENVTL. L. 1095, 1133–37 (1996) (discussing historic property use restrictions); Leslie Bender, *The Takings Clause: Principles or Politics?*, 34 BUFF. L. REV. 735, 751–52 (1985) (discussing restrictions on perceived noxious activity in early America). See generally John F. Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252 (1996) (surveying early imposition of public needs on private property).

<sup>125</sup> See, e.g., *Penn Central*, 438 U.S. 104, 134–35 (1978) (discussing the burdens and benefits on property owners and the public).

<sup>126</sup> *Loretto*, 458 U.S. 419, 441 (1982) (emphasis added); see also *Hadacheck v. Sebastian*, 239 U.S. 394, 410–11 (1915) (upholding prohibition of brickyard in residential area).

<sup>127</sup> *Alger*, 61 Mass. (7 Cush.) 53, 86 (Mass. 1851).

<sup>128</sup> 123 U.S. 623 (1887).

<sup>129</sup> *Id.* at 664.



protect others' rights from the ill effects of noxious uses—was not itself a constitutional deprivation.<sup>130</sup>

Importantly, preceding and during the reign of the ruling in *Mugler*, the Court was not faced with the types of land use regulations at issue today. Indeed, property has evolved from the rule in *Mugler*, both in the use of the police power authority and in the Court's perspective on the reach of property expectations. The question, then, is how changes in property jurisprudence subsequent to *Mugler* have maintained the structure of property, while accounting for the possibility that a restriction on property use will upset the balance due to the character of the regulation's impact on property value.

Contemporary property jurisprudence owes its emergence to Justice Holmes' decision in *Pennsylvania Coal Co. v. Mahon*.<sup>131</sup> Cautioning that “[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law,”<sup>132</sup> the Court recognized that a dogmatic expression of property limitations—for instance, the converse of the property rights absolutism expressed in Measure 37—may go so far as to leave no benefits of property ownership. So, in consideration of each case “upon the particular facts,”<sup>133</sup> the *Pennsylvania Coal* Court contrasted the “extent of the diminution” of property value relative to the public need for such regulation.<sup>134</sup> The resulting canon of law was vague, balancing, and reserved, and expressed a certain sensitivity to a blatant public capture of private land use opportunities: “The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.”<sup>135</sup> However, the Court was clear that a regulation has *not* gone too far by securing an “average reciprocity of advantage” to all interested owners.<sup>136</sup>

What *appears* notable about the *Pennsylvania Coal* decision was its seeming divergence from the absolute rule expressed in the *Mugler* decision: notwithstanding the “average reciprocity” ideals laid out in the opinion, the *Pennsylvania Coal* Court appeared to undermine the role of property limitations. The Court immediately demonstrated that there had been no such dramatic

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<sup>130</sup> *Id.* at 669 (“The exercise of the police power by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use, or from depriving a person of his property without due process of law. In the one case, a nuisance only is abated; in the other, unoffending property is taken away from an innocent owner.”).

<sup>131</sup> 260 U.S. 393 (1922).

<sup>132</sup> *Id.* at 413.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 415; *see also id.* at 413 (“When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act.”).

<sup>136</sup> *Id.* at 415. Holmes found the “average reciprocity” justification inapposite to a regulation which applied on a property-specific basis to protect a surface interest which was markedly absent of a subsurface right. Nevertheless, where a “prohibition applies over a broad cross section of land [it] thereby ‘secure[s] an average reciprocity of advantage.’” *Penn Central*, 438 U.S. 104, 147 (1978) (quoting *Pennsylvania Coal*, 260 U.S. at 415) (first alteration added). Land use regulations are thus understood to provide a “reciprocity of advantage” among all landowners. *Keystone Bituminous Coal Ass’n*, 480 U.S. 470, 491 (1987) (“While each of us is burdened somewhat by such restrictions, we, in turn, benefit greatly from the restrictions that are placed on others.”).

transformation in property. Following the adoption of a regulatory takings analysis in *Pennsylvania Coal*, the Court approved the concept of zoning and confirmed that property duties had been retained in the fundamental architecture of property rights in property uses in *Euclid v. Ambler Realty Co.*<sup>137</sup>

In *Euclid*, the Court was faced with a circumstance of property as a concept in conflict due to the changes in technology and social needs in urban communities, including the “advent of automobiles and rapid transit street railways.”<sup>138</sup> With such changes, the impacts of private use of property were being felt far beyond the borders of private property.<sup>139</sup> With the increasing impacts, however, came expanded notions of how private property use imposes impacts on the public health, safety, and welfare. In its first look at comprehensive zoning and its relation to property rights, the Court did not limit its analysis to the house of ill repute, slaughterhouse, gunpowder storage, or other examples commonly used to justify the noxious-use limitation in the past.<sup>140</sup> Instead, the Court focused on the more difficult question of separating “houses, business houses, retail stores and shops, and other like establishments” from residential areas.<sup>141</sup> The Recognizing that while the impacts of the former may be different in degree from the latter, they are not different in kind relative to the duties of property,<sup>142</sup> the Court found the approval of zoning was necessary to maintain the fundamental architecture of property rights in property uses.

The *Euclid* Court held that legitimate property use expectations can be captured against the public welfare only where they are consistent with contextual needs, stating that

the question whether the power exists to forbid the erection of a building of a particular kind or for a particular use, like the question whether a particular thing is a nuisance, is to be determined, not by an abstract consideration of the building or the thing considered apart, but by considering it in connection with the circumstances and the locality.<sup>143</sup>

In this decision, the *Euclid* Court assured that property retained its foundations: otherwise valid land use restrictions—adopted to preserve the public health, safety, and welfare—derive from the same authority as the state wields to protect others’ rights from nuisances, and therefore fall within the confines of property duties.<sup>144</sup>

Between *Pennsylvania Coal* and *Euclid*, of course, spans a wide analytical gap in discerning between capturable land use values and those property

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<sup>137</sup> 272 U.S. 365, 386–88 (1926).

<sup>138</sup> *Id.* at 387.

<sup>139</sup> *Id.* at 389.

<sup>140</sup> *See, e.g.*, *Slaughter-House Cases*, 83 U.S. 36, 62 (1872).

<sup>141</sup> *Euclid*, 272 U.S. at 390.

<sup>142</sup> *Id.* at 387 (finding a balance, the Court reminded that, “while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation”).

<sup>143</sup> *Id.* at 388.

<sup>144</sup> *See id.* at 387 (stating “[t]he ordinance now under review, and all similar laws and regulations, must find their justification in some aspect of the police power, asserted for the public welfare”).

opportunities which are limited without recourse. Hence, in *Penn Central Transportation Co. v. City of New York (Penn Central)*,<sup>145</sup> the Court established an analytical framework for measuring the extent of property protection in a regulatory controversy. In deciding to review each case on an “ad hoc” basis, the Court elucidated “several factors” of “particular significance.”<sup>146</sup> Consideration of these factors poses a taking as an exchange between the “economic impact on the claimant” and extent to which land use values had been effectively “captured” by a showing of “distinct investment-backed expectations” in the claimed property use on the one hand, and the “character of the governmental action” on the other.<sup>147</sup> A regulation “goes too far” when the public benefit from the regulation is “owner-ous”: able to be characterized as a physical invasion or public, interloping capture of the expectation which denies a valid expectation of land use in a manner that should be acquired by purchase, rather than regulation.<sup>148</sup>

In affording owners the opportunity to capture land uses against contrary regulations, the Court recognized that not all exercises of the police power produce benefits that should be obtained at the expense of few.<sup>149</sup> Yet, the Court reaffirmed the principle that property *cannot* be understood *only* by focusing on the circular but otherwise punctuated point that a regulation which acts like a physical appropriation should be treated like a physical appropriation: perceived conflicts between private property and public regulation are necessary in the process of “adjusting the benefits and burdens of economic life.”<sup>150</sup> Property jurisprudence does, then, take into account property value, but meanwhile recognizes that such interests constitute few of the sticks among an aggregated bundle which constitutes the property right. The various sticks are only categorically protected in land uses subject to capture, and even then, only for vested expectations in an actual land use.<sup>151</sup> Property is laden with the bedrock principle that its entitlement side is not comprised of absolutely severable economic pieces<sup>152</sup>: such pieces succumb to the necessary expectation that some value will be impacted by the government’s

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<sup>145</sup> 438 U.S. 104, 124 (1978).

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*; see also *id.* at 130–31 (focusing “both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole”).

<sup>148</sup> See *id.* at 124.

<sup>149</sup> See *Pennsylvania Coal*, 260 U.S. 393, 413 (1922) (finding constitutional limits to the use of the police power).

<sup>150</sup> See *Penn Central*, 438 U.S. at 124 (noting the expectation of property owners that government actions “adjusting the benefits and burdens of economic life to promote the common good” may have a reasonable impact on property value). See also *id.* at 147 (Rehnquist, J., dissenting) (“While zoning at times reduces *individual* property values, the burden is shared relatively evenly and it is reasonable to conclude that on the whole an individual who is harmed by one aspect of the zoning will be benefitted by another.”).

<sup>151</sup> See, e.g., *Town of Stephens City v. Russell*, 399 S.E.2d 814, 816 (Va. 1991) (no rights against changes in zoning until claimant acquires vested rights); *Twin Rocks Watseco v. Sheets*, 516 P.2d 472, 474 (Or. Ct. App. 1973) (“[A] permit or license does not create irrevocable rights, but, instead, is subject to modification or revocation by subsequent changes in law.”).

<sup>152</sup> *Penn Central*, 438 U.S. at 130 (“‘Taking’ jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated.”).

protection of the public health, safety, and welfare,<sup>153</sup> whether that protection comes in the form of public nuisance abatement or land use controls, both of which limit the private “capture” of particular property uses based on the impacts stemming from such uses. In its holistic view of the property right, the Court has emphasized that “not all economic interests are ‘property rights’; only those economic advantages are “rights” which have the law back of them, and only when they are so recognized may courts compel others to forbear from interfering with them or to compensate for their invasion.”<sup>154</sup>

Now, it might be argued—and indeed it has—that property duties *might* legitimately extend to nuisances, but that *beyond* noxious uses, land use regulation exceeds any property right limitations.<sup>155</sup> According to this argument, Measure 37 did not *expand* property rights against property duties, evidenced by both the exception in Measure 37 for “activities commonly and historically recognized as public nuisances under common law,”<sup>156</sup> and by the express limitation that claims under the Measure may have only been made against laws and ordinance coming into effect after the owner’s initial acquisition of the property.<sup>157</sup> Any needed social justification for property was arguably satisfied by the manner in which the Measure allowed government to maintain public health, safety, and welfare needs existing at the time of property acquisition, which both establishes and maintains any legitimate limitation on private property.<sup>158</sup>

It should not take much argument to establish that Measure 37’s limited exception for nuisances did not preserve property duties.<sup>159</sup> At least, the argument

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<sup>153</sup> Hence, in *Pennsylvania Coal* Justice Holmes recognized that “some values are enjoyed under an implied limitation and must yield to the police power.” *Pennsylvania Coal*, 260 U.S. at 413. More recently, in dismissing the notion that temporary planning delays constitute a categorical taking, the Court asked property owners to recognize that “[l]and-use regulations are ubiquitous and most of them impact property value in some tangential way—often in completely unanticipated ways. Treating them all as *per se* takings would transform government regulation into a luxury few governments could afford.” *Tahoe-Sierra*, 535 U.S. 302, 324 (2002). This is the point made by Mark Cordes. Mark W. Cordes, *Leapfrogging the Constitution: The Rise of State Takings Legislation*, 24 *ECOLOGY L.Q.* 187, 232 (1997) (“[T]his accommodation between private and public rights is an inherent limitation in the bundle of private rights to begin with, rather than a deprivation of interests.”).

<sup>154</sup> *United States v. Willow River Power Co.*, 324 U.S. 499, 502 (1945); *see also Henneford v. Silas Mason Co.*, 300 U.S. 577, 582 (1937) (“The privilege of use is only one attribute, among many, of the bundle of privileges that make up property or ownership.”).

<sup>155</sup> *See* EPSTEIN, *supra* note 99, at 265 (assuming a limited property duty of private property, Epstein asserts that “[z]oning stands in stark contrast to a system of private property, which allows a single owner (within the confines of the nuisance limitation) to decide how to use his plot of land”).

<sup>156</sup> OR. REV. STAT. § 195.305(3)(a) (2005).

<sup>157</sup> *Id.* § 195.305(3).

<sup>158</sup> *Id.* § 195.305(3)(b).

<sup>159</sup> There are other reasons supporting the argument that the nuisance exception expands property rights beyond property duties. First, it is difficult to believe that any hypothetical list of “commonly and historically recognized . . . nuisances” as limited in the Measure would be coextensive with the *sic utere tuo* limitation on property rights. *Id.* § 195.305(3)(a). Background principles of state property law have traditionally included, at least, the public trust doctrine, navigation servitudes, statutes, and customary constraints on free property use. *See generally* Breemer & Radford, *supra* note 123; (examining pre-existing statutes’ role in regulatory takings analysis); *see also* David L. Callies, *Custom and Public Trust: Background Principles of State Property Law*, 30 *ENVTL. L. REP.* 10,003 (2000) (examining custom and the expanding public trust doctrine). Second, the Court itself has recognized that the types of activities which amount to nuisance, as well as the governmental police power exercised to protect the

ignores the Court's finding that the police power is not limited to abatement of specific, identified noxious uses.<sup>160</sup> By rejecting the "noxious" use distinction in the regulatory takings context, the Court indicated that the prevention of injury to the public welfare and acts providing a public benefit are relatively indistinguishable for purposes of defining the scope of the police power, where the specificity in the "harm" analysis in public nuisance litigation is more restrictive.<sup>161</sup> In short, Measure 37's restrictive use of the public nuisance limitation in Measure 37 claims did little to preserve the *sic utere tuo* limitation so relevant to property rights in property uses.

Ultimately, even within the universe of capturable property use expectations, the analogy to nuisance still applies, distinguishing regulations that create a competition between a private and public appropriation from the mere exercise of a governmental power that maintains a complementary and overlapping relationship between an individual and community needs. Where by regulation the government merely acts as umpire to curtail the impacts of particular land uses,<sup>162</sup> a claim for categorical protection against the public health, safety, and welfare cannot be made without assuming an incommensurable meaning of property, one that simply ignores the duties of property and therefore skews the tautology. Yet, by treating all land use regulation as a physical intrusion, the effect of Measure 37 was to deflate the inherent limitations in property by relieving property of its *sic utere tuo ut alienum no laedus* duties. Rather than adjusting the balance between private interests and public needs, Measure 37 accomplished the extraction of property obligations from the bundle of rights.<sup>163</sup>

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public health, safety, and welfare, have been continually in evolution, a legal certainty which is effectively denied under the terms of the exception. *Lucas*, 505 U.S. 1003, 1031 (1992) ("[C]hanged circumstances or new knowledge may make what previously permissible no longer so.").

<sup>160</sup> *Lucas*, 505 U.S. at 1024.

<sup>161</sup> *Id.* ("The transition from our early focus on control of 'noxious' uses to our contemporary understanding of the broad realm within which government may regulate without compensation was an easy one, since the distinction between 'harm-preventing' and 'benefit-conferring' regulation is often in the eye of the beholder."); *Id.* at 1025–26 ("When it is understood that 'prevention of harmful use' was merely our early formulation of the police power justification necessary to sustain (without compensation) any regulatory diminution in value; and that the distinction between regulation that 'prevents harmful use' and that which 'confers benefits' is difficult, if not impossible, to discern on an objective, value-free basis; it becomes self-evident that noxious-use logic cannot serve as a touchstone to distinguish regulatory 'takings' – which require compensation – from regulatory deprivations that do not require compensation.").

<sup>162</sup> *Jones v. Bd. of Adjustment*, 204 P.2d 560, 563–64 (Colo. 1949) ("In every ordered society the state must act as umpire to the extent of preventing one man from so using his property as to prevent others from making a corresponding full and free use of their property."); *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 77 (1911) ("It does not take from any surface owner the right to tap the underlying rock and to draw from the common supply, but, consistently with the continued existence of that right, so regulates its exercise as reasonably to conserve the interests of all who possess it."). See *Bandini Petroleum Co. v. Super. Ct. of Cal. in and for L.A. County*, 284 U.S. 8, 21–22 (1931) (finding governmental acts to avoid overconsumption in wasteful uses are valid).

<sup>163</sup> Oregonians in Action, Memorandum to the 1,054,000 Oregonians who Voted for Measure 37, <http://oia.org/Mez37decisionmemo.htm> (last visited Sept. 7, 2008) (arguing against the "imaginary police power").

### III. LAND USE CONTROLS: EUCLIDEAN ZONING, SMART GROWTH PLANNING, AND THE ROLE OF PROPERTY DUTIES IN A PROPERTY SYSTEM

Governmental mingling in property use might be problematic and frustrating due to the vagueness in the Court's regulatory takings analysis,<sup>164</sup> at least to owners who view property from the perspective of economic potential. Such owners are disillusioned by the Court's Fifth Amendment jurisprudence, which poses a different character of property than the picture offered by property absolutism. However, the response of compensation legislation, illustrated most clearly in Measure 37, has been to allow acquisition and use of a property expectation in a manner that is *not property*. Measure 37 allowed vesting of uncapturable property uses and excused claimants from the burden of capturing a valid expectation, rendering obsolete the doctrines of vested rights and regulatory takings. Yet it is the intention of vested rights and the Takings Clause to *protect* property, even if in doing so they recognize that property is comprised of both rights and burdens that are relevant to the balance. The effect of Measure 37 was to reconfigure the relationship between the incidents of property ownership (possession, use, exclusion, and transfer), and then, by deflating the public stake in private land uses, to construe property rights without property duties in an inconsistent intermingling of property pieces.

Turning the focus now to the property system in which the Measure will operate, we again begin with the goal of Measure 37: proponents of compensation legislation sought a property right to use property in any way seen fit, free from regulatory oversight, subject only to the market itself. At stake in this debate is the adoption of an "extreme categorical rule that . . . would undoubtedly require changes in numerous practices that have long been considered permissible exercises of the police power."<sup>165</sup> Compensation legislation sets property rights into tension with an inspiring history of public welfare and community-building exercises: in the past, state and local governments exercised the police power to protect citizens from the adjacent location of incompatible land uses, the spread of fire and disease, urban blight, racial segregation, and unsafe structures.<sup>166</sup> More recently, attention has been given to sprawl, affordable housing, environmental health, aesthetic quality, affordable infrastructure, and the efficient transportation of goods, services, and people. From the tools used to accomplish such goals—land use regulations, including zoning, comprehensive planning, subdivision, and environmental regulations—state and local governments have controlled the creation and redevelopment of communities, "adjusting the benefits and burdens of

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<sup>164</sup> See Carol M. Rose, *Mahon Reconstructed: Why the Takings Issue is Still a Muddle*, 57 S. CAL. L. REV. 561, 562 (1984) ("[C]ommentators propose test after test to define 'takings,' while courts continue to reach ad hoc determination rather than principled resolutions."). This may be because, as the Court has noted, occasionally the "rhetorical force" of the Court's takings analysis "is greater than its precision." *Lucas*, 505 U.S. at 1016 n.7.

<sup>165</sup> *Tahoe-Sierra*, 535 U.S. 302, 334–35 (2002).

<sup>166</sup> Cf. *Euclid*, 272 U.S. 365, 391–92 (1926) (providing a number of grounds for "[t]he exclusion of places of business from residential districts," such as "promotion of the health and security from injury of children," "suppression and prevention of disorder," and facilitating "the suppression of disorder, the extinguishment of fires, and the enforcement of traffic and sanitary regulations").

economic life,”<sup>167</sup> tempered by the notion that Government is prohibited “from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”<sup>168</sup> Compensation legislation tips this measure of lawfulness to ensure that individual property owners bear no subservient burden to public needs.

The Court has repeatedly asserted the practical impossibility of the very proposition,<sup>169</sup> and indeed, it should come as no surprise that Measure 37's property value platform illustrated a striking ignorance of who pays for Measure 37 rights: leaving a government powerless to protect the welfare of the public effectively injures all whose needs are within the scope of the public welfare.<sup>170</sup> Perhaps more importantly, Measure 37 intended that claimants escape existing land use controls, but meanwhile benefit from the *enforcement* of those land use regulations against their newer neighbors, skewing the “average reciprocity of advantage” ambition contained in takings jurisprudence.<sup>171</sup> At least, Measure 37 denied the property

<sup>167</sup> *Penn Central*, 438 U.S. 104, 124 (1978).

<sup>168</sup> *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

<sup>169</sup> Judicial protection of the general welfare has been another way of saying that the Fifth Amendment establishes the line at which our community needs—the control and suppression of threats to public health, safety or morality—touches upon the core functions of government. Talmadge, *supra* note 31, at 877 (citing *Phalen v. Virginia*, 49 U.S. (8 How.) 163, 168 (1850)) (mem.) (upholding Virginia's law prohibiting lotteries and sale of lottery tickets). The Court has been skeptical of attempts to undermine the police power, whether raised in the form of contracts, due process, or takings. Prior to *Pennsylvania Coal* the Court ruled that

the power of the State to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community . . . can neither be abdicated nor bargained away, and is inalienable even by express grant; and that all contract and property rights are held subject to its fair exercise.

*Atl. Coast Line R.R. v. City of Goldsboro*, 232 U.S. 548, 558 (1914); *see also Corvallis Creamery Co. v. Van Winkle*, 274 F. 454, 456, 458 (D. Or. 1921) (finding no “arbitrary fiat of supposed legislative power” that might justify a court's interference with a “statute enacted . . . professedly to conserve the public morals, health, or welfare of society”).

So central is the police power to a functioning society that, by design, the police power “coincides with the power of government itself,” and its exercise is “necessary to adjust interpersonal relationships in such a way as to facilitate the general ability to live together in society.” Talmadge, *supra* note 31, at 904; *see also Hadacheck v. Sabastian*, 239 U.S. 394, 410 (1915) (stating that the police power is “one of the most essential powers of government, one that is the least limitable”); *Slovanian Literary & Social Ass'n v. City of Portland*, 224 P. 1098 (Or. 1924) (“The police power is the very essence of the sovereignty of the state.”).

<sup>170</sup> Of course, this point should not be overstated: property absolutists do not deny the importance of furthering *any* social values by limiting free property use. To the contrary, “property rights advocates seldom argue that government regulation is not important; rather, they argue that when regulation is necessary, the government must pay for any and all costs imposed upon property owners by those laws.” Lynda J. Oswald, *Property Rights Legislation and the Police Power*, 37 *AM. BUS. L.J.* 527, 536–37 (2000).

<sup>171</sup> Rather than consistently arguing against all regulations that presumptively affect the value of property, Measure 37 advocates argued that “[e]very law benefits only people to whom it applies.” *Good-bye Initiative?*, ALBANY DEMOCRAT HERALD, <http://www.democratherald.com/articles/2005/10/17/news/opinion/edit02.txt> (last visited Sept. 27, 2008). Although the converse appears true—a person bound by a law should be entitled to benefit from its enforcement—the statement exemplifies the circumstance in which a noncontributor benefits from other's compliance, perhaps better known as the freerider problem.

expectations of nonclaimants, who likely expect that property will be used in accordance with public welfare needs.

The most coherent way of understanding Measure 37, then, is not by the interests which it tried to categorically protect, but by the property duties recognized in American jurisprudence that the Measure extracted from property rights. Typically, the regulatory takings morass is described as the antithesis of such absolutism, designed, in a relevant sense, to *preclude* substantively absolutist principles from trumping the balancing ones.<sup>172</sup> Land use controls are generally protected by regulatory takings analysis where they are inclusive and democratic, while exhibiting a complementary relationship with the substance of right in property uses. In short, takings analysis reflects negotiation, adaption, and incorporation in the process of law. Because the Measure allowed property uses which have been found to be detrimental to the public health, safety, and welfare, and hence have been prohibited in the exercise of police power authority,<sup>173</sup> the pressing question is: what would have been the *cost* of assuring Measure 37 claimants the right to piece apart the duties of property?

#### A. Euclidean Zoning as Providing the Average Reciprocity of Advantage

For those communities able and willing to engage in politics, the genius of zoning is that it affords local governments the opportunity to manage issues of local concern—whether the concern is traffic congestion, school quality, recreational opportunities, police and fire services, etc.—and create intentional and organized communities by arranging land uses according to their characteristics, associations, and impacts. To protect the public health, safety, and general welfare, local governments enact zoning regulations pursuant to their police power authority<sup>174</sup> to direct the most appropriate uses of land in their most appropriate locations. Importantly, the basic premise of the Euclidean scheme is analogous to nuisance law in that the propriety of particular land uses is governed by their locational context: “A nuisance may be merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard.”<sup>175</sup> As noted above, in the seminal case of *Euclid v. Ambler Realty Co.*, the United States Supreme Court affirmed this exercise of the government’s general police power.<sup>176</sup>

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<sup>172</sup> See Marc R. Poirier, *The Virtue of Vagueness in Takings Doctrine*, 24 CARDOZO L. REV. 93, 190–91 (2002) (arguing that vagueness in regulatory takings “urges that, although surprises and bad things may happen, we will all try to be fair and make it right”).

<sup>173</sup> See JOHN D. ECHEVERRIA & THEKLA HANSEN-YOUNG, GEORGETOWN UNIVERSITY LAW CENTER, THE TRACK RECORD ON TAKINGS LEGISLATION 2-3 (2008), available at <http://www.law.georgetown.edu/gelpi/TrackRecord.pdf>; MARTIN & SHRIVER, *supra* note 107, at 4–7.

<sup>174</sup> *Kroner v. City of Portland*, 240 P. 536, 539 (Or. 1925); *Chanhassen Estates Residents Ass’n v. City of Chanhassen*, 342 N.W.2d 335, 340 (Minn. 1984) (“[W]hen a city designates a specific use as permissible in a particular zone or district, the city has exercised its discretion and determined that the permitted use is consistent with the public health, safety, and general welfare and consonant with the goals of its comprehensive plan.”).

<sup>175</sup> *Euclid*, 272 U.S. 365, 388 (1926).

<sup>176</sup> *Id.* at 397. See also *Sinclair Refining Co. v. City of Chicago* 178 F.2d 214, 216 (7th Cir. 1949) (stating that the general police power is “that power required to be exercised in order to effectually discharge within the scope of the constitutional limitations [the government’s] paramount obligation to promote and protect the public health, safety, morals, comfort and general welfare of the people”).



The Euclidean zoning scheme is designed to be progressive.<sup>177</sup> With flexible zoning tools such as vested rights,<sup>178</sup> estoppel,<sup>179</sup> and nonconforming rights,<sup>180</sup> the expectations of *engaged* land users (as opposed to owners of vacant or unused property) are incorporated into and protected against changes in local regulations. Conditional use<sup>181</sup> and variance<sup>182</sup> procedures allow for divergence from

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<sup>177</sup> See generally Charles M. Haar & Michael Allan Wolf, *Euclid Lives: The Survival of Progressive Jurisprudence*, 115 HARV. L. REV. 2158, 2197–98 (2002) (“The adjective “Progressive” fits *Euclid* and the village’s regulatory scheme for several reasons. First, judges who practice the sort of Progressive jurisprudence typified by the Court’s opinion in *Euclid* endorse the view that legislative and administrative efforts often result in social and economic progress for the commonwealth. . . . Second, government initiatives such as zoning are easily identified with the Progressive era in American history. . . . Third, the word “Progressive” comprehends an approach to governance and to judicial decisionmaking that is as separate and distinct from the New Deal politics and jurisprudence that gained prominence in the late 1930s as it is from the formalism that typified the judicial craft for much of the nineteenth century. . . . Finally, the term “Progressive” relates to the influence certain philosophical approaches brought to bear on much legislative and judicial lawmaking during the early twentieth century.”). Identifying the design of zoning as progressive is not intended to end the question: of course, the emergence of smart growth and related movements was arguably needed due to limitations in Euclidean zoning, suggesting that Euclidean zoning was not progressive enough.

<sup>178</sup> Under Oregon’s common law, a proposal is entitled to develop based on an analysis of “whether a landowner has developed his land to the extent that he has acquired a vested right to continue the development.” *Clackamas County v. Holmes*, 508 P.2d 190, 192 (Or. 1973). In the principal case, the court balanced the amount of expenditures committed against the reasonable expectations of the developer, among others. To some degree, this has been changed by the adoption of statutes providing that consideration of a land use application “shall be based on the standards and criteria that were applicable at the time the application was first submitted.” OR. REV. STAT. § 215.428(3) (1983); OR. REV. STAT. § 227.178(3) (2003). Notably, Measure 49 addresses the potential confusion of claims that were filed under Measure 37, and only confers vested rights for Measure 37 claims that can meet the common law test for vested rights. Measure 49 provides that a property owner who successfully sought and obtained a valid waiver under Measure 37 may, “to the extent that the claimant’s use of the property complies with the waiver and the claimant has a common law vested right[,] . . . complete and continue the use described in the waiver.” OR. REV. STAT. § 195.305(5) (2007). It is not clear how many of the approximately 7500 claims filed under Measure 37 will be able to meet the common law vested rights test. See generally, OR. DEP’T OF LAND CONSERVATION & DEV. AND THE OR. DEP’T OF JUSTICE, *BALLOT MEASURE 49 AND THE COMMON LAW OF VESTED RIGHTS 1–4* (2007) (guidance document stating that vested right determinations are made on a case by case basis by cities, counties, and circuit courts based on various factors, making it difficult to estimate the number of Measure 37 claims able to meet the test).

<sup>179</sup> See, e.g., *Even v. Parker*, 597 N.W.2d 670, 675 n.5 (S.D. 1999) (“The Court’s equitable powers are for protection of homeowners’ property interests.”).

<sup>180</sup> A nonconforming right is extended to uses that were lawful when initiated, but later became unlawful due to changes in zoning regulations. See *Clackamas County*, 508 P.2d at 192. In general, nonconforming rights “may be continued,” and even altered. OR. REV. STAT. § 215.130(5) (2007). Such use may, however, be subject to a reasonable amortization. *Cope v. City of Cannon Beach*, 855 P.2d 1083, 1084 (Or. 1993).

<sup>181</sup> Conditional use approvals may be granted for a land use which, with appropriate conditions, may be made consistent with the purposes of the zoning district in which it is located. *Anderson v. Peden*, 569 P.2d 633, 637 (Or. Ct. App. 1977), *aff’d*, 587 P.2d 59 (Or. 1978) (“By providing that a given use will only be allowed conditionally in a given zone, a local government finds that there is a possible public need for that use in that zone, and simultaneously finds that introduction of that use into that zone may have disadvantages that outweigh the advantages.”).

<sup>182</sup> A variance “by definition is a use of property which is otherwise expressly prohibited by law.” *Bienz v. City of Dayton*, 566 P.2d 904, 920 (Or. Ct. App. 1977). Variances focus on individual hardships as a justification for flexibility and exception in applying zoning standards. *Erickson v. City of*

established standards on an individual basis, in a manner that is sympathetic to individualized needs while cognizant of the public interest.

Just as such flexibility is intended to further the health, safety, and welfare of individuals, it is also the case that communities grow and changes occur. Whether growth is the result of a favorable economy, new technologies, trends in community values, or something else entirely, local governments must respond in some way to such changes.<sup>183</sup> Accordingly, the exercise of the police power has not been static.<sup>184</sup> Local zoning bodies need the authority to adapt to the ever-changing circumstances and to the changing needs and conditions of the community. Hence, comprehensive and site-specific rezones provide flexibility for communities to respond to changing conditions and values.<sup>185</sup>

Zoning has effected changes in the right to use property, prompting some to argue for the deregulation of land use.<sup>186</sup> However, it is arguable that these changes did not affect the substance or character of the property right: zoning did not alter the basis for the nuisance limitation on the property right, with its focus on the public's interest in allowing or restricting particular uses based on their location, effects on others, and contribution to contemporary needs and values. The only change of substance was in the manner and forum in which the determination was made. Rather than the ad hoc, judicial identification of matters within the public interest applied to curtail the nuisance effects of particular land uses to their locality, zoning afforded the opportunity for local communities to identify for themselves locally important and incompatible land uses, and to determine how land uses should be situated so as to prevent breaches of the maxim, *sic utere tuo ut alienum non laedus*. Therefore, the "helpful clew" which Justice Sutherland drew from nuisance law was the need to apply the maxim in the context in which the land uses arise:

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Portland, 496 P.2d 726, 728–29 (Or. 1972) ("Variances traditionally have been considered escape valves to allow property owners relief from zoning restrictions which, when applied to particular land, have the result of making that land completely unusable, or usable only with extraordinary effort.").

<sup>183</sup> The classic case of a failure to anticipate new trends and circumstances is the growth of drive-through restaurants (e.g., McDonalds), which created difficulties in applying zoning ordinances that sought regulatory means to control the different types of impacts between drive-in restaurants and family dining establishments. *See, e.g., Chanhassen Estates Residents' Ass'n v. City of Chanhassen*, 342 NW.2d 335, 336–37 (Minn. 1984).

<sup>184</sup> *Euclid*, 272 U.S. 365, 387 (1926) ("Regulations, the wisdom, necessity, and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even a half century ago, probably would have been rejected as arbitrary and oppressive.").

<sup>185</sup> *See* Charles M. Haar, *The Twilight of Land-Use Controls: A Paradigm Shift?*, 30 U. RICH. L. REV. 1011, 1036 (1996). ("Inevitably, changes will continue in an evolutionary form, not by a sharp turn in one direction or the other."). Taking the Standard Zoning Enabling Act (SZE) as an indication of the extent of public interests in 1926, we find that zoning was intended "to lessen congestion in the streets," and "to secure safety from fire," "to provide adequate light" and "to avoid undue concentration of population." ADVISORY COMM. ON ZONING, DEP'T OF COMMERCE, A STANDARD STATE ZONING ENABLING ACT: UNDER WHICH MUNICIPALITIES MAY ADOPT ZONING REGULATIONS § 3 (1926). The SZE also expressly required local governments to consider how zoning would affect property values by "conserving the value of buildings," both on a site-specific level and community-wide, by "encouraging the most appropriate use of land throughout [the] municipality." *Id.*

<sup>186</sup> *See, e.g., Robert C. Ellickson, Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681 (1973) (discussing the merits of decentralized planning and zoning).

[T]he question whether the power exists to forbid the erection of a building of a particular kind or for a particular use, like the question whether a particular thing is a nuisance, is to be determined, not by an abstract consideration of the building or of the thing considered apart, but by considering it in connection with the circumstances and the locality.<sup>187</sup>

This is not to say that the change in forum was insignificant. Property users may be denied a presumption of lawful property use, but do so in exchange for predictability and certainty in an expectation that the scheme would be applied throughout the community, and not on an individual basis. With such front-end focus, zoning allows local governments to begin to realize the public's interest in containing incremental impacts, the control of which was impractical under the law of nuisance. This change in thinking allowed local governments to transcend past practices and respond to impacts that were unanticipated or even caused by stagnation in the status quo. The *Euclid* Court's reasoning, even as early as 1926, is instructive on the need of society to evolve with a "changing world":

Until recent years, urban life was comparatively simple; but, with the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities. Regulations, the wisdom, necessity, and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive. Such regulations are sustained, under the complex conditions of our day, for reasons analogous to those which justify traffic regulations, which, before the advent of automobiles and rapid transit street railways, would have been condemned as fatally arbitrary and unreasonable. And in this there is no inconsistency, for, while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation.<sup>188</sup>

In keeping with these principles, the mere purchase of land, even when in reliance on a current zoning classification, does not vest the purchaser with an expectation to any authorized land use, unless the use is engaged prior to changes in the zoning.<sup>189</sup> Such a right would undermine, if not destroy the ability of local

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<sup>187</sup> *Euclid*, 272 U.S. at 388.

<sup>188</sup> *Id.* at 386–87.

<sup>189</sup> *Lee County v. Morales*, 557 So.2d 652, 655 (Fla. Dist. Ct. App. 1990) ("Thus, although appellees may have purchased the property as an investment with plans of building a marina under the commercial zoning which existed at that time, the mere purchase of land did not create a right to rely on that zoning."); *Town of Vienna Council v. Kohler*, 244 S.E.2d 542, 548 (Va. 1978) ("[P]roperty owners have no vested right to continuity of zoning of the general area in which they reside, and the mere purchase of land does not create a right to rely on existing zoning."); *Perkins v. Joint City-Council Planning Comm'n*, 480 S.W.2d 166, 168 (Ky. 1972) ("Mere contemplation of use of the property for a specific purpose is not sufficient to place it in a nonconforming-use status. Nor is the purchase of the property accompanied by an intent to use it for a specific purpose sufficient." (internal citations omitted)); *Bankus v. City of Brookings*, 449 P.2d 646, 648 (1969) ("Nor may a city be estopped by the acts of a city official who purports to waive the provisions of a mandatory ordinance or otherwise exceeds his authority.").

governments to respond to new challenges and emerging needs: more specifically, such a right would destroy the ability of local governments to respond to public needs related to the use of a particular property or land use.

Along with the correlative basis for the analogy to nuisance, the oft-cited justification for burdening individual landowners by land use regulations is that regulations provide an “average reciprocity of advantage”: “While each of us is burdened somewhat by such restrictions,” reasoned the Supreme Court, “we, in turn, benefit greatly from the restrictions that are placed on others.”<sup>190</sup> The obvious manner in which zoning ensures an average reciprocity of advantage is to apply zoning regulations uniformly. This does not mean that all substantive zoning restrictions are applied in exactly the same manner to all properties, but that they are applied to all properties, and in a uniform manner to all properties designated for particular uses.<sup>191</sup> This is, of course, how development under a zoning plan ensures that the vision of the plan is implemented. The Maryland Court has made this point succinctly:

Because zoning necessarily impacts the economic uses to which land may be put, and thus impacts the economic return to the property owner, the requirement that there be uniformity within each zone throughout the district is an important safeguard of the right to fair and equal treatment of the landowners at the hands of the local zoning authority. Frankly put, the requirement of uniformity serves to protect the landowner from favoritism towards certain landowners within a zone by the grant of less onerous restrictions than are applied to others within the same zone elsewhere in the district, and also serves to prevent the use of zoning as a form of leverage by the local government seeking land concession, transfers, or other consideration in return for more favorable zoning treatment.<sup>192</sup>

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<sup>190</sup> *Keystone Bituminous Coal Ass'n*, 480 U.S. 470, 491 (1987). Property advocates appear to fear that if the “average reciprocity” analysis is not itself held to some measurable standard, there may be no rational basis connected to property rights to determine whether the police power is being abused. *See, e.g.,* William W. Wade & Robert L. Bunting, *Average Reciprocity of Advantage: “Magic Words” or Economic Reality – Lessons from Palazzolo*, 39 URB. LAW. 319, 369-70 (2007) (arguing that the “average reciprocity” analysis must be justified in economic terms). Dismissing the idea that “rational basis” review of local legislation allows for a meaningful means-ends analysis, Epstein grafts the “full and perfect equivalent” standard from “just compensation” as the measure of constitutionality. EPSTEIN, *supra* note 99, at 273. He adds to this measure the notion that “it is immaterial that other property owners are subject to the zoning regulation” or that other “owners ‘share’ in the benefits of the police power.” *Id.* The dilemma is that no regulation could *ever* be discussed in terms of “average reciprocity” if the benefits of the regulation to the system at large were extracted from the reciprocity analysis. That is to say, assuming property has no meaning outside of a system which supports “property” (in the sense employed herein), any theory which conceives of an individual owner as an island will lose sight of how such interests exist at all. It obviously operates in the same manner for other types of police power regulations. *Id.*

<sup>191</sup> *See* ADVISORY COMM. ON ZONING, DEP’T OF COMMERCE, A STANDARD STATE ZONING ENABLING ACT: UNDER WHICH MUNICIPALITIES MAY ADOPT ZONING REGULATIONS § 2 (1926); *Bell v. City Council of Charlottesville*, 297 S.E.2d 810, 814 (Va. 1982).

<sup>192</sup> *Mayor and Council of Rockville v. Rylyns Enterprises, Inc.*, 814 A.2d 469, 481–82 (Md. 2002). In a recent decision invalidating a development agreement allowing a landowner to circumvent the rezoning process, the California court echoed these sentiments:

A zoning scheme, after all, is similar in some respects to a contract; each party foregoes rights to use its land as it wishes in return for the assurance that the use of neighboring property will be

Whether one finds the “average reciprocity” reasoning persuasive, it is clear that Measure 37 rejected uniformity in land use regulation. The Measure created conflicting classes of property interests: the Measure did not apply to all owners in the same fashion, and qualified Measure 37 claimants became windfall beneficiaries of an unregulated (or underregulated) property in an otherwise regulated market.<sup>193</sup> Because the Measure did not apply to regulations existing at the time property is purchased, new land owners were provided only prospective rights (if at all); for new owners, only future changes to land use regulations could be neutralized by a Measure 37 claim.<sup>194</sup> In contrast, for existing owners, more so for those able to establish a substantial length of ownership in a blood line,<sup>195</sup> the Measure allowed the claimant to reach behind the existing regulations to those applicable on the date the property was acquired. As a result, the Measure created a patchwork landscape of potentially inconsistent land uses based solely on the date on which an owner acquired title, complemented by an entitlement to property values<sup>196</sup> reminiscent of a “landed gentry” form of land ownership.<sup>197</sup> In essence,

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similarly restricted, the rationale being that such mutual restriction can enhance total community welfare. If the interest of these parties in preventing unjustified variance awards for neighboring land is not sufficiently protected, the consequence will be subversion of the critical reciprocity upon which zoning regulation rests. . . .

By creating an ad hoc exception to benefit one parcel in this case—an exception that was not a rezoning or other amendment of the ordinance, not a conditional use permit in conformance with the ordinance, and not a proper variance—the county allowed this “contract” to be broken. If the county had, for instance, rezoned the property, it would be declaring that the Petersons’ property appropriately *belonged* in a different zone and was subject to all the rules and limitations applicable to the other parcels in the new zone. Others similarly situated could argue, at future rezonings, that their parcels also belong in a different zone. If the county had altered the zoning ordinance to allow commercial uses like the ones here at issue as conditional uses within the agricultural zone, it would necessarily have given other owners in the zone the opportunity to apply for conditional use permits allowing those uses. Instead, the county simply let one parcel and owner off the hook. In light of the key role played by the requirement of uniformity in a zoning scheme, the parcel’s neighbors had a right to expect that this would not happen.

*Neighbors in Support of Appropriate Land Use v. County of Toulumne*, 68 Cal. Rptr. 3d 882, 891 (Cal. Ct. App. 2007) (internal citations omitted).

<sup>193</sup> See MARTIN & SHRIVER, *supra* note 107, at 7 (discussing how the “lack of guidelines for the value of claims and . . . funds to pay for them” lead state and local governments “to waive regulations for some classes while keeping them in place for others,” causing unfairness).

<sup>194</sup> OR. REV. STAT. § 197.352(1) (2005) (“If a public entity enacts or enforces a new land-use regulation or enforces a land use regulation enacted prior to the December 2, 2004, that restricts the use of private real property or any interest therein and has the effect of reducing the fair market value of the property, or any interest therein, then the owner of the property shall be paid just compensation.”)

<sup>195</sup> See *Oregonians in Action*, *supra* note 56 (arguing by way of example: “[S]ay my grandmother owns 1% of a piece of property that she bought in 1940 and I own the other 99%, which she gave me in 1990. My grandmother’s 1% is enough to sustain a Measure 37 claim going back to 1940.”)

<sup>196</sup> Of course, the privileges of descent and devise are not based in constitutional guarantees, but are instead born of policy decisions. See, e.g., Ronald Chester, *Is the Right to Devise Property Constitutionally Protected?—The Strange Case of Hodel v. Irving*, 24 SW. U. L. REV. 1195, 1198, 1201, 1213 (1995) (describing the lack of precedential value of *Hodel*’s revival of a long-dormant natural law view of devise and inheritance). Notwithstanding the Supreme Court’s landmark decision in *Hodel v. Irving*, 481 U.S. 704 (1987), most courts are in accord with the notion that the Constitution does not protect a right to bequeath or inherit property, whether by intestacy or will. See, e.g., *Hall v. Vallandigham*, 540 A.2d 1162, 1164–65 (Md. Ct. Spec. App. 1988); *Estate of Ford*, 552 So. 2d 1065,

Measure 37 transformed the notion of property into a grab-bag of contingent historical references. The resulting dilemma was not limited to the obvious inefficiency and complexity of delineating the varying property rights in land uses for different properties. Measure 37 effectively created a land use system of vested, nonconforming rights for *some* owners in uses *not yet* established.

The Supreme Court has been skeptical of such a scheme. In *Palazzolo v. Rhode Island*,<sup>198</sup> a property owner complained of the effects of a wetland development regulation which overwhelmingly restricted the proposed housing development. The state court held that the landowner's takings remedies were foreclosed *because* the property had been acquired after adoption of the restriction,<sup>199</sup> and that the landowner's notice of the regulation contradicted any possible "investment-backed expectations."<sup>200</sup> The Court rejected the proposed construction of the Fifth Amendment, finding it "capricious in effect. The young owner contrasted with the older owner, the owner with the resources to hold contrasted with the owner with the need to sell, would be in different positions. The Takings Clause is not so quixotic."<sup>201</sup> The Court reasoned that such a construction would allow governments "to put an expiration date on the Takings Clause."<sup>202</sup> Therefore, the Takings Clause insures that "[f]uture generations, too, have a right to challenge unreasonable limitations on the use and value of land,"<sup>203</sup> and that,

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1067 (Miss. 1989) ("Intestate succession via descent and distribution is purely a function of the positive law of the state."); Jeffrey G. Sherman, *Posthumous Meddling: An Instrumentalist Theory of Testamentary Restraints on Conjugal and Religious Choices*, 1999 U. ILL. L. REV. 1273, 1288–89 (1999). Some state constitutions do provide this right. *See, e.g.*, LA. CONST. art. XII, § 5.

<sup>197</sup> Justice Stevens has explained that

Such pure discrimination is most certainly not a 'legitimate purpose' for our Federal Government, which should be especially sensitive to discrimination on grounds of birth. 'Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.' *Hirabayashi v. United States*, 320 U.S. 81, 100 [1943]. From its inception, the Federal Government has been directed to treat all its citizens as having been 'created equal' in the eyes of the law. . . . And the rationale behind the prohibition against the grant of any title of nobility by the United States, see U.S. Const., Art. I, § 9, cl. 8, equally would prohibit the United States from attaching any badge of ignobility to a citizen at birth.

*Mathews v. Lucas*, 427 U.S. 495, 520–21, n.3 (1976) (Stevens, J., dissenting). *See also* *Wildenstein & Co., Inc. v. Wallis*, 595 N.E.2d 828, 832 (N.Y. 1992) (discussing the Rule Against Perpetuities: "The rule against remote vesting originated in the late 17th century to address donative transfers of land among family members. By curbing attempts by the landed gentry to control future generations' ownership of their real property, the rule protected the public's interest in the development of land and prevented undue concentrations of wealth and power.").

<sup>198</sup> 533 U.S. 606, 611 (2001).

<sup>199</sup> *Id.* at 626 ("[The Rhode Island Supreme Court's] two holdings together amount to a single, sweeping, rule: A purchaser or a successive title holder like petitioner is deemed to have notice of an earlier-enacted restriction and is barred from claiming that it effects a taking.").

<sup>200</sup> *Id.* ("So, the argument goes, by prospective legislation the State can shape and define property rights and reasonable investment-backed expectations, and subsequent owners cannot claim any injury from lost value. After all, they purchased or took title with notice of the limitation.").

<sup>201</sup> *Id.* at 628 ("A blanket rule that purchasers with notice have no compensation right when a claim becomes ripe is too blunt an instrument to accord with the duty to compensate for what is taken.").

<sup>202</sup> *Id.* at 627.

<sup>203</sup> *Id.*

among property owners, “[a] regulation or common-law rule cannot be a background principle for some owners but not for others.”<sup>204</sup> Because property is intended to be inclusive of both duties and entitlements, the Court was *forced* to reject the positivistic attempt to parcel out trump cards among the property interests that comprise the property right.<sup>205</sup> It is this same trump card that we found in Measure 37.

For purposes of the inquiry herein, a more notable condemnation of hierarchical property treatment under zoning law, termed “spot zoning,” illustrates the relevance of the correlative rights of “others.” Where a local government grants selective awards of zoning benefits through a piecemeal zoning decision, reprehension about spot zoning emphasizes the protection of reciprocal expectations afforded throughout the scheme. Spot zoning has been defined as “zoning for private gain designed to favor or benefit a particular individual or group and not the welfare of the community as a whole,” and is problematic precisely because of “its inevitable effect of granting a discriminatory benefit to one or a group of owners and to the detriment of their neighbors or the community without adequate public advantage or justification.”<sup>206</sup> The focus of this definition is the conferral of property rights which fail to correlate with the needs of the “public health, safety, morals or general welfare.”<sup>207</sup> The legal defects in the

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<sup>204</sup> *Id.* at 630. “The determination whether an existing, general law can limit all economic use of property must turn on objective factors, such as the nature of the land use proscribed.” *Id.*

<sup>205</sup> *Id.* at 627. (“The State may not put *so potent* a Hobbesian stick into the Lockean bundle.” (emphasis added)). In contrast to Locke’s natural rights theory, some positivistic theorists argue that the sovereign is entitled to discretion in determining the character of ownership and use of private property. For instance, Thomas Hobbes argued, in *LEVIATHAN*, that “without a common Power to keep them all in awe, they are in that condition which is called Warre; and such a warre, as is of every man, against every man. . . . And the life of man [is] solitary, poore, nasty, brutish, and short.” THOMAS HOBBS, *LEVIATHAN* 103–04 (E.P. Dutton & Co. ed. 1950) (1660). According to Hobbes, it is “necessary, to lay down this right to all things; and be contented with so much liberty against other men as he would allow other men against himselfe.” *Id.* at 108. Due to the “natural” circumstances of fear and misery, people formed groups and waived their freedoms enjoyed in the state of nature to the discretion of government. *Id.* at 104–05.

The resulting scheme of positive law is premised on an understanding that government is authorized to take back those rights under relevant circumstances. Under Hobbes’s positivism, individual rights arise as a social, governmental choice. Hobbes argues that a person’s rights are “annexed to the Sovereignty, the whole power of prescribing the Rules, whereby every man may know, what Goods he may enjoy, and what Actions he may doe, without being molested by any of his fellow Subjects: And this is it men call *Propriety*.” *Id.* at 149.

<sup>206</sup> *Smith v. Skagit County*, 453 P.2d 832, 848 (Wash. 1969) (“Spot zoning has come to mean arbitrary and unreasonable zoning action by which a smaller area is singled out of a larger area or district and specially zoned for a use classification totally different from and inconsistent with the classification of surrounding land, and not in accordance with the comprehensive plan. Spot zoning is a zoning for private gain designed to favor to benefit a particular individual or group and not the welfare of the community as a whole.”). *See also* *Lutz v. City of Longview*, 520 P.2d 1374, 1379 (Wash. 1974); *Bishop Nursing Home, Inc. v. Zoning Hearing Bd.*, 638 A.2d 383, 386–87 (Pa. Commw. Ct. 1994) (“[S]pot zoning occurs when . . . the zoning scheme is arbitrary and unreasonable, with no relation to the public health, safety, morals and general welfare and has no relation to the municipality’s comprehensive plan. The most important factor in an analysis of a spot zoning question is whether the land is being treated unjustifiably different from similar surrounding land, thereby “creating an ‘island’ having no relevant differences from its neighbors.” (citations omitted)).

<sup>207</sup> *Bishop Nursing Home*, 638 A.2d at 386; *see also* *State ex rel. Miller v. Cain*, 242 P.2d 505, 509–10 (Wash. 1952); *Pierce v. King County*, 382 P.2d 628, 638 (Wash. 1963). The hallmark and test for

“reprehensible and unconstitutional”<sup>208</sup> practice of spot zoning have thus been articulated as substantive due process, equal protection, and failure to comply with a comprehensive plan.<sup>209</sup> The burden is borne by the public, even if more particularly by the neighbors to the claimant.

The Oregon courts did not reach the question of whether a Measure 37 decision to “waive or pay” a Measure 37 claim must be justified within the public health, safety, and welfare.<sup>210</sup> Nevertheless, because in Oregon (as elsewhere) zoning and planning are only valid to the extent that they protect the public health, safety, and welfare,<sup>211</sup> and because Measure 37 approvals amounted to an exception from that justification on a piecemeal basis, Measure 37 claims presumptively *conflicted* with the public welfare by authorizing impacts likely comparable to that of a neighboring nuisance. The issue, of course, is not the damages from legalizing a nuisance,<sup>212</sup> but in legalizing that activity for only one person. Measure 37 approvals effectively forced spot zoning circumstances in which the adversely affected, neighboring property owners would have been entitled to protection *because* postwaiver zoning would deny existing land uses the “average reciprocity of advantage.”<sup>213</sup> At least in theory, the approval of most Measure 37 claims should have been *ultra vires*, in conflict with the police power.<sup>214</sup>

Measure 37 further undermined those collective welfare interests of the public by allowing a claimant to brazenly announce that the community vision

spot zoning is whether a land use decision indicates that the “zoning action bears a substantial relationship to the general welfare of the affected community.” *Save Our Rural Env’t v. Snohomish County*, 662 P.2d 816, 819 (Wash. 1983).

<sup>208</sup> *Holt v. City of Salem*, 234 P.2d 564, 571 (Or. 1951); *see also Shaffner v. City of Salem*, 268 P.2d 599, 603 (Or. 1954) (discussing the practice of “spot zoning in its least savory sense”).

<sup>209</sup> *See, e.g., Smith v. County of Washington*, 406 P.2d 545, 547 (Or. 1965) (discussing “the antithetical character of spot zoning and its recognized erosive effect upon the comprehensive zoning plan”); *Pumo v. Borough of Norristown*, 172 A.2d 828, 830 (Pa. 1961); *Save Our Rural Env’t*, 662 P.2d at 819; *Pierce*, 382 P.2d at 638.

<sup>210</sup> Although Measure 37 does not expressly recognize this limitation, some local governments have incorporated police power limitations in their Measure 37 ordinances. *See, e.g., WASHINGTON COUNTY CODE*, § 15.16.080.A (2007) (“[M]ay impose any conditions of approval that it deems reasonable and appropriate to protect the public interest.”); *Id.* § 15.16.080.C (“[S]hall exercise its policy discretion to § determine whether the public interest is best served . . .”). By Ordinance 20331, the Eugene Code was amended to provide that a “waive or pay” decision is based in the public interest. *EUGENE MUNICIPAL CODE* § 2.090(3) (2008).

<sup>211</sup> *Holt v. City of Salem*, 234 P.2d 564, 571 (Or. 1951) (zoning fails constitutional muster when it does “not bear a substantial relationship to the public health, safety, morals and general welfare.”).

<sup>212</sup> *See, e.g., Richards v. Wash. Terminal Co.*, 233 U.S. 546, 554, (1914) (“Any diminution in value of property not directly invaded not peculiarly affected, but sharing in the common burden of incidental damages arising from the legalized nuisance, is held not to be a ‘taking’ within the constitutional provision.”).

<sup>213</sup> *Atl. Coast Line R.R. Co. v. City of Goldsboro, N.C.*, 232 U.S. 548, 559 (1914) (property owners are protected from action which “is not in any way designed to promote the health, comfort, safety, or welfare of the community, or that the means employed have no real and substantial relation to the avowed or ostensible purpose”).

<sup>214</sup> This conflict might be understood in light of the rule that government may not bargain away the police power. *See, e.g., Carlino v. Whitpain Investors*, 453 A.2d 1385, 1388 (Pa. 1982) (contractually conditioned rezoning not a proper exercise of the police power); *League of Residential Advocates v. City of Los Angeles*, 498 F.3d 1052, 1053 (9th Cir. 2007) (“the pendency of litigation is not a ‘blank check’” to settle land use cases in ways which violate the zoning code).



incorporated in land use regulations was uninformed—like the interloping Pierson, except at the much later time, after zoning ordinances and other land use regulations were adopted in reliance of the claimant's prior inaction. Of course, as the very vision of community, zoning decisions premised on knowledge of actual circumstances are more likely to fairly distribute economic advantages and burdens, and more likely to aid successful development in a community.<sup>215</sup> It is here that the openness and communicative aspect of capturing land use expectations has a tangible impact. Perhaps more than the regulations themselves, it is the informed zoning decision that provides expectations in the residents of a community. Yet, as neighborhoods were settled and community visions were implemented in zoning plans, the Measure 37 claimant's proposal was not communicated, engaged, or perhaps even conceived. Measure 37 created rights for claimants to act in ways against which nonclaimants would otherwise be protected.<sup>216</sup> By abdicating the property duties of Measure 37 claimants, the net effect of a Measure 37 claim was to re-allocate to a claimant's bundle the valid property expectations accruing to each other property owner.

### *B. Smart Growth and Property Value*

Although the effect of applying disparate regulations to similarly situated properties is an unfortunate problem for affected neighborhoods, it is likely unnoticeable in comparison to damage done by entitlements given to all property owners: Measure 37 applied prospectively to all landowners, providing for compensation for future changes in land use regulations.<sup>217</sup> The Measure thus placed state and local governments in a Hobson's choice between an unaffordable governmental regime which meets new challenges by engaging in community planning, or an affordable government which operates without exercising the authority to regulate impacts to the livability of communities. This problem appears

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<sup>215</sup> One example relates to the importance of making an accurate (or at least realistic) estimate of population growth in planning for traffic capacity and infrastructure financing; a miscalculation in direction or amount of growth can result in severely inadequate roads and leave a local government without a source of infrastructure financing. *See, e.g.,* Evergreen Islands, No. 00-2-0046c, 2001 GMHB LEXIS 51, at \*33 (W. Wash. Growth Mgmt. Hearings Bd. Feb. 6, 2001) (requiring internal and external consistency in planning expectations, because the Washington Growth Management Act requires all elements of a comprehensive plan and capital facilities plan to be based on the same planning period and the same population projections.).

<sup>216</sup> When making a land purchase and engaging in a land use—say, constructing a home—many, if not most people rely on land use regulations in their neighborhood as a determinant of property value, the character of the neighborhood, and the possibility that incompatible land uses will spring up on adjacent properties, interfering with property enjoyment at a very basic level. The affected neighbors to a Measure 37 claim are denied their expectations, despite *their* investments made in reliance of the local government's land use planning. This result might be acceptable if the neighbors' expectations are themselves outdated or mistaken, or where new circumstances suggest that the public welfare *would* be served by an introduction of new land uses on a particular property (for example, as in a change in zoning to serve the public need, or to respond to new circumstances, or to accommodate the new vision of a comprehensive plan). In the case of a Measure 37 claim, however, neighbors' expectations are subjected to the right of a claimant to act contrary to the public welfare.

<sup>217</sup> *Id.* § 197.352(8).

even more acute in light of the goals of Smart Growth and Oregon's planning experiment.

Indeed, it may seem odd to some that Measure 37 advocates set their aim at Oregon due to the state's far-reaching, Smart Growth land use planning scheme.<sup>218</sup> Smart Growth programs are intended to exceed the progressive aims of Euclidean zoning. In this, we must recognize that Smart Growth and its associated principles and models present themselves not at the inception of cities, but at their decline—due not so much to the location of a pig farm or brick oven in a single family neighborhood, but by imprudence of uncontrolled congestion, urban blight, sprawl, and loss of open space and natural resources. Just as zoning was an improvement on nuisance litigation as a land use control device, Smart Growth adds to Euclidean zoning a response to the impacts caused by the absence of such forward thinking in its predecessor, to meet the “new and different conditions which are constantly coming within the field of their operation.”<sup>219</sup>

It cannot be seriously contested that today's land use problems, no less than the impropriety of nuisances a century ago, adversely affect the public health, safety, and welfare. However, in contrast to the impacts on which land use regulations focused in the past, the challenges capturing attention today are often the product of “extensive and often uncontrollable development.”<sup>220</sup> Like nonpoint source pollution challenges in the water quality context<sup>221</sup> or cumulative impacts

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<sup>218</sup> If we assume that the property damage discussed herein was not intended by the proponents of Measure 37 or Oregon's voters, we might ask about the types of property changes which were intended. On the other hand, we might also detour around the property issue altogether to recognize that Measure 37 may have signified something other than property itself. In many (if not most) states, land use policies have consistently demonstrated a preference for local discretion, instead of centralized and uniform decision making. See Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 114 (1990) (“It is the ideological strength of localism, its importance in shaping ‘perceptions, cognitions and preferences’ about the allocation of authority between state and local governments, that accounts for the success of local governments and indicates the magnitude of local power. In a political system in which so many participants support the legitimacy of local decision making, local autonomy is ‘the relatively firm institutionalization of the normative order itself.’”). However, like many of the Smart Growth states, Oregon's promulgation of state-wide policies and a centralized Land Use Board of Appeals can be understood to favor uniformity over parochialism.

One reasonable explanation might be Carol Rose's warning about the responsiveness of land use regulations: where local residents do not feel their voice is heeded or heard, the local government risks the residents' exit and loss of legitimacy of the governmental authority. See, Carol M. Rose, *Planning and Dealing: Piecemeal Land Use Controls as Problem of Local Legitimacy*, 71 CAL. L. REV. 837, 883–86 (1983). I take Rose's voice-or-exit risk as one which exists without regard to the land use system's actual effect (as liberating, participatory, representative, or otherwise), as much as the felt effect. Because Smart Growth ambitions often appear paternalistic in presentation (despite the common core element of public participation), Measure 37 could be understandable simply as a reaction to an unresponsive planning scheme, at least to the extent that employment and other needs differ from region to region. Hence, Oregon's state-wide goal of natural resource protection may match few socially-prevailing values in a logging town. Although Oregon's system (like other such efforts) requires the incorporation of local needs into the planning scheme, it is at least arguable that the state's top-down approach fails to provide enough flexibility for local governments to meet locally significant needs.

<sup>219</sup> *Euclid*, 272 U.S. 365, 387 (1926).

<sup>220</sup> Patrick Gallagher, *The Environmental, Social, and Cultural Impacts of Sprawl*, 15 NAT. RES. & ENV'T 219, 219 (2000).

<sup>221</sup> See Federal Water Pollution Control Act, 33 U.S.C. § 1329 (a)–(b) (2000).

analysis under the National Environmental Policy Act,<sup>222</sup> it is not easy to identify the source of the *incremental* impacts (e.g., an individual contribution to congestion, smog, or loss of open space) of unregulated land use choices.<sup>223</sup> It may be that the social and ecological justifications of open space preservation, as well as the growing disfavor for sprawl, traffic congestion, and urban blight were less persuasive to planners a century ago.<sup>224</sup> Nevertheless, with diffuse challenges at the forefront of land use planning, Smart Growth's identification, resolution, and even prevention of such problems insures that Smart Growth programs retain the valid police power basis of maintaining the health, safety, and welfare of the public. In response to such problems, the Smart Growth policies of several states<sup>225</sup> aim to "repeal an 'insidious form of entitlement—the idea that state government has an open-ended obligation, regardless of where you choose to build a house or open a business,'" to provide adequate public services, infrastructure, utilities, and other staples of community that secure the value and liveability of a community.<sup>226</sup> Smart Growth encourages thinking and planning beyond the Euclidean focus on land use compatibility and the remedial process of nuisance litigation.<sup>227</sup> It anticipates impacts affecting regions, across municipal boundaries.<sup>228</sup>

Now, it would be a bit disingenuous to argue that Smart Growth legislation is merely a subset of Euclidean zoning—clearly, it is not.<sup>229</sup> Oregon's employment of

<sup>222</sup> See 42 U.S.C. § 4331 (2000).

<sup>223</sup> See COUNCIL ON ENVTL. QUALITY, CONSIDERING CUMULATIVE EFFECTS UNDER THE NATIONAL ENVTL. POLICY ACT (1997), available at <http://ceq.hss.doe.gov/nepa/ccenepa/ccenepa.htm>; 40 C.F.R. §§ 1508.7, 1508.27(b)(7) (2007).

<sup>224</sup> See, e.g., *Golden v. Planning Bd. of Ramapo*, 285 N.E.2d 291 (N.Y. 1972).

<sup>225</sup> See generally James E. Holloway & Donald C. Guy, *Smart Growth and Limits on Government Powers: Effecting Nature, Markets and the Quality of Life Under the Takings and Other Provisions*, 9 DICK. J. ENVTL. L. & POL'Y 421 (2001) (providing an analysis of the implications of changing our way of thinking toward Smart Growth programs); Patricia E. Salkin, *The Smart Growth Agenda: A Snapshot of State Activity at the Turn of the Century*, 21 ST. LOUIS. U. PUB. L. REV. 271 (2002) (comparing the effectiveness of various state Smart Growth programs).

<sup>226</sup> BRUCE KATZ, SMART GROWTH: THE FUTURE OF THE AMERICAN METROPOLIS? 18 (2002), available at [http://www.brookings.edu/~media/Files/rc/reports/2002/11metropolitanpolicy\\_katz/CASEpaper58.pdf](http://www.brookings.edu/~media/Files/rc/reports/2002/11metropolitanpolicy_katz/CASEpaper58.pdf).

<sup>227</sup> Gabor Zovanyi notes the development of growth management programs as an evolving and expanding umbrella of programs to derail a wide array of community needs:

Growth management has been offered as a solution to a broad array of social problems attributable to sprawl, starting with environmental decline, inefficient provision of facilities and services, and loss of community character. Over time, growth management has moved on to represent solutions for the loss of open space, resource lands, and rural landscapes; worsening congestion; unaffordable housing; the revival of declining cities; and inadequate economic development.

Gabor Zovanyi, *The Role of Initial Statewide Smart-Growth Legislation in Advancing the Tenets of Smart Growth*, 39 URB. LAW. 371, 374 (2007).

<sup>228</sup> See generally Janice C. Griffith, *Smart Governance for Smart Growth: The Need for Regional Governments*, 17 GA. ST. U. L. REV. 1019 (2001); James H. Wickersham, Note, *The Quiet Revolution Continues: The Emerging New Model for State Growth Management Statutes*, 18 HARV. ENVTL. L. REV. 489 (1994).

<sup>229</sup> See generally James A. Kushner, *Smart Growth: Urban Growth Management and Land-Use Regulation Law in America*, 32 URB. LAW. 211 (2000); Charles M. Haar, *The Twilight of Land-Use Controls: A Paradigm Shift?*, 30 U. RICH. L. REV. 1011 (1996).

Smart Growth tools, such as open space preservation mandates and tiered growth models implemented in urban growth boundaries (among others), arguably broadens the scope of the justifiable means used to secure the public welfare from traditional, judicial nuisance formulations. Perhaps it is this use of foresight, combined with the perspective of integration, pluralism, and comprehensive thinking that makes Smart Growth programs appear more elitist and intellectual compared to Euclidean zoning schemes. Regardless, it is likely this aspect of Smart Growth programs that makes Oregon a suitable target for property rhetoric.<sup>230</sup>

Since its inception in 1973, Oregon's land use control experiment has been innovative and exemplary.<sup>231</sup> Indeed, it is difficult to read any Smart Growth assessment without encountering Metro's regional planning scheme, Portland's urban growth boundary, or Oregon's agricultural and forest lands protections. These innovations were not primarily directed at securing individual property rights, or invigorating individual property values in the market, or otherwise providing incentives for the development of land. Instead, Oregon planning (along with Smart Growth in general) has focused on *smart* development: planning for land development which improves property values in general by precluding land uses which, due to their character and intensity, and under the circumstances and in the particular location, cause unnecessary adverse impacts to the values, character, and livability of Oregon's communities. It may be understood that Oregon's innovative planning responses to cumulative, incremental impacts on the public welfare have worked cooperatively with individual interests in property, to keep those impacts from compounding across the various social, economic, and individual strata. More importantly, even the more novel planning experiments

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<sup>230</sup> See generally Robert L. Glicksman & Stephen B. Chapman, *Regulatory Reform and (Breath of) the Contract with America: Improving Environmental Policy or Destroying Environmental Protection?*, KAN. J.L. & PUB. POL'Y, Winter 1996, at 9, 22 (noting that property rights legislation may be influenced by hopes of diminished environmental regulation). It may be notable that the Oregon legislature initially considered a compensation provision in Senate Bill 100, 1973 Legis. Assemb., Reg. Sess. (Or. 1973). However, since passage of Senate Bill 100, the Oregon legislature has continued to "add to, rather than revise, the existing planning legislation." Edward J. Sullivan, *Remarks to University of Oregon Symposium Marking the Twenty-Fifth Anniversary of S.B. 100*, 77 OR. L. REV. 813, 819 (1998).

<sup>231</sup> Oregon's model land use regime began in 1973 with the legislative adoption of Senate Bill 100, 1973 Legis. Assemb., Reg. Sess. (Or. 1973). Under Senate Bill 100, each local government was required to design and enforce comprehensive land use planning to implement certain state-wide planning goals including, among other things, public collaboration, location of urban growth boundaries, provision of housing, protection of farm and forest lands, conservation of natural resources and economic growth. See OR. REV. STAT. § 197.175(2)(a) (2007) (requiring each local government to "[p]repare, adopt, amend and revise comprehensive plans in compliance with goals approved by the commission"). Local governments are required to periodically review, revise and resubmit their land use planning for review. *Id.* § 197.646; Robert Liberty, *Planned Growth: The Oregon Model*, 13 NAT. RESOURCES & ENV'T. 315 (1998). Among the necessary components of the plan were promulgation of a comprehensive land use map and policies addressing "sewer and water systems, transportation systems, educational facilities, recreational facilities, and natural resources and air and water quality management programs." OR. REV. STAT. § 197.015(5) (2007). Oregon implemented a "top-down" approach to planning by subjecting local comprehensive plans to statewide standards, while encouraging governments to devise their own local planning priorities, policies and rules. With this system comes deference to local governments and their own construction of their comprehensive plans, as well as expectation and stability in that system. Hong N. Huynh, Comment, *Administrative Forces in Oregon's Land Use Planning and Washington's Growth Management*, 12 J. ENVTL. L. & LITIG. 115 (1997).

have occurred within the existing land use scheme, indicating an ongoing and adapting, but ultimately successful system of negotiation and compromise over the highest and best use of land. The increased preference (for developers and local governments alike) for more flexible development and zoning schemes—such as those illustrated by planned unit developments and cluster zoning, transferable development rights, and mixed use and floating zones—indicates an evolution from the Euclidean zoning scheme toward the changing values for open space, historic and natural resource protection, while demonstrating a keen appreciation for the property right impacts that can be avoided with such flexible planning ideas in application.

As a result, it is a bit ironic that Measure 37 took Oregon's land use experiment to task during the Smart Growth explosion. What Smart Growth has *not* envisioned or even considered is an extinguishment of property value. The goal has been integration of private needs with the demands of the public welfare in a manner that manages and improves property values generally (and in a reciprocal fashion).<sup>232</sup> It may be that this integration is easily disguised as a public capture of some undeveloped property value, as Smart Growth programs typically focus on the burden that new development imposes on urban infrastructure, including water provision, roads, and sewer systems, which inevitably occur during and after the expansion of urban areas beyond the geographical reach and capacity of the existing infrastructure, but are only occasionally (but infrequently) attributable to the actions of a single property owner.<sup>233</sup> Nonetheless, Smart Growth demands that a comprehensive approach to economic development include a public accounting for the *individual* costs and advantages resulting from population expansion and the corresponding infrastructure demand.<sup>234</sup>

Protecting the relationship between property value and growth control is not a new idea, of course. Maintenance of property value has been a principal purpose of zoning since, at the latest, publication of the Standard Zoning Enabling Act,<sup>235</sup> a purpose taken even more seriously with the advent of Smart Growth; to avoid such programs certainly strains the test of reason.<sup>236</sup> That is to say, how are roads built?<sup>237</sup> How is water quality in our drinking water maintained? How does local

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<sup>232</sup> Brian W. Ohm, *Reforming Land Planning Legislation at the Dawn of the 21st Century: The Emerging Influence of Smart Growth and Livable Communities*, 32 URB. LAW. 181, 189 (2000) (describing the quality of life focus of Smart Growth as balancing approach between economic development and environmental quality).

<sup>233</sup> *Id.* at 191 (defining the general objectives of Smart Growth).

<sup>234</sup> *Id.* at 203 (describing the Smart Growth approach to comprehensive planning).

<sup>235</sup> ADVISORY COMM. ON ZONING, DEP'T OF COMMERCE, A STANDARD STATE ZONING ENABLING ACT: UNDER WHICH MUNICIPALITIES MAY ADOPT ZONING REGULATIONS § 3 (1926) (zoning should be done "with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout such municipality"). See also Edward D. Landels, *Zoning: An Analysis of Its Purposes and Its Legal Sanctions*, 17 A.B.A. J. 163, 166 (1931) (urging the recognition of the economic aspect of zoning); *Karen v. Town of East Haddam*, 155 A.2d 921, 927 (Conn. 1959) ("One of the main purposes of zoning is the maintenance of property values.").

<sup>236</sup> Talmadge, *supra* note 31, at 904–05.

<sup>237</sup> This issue appears in Epstein's analysis as a problem of regulatory overbreadth. See EPSTEIN, *supra* note 99, at 133. However, the argument that under- or overbreadth of zoning illuminates a defect is difficult to reconcile with the character of harms sought to be avoided (or range of benefits sought to be secured). Among others, the *Euclid* Court noted that the "construction and repair of streets may be

government keep sewage in the public sewer system? (Indeed!). In recent times, such facilities are often constructed as an expense of new development—the development causing the need for such new facilities—but only when subject to land use regulations. More to the point, perhaps, is that the problems of traffic congestion, inadequate facilities, and deteriorating environmental quality do in fact relate to property value. Regulation, and its uniform application in a comprehensive planning scheme, keep these problems from reaching an unacceptable level.<sup>238</sup> Yet, in its prospective operation, Measure 37 did not leave a limited, but effective government free to operate. It merely allowed governments to regulate *past* public needs and values against *some* people, to *some* extent, with limited financially feasible goals.<sup>239</sup> By curtailing the ability of local governments to protect property values through sound land use planning, Measure 37 advocates undercut their own property value goals.<sup>240</sup>

With this in mind, Measure 37 also failed to account for the *positive* contributions to property value attributable to land use control devices,<sup>241</sup> such as preventing—by zoning and other land use controls—the development of land uses

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rendered easier and less expensive, by confining the greater part of the heavy traffic to the streets where business is carried on.” *Euclid*, 272 U.S. 365, 391 (1926). As such, “[t]he harmless may sometimes be brought within the regulation or prohibition in order to abate or destroy the harmful.” *Euclid*, 272 U.S. at 393 (quoting *City of Auburn v. Burns*, 149 N.E. 784, 788 (Ill. 1925)).

<sup>238</sup> William K. Jaeger, *The Effects of Land-Use Regulations on Property Values*, 36 ENVTL. L. 105, 126 (2006) (“Decisions about zoning and urban growth boundaries are interdependent with decisions about funding for roads and other infrastructure development, and all of these will affect the value (and potential value) of developed and undeveloped properties within and outside each boundary and zone.”).

<sup>239</sup> If local governments are faced with the prospect of paying exorbitant, exaggerated prices to individuals simply for the power to condition a subdivision approval for construction of roads, sewer and water to serve that development, local government would likely not provide roads, sewer, and water. To put it another way—if government there be, let it be the best government possible. This view is attributable to, among others, Alexander Hamilton in the *Federalist Papers*. THE FEDERALIST NO. 31, at 193–94 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

<sup>240</sup> Other confusion pervades the timing scheme, particularly to the extent that the property value “lost” by the enforcement of new land use regulations is a function of time. For instance, is the land value “damaged” by the later-enacted regulations because the value of the land as developed pre-existed the regulations? We have already seen that the typical manner of obtaining such value—engaging the land in an actual use that adds value on the market, or in Lockean terms, mixing the land with labor—did not pre-exist the regulations for claimants. Nevertheless, if the developed property value existed in the property before the regulatory restriction, are claimants (who have been paying property and inheritance taxes on a much underappreciated land value) liable for unpaid taxes based on the Measure 37 value of the property? The measure did not address this issue. On the other hand, if the developed property value did not pre-exist the new regulations (which would make more factual sense), is it actually the freedom from the new regulations (which are applicable to other, neighboring properties) which gives the added value? That would make more sense. However, it also makes the measure look less as a takings statute, and more as a simple windfall benefit. As Richard Rorty points out, “meaningless is exactly what you have to flirt with when you are in between social, and in particular linguistic practices – unwilling to take part in an old one but not yet having succeeded in creating a new one.” RICHARD RORTY, *TRUTH AND PROGRESS* 202, 217 (1998).

<sup>241</sup> See Mark E. Sabath, Note, *The Perils of the Property Rights Initiative: Taking Stock of Nevada County’s Measure D*, 28 HARV. ENVTL. L. REV. 249, 276 (2004) (“Most home property values actually benefit from land use regulations, including those that segregate industrial, commercial, and residential uses of property.”). *But see* EPSTEIN, *supra* note 99, at 210 (arguing that the aggregate of regulatory impositions results only in “a larger negative sum”).

on neighboring properties that would damage the property value of claimants.<sup>242</sup> The proposition at issue is that the *current* property value enjoyed by Measure 37 claimants benefits from the restraining effect such controls have effected—in the past and continuing into the present—on neighboring properties.<sup>243</sup> Because the projected property values asserted by claimants depended on market influences such as zoning—and certainly upon the provision of public services such as roads, sewer, water, etc.—a waiver of land use restrictions to a sole parcel not only granted a dramatic windfall, but may also have diminished the property values of neighbors due to interference with expectations in the community plan. This sentiment is echoed in the coining of the name “givings” to refer to the increase on property value attributable to governmental regulation.<sup>244</sup>

In this light, Measure 37 merely emphasized the problems caused by inflating the economic worth of individual property pieces. Recall that Measure 37 vests property rights without a capture obligation, and therefore without the owner’s intent, labor, or communication.<sup>245</sup> Note, however, that the vested rights doctrine does more than merely identify the amount and character of labor needed to earn a property right in property use; it also sets a pace for the property system to work effectively and provide an average reciprocity. By leaving lands undeveloped, the Measure 37 claimant has not contributed to the community in ways that others have—for example, by using their lands in accordance with the zoning scheme and land use regulations, expanding the local tax base, paying infrastructure exactions, dedicating lands for public uses, building roads and parks, and so on. Arguably, while the community was being built on the shoulders of others, Measure 37 claimants reaped the benefits in a higher-than-average manner. Others have borne the cost of providing the “reciprocal” benefits, and in the meantime have improved the value of individual properties by improving the character, livability and general welfare of the entire community. “Reciprocity” has meaning in the context of *collective* compliance with land use regulations, just as “property” has meaning within a system of property rights.<sup>246</sup>

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<sup>242</sup> It seems naive to think that such regulations *only* diminish property value. See, e.g., Abraham Bell & Gideon Parchomovsky, *Givings*, 111 YALE L.J. 547 (2001) (proposing a framework for analyzing “givings,” which are loosely defined as the benefits conferred when the government changes zoning ordinances, relaxes environmental regulations, or takes other actions that lead to a distribution of property). In addition, land use regulations are often not the sole factor, or even an appropriate factor, in considering negative affects to property value. See Norman Williams, *Planning Law and Democratic Living*, 20 LAW & CONTEMP. PROBS. 317, 334 (1955) (discussing factors that some people tend to dislike, which may lead to a decrease in property values for a particular area); Jaeger, *supra* note 238, at 126 (“[A]n appraiser’s estimate that a property’s value would rise if a given land-use regulation were removed tells us nothing definitive about whether the land-use regulation has actually reduced the property’s value.”).

<sup>243</sup> See generally Sabath, *supra* note 241, at 276 (“Paradoxically . . . a freeze in land use regulation has the potential to bring about a reduction in property values. Zoning . . . was actually the creation of business interests attempting to protect their property values.”).

<sup>244</sup> See, e.g., Daniel D. Barnhizer, *Givings Recapture: Funding Public Acquisition of Private Property Interests on the Coasts*, 27 HARV. ENVTL. L. REV. 295 (2003) (stating that givings are “government actions that increase the value of private property”); Bell & Parchomovsky, *supra* note 242, at 550.

<sup>245</sup> See discussion *supra* Part II.B.

<sup>246</sup> See JOHN D. ECHEVERRIA, PROPERTY VALUES AND OREGON MEASURE 37: EXPOSING THE FALSE PREMISE OF REGULATION’S HARM TO LANDOWNERS 9 (Ford Runge ed., 2007) (discussing the positive

Hence, it is understandable that Measure 37's compensation for loss of speculative and piecemeal property interests did not translate into a coherent measure of property value. As the Supreme Court stated, with reference to the Fifth Amendment's "just compensation" clause:

[I]f the adjective "just" had been omitted, and the provision was simply that property should not be taken without compensation, the natural import of the language would be that the compensation should be the equivalent of the property. And this is made emphatic by the adjective "just." There can, in view of the combination of those two words, be no doubt that the compensation must be a full and perfect equivalent for the property taken . . . .<sup>247</sup>

What is the "full and perfect equivalent" of a speculative use?<sup>248</sup> Under the Fifth Amendment, it is something that may be better recovered (if at all) in the

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economic impacts of the circumstance in which a "comprehensive regulation that restricts what an owner can do with his property also restricts what the owner's neighbors can do with their property"), available at <http://www.law.georgetown.edu/gelpi/GELPIMeasure37Report.pdf>.

<sup>247</sup> *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 326 (1893). Take, for instance, the effect of Measure 37 on the Court's decision that temporary delays are not provided categorical protection under takings analysis. The Court has supported careful deliberation, public process and a pluralistic participatory process to insure that planning and zoning adhere to the "average reciprocity" constraint. See, e.g., *Tahoe-Sierra*, 535 U.S. 302, 339 (2002) ("The interest in facilitating informed decisionmaking by regulatory agencies counsels against adopting a *per se* rule that would impose such severe costs on their deliberations. Otherwise, the financial constraints of compensating property owners during a moratorium may force officials to rush through the planning process or to abandon the practice altogether."). The timing delays imposed on individual property owners comprise a piece of the justification, and conversely, the timing insistence in Measure 37 threatens the comprehensiveness of the planning scheme, reduces the likelihood of a reciprocal benefit, and promotes hasty, uninformed planning.

<sup>248</sup> This raises an impenetrable problem in defining the term. See Edward J. Sullivan, *Through a Glass Darkly: Measuring Loss Under Oregon's Measure 37*, 39 URB. LAW. 563, 565 (2007) (arguing, among other things, that Measure 37 uses the term "'just compensation' . . . to establish the obligation of a public body to pay for the regulation, even though that body is not seeking to acquire property for public use, as it would under eminent domain law."). At the least, we must recognize that this property interest might exceed even the valuation provided for physical invasions. Land use regulations are typically deemed relevant in assessing property value in accordance with the 'highest and best use.' However, the Measure contemplates both a zoning designation and the *right to build* according to the zoning. In determining fair market value in eminent domain cases, courts consider only those facts and circumstances that would reasonably influence the price agreed upon by a reasonable seller, willing but not obliged to sell, and a reasonable buyer, willing but not obliged to buy. See, e.g., *United States v. 429.59 Acres of Land*, 612 F.2d 459, 462 (9th Cir. 1980); *United States v. Smith*, 355 F.2d 807, 809 (5th Cir. 1966). Accordingly, courts appropriately consider evidence regarding the highest and best use to which the land is put or reasonably may be adapted in the future. *United States v. Benning*, 330 F.2d 527, 531 (9th Cir. 1964). However, courts assume that ordinary prudence in these hypothetical transactions includes motivation by a market, and not by speculation or conjecture. See *Olson v. United States*, 292 U.S. 246, 256-57 (1934) ("Elements affecting value that depend upon events or combinations of occurrences which, while within the realm of possibility, are not fairly shown to be reasonably probable should be excluded from consideration for that would be to allow mere speculation and conjecture to become a guide for the ascertainment of value—a thing to be condemned in business transactions as well as in judicial ascertainment of truth."); *Cameron Development Co. v. United States*, 145 F.2d 209, 210 (5th Cir. 1944) ("In determining this value, the highest and most profitable use for which the property is adaptable and needed, or is likely to be needed in the near future, is to be considered; but elements affecting value that depend upon events, which while possible are not fairly



market than in the courts; it is merely a piece of property, and not even a formidable one at that. Under the Measure, speculative property uses were the basis for compensation, where a restriction on *potential* value is compensated as an invasion of a captured expectation. The court's rejection of this formulation of property as comprised of severable and individually compensable interests was thus abrogated from Oregon law.<sup>249</sup>

The false dichotomy posed by Measure 37 is apparent upon the realization that Smart Growth schemes have never been independent of a public need or public benefit justification, and are not intended to otherwise disrupt the average reciprocity. Rather, the forward-looking perspective of Smart Growth planning is merely *more* preventative of social ills—social ills that have a negative impact on property value—than its predecessor by its comprehensive planning perspective. In the process, Smart Growth planners and local governments have managed to reconcile a multiplicity of perspectives and needs into a focus on creating livable, feasible communities. As a result, it makes little sense to argue that compensation statutes are consistent with Smart Growth programs, or that compensation statutes are justified because Smart Growth programs have “gone too far,” simply because “[v]oters were frustrated by the ever-expanding regulatory system, the courts’ incoherent takings law, and thwarted attempts . . . to protect their property rights.”<sup>250</sup> It appears even more short-sighted to assert that, “far from derailing Smart Growth efforts, [compensation statutes] will actually improve Smart Growth”<sup>251</sup> due to the manner in which the Measure forces local government to consider property values.<sup>252</sup> Property values are intertwined with opportunity and livability in a given community, which is the very heart of zoning and planning, but cannot (at least, not in the manner proposed by Measure 37) be coherently segregated from the system that gives meaning to the individual pieces.

### C. Property Pieces in a System of Property Use

In closing this argument on the limits of rights in property uses, it should appear a bit question begging, as the piecing of property arguably *originates* not in protective property legislation, but in the *regulation* of property use according to a use's impacts. Put otherwise, an examination of the consequences of land use regulation to identify the limits of categorical rights in property use is partly circular, and we might wonder whether the viciousness of the circle is fatal. I

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shown to be reasonably probable, should be excluded. The judicial ascertainment of fair market value may not rest upon speculation and conjecture. . . . No evidence was offered to prove that any market existed, or was reasonably likely to exist in the near future, at which this shell could be profitably sold.”); *See Omnia Commercial Co. v. United States*, 261 U.S. 502, 512–13, (1923) (losses due to frustration of a business plan are generally not compensable).

<sup>249</sup> *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 (2005).

<sup>250</sup> *Id.* at 600.

<sup>251</sup> Jeffrey W. Porter, *Will Property Rights Legislation Endanger Smart Growth Efforts?*, 30 REAL ESTATE L.J. 275, 302 (2002).

<sup>252</sup> Oregonians in Action, *supra* note 56 (arguing that Measure 37 will not “eliminate” Oregon's land use planning because “[a]ll Measure 37 does is level the playing field by forcing local governments—and the state government—to consider the economic impact of its decisions on Oregonians.”).

would suggest that as it pertains to property uses in particular, this circularity is purposeful.

As indicated above, through the development of land use regulatory tools and their intended effectuation of both individual and community needs, property jurisprudence has largely resisted absolutes on *both* the community and individualistic sides, but not for lack of opportunity. Indeed, the pressure for advancement of both public and private regulatory interests has become increasingly panicked. Property owners have recognized that the duties of property ownership invite a land ethic into land ownership that conflicts with a more “natural” sense of individuality and liberty which might be found in the state of nature. Meanwhile, local governments have realized that piecemeal land use control allows growth to outpace infrastructure and causes unmanageable natural resource loss and other public costs which are difficult to recover. When these perspectives are set into a polemic, as they typically are in compensation legislation, they appear incommensurable. Yet, the notion of property pervading our property rights system is sophisticated and inclusive, enough so to avoid deadlock.

It is easy to forget that the invention of regulatory takings in the *Pennsylvania Coal* decision was part of the same swell that approved land use regulations in *Euclid*.<sup>253</sup> When taken together as the inseparable rights (*Pennsylvania Coal*) and the duties (*Euclid*) of property, it seems that law’s major accomplishment was to maintain continuity in the property tautology through the growth of a regulatory state. Hence, what is important here is to note that protection of property rights is appropriate where their exercise does not destroy the system of property, and also that planning and zoning are not seen as presumptively appropriatory, but are instead understood *by design* to benefit individual property ownership.<sup>254</sup> Thus, the fascinating but frustrating growth phasing schemes at issue in *Golden v. Planning Board of Ramapo*<sup>255</sup> and *Construction Industry Association v. City of Petaluma*<sup>256</sup> have demanded fundamental changes in our thinking about planning on both a comprehensive and site-specific level, emphasizing more regional, comprehensive planning, and identifying the carrying capacity of land and public infrastructure and facilities. Likewise, the Supreme Court’s approval of the moratoria in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*<sup>257</sup> was premised on the promises of planning in determining how property uses would be best integrated with the need for public resources.<sup>258</sup> In these cases, extensive development delays thrust upon the community were justified by the time that was needed to benefit all properties through a well-balanced scheme.

In addition to the balancing test in *Penn Central*, the Court’s exactions architecture reveals a tempered exchange in the means by which an entire spectrum

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<sup>253</sup> Lawrence Friedman, *A Search for Seizure: Pennsylvania Coal Co. v. Mahon in Context*, 4 LAW & HIST. REV. 1, 16 (1986).

<sup>254</sup> Regulation of competing property uses “must . . . be treated as relating to the preservation and protection of rights of an essentially local character.” *Ohio Oil Company v. Indiana*, 177 U.S. 190, 212 (1900).

<sup>255</sup> 285 N.E.2d 291, 293–95 (N.Y. 1972).

<sup>256</sup> 522 F.2d 897 (9th Cir. 1975).

<sup>257</sup> 535 U.S. 302 (2002).

<sup>258</sup> *Id.* at 309–10; *see also* *Block v. Hirsh*, 256 U.S. 135, 157 (1921) (“A limit in time, to tide over a passing trouble, may well justify a law that could not be upheld as a permanent change.”).

of property interests are realized, where both public needs and private expectations are incorporated into the analysis.<sup>259</sup> In the opinions of *Nollan v. California Coastal Commission*<sup>260</sup> and *Dolan v. City of Tigard*,<sup>261</sup> the Supreme Court emphasized that the authority to design and implement local planning as an excise from the business of development is not carte blanche approval for local governments to allocate too great a burden on specific landowners.<sup>262</sup> Under these holdings, the Court cautioned that an appropriation of private property in the development context must be justified by, connected to, and proportional to the problems caused by the proposed land use.<sup>263</sup> Where exactions do not meet this police power justification, an appropriation of private property to the public use may not be made without just compensation to the property owner. These cases signify victories for property rights advocates, and they result in an unwavering demand that local governments treat property owners with a due respect which maintains pace with changing public needs and perceived planning challenges.

As a substantive matter, then, it is the contextual antecedent needs of property, provided in part by the land use system, that defend against absolute visions in matters of private property pieces. Just as it has historically been within the law of nuisance, land use regulation and its constitutional complement—the doctrine of regulatory takings—have been progressive, allowing courts to adhere to context in employing an inclusive, pluralistic perspective which evolves with both public and private needs in the use of the particular parcel. The regulatory takings bog<sup>264</sup> is, in effect, an experiment in pragmatic jurisprudence. As much as any progressive doctrine, the Court's ad hoc regulatory takings analysis from *Penn Central* guarantees that, no matter what the effective balance may be, property rights are tested against the current ebb and flow of public needs as they define the scope of private opportunities. The complementary rejection of an absolute police power and absolute property rights, initiated in *Euclid* and *Pennsylvania Coal* and confirmed by the rejection of potent Hobbesian sticks in *Palazzolo*,<sup>265</sup> retains the meaning of property use in property ownership.

Within these confines, examples of an otherwise consistent basis for state legislation affecting the capture of land use rights might be a certain designation of vested development rights,<sup>266</sup> “deemed approved”<sup>267</sup> statutes relating to permit approvals, or “reasonable use assurance” provisions in local habitat regulations. At least in part, these enactments enhance and define development rights more clearly

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<sup>259</sup> See Joseph William Singer, *The Ownership Society and Takings of Property: Castles, Investments and Just Obligations*, 30 HARV. ENVTL. L. REV. 309, 335 (2006) (arguing that the *Penn Central* approach to regulatory takings “appears incoherent because it embodies several different models of property”).

<sup>260</sup> 483 U.S. 825 (1987).

<sup>261</sup> 512 U.S. 374 (1994).

<sup>262</sup> *Nollan*, 483 U.S. at 835 n.4; *Dolan*, 512 U.S. at 384.

<sup>263</sup> *Nollan*, 483 U.S. at 836–37; *Dolan*, 512 U.S. at 391.

<sup>264</sup> *Brazos River Auth. v. City of Graham*, 354 S.W.2d 99, 105 (Tex. 1962) (describing the distinction between eminent domain and the police power as the “sophistic Miltonian Serbonian Bog”). See also the discussion of the “muddle” in Carol M. Rose, *Mahon Reconstructed: Why the Takings Issue is Still a Muddle*, 57 S. CAL. L. REV. 561, 562 (1984).

<sup>265</sup> 533 U.S. 606, 627 (2001).

<sup>266</sup> OR. REV. STAT. §§ 215.427(3), 227.178(3) (2007).

<sup>267</sup> *Id.* §§ 227.179, 215.429.

by creating definite expectations of how the police power may be wielded against property interests. However, they do not reallocate others' property rights as in the effort to legislate away the right against nuisances,<sup>268</sup> to legislate away a takings claim by virtue of notice,<sup>269</sup> or, of course, to implement statutes like Oregon's Measure 37. Rather, legislation which further defines the capture of private property interests allows for a confined sense of the general welfare (and how the general welfare needs are met) to track changing public needs related to the use, as opposed to the ownership, of property.<sup>270</sup> In these examples, the part each property expectation plays is not windfalls and absolutism, but the need for context to support the enforceability of a property right. The right to a particular property use depends for its validity and value on coherence with a broader property scheme.

For property theorists who view much of environmental and land use regulation as occurring within an established, pluralistic Fifth Amendment property framework, the relationship between regulatory takings and police power limitations on the use of property makes good sense. In particular, the vagueness pervading regulatory takings resonates as a success in not only balancing public needs with private interests in property and in encouraging particular land uses while being mindful of their impacts on others, but also in assessing and prioritizing the economic impacts of allowing a given use to continue in accordance with a coherent, evolving social context. This pluralistic exercise accounts for a variety of interests and injuries, subjects those competing interests to a determination of relative values, and acknowledges function apposite to the context in which the controversy arises.<sup>271</sup> Nothing is new here; the meaning of the maxim, *sic utere tuo ut alienum non laedus*, has not changed, but its application has adapted to the circumstances of changing technology and society. The reasoning behind the approval of zoning in the *Euclid* decision applies to today's planning achievements with equal force.

#### IV. CONCLUSION

One interpretation of compensation legislation, and Measure 37 in particular, is that the public ought not exact too onerous a benefit from the regulation of any individual; that appropriating the land value or opportunities from a landowner impedes upon the rights accruing in the ownership of property. This interpretation, which is typically proffered by proponents of compensation legislation, is ripe for political rhetoric and appeals to a popular sense of justice. The problem with this generous interpretation of Measure 37 is, first, that it is not contested, but more importantly, that it fails to account for the effect of the Measure on "property."

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<sup>268</sup> See, e.g., *Richards v. Wash. Terminal Co.*, 233 U.S. 546, 553 (1914) ("[W]hile the legislature may legalize what otherwise would be a public nuisance, it may not confer immunity from action for a private nuisance of such a character as to amount in effect to a taking of private property for public use.").

<sup>269</sup> See *Palazzolo*, 533 U.S. at 627.

<sup>270</sup> See *Euclid*, 272 U.S. 365, 387 (1926). See also Carol M. Rose, *A Dozen Propositions on Private Property, Public Rights, and the New Takings Legislation*, 53 WASH. & LEE L. REV. 265, 268–69, 273–79 (1996) (discussing the evolution of private property rights in response to changing public needs).

<sup>271</sup> See Julian C. Juergensmeyer, *The American Legal System and Environmental Pollution*, 23 U. FLA. L. REV. 439, 447–48 (1971) (discussing the social function theory of property).

In addition to being misconceived, Oregon's Measure 37 was largely misunderstood.<sup>272</sup> In either case, the strength and failure of Measure 37 was in its marketing. The advocates of Measure 37 championed "fairness," protection from tyrannical regimes, and "just compensation," terms which are familiar, easy to sell, and fit well on billboards. However, the manner in which those terms dominated Measure 37 rhetoric appears incommensurable with law. Hence, the Oregon public intended to vote for fairness and protection of property rights; it received the *creation* of rights for *some* types of property, for *certain* people, at a potentially immense public expense. The Oregon public voted for governmental consideration of the impacts of individual economic burdens imposed by the public; they received a law that shifted public facilities and infrastructure costs away from those creating the need for such public services and reallocated rights in unanticipated ways. Finally, the Oregon public voted for salvation from "enlightened elitists,"<sup>273</sup> and to achieve some semblance of active participation in the democratic process; they received a law that questions their own expectations in favor of a new class of property owners who rely upon rights which arise, for the most part, outside of the legal system from which they benefit. In the meantime, despite the stated fears of Measure 37 advocates, there is little evidence to support the claims that Oregon's land use regulations have crippled the use of land or property values.<sup>274</sup>

Ironically, Measure 37 largely won on its platform of fairness.<sup>275</sup> The notion of "fairness," which has been recognized as an important conceptual basis for takings analysis,<sup>276</sup> "resonates with lay people."<sup>277</sup> I would add that "fairness" also resonates with professionals and specialists, such as politicians, scholars, planners and judges, all agreeing that "[t]here are occasions when the cost of a regulatory burden should be borne, not by the individual, but by the public."<sup>278</sup> Of course, that is what the Takings Clause seeks to accomplish. Hence, from the pragmatic point of view, the real tragedy of Measure 37 was the initial foreclosure of an honest and

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<sup>272</sup> See Margaret H. Clune, *Government Could Hardly Go on: Oregon's Measure 37, Implications for Land Use Planning and a More Rational Means of Compensation*, 38 URB. LAW. 275, 295 (2006) (noting that the advertising campaign for Measure 37 "emphasized the initiative's benefits to the exclusion of its costs—the theme was 'not anti-planning, but fairness.'").

<sup>273</sup> Jim Pasero, *Judge Slams Voters' Will*, BRAINSTORM, Nov. 2005, [http://www.brainstormnw.com/archive/nov05\\_feature.html](http://www.brainstormnw.com/archive/nov05_feature.html) (last visited Sept. 27, 2008).

<sup>274</sup> At the time Measure 37 was adopted, the State of Oregon had not suffered a shortage of development opportunities, discouraged investment or demoralized property owners, where real estate prices were on the rise and homebuilding was touted as the fastest growing industry in the state. Kgw.com, *Experts Predict Ore. Construction to Slow Down*, [http://www.kgw.com/realestate/realestatestories/stories/kgw\\_120705\\_news\\_housing\\_demand.441190cd.html](http://www.kgw.com/realestate/realestatestories/stories/kgw_120705_news_housing_demand.441190cd.html) (last visited Sept. 10, 2008) (noting that construction is the fastest growing 2005 industry in Oregon, at 9.3% growth).

<sup>275</sup> Oregonians in Action, *Marion County Judge Overturns Measure 37*, <http://oia.org/Measure37overturnPR.htm> (last visited Sept. 27, 2008) ("How much longer will people have to wait to be treated fairly?").

<sup>276</sup> *Armstrong*, 364 U.S. 40, 49 (1960) (observing the takings clause "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."); *Palazzolo*, 533 U.S. 606, 618 (2001); *Dolan*, 512 U.S. 374, 384 (1994); *Penn Central*, 438 U.S. 104, 123–24 (1978).

<sup>277</sup> George Charles Homsy, *The Land Use Planning Impacts of Moving "Partial Takings" from Political Theory to Legal Reality*, 37 URB. LAW. 269, 272 (2005).

<sup>278</sup> Jeffrey W. Porter, *Will Property Rights Legislation Endanger Smart Growth Efforts?*, 30 REAL EST. L.J. 275, 302 (2002).

open, pluralistic and progressive dialogue to resolve perceived problems in Oregon's land use planning system. Such a dialogue might have recognized that property rights legislation, and compensation laws in particular, are not inherently inimical to land use regulations—indeed, the Supreme Court has all but invited such legislation.<sup>279</sup> Arguably, such aspirations *can* be integrated into existing law in a seamless fashion that preserves both the advocates' vested property interests and the pre-existing legal and social structures which gave rise to such claims.<sup>280</sup>

When considering the role of property rights in a system of property, it is impossible that ownership alone carries the Lockean force asserted by property absolutists. Therefore, given that the Hobbesian stick of Measure 37 was so potent, it was expected that law would respond to the crisis.<sup>281</sup> I preferred to think that law

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<sup>279</sup> *Tahoe-Sierra*, 535 U.S. 302, 335 (2002) (“A rule that required compensation for every delay in the use of property would render routine government processes prohibitively expensive or encourage hasty decisionmaking. Such an important change in the law should be the product of legislative rulemaking rather than adjudication.”).

<sup>280</sup> Florida's pluralistic model for compensation statutes provides our “helpful clew.” FLA. STAT. § 70.001(1)–(13) (Supp. 2008); see *Euclid*, 272 U.S. 365, 387 (1926). Florida's compensation statute, adopted in 1995, orders that “[w]hen a specific action of a governmental entity has inordinately burdened an existing use of real property or a vested right to a specific use of real property, the property owner of that real property is entitled to relief, which may include compensation for the actual loss to the fair market value of the real property caused by the action of government.” FLA. STAT. § 70.001(2) (Supp. 2008). The Florida statute arguably adheres to the confines of regulatory takings jurisprudence. First, the term “inordinately burden” is defined as an action in which the governmental entity “has directly restricted or limited the use of real property such that the property owner is permanently unable to attain the reasonable, investment-backed expectation for the existing use of the real property or a vested right to a specific use of the real property.” *Id.* § 70.001(3)(e). The Florida statute incorporates the ‘whole parcel’ rule and is not triggered by temporary impacts to real property or regulation of land use impacts. *Id.*

Importantly, the Florida statute requires the governmental entity to craft settlement proposals that incorporate, rather than abdicate, the current regulatory controls. For instance, the governmental entity may consider the purchase of the property, transfer of development rights, adjustments to the regulatory standards at issue, with appropriate conditions, or even an approach that considers a response on a appropriate level of comprehensive planning. *Id.* § 70.001(4)(c). In addition, the Florida statute provides that when the governmental entity compensates for the restriction, the governmental entity acquires the development rights at issue as transferable development rights. *Id.* § 70.001(7)(b). As further insurance that this extra property protection strike an appropriate balance, the statute requires that any settlement agreement must be approved by the circuit court “to ensure that the relief granted protects the public interest served by the statute at issue and is the appropriate relief necessary to prevent the governmental regulatory effort from inordinately burdening the real property.” *Id.* § 70.001(4)(d)(2).

It is, of course, likely the case that the Florida effort does not effectively meet all of the needs of either the property rights or governmental camps. Nonetheless, the effort leaves intact the planning scheme under the police power *and* protects reasonable investment-backed expectations beyond the extent of property rights protection under Florida law. To the extent that the Florida scheme provides compensation to individual property owners, its requirement that the compensation decision be incorporated into the planning vision and occur in an integrated—rather than in an isolated, individualistic setting—maintains the balancing goals of a workable property right.

<sup>281</sup> See Edward J. Sullivan, *Year Zero: The Aftermath of Measure 37*, 38 URB. LAW. 237, 256–60 (2006) (discussing likely directions in resolving the inconsistencies and ambiguities). See also OR. REV. STAT. § 197.353 (2007). Section 197.353 recently extended the time for state and local governments to approve or deny Measure 37 claims filed on or after November 1, 2006. For claims filed after that date, the deciding governmental entity is provided a total of 540 days (180 days under the measure, plus a 360-day extension under the statute) to issue a final decision. This relief was thought necessary due to

would work out the impacts of this new property allocation in some form of a regulatory reaction,<sup>282</sup> adaptation, and evolution<sup>283</sup> into new ways to protect natural resources, control congestion, prevent nuisances, or secure other important public needs. This reaction might have reinvented land use controls and, like Measure 37, may have called for a different type of analysis to account for the new constraints on traditional police power and property controls. Luckily, perhaps, the recent adoption of Oregon's Measure 49<sup>284</sup> does not call for a revolution, re-invention, or a fundamental restructuring of law.

In the final analysis, we must recognize that property pervades our jurisprudential traditions and should not be reorganized without searching consideration of the destructive consequences throughout the web of rights in the system. In this analysis (returning again to Holmes), to avoid a fight, we may find ourselves conceding that the knight's romance is the best and brightest of any imaginable, particularly if we do not ourselves frequent the pub; however, given the importance of the issue, we will continue to insist that the fox hunt was harrowing and well-executed, but ultimately unsuccessful, and that property ownership does not vest unfettered rights to land uses. The "property" protected under Measure 37 created internal conflicts throughout the law, leaving law the messy task of administering a system of competing property expectations without the benefit of a coherent bundle of rights from which such expectations can be judged as valid (in a relative sense), and where qualified Measure 37 claimants were entitled to piece apart property, relieved of both the measure of property interests and the manner of acquiring a right in land uses.

Ashes to ashes, and dust to dust.

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the overwhelming number of claims filed in late 2006. State and local governments reported that they were unable to resolve claims within the short time period provided under the measure.

<sup>282</sup> The Measure 37 experience has arguably led to a reactionary trend against takings legislation. The 2007 ballot in Oregon confirms this trend with Measure 49. *See* Measure 49 text, *supra* note 28. *See also* Patty Salkin, Private Property Protection Act Soundly Defeated in Alaska, <http://lawoftheland.wordpress.com/2007/10/06/private-property-protection-act-soundly-defeated-in-alaska/> (last visited Sept. 7, 2008) (discussing the defeat of Proposition 1 in Matanuska-Susitna Borough in Alaska by a 70% majority ballot vote).

<sup>283</sup> The Measure 37 experience appears to offer an opportunity to apply evolutionary models to understand how and why the law has proposed, resisted, and undergone these changes. *See* E. Donald Elliott, *Law and Biology: The New Synthesis?*, 41 ST. LOUIS U. L.J. 595, 600 (1997) (Under the model of evolutionary theory, "any system that exhibits the three features of reproduction, variation and selection by the environment will evolve in the direction of greater fit with its environment."). Elliott categorizes as "evolutionary" any theory that proposes "that the law is shaped by its environment in a way that is analogized explicitly to the theory of evolution in biology: namely, the theory, usually attributed to Charles Darwin, that the forms of living things are shaped by environmental conditions, not by the design choices of a Creator." E. Donald Elliott, *The Evolutionary Tradition in Jurisprudence*, 85 COLUM. L.REV. 38, 39 (1985). The basic notion that is exhibited in the case of Measure 37 is one of maladaptation and selection—whether the legal system is so structured to retain radical, potentially self-defeating variations in law.

<sup>284</sup> *See* Measure 49 text, *supra* note 28.