

Restoring Property Rights in Washington: Regulatory Takings Compensation Inspired by Oregon's Measure 37

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I. INTRODUCTION

You get what you pay for, right? Well, not always. There is a loophole in the law that allows the government to take away valuable private property rights, through regulation, without compensation.¹ Specifically, the government can impose regulations on private property that limit its use and result in a diminution in its fair market value, without having to pay the property owner a cent.² Accordingly, many property owners are denied the full benefit of their bargain because they are not compensated for a reduction in the value of their land caused by land-use regulations that restrict uses of the property that were permitted when the owner originally purchased the land.³

Imagine, for example, a developer who invests ten million dollars in acquiring 100 acres of undeveloped residential land. The purchase price reflects the fact that the property is zoned at a density of one house per acre. Thus, the developer makes this investment with the intent of building and selling 100 houses, yielding an estimated five million dollar profit. However, before the houses are built, the local government, in an effort to reduce urban sprawl, enacts a land-use regulation which restricts the land to agricultural use. Such a regulation would result in a vast diminution of the property's value, as well as a loss of the developer's

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1. See *infra* Part V.B.

2. *Id.*

3. *Id.*

five million dollar expected profit. Consequently, the developer whose land has been restricted is forced to bear the entire economic cost of a land-use regulation that is designed to benefit the public as a whole, in this case by reducing urban sprawl.

Furthermore, any private property owner, no matter how large or small, may be forced to bear disproportionate burdens resulting from land-use regulations designed to benefit society at large.⁴ For instance, imagine a young couple who buys a house where they envision raising their children. Further, suppose the couple purchases the particular parcel because it abuts wetlands; thus, the property will always be ensured privacy, as nothing can be built on the wetlands. Additionally, suppose the property has a spacious twenty-foot-deep backyard in which they intend to build a pool and a swing set for their children. Unfortunately, these plans are destroyed by a subsequent government regulation which widens the buffer zone along the wetlands by an additional twenty feet. Such a regulation subsumes their backyard, leaving the couple with no usable land, as they are now prohibited from putting any structures in their backyard.

As a final hypothetical, imagine a diner that burns to the ground in an accidental fire. Despite the fact that the business might be in compliance with governmental regulations when it burns down, the government may later refuse to permit the owners to rebuild their business because the government has changed land-use regulations in the interim.

As these possibilities demonstrate, there are a myriad of ways in which a private property owner may be adversely affected by land-use regulations. This adverse effect is caused by the fact that, unlike the requirement for compensation when the government "takes" property via eminent domain,⁵ there is no requirement that the government compensate a property owner when the "taking" is effectuated through burdensome land-use regulations not in effect when the property owner purchased the land.⁶

The legal term "property" denotes not merely a tangible thing, but also the rights in and appurtenant to that thing.⁷ These rights, often col-

4. *Id.*

5. *See* U.S. CONST. amend. V; STEVEN J. EAGLE, REGULATORY TAKINGS § 1-12(a), at 216 (3d ed. 2005).

6. *See* 1 JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN § 1.42[3] (rev. 3d ed. 2006).

7. *See* *Manufactured Hous. Cmty. v. State*, 142 Wash. 2d 347, 367 n.10, 13 P.3d 183, 193 (2000) (quoting William B. Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553, 600 (1972)); *id.* at 380 (citing *State ex. rel. Smith v. Superior Court*, 26 Wash. 278, 287, 66 P. 385, 388 (1901)). "Property in a thing consists not merely of its ownership and possession, but in the unrestricted right of use, enjoyment and disposal. Anything which destroys any of the elements of property, to that extent, destroys the property itself. The substantial value of property lies in its use. If the right of use be denied, the value of the property is annihilated and ownership is rendered a

lectively termed a “bundle of rights,” include the rights to possess, to use, to exclude, to profit, and to dispose.⁸ As early as 1900, it was noted that “when a person is deprived of any of those rights, he is to that extent deprived of his property, and hence, that his property may be taken, in the constitutional sense, though his title and possession remain undisturbed.”⁹ Accordingly, when a government regulation modifies the bundle of rights associated with owning property, the government is arguably “taking” the landowner’s “property” in the constitutional sense, thus requiring the owner to be compensated.¹⁰ This type of “taking” is characterized as a “regulatory taking.”¹¹

A “regulatory taking” occurs when the government diminishes the value or usefulness of private property “by a regulatory action that does not involve a physical occupation of the property.”¹² However, the U.S. Supreme Court has conceded that “the attempt to distinguish ‘regulation’ from ‘taking’ is the most haunting jurisprudential problem in the field of contemporary land-use law.”¹³

Although property rights are protected by the Fifth and Fourteenth Amendments of the U.S. Constitution, there is much debate over “the degree to which they are protected and the degree to which they are limited by the interests of the general public.”¹⁴ Thus, there is an inevitable tension between the government’s right to regulate in the public interest and the constitutional right of citizens to the enjoyment of private property, free from unreasonable restrictions.¹⁵ It is clear that the government must have the power to regulate property; however, the extent to which government may restrict private property rights in the name of the public interest is not as apparent.

barren right.” *Ackerman v. Port of Seattle*, 55 Wash. 2d 400, 409, 348 P.2d 664, 669 (1960) (quoting *Spann v. City of Dallas*, 235 S.W. 513, 514–15 (Tex. Sup. Ct. 1921)).

8. See *United States v. Frost*, 125 F.3d 346, 367 (6th Cir. 1997).

9. See *Manufactured Hous. Cmty.*, 142 Wash. 2d at 379, 13 P.3d at 199 (citing *State ex. rel. Smith*, 26 Wash. at 287, 66 P. at 388). “[W]hen the government takes one right from the bundle which comprises ‘property,’ it thereby takes an aspect or attribute of property itself.... If one of the rights of property has been damaged or removed from the bundle, the property has accordingly been damaged or taken to that extent.” *Id.* (emphasis added).

10. See *supra* note 5.

11. See *infra* note 12 and accompanying text.

12. See *Hotel & Motel Ass’n of Oakland v. City of Oakland*, 344 F.3d 959, 965 (9th Cir. 2003) (quoting *Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, 684 (9th Cir. 1993)); see also *Berst v. Snohomish County*, 114 Wash. App. 245, 255–56, 57 P.3d 273, 278 (2002) (quoting *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001)).

13. *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 650 n.15 (1981) (quoting CHARLES M. HARR, *LAND-USE PLANNING: A CASEBOOK ON THE USE, MISUSE AND RE-USE OF URBAN LAND* 766 (3d ed. 1976)).

14. THOMAS E. ROBERTS, *TAKING SIDES ON TAKINGS ISSUES: PUBLIC AND PRIVATE PERSPECTIVES* 2 (2001).

15. See 83 AM. JUR. 2D *Zoning & Planning* § 37 (2005); U.S. CONST. amend. V.

While regulatory actions are generally intended to protect or improve the well-being of citizens and the environment, they may impose costs on isolated private property owners by limiting the use or development of their land.¹⁶ This often results in an unfair distribution of the costs and benefits of the imposed regulation, as individuals are forced to bear the cost of a regulation whose benefits are enjoyed by society as a whole. Accordingly, one of the principal purposes of the Fifth Amendment's Takings Clause,¹⁷ in prohibiting the taking of private property for public use without just compensation, is to prevent the 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."¹⁸

To effectuate that goal, in November 2004, Oregon voters passed a ballot initiative, Measure 37, which imposed the most progressive regulatory takings compensation statute in the country.¹⁹ Although planners and environmentalists have praised Oregon's aggressive policies designed to preserve open space and limit growth,²⁰ the passage of the citizen-sponsored Measure 37 indicated that Oregon citizens were dissatisfied with the state's means of achieving its land-use goals. Measure 37 enacted a statute²¹ requiring the government to pay just compensation when the government enacts or enforces a land-use regulation that restricts the use of the property and results in a reduction in the fair market

16. See CONG. BUDGET OFFICE, REGULATORY TAKINGS AND PROPOSALS FOR CHANGE 1 (1998), available at <http://www.cbo.gov/ftpdocs/10xx/doc1051/takings.pdf> [hereinafter CBO REGULATORY TAKINGS]; see also Standards.gov, http://standards.gov/standards_gov/v/Regulations/index.cfm (last visited July 27, 2006).

17. See U.S. CONST. amend. V.

18. *Palazzolo v. Rhode Island*, 533 U.S. 606, 633 (2001).

19. See generally OR. SEC'Y OF STATE, OREGON VOTERS' PAMPHLET: VOLUME 1 - STATE MEASURES 104 (2004), available at http://www.sos.state.or.us/elections/nov22004/guide/meas/m37_bt.html [hereinafter OREGON VOTERS' PAMPHLET VOL. 1] (providing the ballot title, the text of the measure, an explanatory statement, and arguments in favor and in opposition of the measure); see also OREGONIANS IN ACTION, BALLOT MEASURE 37: BREAKDOWN OF THE VOTE, http://measure37.com/measure%2037/vote_breakdown.html (last visited July 27, 2006) [hereinafter BREAKDOWN OF THE VOTE] (providing statistics on votes for Measure 37 by district).

20. In 1973, the Oregon Legislature adopted Senate Bill 100, establishing a statewide centralized land-use planning system. See David J. Hunnicutt, *Oregon Land-Use Regulation and Ballot Measure 37: Newton's Third Law at Work*, 36 ENVTL. L. 25, 27-28 (2006). Senate Bill 100 created a state agency, the Department of Land Conservation and Development, which developed 19 statewide planning goals through its Land Conservation and Development Commission ("LCDC"). *Id.* at 28-29. Accordingly, local governments were stripped of their land-use planning authority, as Senate Bill 100 required local governments to adopt comprehensive land-use plans and zoning ordinances in compliance with the statewide goals. *Id.* at 29. These goals are intended to concentrate development in urban areas, while preserving forest and agricultural land in rural areas. *Id.* at 29; see also OR. DEPT. OF LAND CONSERVATION AND DEV., STATEWIDE PLANNING GOALS, <http://egov.oregon.gov/LCD/goals.shtml> (last visited July 31, 2006).

21. See OR. REV. STAT. § 197.352 (2005).

value of the property.²² As an alternative to compensation, the government may choose to modify, remove, or not apply the regulation to the owner's property.²³ Despite opponents of Measure 37 outspending proponents at a rate of more than two-to-one,²⁴ the measure was approved by Oregon voters with nearly sixty-one percent of the vote,²⁵ garnering more votes than any initiative in Oregon history.²⁶

The overwhelming passage of Measure 37 in Oregon has inspired property rights advocates in other states to follow Oregon's lead in their own efforts to strengthen property rights.²⁷ In particular, Measure 37's success has revived the property rights movement in Washington and galvanized efforts to put a similar measure before the voters on the November 2006 ballot.²⁸ Washington should follow Oregon's lead by enacting a regulatory takings compensation statute so that society as a whole equitably shares both the costs and the benefits of land-use regulations, and individual property owners affected by such regulations are not unfairly deprived of the benefit of their bargain.

Part II of this Comment provides a background of regulatory takings jurisprudence, outlining both the U.S. Supreme Court's and Washington courts' respective analyses of regulatory takings challenges under the takings clauses of both the U.S. and Washington Constitutions. Part III discusses the threshold compensation statutes that have been enacted by four states in an effort to remedy the problem of regulatory takings. Part IV examines Oregon's Measure 37 and the lawsuit that validated its

22. See *id.* § 197.352(1).

23. See *id.* § 197.352(8).

24. The proponents began the campaign with a balance of \$264,991.47 and raised another \$988,248.52, for a total of \$1,253,239.99. See OR. SEC'Y OF STATE, ELECTRONIC FILING REPORT, SUMMARY STATEMENT OF CONTRIBUTIONS AND EXPENDITURES, FAMILY FARM PRESERVATION PAC 1 (Sept. 23, 2004), http://egov.sos.state.or.us/elections/elec_images/4668_2004_G100_1STPRE.pdf; OR. SEC'Y OF STATE, ELECTRONIC FILING REPORT, SUMMARY STATEMENT OF CONTRIBUTIONS AND EXPENDITURES, FAMILY FARM PRESERVATION PAC 1 (Sept. 9, 2005), http://egov.sos.state.or.us/elections/elec_images/4668_2005_SUPL_SUPP.pdf.

The opponents raised \$2,727,828.03. See Or. Sec'y of State, Electronic Filing Report, Summary Statement of Contributions and Expenditures, No on 37 Take a Closer Look Committee 1 (Dec. 2, 2004), http://egov.sos.state.or.us/elections/elec_images/4847_2004_G100_POST.pdf.

25. See OR. SEC'Y OF STATE, NOVEMBER 2, 2004, GENERAL ELECTION ABSTRACT OF VOTES: STATE MEASURE NO. 37 (2004), available at <http://www.sos.state.or.us/elections/nov22004/abstract/m37.pdf> [hereinafter ABSTRACT OF VOTES].

26. See BREAKDOWN OF THE VOTE, *supra* note 19.

27. Brad Shannon, *Money Flows to Initiative Efforts*, THE OLYMPIAN (Olympia, Wash.), May 11, 2006, at 1B; Eric Pryne, *Property-rights Initiative Likely to Spark Fierce Fight*, THE SEATTLE TIMES, Feb. 9, 2006, at B1. See also Eric de Place, *This Land is My Land*, WASHINGTON LAW & POLITICS, Oct.-Nov. 2005, at 18; Aaron Corvin, *State Might Copy Oregon Property Rights Plan*, THE NEWS TRIBUNE (Tacoma, Wash.), Jan. 15, 2005, at A1.

28. Sam Howe Verhovek, *Property Rights Law is Upheld in Oregon*, THE LOS ANGELES TIMES, Feb. 22, 2006, at A12.

constitutionality. Part V analyzes Washington's proposed property rights measure, Initiative 933, and argues that Washington needs a regulatory takings compensation statute. Finally, Part VI concludes that Washington should restore its residents' private property rights by enacting a regulatory takings compensation statute modeled after Oregon's Measure 37.

II. BACKGROUND OF REGULATORY TAKINGS JURISPRUDENCE

Regulatory takings jurisprudence is grounded in the Takings Clause of the Fifth Amendment to the U.S. Constitution, which prohibits the federal government from taking private property for public use without paying the owner just compensation.²⁹ This prohibition has been extended to state and local governments through the due process conduit of the Fourteenth Amendment.³⁰ Accordingly, the Takings Clause prescribes mandatory minimum limitations on state and local governments;³¹ however, state constitutions may afford property owners broader protection.³² Moreover, all state constitutions include provisions comparable to the federal Takings Clause.³³ Washington's takings clause, for example, provides that "[n]o private property shall be taken or damaged for public or private use without just compensation having first been made."³⁴

Analysis under the Takings Clause of the U.S. Constitution usually involves the relatively straightforward application of *per se* rules when the government exercises its power of eminent domain to formally condemn private property for a public purpose, such as to build a post office or a highway.³⁵ However, the issue becomes convoluted when property owners allege that a land-use regulation imposed by the government effects a "taking" of their property and that compensation ought to be

29. U.S. CONST. amend. V. The Takings Clause of the Fifth Amendment is also referred to as the Just Compensation Clause.

30. U.S. CONST. amend. XIV; *Orion Corp. v. State*, 109 Wash. 2d 621, 652, 747 P.2d 1062, 1079 (1987) (the Fifth Amendment is applied to the states through the Fourteenth Amendment).

31. See Richard L. Settle, *Regulatory Taking Doctrine in Washington: Now You See It, Now You Don't*, 12 U. PUGET SOUND L. REV. 339, 343 (1989); see also *Orion Corp.*, 109 Wash. 2d at 652, 747 P.2d at 1079 (characterizing the Federal Constitution as establishing "a minimum floor of protection below which state law may not go.").

32. See Settle, *supra* note 31, at 343; see also *Eggleston v. Pierce County*, 148 Wash. 2d 760, 766, 64 P.3d 618, 622 (2003) (stating that article I, § 16 of Washington's constitution "in some ways provides greater protection" than "its United States constitutional counterpart").

33. See Settle, *supra* note 31, at 343-44 (1989); see, e.g., WASH. CONST. art. I, § 16; OR. CONST. art. I, § 18.

34. WASH. CONST. art. I, § 16.

35. See CBO REGULATORY TAKINGS, *supra* note 16, at ix; see also *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 217 (2003) (the government may exercise its power of eminent domain as long as the taking is for a "public use" and the government pays the owner "just compensation").

paid.³⁶ Property owners who believe that a government action resulted in a "regulatory taking" may file suit against the government for violating the Fifth Amendment³⁷ and demand compensation in a cause of action known as inverse condemnation.³⁸ However, the property owner carries the burden of initiating suit against the government,³⁹ as well as the burden of proving that a regulatory taking has occurred.⁴⁰

A land-use regulation may be challenged either as an unconstitutional taking or as a violation of substantive due process.⁴¹ However, there is an overlap between the test for a denial of substantive due process and the test for a regulatory taking, which the Supreme Court has yet to resolve.⁴² Consequently, courts often erroneously mesh the two analyses, adding to the uncertainty in this already convoluted area of the law. A land-use regulation may be void for denial of substantive due process if it does not substantially advance the public health, safety, or welfare.⁴³ Moreover, even if the land-use regulation serves a substantial public purpose, it may violate substantive due process if, balancing the benefit received by the public from the regulation against the burden on the regulated landowner, it is "unduly oppressive" on the landowner.⁴⁴

Although courts have yet to develop a specific test for determining when a land-use regulation becomes a taking, courts often balance various *ad hoc* factors in an effort to determine whether the regulation has

36. See CBO REGULATORY TAKINGS, *supra* note 16, at ix; see also *Brown*, 538 U.S. at 217.

37. See U.S. CONST. amend. V.

38. See EAGLE, *supra* note 5, § 8-9(d)(1), at 1157; JULIAN CONRAD JUERGENSMEYER & THOMAS E. ROBERTS, LAND USE PLANNING AND CONTROL LAW § 10.2, at 419 (1998) [hereinafter JUERGENSMEYER]. The U.S. Supreme Court defines inverse condemnation as "a cause of action against a governmental defendant to recover the value of property which has been taken in fact by the governmental defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency." *United States v. Clarke*, 445 U.S. 253, 257 (1981) (quoting D. HAGMAN, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW 328 (1971)).

39. JUERGENSMEYER, *supra* note 38, § 10.2, at 419.

40. CBO REGULATORY TAKINGS, *supra* note 16, at 2.

41. See *Presbytery of Seattle v. King County*, 114 Wash. 2d 320, 329, 787 P.2d 907, 912 (1990); *Orion Corp. v. State*, 109 Wash. 2d 621, 649, 747 P.2d 1062, 1077 (1987).

42. See, e.g., JUERGENSMEYER, *supra* note 38, § 10.12, at 459-60 (1998) (declaring that the test for a denial of substantive due process and the test for a regulatory taking "are virtually indistinguishable, and, over the years, the Court has incorporated its substantive due process case law into its takings formula"); DANIEL R. MANDELKER, LAND USE LAW § 2.31, at 37 (1982) (noting an overlap between substantive due process and takings doctrine); Lawrence Berger, *Public Use, Substantive Due Process, and Takings—An Integration*, 74 NEB. L. REV. 843, 844 (1995) (suggesting that the U.S. Supreme Court "has failed to maintain clear lines of demarcation between the substantive due process and takings rules and has introduced some unnecessary overlap and confusion in their application.").

43. See, e.g., JUERGENSMEYER, *supra* note 38, § 10.12, at 455; MANDELKER, *supra* note 42, § 2.31, at 37. The test for denial of substantive due process can be traced back to the Supreme Court's decision in *Lawton v. Steele*, 152 U.S. 133, 137 (1894).

44. *Lawton*, 152 U.S. at 137; see also JUERGENSMEYER, *supra* note 38, § 10.12, at 459 (1998).

gone “too far” and has thereby created an unreasonable restriction on the landowner.⁴⁵ The Washington Supreme Court conceded that a “doctrinal blurring” has occurred between the test for a denial of substantive due process and the test for a regulatory taking such that the tests “seem almost analytically identical.”⁴⁶ However, a critical distinction between the two constitutional doctrines lies in the remedy to be applied: the remedy for a violation of substantive due process may be injunctive relief, such that the regulation is invalidated, whereas the sole remedy for a taking is just compensation.⁴⁷

A. The U.S. Supreme Court’s Analysis of Regulatory Takings Claims

In the nineteenth century, the Supreme Court rejected the idea that a land-use regulation could cause a taking.⁴⁸ The first decision by the Supreme Court finding that a land-use regulation violated the Fifth Amendment’s Takings Clause occurred in 1922, in *Pennsylvania Coal Company v. Mahon*.⁴⁹ Writing for the Court in that case, Justice Holmes struggled to conciliate the disparate positions surrounding regulatory takings. On the one hand, he recognized that “[g]overnment could hardly go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.”⁵⁰ On the other hand, he established that “while property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking.”⁵¹

45. See JUERGENSMEYER, *supra* note 38, § 10.2, at 426–27; MANDELKER, *supra* note 42, § 2.11, at 22. See also *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

46. *Orion Corp.*, 109 Wash. 2d at 647–48, 747 P.2d at 1077.

47. JUERGENSMEYER, *supra* note 38, § 10.12, at 460; see also *Orion Corp.*, 109 Wash. 2d at 649, 747 P.2d at 1077.

48. See ROBERTS, *supra* note 14, §1.1(b), at 4; see, e.g., *Mugler v. Kansas*, 123 U.S. 623 (1887). In *Mugler*, the U.S. Supreme Court rejected a brewery owner’s argument that his property had been taken by a law prohibiting the manufacture of alcoholic beverages and that he should receive compensation. 123 U.S. at 623–25, 675. The Court found that a severe impairment to the value of the brewery caused by a state prohibition law was not a taking, but rather the application of justified police power regulation, which was not burdened by a requirement of compensation. *Id.* at 671. The Court declared 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,” *id.* at 665, and that “[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 sense, be deemed a taking or an appropriation of property for the public benefit.” *Id.* at 668–69.

49. *Pa. Coal Co. v. Mahon*, 260 U.S. 393 (1922). In *Mahon*, the Supreme Court held that a Pennsylvania state law forbidding mining that might cause subsidence was a regulatory taking when the coal company had, by contract, expressly reserved the right to mine. *Id.*; see also ROBERTS, *supra* note 14, §1.1(b), at 4.

50. *Mahon*, 260 U.S. at 413.

51. *Id.* at 415. Justice Holmes warned that “[w]e are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.” *Id.* at 416.

Since that decision, there has been much debate but no consensus on what action constitutes going “too far.”⁵²

Accordingly, the Supreme Court has continued to decide regulatory takings claims on a case-by-case basis.⁵³ However, while the Court has categorized the necessary inquiry into whether a regulatory taking has occurred as *ad hoc*,⁵⁴ it has attempted to establish a framework to assist courts in determining what constitutes going “too far.”⁵⁵

The Court has identified two clear instances, known as *per se* takings rules, in which a regulatory taking will usually be found.⁵⁶ First, a regulation that results in a permanent physical occupation of private property constitutes a *per se* taking.⁵⁷ Since the right to exclude is “one of the most treasured strands in an owner’s bundle of property rights,”⁵⁸ the Court has held that a permanent physical occupation of property is a taking no matter how small the intrusion or how great the public interest.⁵⁹ Second, a regulation that deprives a landowner of all economically beneficial or productive use of the property is a *per se* taking.⁶⁰

If the governmental action does not constitute a *per se* taking, the Court generally analyzes three factors: (1) the economic impact of the action on the property; (2) the extent to which the action interferes with reasonable, investment-backed expectations; and (3) the character or extent of the government action.⁶¹ However, because the Court often describes and weighs these factors in varying ways, it is difficult to accurately predict how any particular regulatory takings claim will be de-

52. CBO REGULATORY TAKINGS, *supra* note 16, at 14.

53. See THEODORE J. NOVAK ET AL., CONDEMNATION OF PROPERTY: PRACTICE AND STRATEGIES FOR WINNING JUST COMPENSATION § 5.3, at 43, § 7.1, at 65 (1993). The Supreme Court has noted that the question of defining what constitutes a taking “has proved to be a problem of considerable difficulty.” *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 123 (1978). Further, the Court conceded that it “has been unable to develop any ‘set formula’ for determining when ‘justice and fairness’ require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons.” *Id.* at 124.

54. See *Penn Cent. Transp. Co.*, 438 U.S. at 124.

55. See JUERGENSMEYER, *supra* note 38, at 427; see also *Penn Cent. Transp. Co.*, 438 U.S. at 124.

56. See NOVAK, *supra* note 53, § 7.5, at 68.

57. See, e.g., *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 421 (1982).

58. *Id.* at 435 (citing *Kaiser Aetna v. United States*, 444 U.S. 164, 179–80 (1979)).

59. *Id.* at 426; *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992).

60. *Lucas*, 505 U.S. at 1015. The only exception to the requirement to pay just compensation when a regulation is so severe that it prohibits all economically beneficial use of land is when the government can demonstrate that the restrictions in the regulation are already found in the restrictions that the state’s law of nuisance places upon land ownership. *Id.* at 1004.

61. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

cided.⁶² Consequently, these inconsistent precedents provide little guidance to lower courts.⁶³

B. Washington's Analysis of Regulatory Takings Claims

The Washington Supreme Court has attempted to conform its regulatory takings analysis to recent rulings by the U.S. Supreme Court, as Washington courts not only decide takings claims raised under the Washington constitution but also decide takings claims raised under the Fifth Amendment to the U.S. Constitution.⁶⁴ The holdings of four landmark cases—*Presbytery*,⁶⁵ *Sintra*,⁶⁶ *Robinson*,⁶⁷ and *Guimont*⁶⁸—together constitute the Washington Supreme Court's attempt to eliminate *ad hoc* decision-making and consolidate all of the takings factors from federal jurisprudence into a comprehensive formula.⁶⁹

First, the court employs a "threshold inquiry" to determine whether to analyze a challenged regulation under the takings doctrine or substantive due process.⁷⁰ The court begins its threshold inquiry by asking whether the regulation destroys or derogates any fundamental attribute of property ownership, including the right to possess, to exclude others, to dispose of property, to prevent physical invasion, or to make some economically viable use of the property.⁷¹ If the challenged regulation either results in a "physical invasion" of private property or "denies all economically beneficial or productive use of land," then a *per se* taking has occurred and the property owner need not proceed with the remainder of the analysis.⁷² A second threshold question asks "whether the challenged

62. CBO REGULATORY TAKINGS, *supra* note 16, at 16.

63. *Id.*

64. See *Presbytery of Seattle v. King County*, 114 Wash. 2d 320, 328, 787 P.2d 907, 911-12 (1990); *Orion Corp. v. State*, 109 Wash. 2d 621, 652, 747 P.2d 1062, 1079 (1987) (stating "we must ensure that our state approach conforms with the minimum due process floor set by the Fifth Amendment to the United States Constitution, as applied to the states through the Fourteenth Amendment."); 24 WASH. PRAC., ENVIRONMENTAL LAW AND PRACTICE § 21.2 (noting that "state constitutional standards have not yet been elaborated separately from federal standards.").

65. *Presbytery*, 114 Wash. 2d at 320, 787 P.2d at 907.

66. *Sintra, Inc. v. Seattle*, 119 Wash. 2d 1, 829 P.2d 765 (1992).

67. *Robinson v. Seattle*, 119 Wash. 2d 34, 830 P.2d 318 (1992).

68. *Guimont v. Clarke*, 121 Wash. 2d 586, 854 P.2d 1 (1993).

69. 24 WASH. PRAC., ENVIRONMENTAL LAW AND PRACTICE § 21.2; see also *EAGLE*, *supra* note 5, § 8-10(a)(3), at 1176.

70. See *Presbytery*, 114 Wash. 2d at 329, 787 P.2d at 912; see also 24 WASH. PRAC., ENVIRONMENTAL LAW AND PRACTICE §§ 21.3-21.6 (describing nature and application of the threshold test).

71. *Guimont*, 121 Wash. 2d at 602, 854 P.2d at 10; see also *Sintra*, 119 Wash. 2d at 14 n.6, 829 P.2d at 772; *Robinson*, 119 Wash. 2d at 50, 830 P.2d at 328; *Presbytery*, 114 Wash. 2d at 329-30, 787 P.2d at 912.

72. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015, 1016 n.7 (1992); *Guimont*, 121 Wash. 2d at 598, 601, 737 P.2d at 8-9.

regulation safeguards the public interest in health, safety, the environment or the fiscal integrity of an area, or whether the regulation seeks less to prevent a harm than to impose on those regulated the requirement of providing an affirmative public benefit.”⁷³ The court only proceeds with its takings analysis if the regulation in question either infringes on a fundamental attribute of ownership, or if the regulation goes beyond simply preventing a public harm and imposes its associated costs solely on regulated property owners who unfairly bear the burden of providing a public benefit.⁷⁴

If the regulation passes the threshold test, the court next examines whether the regulation substantially advances a legitimate state interest. If it does not advance a legitimate state interest, then it automatically constitutes a taking.⁷⁵ Conversely, if the regulation does substantially advance a legitimate state interest, then the court performs a balancing test like the one set out by the U.S. Supreme Court in *Penn Central*.⁷⁶ Specifically, the court weighs the following factors: (1) the regulation’s economic impact on the property; (2) the extent of the regulation’s interference with investment-backed expectations; and (3) the character of the governmental action.⁷⁷ If the balancing of factors favors a taking, then the court determines that a taking has occurred and just compensation is mandated.⁷⁸

However, since neither the U.S. Supreme Court nor the Washington Supreme Court has ever articulated any guidelines as to how much weight to give each factor, lower courts forced to determine whether a regulatory taking has occurred have based their analysis “largely ‘upon the particular circumstances [in that] case.’”⁷⁹ As a result, the constitutional takings jurisprudence that has developed is “generally tolerant of

73. *Guimont*, 121 Wash. 2d at 603, 854 P.2d at 10 (internal quotations omitted); *see also Sintra*, 119 Wash. 2d at 14–15, 829 P.2d at 772–73; *Robinson*, 119 Wash. 2d at 50, 830 P.2d at 328; *Presbytery*, 114 Wash. 2d at 329, 787 P.2d at 912.

74. *Guimont*, 121 Wash. 2d at 595, 854 P.2d at 6; *Sintra*, 119 Wash. 2d at 14–15, 829 P.2d at 772–73; *Robinson*, 119 Wash. 2d at 49, 830 P.2d at 327–28; *Presbytery*, 114 Wash. 2d at 329, 787 P.2d at 912. Note that if the regulation does not infringe on a fundamental attribute of property ownership and the regulation protects the public health, safety, and welfare, then no taking occurs; however, it is still possible that the regulation violates the landowner’s substantive due process rights.

75. *Guimont*, 121 Wash. 2d at 595, 854 P.2d at 6; *Robinson*, 119 Wash. 2d at 50, 829 P.2d at 328; *Presbytery* 114 Wash. 2d at 333, 787 P.2d at 914.

76. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

77. *See Guimont*, 121 Wash. 2d at 604, 854 P.2d at 11; *Robinson*, 119 Wash. 2d at 51, 830 P.2d at 328; *Presbytery*, 114 Wash. 2d at 335–36, 787 P.2d at 915–16.

78. *See Robinson*, 119 Wash. 2d at 51, 830 P.2d at 328; *Presbytery*, 114 Wash. 2d at 335–36, 787 P.2d at 915–16.

79. *Penn Cent. Transp. Co.*, 438 U.S. at 124 (quoting *United States v. Cent. Eureka Mining Co.*, 357 U.S. 155, 168 (1958)).

actions by the government that serve legitimate public objectives.”⁸⁰ In fact, courts rarely find that a government land-use regulation effects a “taking” of private property that requires compensation under the Fifth Amendment.⁸¹ Thus, due to its unpredictability, the current judicial remedy available in Washington appears inadequate to protect certain individual property owners from bearing the burden of regulations that are intended to generate benefits for all of society.

III. THRESHOLD COMPENSATION STATUTES IN OTHER STATES

Some states have attempted to provide property owners greater protection against burdensome regulations by enacting regulatory takings compensation statutes. These compensation statutes vary in scope and in the timing of when compensation is triggered. Generally, however, the statutes require the government to reimburse property owners whose property value has declined a specified threshold amount due to a government regulation.⁸² Moreover, such compensation statutes supplement, rather than replace, the protection of property rights provided by the Constitution.⁸³ Thus, property owners in these states may pursue compensation under either their respective state constitutions, the U.S. Constitution, or under the regulatory takings compensation statute.⁸⁴

To date, at least four states have enacted threshold regulatory takings compensation statutes. “Florida and Texas have comprehensive compensation laws, while Louisiana and Mississippi have compensation laws of limited scope.”⁸⁵

In 1995, Florida enacted the Bert J. Harris, Jr. Private Property Rights Protection Act.⁸⁶ This statute requires the government to provide compensation for regulations that “inordinately burden” real property, even if the burden does not amount to a taking under either the state or Federal Constitution.⁸⁷ Under the statute, a regulation is an “inordinate burden” when the affected property owner either “is permanently unable to attain reasonable, investment-backed expectation[s]” for the property or “bears permanently a disproportionate share of a burden imposed for the good of the public, which in fairness should be borne by the public at

80. CBO REGULATORY TAKINGS, *supra* note 16, at 2.

81. *See id.* at 18; Mark W. Cordes, *Leapfrogging the Constitution: The Rise of State Takings Legislation*, 24 *ECOLOGY L.Q.* 187, 188–89 (1997).

82. JUERGENSMEYER, *supra* note 38, § 10.11, at 453; *see also* Cordes, *supra* note 81, at 212.

83. CBO REGULATORY TAKINGS, *supra* note 16, at xii.

84. *See id.*

85. *See* JUERGENSMEYER, *supra* note 38, § 10.11, at 453 (1998).

86. FLA. STAT. ANN. § 70.001 (West 2006).

87. *Id.* § 70.001(1).

large.”⁸⁸ Determination of when the “inordinate burden” standard has been met is judicial.⁸⁹

In contrast to Florida’s inordinate burden standard, other states have established a threshold percentage reduction in property value to determine when compensation is mandated. For example, Texas’ 1995 Private Real Property Rights Preservation Act provides that a taking occurs when a governmental action reduces the value of property by twenty-five percent or more.⁹⁰ When a taking is found, the government has a choice between invalidating the action or compensating the property owner for the diminution in value of the property.⁹¹ The Texas statute applies to most state agency actions; however, it only covers municipalities if they are acting extraterritorially.⁹² As an additional protection against burdensome regulations, the statute also requires state agencies to write a “takings impact assessment” for each proposed governmental regulation.⁹³ The takings impact assessment must describe the purpose of the proposed action, evaluate the potential benefits to society and the burdens imposed on private real property, determine whether engaging in the action will constitute a taking, and consider alternatives to the proposed action.⁹⁴

Like the Texas statute, the regulatory takings compensation statutes in Louisiana and Mississippi also use a threshold percentage diminution in property value to determine when compensation is required. The Louisiana and Mississippi statutes, however, are more limited in scope, as they apply only to agricultural and forest land. The Louisiana statute requires just compensation to be paid when a government regulation reduces the value of agricultural or forest land by twenty percent or more.⁹⁵ The counterpart law in Mississippi requires the government to compensate for losses in value of forty percent or more.⁹⁶

In general, state compensation statutes provide a more lenient and explicit standard to determine eligibility for compensation than the current constitutional takings jurisprudence.⁹⁷ As a result, compensation

88. *Id.* § 70.001(3)(e).

89. *Id.*

90. TEX. GOV’T CODE ANN. § 2007.002(5) (Vernon 2006).

91. *Id.* § 2007.024.

92. *Id.* § 2007.003(a)(3).

93. *Id.* § 2007.043(a).

94. *Id.* § 2007.043(b).

95. LA. REV. STAT. ANN. § 3:3601–3:3660 (2003).

96. MISS. CODE ANN. § 49-33-1 to -19 (West 2006).

97. See Cordes, *supra* note 81, at 226. “Most . . . compensation statutes draw a relatively clear line on when diminution in value requires compensation. To some extent this clarity is illusory, since different appraisals are inevitable . . . Even conceding these problems, however, the test is certainly clearer and easier to apply than the current balancing required by judicial standards.” *Id.*

statutes confer greater protection on property owners by holding the government more accountable for the impacts of regulation on private property.

IV. OREGON'S REGULATORY TAKINGS COMPENSATION STATUTE: MEASURE 37

In November 2000, Oregon voters passed a ballot initiative, Measure 7, imposing the most aggressive regulatory takings compensation law in the nation.⁹⁸ Measure 7 amended article I, § 18 of the Oregon constitution to require the government to pay just compensation to property owners for regulations that reduced the value of their property.⁹⁹ Notably, unlike the Texas, Louisiana, or Mississippi laws, Measure 7 set no minimum threshold to trigger the compensation requirement.¹⁰⁰ However, before Measure 7 was implemented, the Oregon Supreme Court unanimously invalidated the law on grounds that it contained unrelated changes in a single measure in violation of the Oregon constitution's "separate-vote" provision.¹⁰¹

A. Voters Approved Measure 37

After the invalidation of Measure 7 by the Oregon Supreme Court, Oregon's electorate did not relent in its effort to protect private property rights. Rather, in November 2004, Oregon voters convened and passed a citizen-sponsored initiative¹⁰² almost identical in effect to Measure 7.¹⁰³ However, Measure 37—the new initiative—enacted a statute, rather than

98. See EAGLE, *supra* note 5, § 9-4, at 1217-18 (reprinting complete text of Measure 7); OR. SEC'Y OF STATE, *BALLOT MEASURE 7* (1999), available at <http://www.sos.state.or.us/elections/irr/2000/046text.pdf> [hereinafter *BALLOT MEASURE 7*].

99. EAGLE, *supra* note 5, § 9-4, at 1217-18; *BALLOT MEASURE 7*, *supra* note 98.

100. EAGLE, *supra* note 5, § 9-4, at 1217-18; *BALLOT MEASURE 7*, *supra* note 98.

101. *League of Or. Cities v. State*, 56 P.3d 892, 910 (Or. 2002). Measure 7 contained an exemption, stating, "Nothing in this 2000 Amendment shall require compensation due to a government regulation prohibiting the use of a property for the purpose of selling pornography, performing nude dancing, selling alcoholic beverages or other controlled substances, or operating a casino or gambling parlor." *Id.* at 905. The court found that the exemption of government regulations that restrict the right of property for purposes of selling pornography from the just compensation requirements of the measure impliedly amended article I, § 8 of the Oregon constitution, Oregon's free speech clause. *Id.* at 905-06. Accordingly, the court held that two changes were made to the Oregon constitution—an express change to Oregon's takings clause and an implied change to Oregon's free speech clause—each of which should have been voted on separately. *Id.* at 910-11. Since the changes appeared in the same measure, the measure violated the "separate-vote" provision, and thus, was void in its entirety. *Id.* at 869.

102. Measure 37 was drafted by a non-profit property rights advocacy group called Oregonians in Action (OIA). See OREGONIANS IN ACTION, <http://www.oia.org> (last visited July 27, 2006).

103. See *ABSTRACT OF VOTES*, *supra* note 25 (outlining the votes on Measure 37 by county and showing that 1,054,589 voted for and 685,079 voted against the measure).

attempting a constitutional amendment, in order to circumvent the problems that proved fatal to Measure 7.¹⁰⁴

Measure 37's ballot title provided: "Governments must pay owners, or forgo enforcement, when certain land-use restrictions reduce property value."¹⁰⁵ Like Measure 7, Measure 37 set no minimum threshold diminution in value in order to generate a claim.¹⁰⁶ Accordingly, the enacted statute entitles property owners to receive just compensation if a government entity enacts or enforces a "land use regulation"¹⁰⁷ that restricts the use of property and results in any diminution in the fair market value of the property.¹⁰⁸ Alternatively, the government may choose to avoid the payment of just compensation by modifying, removing, or not applying the challenged land-use regulation "to allow the owner to use the property for a use permitted at the time the owner acquired the property."¹⁰⁹

The statutory remedies of just compensation or invalidation are only available for land-use regulations enacted after the present "owner"¹¹⁰ or a "family member"¹¹¹ of the present owner acquired the property.¹¹² Thus, a property owner who does not exercise the right to file a claim and subsequently sells the property to a non-family member waives any future right to a remedy based on any diminution in value, as the right does not transfer with the property. Additionally, the statute contains four other categories of regulations that are exempt from the requirement of just compensation or invalidation: the statute does not apply to commonly and historically recognized nuisances, to public health and safety regulations, to regulations required to comply with fed-

104. Measure 37 is codified at OR. REV. STAT. § 197.352 (2005).

105. OREGON VOTERS' PAMPHLET VOL. 1, *supra* note 19, at 103.

106. *See* OR. REV. STAT. § 197.352 (2005).

107. The statute defines a "land use regulation" as including: "(i) Any statute regulating the use of land or any interest therein; (ii) Administrative rules and goals of the Land Conservation and Development Commission; (iii) Local government comprehensive plans, zoning ordinances, land division ordinances, and transportation ordinances; (iv) Metropolitan service district regional framework plans, functional plans, planning goals and objectives; and (v) Statutes and administrative rules regulating farming and forest practices." *Id.* § 197.015(11)(B).

108. *See id.* § 197.352(1).

109. *See id.* § 197.352(8).

110. *Id.* § 197.352(11)(C). "Owner" is defined as the present owner of the property, or any interest therein. *Id.*

111. *Id.* § 197.352(11)(A). "'Family member' shall include the 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." *Id.*

112. *See id.* § 197.352(3)(E).

eral law, and to regulations restricting or prohibiting the use of property for the purpose of selling pornography or performing nude dancing.¹¹³

The statute allows local governments to adopt procedures for processing claims for compensation, but prohibits those procedures from being treated as a prerequisite to the filing of a cause of action in court.¹¹⁴ Property owners who believe that a land-use regulation reduces the fair market value of their property must make a written demand for compensation within two years of the effective date of the statute or within two years of the enactment of the land-use regulation, whichever occurs later.¹¹⁵ Once property owners make a written demand for compensation, the statute allows the government 180 days to compensate the complaining property owners.¹¹⁶ Only if the government fails to act in the 180-day time period may the issue be litigated.¹¹⁷ Landowners forced to litigate their claims are entitled to attorneys fees, costs, and other expenses reasonably incurred in collecting compensation.¹¹⁸ Measure 37 did not provide any new revenue source for compensation payments.¹¹⁹

B. Oregon's Supreme Court Upheld Measure 37

Undaunted by the landslide victory of Measure 37,¹²⁰ opponents of the initiative immediately sought to invalidate the law. On January 14, 2005, opponents of the measure filed a declaratory judgment action, alleging that the measure was unconstitutional based on several provisions of both the Oregon constitution and the U.S. Constitution.¹²¹ On October 14, 2005, the trial court ruled that Measure 37 violated five state and federal constitutional provisions, and thus was unconstitutional and inva-

113. *See id.* § 197.352(3)(A)–(D). Statutes, administrative rules, and local regulations that are designed to protect the public's health and safety, include fire codes, building codes, health codes, sanitation codes, solid wastes or hazardous waste regulations and/or codes, pollution control regulations, and traffic safety regulations. *Id.*

114. *Id.* § 197.352(7).

115. *Id.* § 197.352(4)–(5).

116. *Id.* § 197.352(4).

117. *Id.* § 197.352(6).

118. *Id.*

119. *Id.* § 197.352(10).

120. *See* ABSTRACT OF VOTES, *supra* note 25 (illustrating that voters supported measure 37 by a margin of three to two).

121. *MacPherson v. Dep't of Admin. Servs.*, 130 P.3d 308, 312 (Or. 2006). The plaintiffs filing the lawsuit included 1000 Friends of Oregon, seven landowners, and five county Farm Bureau units. Peter Wong, *High Court Upholds Measure 37*, STATESMAN JOURNAL (Salem, Or.), Feb. 22, 2006, at 1A. The lead plaintiff in the lawsuit was Hector MacPherson, a farmer, who as former Oregon State Senator was the co-sponsor of Senate Bill 100, Oregon's 1973 land-use law. *Id.* "It was defended by the state, which is obligated to do so for all measures approved by voters, and by the measure's three chief sponsors through Oregonians in Action." *Id.*

lid.¹²² In particular, the trial court concluded that Measure 37 was invalid for the following reasons: (1) it impermissibly impeded the legislature's plenary power; (2) it violated the equal privileges and immunities guarantee of the state constitution; (3) it impermissibly suspended laws in violation of the state constitution; (4) it violated the separation of powers constraints of the state constitution; and (5) it violated the procedural and substantive due process provisions of the Fourteenth Amendment to the U.S. Constitution.¹²³

Defendants and intervenors appealed the trial court's judgment directly to the Oregon Supreme Court.¹²⁴ On appeal, plaintiff-respondents supported the five grounds on which the trial court found Measure 37 to be unconstitutional, and renewed two additional constitutional challenges that the trial court had rejected: that (1) Measure 37 impermissibly waived sovereign immunity; and (2) Measure 37 violated separation of powers constraints by infringing on executive power and by delegating legislative power without adequate safeguards.¹²⁵ Furthermore, the high profile case drew more than two dozen organizations and individuals to file ten amicus curiae briefs.¹²⁶ The Oregon Supreme Court heard arguments on January 10, 2006, and in an extraordinarily quick decision, ruled six weeks later.¹²⁷ The court unanimously reversed every element of the trial court's decision and upheld Measure 37.¹²⁸

1. Oregon Constitutional Challenges

The court's opinion began by addressing each of the five alleged violations of the Oregon constitution.¹²⁹ First, the court overturned the trial court's ruling that Measure 37 imposed unconstitutional limitations

122. *MacPherson*, 130 P.3d at 312; see also *MacPherson v. Dep't of Admin. Servs.*, No. 05C10444 (Or. Cir. Ct. Oct. 14, 2005), available at <http://www.ojd.state.or.us/mar/documents/Measure37.pdf>.

123. *MacPherson*, 130 P.3d at 308, 311–12; see also *MacPherson*, No. 05C10444 (Or. Cir. Ct. Oct. 14, 2005), available at <http://www.ojd.state.or.us/mar/documents/Measure37.pdf>.

124. Defendants and intervenors appealed directly to the Oregon Supreme Court pursuant to OR. REV. STAT. § 250.044(5) (2005). See Wong, *supra* note 121, at 1A.

125. See *MacPherson*, 130 P.3d at 313–14.

126. See *id.* at 310–11 (listing the individuals and organizations who filed the ten amicus curiae briefs). The plaintiff-respondents' lawyer, Todd Baran, claimed that only one of the amicus briefs squarely supported his cause. Charles Delafuente, *Oregon Lays Down Law on Land Use*, THE NATIONAL PULSE, March 3, 2006, at 5 No. 9 A.B.A. J. E-Report 5. That brief was from the American Planning Association and its Oregon chapter. *Id.* It was submitted by Edward J. Sullivan, chair-elect of the ABA Section of State & Local Government Law, and his colleague, Carrie Richter. *Id.* The rest of the briefs, according to Baran, were either neutral or favored the defendants. *Id.*

127. See *MacPherson*, 130 P.3d at 308.

128. *Id.* at 312.

129. *Id.* at 314–20.

on the government's exercise of plenary power to regulate land use.¹³⁰ The lower court had reasoned that Measure 37 eviscerated the legislature's plenary power to regulate land use by forcing the government to either "pay to govern," if it wanted to enforce a particular land-use regulation, or to refrain from enforcing the regulation.¹³¹ However, the court rejected that reasoning, noting that the legislature and the electorate, acting through the initiative or referendum processes, share in exercising legislative power.¹³² Thus, the electorate, exercising its initiative power, was free to authorize the government to decide whether to pay just compensation or invalidate certain land-use regulations in accordance with Measure 37.¹³³ Accordingly, the court held that "Measure 37 is an *exercise* of the plenary power, not a *limitation* on it."¹³⁴

Second, the court overturned the ruling that Measure 37 violated the equal privileges and immunities guarantee of article I, § 20 of the Oregon constitution¹³⁵ by only applying its compensation and invalidation provisions to landowners who acquired their property prior to the enactment of the land-use regulation in question.¹³⁶ The lower court had reasoned that by differentiating between property owners who acquired their property prior to the enactment of certain land-use regulations and those who took title afterwards, Measure 37 created two unequal classes of property owners in violation of the equal privileges and immunities clause.¹³⁷ However, the court noted that the protection of the equal privileges and immunities clause applies only to "individuals or groups whom the law classifies according to characteristics that exist apart from" the challenged law, not when the law itself creates the alleged classes.¹³⁸ In this case, the court held that the equal privileges and immunities clause was not applicable, as the only classes of persons affected by Measure 37 were the classes it created.¹³⁹ In other words, the distinction between property owners who acquired their property prior to the enactment of

130. *Id.* at 314.

131. *Id.*

132. *Id.*

133. *Id.* at 315.

134. *Id.* (emphasis in original).

135. The Oregon constitution provides: "No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens." OR. CONST. art. I, § 20. This provision guarantees equality of privileges to each individual citizen as well as to "classes" of citizens. *Id.*

136. *MacPherson*, 130 P.3d at 315.

137. *Id.*

138. *Id.* at 316.

139. *Id.*

certain relevant land-use regulations and those who acquired their property afterwards “is significant only by virtue of Measure 37 itself.”¹⁴⁰

Third, the court rejected the lower court’s ruling that Measure 37 waivers of land-use regulations violated the suspension of laws provision contained in article I, § 22 of Oregon’s constitution.¹⁴¹ The lower court had determined that Measure 37 permitted a limited suspension of land-use regulations by allowing the government to waive regulations only for property owners who acquired their property prior to the enactment of the regulations.¹⁴² The lower court concluded that the resulting limited suspension of land-use regulations violated article I, § 22 of Oregon’s constitution by providing “a privilege or immunity that is not available to all.”¹⁴³ However, the court held that Measure 37 does not “suspend” any land-use regulation, but rather, “authorizes a governing body to ‘modify, remove, or not ... apply’ certain such regulations in specific situations.”¹⁴⁴

Fourth, the court necessarily invalidated the trial court’s ruling that Measure 37 violated separation of powers principles contained in article III, § 1 of Oregon’s constitution.¹⁴⁵ The lower court’s separation of powers holding explicitly relied on its previous conclusions—that Measure 37 impermissibly impeded the legislature’s plenary power, violated the equal privileges and immunities clause, and impermissibly suspended laws—each of which the Oregon Supreme Court disagreed with.¹⁴⁶ Furthermore, the court rejected the plaintiff-respondents’ additional contentions that Measure 37 violates separation of powers principles by encroaching on the executive power and by improperly delegating legislative power without adequate safeguards.¹⁴⁷

140. *Id.*

141. *Id.* at 317. The Oregon constitution provides that “[t]he operation of the laws shall never be suspended, except by the Authority of the Legislative Assembly.” OR. CONST. art. I, § 22.

142. *MacPherson*, 130 P.3d at 317.

143. *Id.*

144. *Id.* To interpret the wording of the suspension clause of Article I, § 22, the court looked to a nineteenth century dictionary that defined “suspend” as “to interrupt; to intermit; to cause to cease for time”; “to stay, to delay; to hinder from proceeding for a time”; or “to cause to cease for a time from operation or effect.” *Id.* (citing 1 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE, s.v. “suspend” (1828)); see also *Rico-Villalobos v. Guisto*, 118 P.3d 246, 251 (2005) (noting that when analyzing terms in original Oregon constitution, the court examines meanings of terms as framers would have understood them).

145. The Oregon constitution provides: “The powers of the Government shall be divided into three separate [*sic*] departments, the Legislative, the Executive, including the administrative, and the Judicial; and no person charged with official duties under one of these departments, shall exercise any of the functions of another, except as in this Constitution expressly provided.” OR. CONST. art. III, § 1.

146. *MacPherson*, 130 P.3d at 318.

147. *Id.* at 318–19.

Fifth, the court affirmed the rejection of the plaintiff-respondents' argument that Measure 37 impermissibly waived sovereign immunity by authorizing a claimant to bring an action for compensation based on diminished value in violation of article IV, § 24, of the Oregon constitution.¹⁴⁸ Although the plaintiff-respondents contended that article IV, § 24 does not permit the state to waive its sovereign immunity as to liabilities for economic consequences of regulation,¹⁴⁹ the court held that no constitutional provision, including article IV, § 24, "forbids the state from deciding that it will compensate property owners for the economic consequences of the state's land use regulations, including waiving the state's sovereign immunity to permit those owners to assert their claims in court."¹⁵⁰

2. Federal Constitutional Challenges

After rejecting all of the plaintiff-respondents' state constitutional challenges, the court addressed the alleged violations of the procedural and substantive due process provisions of the Fourteenth Amendment to the U.S. Constitution.¹⁵¹ The court first overturned the determination by the lower court that Measure 37 violated procedural due process protections by failing to provide predeprivation procedures for non-claimants who may suffer "irreparable harm" as a result of the government's decision to waive existing land-use regulations on nearby claimants' properties.¹⁵² The court noted that although Measure 37 does not expressly provide for predeprivation procedures, the measure does not preclude government entities from implementing such procedures.¹⁵³ In fact, Measure 37 specifically contemplates that state or local governments "may adopt or apply procedures for the processing of claims."¹⁵⁴ Accordingly, the court concluded that the plaintiff-respondents failed to meet their burden

148. *Id.* at 319–20. Plaintiff-respondents contended that OR. REV. STAT. § 197.352(6) impermissibly waives sovereign immunity by authorizing a Measure 37 claimant to bring an action for compensation, including reasonable attorney fees, expenses, and costs, if a challenged land-use regulation continues to apply to the subject property more than 180 days after the claimant filed a written Measure 37 claim. *Id.* The Oregon constitution authorizes the state to waive its sovereign immunity as follows:

Provision may be made by general law, for bringing suit against the State, as to *all* liabilities originating after, or existing at the time of the adoption of this Constitution; but no special act authorizeing [*sic*] such suit to be brought, or making compensation to any person claiming damages against the State, shall ever be passed.

OR. CONST. art. IV, § 24 (emphasis added).

149. *MacPherson*, 130 P.3d at 319.

150. *Id.* at 320.

151. *Id.* at 320–22.

152. *Id.* at 320–21.

153. *Id.* at 321.

154. *Id.* (quoting OR. REV. STAT. § 197.352(7) (2005)).

of showing that the “statute cannot be constitutionally applied under any circumstance”; thus, the court held that Measure 37, on its face, did not violate procedural due process.¹⁵⁵

Finally, the court held that Measure 37 does not violate the Fourteenth Amendment’s Due Process Clause because the plaintiff-respondents failed to meet their burden of showing that “the statute bears no reasonable relation to a legitimate state interest.”¹⁵⁶ The court noted that although neither the state nor U.S. Constitution requires the government to compensate property owners when land-use regulations reduce property values, they also do not forbid requiring compensation as provided by Measure 37.¹⁵⁷ Accordingly, the electorate was free to enact Measure 37 in order to further policy objectives such as compensating property owners for, or relieving them from, the financial burden of certain land-use regulations.¹⁵⁸ The court held that “[n]either policy is irrational; no one seriously can assert that Measure 37 is not reasonably related to those policy objectives.”¹⁵⁹

Cognizant of the intense controversy over Measure 37, the court concluded its opinion by noting that it was not empowered to evaluate the merits of Measure 37 as a policy choice: “Whether Measure 37 as a policy choice is wise or foolish, farsighted or blind, is beyond this court’s purview. Our only function in any case involving a constitutional challenge to an initiative measure is to ensure that the measure does not contravene any pertinent, applicable constitutional provisions.”¹⁶⁰

Although the two federal constitutional issues involving the Fourteenth Amendment’s Due Process Clause appeared to provide a foundation for an appeal to the U.S. Supreme Court, neither party petitioned for a writ of certiorari before the deadline lapsed.¹⁶¹ Thus, the Oregon Supreme Court’s ruling in *MacPherson* will presumably remain undisturbed.

155. *Id.* (citing *United States v. Salerno*, 481 U.S. 739, 745 (1987)).

156. *Id.* at 322.

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. SUP. CT. R. 13 (stating that parties have 90 days from the entry of the final judgment to petition for a writ of certiorari). The Oregon Supreme Court’s decision in *MacPherson* was entered on March 13, 2006. See YES ON BALLOT MEASURE 37, <http://measure37.com/index.html> (last visited July 27, 2006) (noting that Measure 37 was re-instated Monday, March 13, 2006).

V. WASHINGTON SHOULD ENACT A REGULATORY
TAKINGS COMPENSATION STATUTE MODELED
AFTER OREGON'S MEASURE 37

The passage of Measure 37 in Oregon and the subsequent decision by the Oregon Supreme Court upholding its constitutionality has inspired property rights advocates in several other states to propose similar reform measures.¹⁶² In particular, Measure 37's success has revived the property rights movement in Washington, galvanizing efforts to put a similar measure before the voters on the November 2006 ballot.

In April 1995, the Washington State Legislature approved Initiative 164, a regulatory takings compensation statute known as the Private Property Regulatory Fairness Act.¹⁶³ The proposed initiative would have required state and local governments to compensate property owners for *any* diminution in the value of real property caused by land-use regulations,¹⁶⁴ unless those regulations were designed to prevent a public nuisance.¹⁶⁵ Like Oregon's Measure 37, Initiative 164 set no threshold for compensation.¹⁶⁶

However, Initiative 164 never took effect. Opponents of Initiative 164 gathered enough signatures to force the initiative onto a statewide referendum, where it appeared on the ballot as Referendum 48.¹⁶⁷ In November 1995, Washingtonians rejected Referendum 48, repealing Initia-

162. See Leonard Gilroy, *States Take Action to Protect Property Rights*, REASON FOUNDATION, May 8, 2006, http://www.reason.org/commentaries/gilroy_20060508.shtml (discussing steps taken by property rights activists and legislators of other states—including Arizona, California, Georgia, Idaho, Missouri, Montana, South Carolina, Washington, and Wisconsin—to enact their own regulatory takings reform). See also ARIZONA HOMEOWNERS PROTECTION EFFORT (HOPE), <http://www.hopeforarizona.com/> (last visited July 29, 2006) (noting that Arizona's property protection measure, Proposition 207, will be on the November 2006 ballot); PROTECT OUR HOMES COALITION, <http://www.90yes.com/> (last visited July 29, 2006) (declaring that California's property rights initiative, Proposition 90, has qualified for the November 2006 ballot); THIS HOUSE IS MY HOME, <http://www.thishouseismyhome.com/> (last visited July 29, 2006) (stating that Idaho's regulatory and eminent domain initiative, Proposition 2, qualified for the November 2006 ballot); MONTANA SEC'Y OF STATE, <http://sos.state.mt.us/News/archives/2006/07-20-06a.htm> (last visited July 29, 2006) (certifying that Montana's proposal to protect property rights, Initiative 154, will be on November 2006 ballot).

163. WASH. STATE LEGISLATURE, INITIATIVE 164, at § 2 (1995), <http://www.leg.wa.gov/pub/billinfo/1995-96/Pdf/Initiatives/Initiative%20To%20The%20Legislature/INITIATIVE%20164.pdf>.

164. *Id.* § 4(2).

165. *Id.* § 7(4).

166. *Id.* §§ 4(2), 7(1).

167. WASH. CONST. art. II, § 1(b), (d) permit opponents of a measure approved by the Legislature to order a public referendum on the measure before it becomes law, provided that the opponents gather a required number of valid signatures of registered voters and file the petition with the Secretary of State's office within 90 days after the Legislature adjourns.

tive 164 by a sixty to forty margin.¹⁶⁸ Despite Initiative 164's defeat at the polls, property rights advocates in Washington now feel that public sentiment has changed and the time is ripe for another try.¹⁶⁹

A. An Opportunity to Enact a Regulatory Takings Compensation Statute in Washington: Initiative 933—The "Property Fairness Act"

Much has changed in the decade since Washington's electorate rejected Referendum 48's proposal to strengthen property rights by enacting a regulatory takings compensation statute. In particular, the government's infringement of property owners' constitutional rights has become more severe due to increasing land-use regulations,¹⁷⁰ coupled with regulatory takings jurisprudential inefficacy. Consequently, individual property owners face an increased probability that they will unfairly and inequitably be forced to shoulder the costs of the public benefits resulting from land-use regulations.

In response to the increasingly restrictive land-use regulations, the Washington State Farm Bureau filed a property rights measure, Initiative 933, which is similar to Oregon's Measure 37.¹⁷¹ Thus, in November 2006, Washington voters will have another opportunity to safeguard the rights guaranteed to property owners by the federal and state constitutions.¹⁷² The official ballot title of Initiative 933 will state, "This measure would require compensation when government regulation damages the use or value of private property, would forbid regulations that prohibit existing legal uses of private property, and would provide exceptions or payments."¹⁷³

168. See 1995 CHALLENGE TO THE GROWTH MANAGEMENT ACT, <http://www.secstate.wa.gov/oralhistory/pdf/OH856.pdf> (last visited July 27, 2006) (showing that 544,788 people voted for and 796,869 people voted against Referendum 48).

169. See de Place, *supra* note 27, at 18–19.

170. See WASH. STATE LEGISLATURE, INITIATIVES AND REFERENDA, INITIATIVE 933, at § 1 (2006), available at <http://www.leg.wa.gov/pub/billinfo/2005-06/Htm/Initiatives/Initiative%20to%20the%20People/INITIATIVE%20933.htm> [hereinafter WASH. INITIATIVE 933].

171. *Id.* (reprinting the text of Initiative 933).

172. To qualify for the November 2006 ballot, proponents of Initiative 933 were required to submit petitions bearing the signatures of at least 224,880 registered voters by July 7, 2006. See PROPERTY FAIRNESS COALITION, PROTECT YOUR PRIVATE PROPERTY RIGHTS, VOTE YES ON INITIATIVE 933, <http://www.propertyfairness.com/index.htm> (last visited July 29, 2006) [hereinafter VOTE YES ON INITIATIVE 933]; see also Eric Pryne, *Expect to See I-933 on November Ballot*, THE SEATTLE TIMES, July 7, 2006, at B1 (noting that at the time of the deadline, Initiative 933's backers submitted petitions bearing more than 317,000 signatures in support of the measure).

173. See WASH. SEC'Y OF STATE, ELECTIONS: INITIATIVES TO THE PEOPLE (2006), <http://www.secstate.wa.gov/elections/initiatives/people.aspx> (last visited July 30, 2006); see also Brad Shannon, *Property-Rights Initiative's Wording Approved*, THE OLYMPIAN (Olympia, Wash.), Mar. 16, 2006, at 1B.

The stated purpose of Initiative 933, also known as the “Property Fairness Act,”¹⁷⁴ is “to protect the use and value of private property while providing for a healthy environment and ensuring that government agencies do not damage the use or value of private property, except if necessary to prevent threats to human health and safety.”¹⁷⁵ In order to accomplish this purpose, Initiative 933 would enact a statute¹⁷⁶ containing two major components: (1) a requirement that the government prepare a takings impact assessment prior to enacting any land-use regulation;¹⁷⁷ and (2) a requirement, similar to Oregon’s Measure 37, that the government either compensate property owners when land-use regulations “damage the use or value of private property,” or waive the regulation.¹⁷⁸

First, in an attempt to prevent unnecessary takings, Initiative 933 requires government agencies to prepare a takings impact assessment, evaluating the possible effects of proposed land-use regulations on constitutionally protected property rights, before enacting any land-use regulation.¹⁷⁹ Thus, “prior to enacting or adopting any ordinance, regulation, or rule which may damage the use or value of private property,” the initiative requires the government to “consider and document” the impacts of the proposed regulatory action on private property, the estimated compensation that may need to be paid to affected property owners under Initiative 933, and any less restrictive alternatives that may accomplish the same legitimate governmental purpose for the regulation.¹⁸⁰ This

174. See WASH. INITIATIVE 933, *supra* note 170, at § 10.

175. See *id.* § 1.

176. Initiative 933 proposes to add new sections to RCW 64.40 and RCW 36.70A. See *id.*

177. See *id.* § 2(1).

178. See *id.* § 3.

179. *Id.* §§ 1, 2(1).

180. *Id.* § 2(1). The full text of §2(1) is as follows:

(1) To avoid damaging the use or value of private property, prior to enacting or adopting any ordinance, regulation, or rule which may damage the use or value of private property, and agency must consider and document:

- (a) The private property that will be affected by the action;
- (b) The existence and extent of any legitimate governmental purpose for the action;
- (c) The existence and extent of any nexus or link between any legitimate government interest and the action;
- (d) The extent to which the regulation’s restrictions are proportional to any impact of a particular property on any legitimate government interest, in light of the impact of other properties on the same governmental interests;
- (e) The extent to which the action deprives property owners of economically viable uses of the property;
- (f) The extent to which the action derogates or takes away a fundamental attribute of property ownership, including, but not limited to, the right to exclude others, to possess, to beneficial use, to enjoyment, or to dispose of property;
- (g) The extent to which the action enhances or creates a publicly owned right in property;
- (h) Estimated compensation that may need to be paid under this act; and

statutory requirement for formally analyzing the impacts of regulatory actions before undertaking such actions will force the government to recognize the true economic costs of proposed land-use regulations; accordingly, this “look-before-you-leap” requirement will likely improve government decision-making by inducing the government to only enact regulations when the total social benefit produced by the regulation outweighs the total social cost.

If, after preparing the takings impact assessment, the government decides to enforce or apply a land-use regulation that would result in “damaging the use or value of private property,”¹⁸¹ Initiative 933 would require the government to compensate property owners *prior to* enforcing the regulation.¹⁸² Alternatively, the government would have the option of waiving application of the land-use regulation against the affected property owner, thereby avoiding liability for paying remuneration.¹⁸³ Notably, the initiative is retroactive, entitling property owners to either compensation or waivers for restrictions imposed any time since January

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- (i) Alternative means which are less restrictive on private property and which may accomplish the legitimate governmental purpose for the regulation, including, but not limited to, voluntary conservation or cooperative programs with willing property owners, or other nonregulatory actions.

Id.

181. Initiative 933 defines “private property” to include “all real and personal property interest protected by the fifth amendment to the United States Constitution or Article I, § 16 of the state Constitution owned by a nongovernmental entity, including, but not limited to, any interest in land, buildings, crops, livestock, and mineral and water rights.” *Id.* § 2(2)(a). The definition of “damaging the use or value” under Initiative 933 is as follows:

- (b) “Damaging the use or value” means to prohibit or restrict the use of property to obtain benefit to the public cost of which in all fairness and justice should be borne by the public as a whole, and includes, but is not limited to:
- (i) Prohibiting or restricting any use or size, scope, or intensity of any use legally existing as of January 1, 1996;
 - (ii) Prohibiting the continued operation, maintenance, replacement, or repair of existing tidegates, bulkheads, revetments, or other infrastructure reasonably necessary for the protection of the use or value of private property;
 - (iii) Prohibiting or restricting operations and maintenance of structures necessary for the operation of irrigation facilities, including, but not limited to, divisions, operation structures, canals, drainage ditches, flumes, or delivery systems;
 - (iv) Prohibiting actions by a private property owner reasonably necessary to prevent or mitigate harm from fire, flooding, erosion, or other natural disasters or conditions that would impair the use or value of private property;
 - (v) Requiring a portion of property to be left in its natural state or without beneficial use to its owner, unless necessary to prevent immediate harm to human health or safety; or
 - (vi) Prohibiting maintenance or removal of trees or vegetation.

Id. § 2(2)(b).

182. *Id.* § 3.

183. *Id.*

1, 1996, when the Farm Bureau claims that the state started taking a heavy-handed approach to planning.¹⁸⁴ Furthermore, Initiative 933 explicitly exempts regulations “that apply equally to all property subject to the agency’s jurisdiction.”¹⁸⁵ Thus, such laws—including building and fire codes, laws limiting the location of sex-offender housing and adult-entertainment businesses, and rules “necessary to prevent an immediate threat to human health and safety”—would be exempted from the initiative’s compensation-or-waiver requirement.¹⁸⁶

B. Why Washington Needs a Regulatory Takings Compensation Statute

Governmental restrictions on the use of property in Washington have increased substantially,¹⁸⁷ however, the current judicial remedy for a regulatory taking is inadequate to ensure that property owners’ constitutional rights are protected. Although both the Washington and U.S. Constitutions require the government to compensate property owners whose property has been taken,¹⁸⁸ Washington property owners who claim a regulatory taking stand little chance of being compensated under current regulatory takings jurisprudence. In reality, the vague and inconsistent standards used by courts to analyze an inverse condemnation claim, under either the state or U.S. Constitution, rarely result in a finding that a government land-use regulation effects a “taking” of private property that requires compensation.¹⁸⁹ Thus, certain property owners whose land is restricted by onerous government regulations are forced to bear the economic costs of land-use regulations that are intended to generate benefits for all of society.

Accordingly, the current system is unfair and inequitable, as it allows society to enjoy a public benefit at private expense. When land-use regulations are intended to protect or enhance the well-being of society as a whole,¹⁹⁰ the economic costs of such regulations should be distributed evenly among society, rather than imposed on only a part of society. In other words, the government clearly must be able to regulate private property rights for the greater good of society; however, since the benefit of such regulations is enjoyed by society as a whole, the burdens of such regulations should also fall on society as a whole.

184. See *id.* § 2(2)(b)(i). See also VOTE YES ON INITIATIVE 933, *supra* note 172 (explaining why the Farm Bureau chose to draft Initiative 933 to be retroactive to January 1, 1996).

185. See WASH. INITIATIVE 933, *supra* note 170, at § 2(2)(c).

186. See *id.* § 2(c) (listing laws exempted from the compensation or waiver requirement).

187. See *id.* § 1.

188. U.S. CONST. amend. V; WASH. CONST. art. I, § 16.

189. See *supra* notes 71–73 and accompanying text.

190. See CBO REGULATORY TAKINGS, *supra* note 16.

To redress the inequities that plague the current system, Washington should enact a regulatory takings compensation statute. In general, such a statute should require state and local governments to either compensate property owners for any diminution to the value of their properties caused by a land-use regulation or, alternatively, to waive individual enforcement of the regulation.¹⁹¹ A regulatory takings compensation statute would protect property owners' constitutional rights by (1) restoring a balance between the government's right to regulate and citizens' right to private property; (2) protecting property owners' reasonable expectations and economic investments; and (3) increasing the fairness and efficiency of regulatory takings jurisprudence.

1. Restoring Balance between Government Regulation and Private Property Rights

Currently, there are inadequate safeguards against government infringement on the constitutional rights of property owners. Due to the lack of an effective judicial remedy, individual property owners are often forced to bear the economic costs of land-use regulations; consequently, the government has no incentive to consider the ultimate economic costs of the regulations it enacts, since it does not have to bear those costs.¹⁹² Conversely, a regulatory takings compensation statute would compel the government to recognize the true economic costs of land-use regulations, as it would "shift the cost [of land-use regulations] from a few landowners back to the public as a whole."¹⁹³

Notably, a regulatory takings compensation statute would not hinder the government's right to regulate, but rather it would merely prevent the government from shuffling the costs of those regulations onto individual property owners. Thus, despite opponents' contentions to the contrary,¹⁹⁴ a regulatory takings compensation statute would not prohibit the government from enacting any land-use regulation that it now has the

191. See, e.g., OR. REV. STAT. § 197.352 (2005); WASH. INITIATIVE 933, *supra* note 170, at § 3.

192. See CBO REGULATORY TAKINGS, *supra* note 16, at 1.

193. Cordes, *supra* note 81, at 228.

194. See, e.g., THURSTON COUNTY DEMOCRATS, THURSTON COUNTY DEMOCRAT PLATFORM 2006, at 9 (April 8, 2006), <http://www.thurstondemocrats.org/newdocs/2006TCDPlatformFinal.pdf> (claiming that Washington's proposed Initiative 933 would "irremediably damage the ability of regional and state government to manage land use and protect our natural resources and environment for the public benefit"); Timothy Sandefur, *Voters Can Act to 'Save Our Homes,'* ORANGE COUNTY REGISTRAR, June 28, 2006, available at http://www.oregister.com/oregister/opinion/homepage/article_1194930.php (noting critics fears that California's proposed property rights initiative, Proposition 90, will "gut government's ability to regulate land-use and urban growth"); OR. SEC'Y OF STATE, OREGON VOTERS' PAMPHLET: MEASURE 37: ARGUMENTS IN OPPOSITION (2004), available at http://www.sos.state.or.us/elections/nov22004/guide/meas/m37_opp.html [hereinafter MEASURE 37: ARGUMENTS IN OPPOSITION].

power to enact, including regulations to prevent urban sprawl, preserve attractive scenery, and protect wildlife habitat. The only difference is that instead of individual property owners being forced to bear the costs of such public benefits, the costs will be more equitably distributed among all of society.

Correspondingly, opponents argue that if no money is set aside for compensation under the regulatory takings compensation statute, then most government entities will be forced to waive land-use regulations because they will not be able to afford to pay.¹⁹⁵ However, any ensuing waivers of land-use regulations will result in a more reasonable outcome than the current system, which allows the government to imperil individual property owners' constitutional rights by forcing them to bear the costs of regulations that even the government cannot afford to pay. In fact, a requirement that the government either pay just compensation or waive burdensome land-use regulations will result in more efficient government regulation, as the government will only enact land-use regulations when the total social benefit produced by the regulation outweighs the total social cost, which includes compensating property owners who are financially injured by the regulation. Alternatively, to enable the government to choose the compensation option, voters could put a measure on the ballot to establish a regulatory takings compensation fund.

A regulatory takings compensation statute would not, however, protect private property owners against all types of land-use regulations; thus, the government would not be required to either pay compensation or waive land-use regulations in every instance. Both Oregon's Measure 37 and Washington's proposed Initiative 933 contain important exceptions.¹⁹⁶ For example, both compensation statutes specifically exempt ordinances, regulations, and rules that are designed to protect the public's health and safety, such as fire codes, building codes, and health codes.¹⁹⁷ Furthermore, Washington's proposed Initiative 933 expressly exempts regulations "that apply equally to all property subject to the agency's jurisdiction."¹⁹⁸ Accordingly, a regulatory takings compensation statute would permit the government to restrict the use of private property, but would require that the costs of such land-use regulations be equitably shared by all of society, thereby restoring a balance between the govern-

195. See Allan Brettman, *Washington: Backers, Critics Debate the Scope of Proposed Law*, THE OREGONIAN (Portland, Or.), July 25, 2006, at A-1; Pryne, *supra* note 20, at B1; MEASURE 37: ARGUMENTS IN OPPOSITION, *supra* note 187.

196. See, e.g., OR. REV. STAT. § 197.352(3) (2005); WASH. INITIATIVE 933, *supra* note 170, at § 2(2)(c).

197. See, e.g., OR. REV. STAT. § 197.352(3)(B) (2005); WASH. INITIATIVE 933, *supra* note 170, at § 2(2)(c).

198. See WASH. INITIATIVE 933, *supra* note 170, at § 2(2)(c).

ment's right to regulate in the public interest and the constitutional right of citizens to the enjoyment of private property.¹⁹⁹

2. Protecting Property Owners' Reasonable Expectations and Economic Investments

The price that a buyer pays for property reflects not only the value of the tangible land, but also the value of the rights associated with owning the property.²⁰⁰ Thus, it is reasonable for property owners to expect that they will be able to use their property in accordance with the rights that they paid for. However, property owners' reasonable expectations and economic investments are destroyed when they are denied the benefit of their bargain due to government regulations that restrict uses of property that were permitted when the owners purchased their land. Remedially, a regulatory takings compensation statute ensures property owners the benefit of their bargain by either compensating for or waiving government regulations that restrict uses of property,²⁰¹ and thus protects property owners' reasonable expectations and economic investments.

Accordingly, a regulatory takings compensation statute would give added security to property owners, as they could rest assured that it would be less likely that their property rights would be taken away without compensation. In turn, such economic protection would likely encourage investment by property owners—both individuals and businesses—which in turn would stimulate the economy, attract new businesses, and create more jobs.²⁰² Similarly, a regulatory takings compensation statute that gives the government the option of waiving a regulation, rather than paying compensation, would provide an economic boost by permitting the government to return the property rights they have taken from individuals, thus allowing property owners the opportunity to make a more productive use of their land.²⁰³

199. See U.S. CONST. amend. V; 83 AM. JUR. 2D *Zoning & Planning* § 37 (2005).

200. See *Ackerman v. Port of Seattle*, 55 Wash. 2d 400, 409, 348 P.2d 664, 669, (1960) (quoting *Spann v. City of Dallas*, 235 S.W. 513, 514–15 (Tex. Sup. Ct. 1921)) (suggesting that the “substantial value of property lies in its use.”).

201. See Hunnicutt, *supra* note 20, at 26 (suggesting that Oregon's regulatory takings compensation statute, Measure 37, is “designed to secure the owners of property in Oregon the benefit of their bargain.”).

202. See generally OR. SEC'Y OF STATE, OREGON VOTERS' PAMPHLET: MEASURE 37: ARGUMENTS IN FAVOR (2004), available at http://www.sos.state.or.us/elections/nov22004/guide/meas/m37_fav.html.

203. *Id.*

3. Increasing the Fairness and Efficiency of Regulatory Takings Law Jurisprudence

Under the current system, property owners who feel that their property has effectively been taken by a government regulation face many onerous barriers to proper compensation. Specifically, litigating a regulatory takings claim is extraordinarily costly and time consuming, precluding "all but the most wealthy and tenacious of litigants from obtaining justice in our courts."²⁰⁴ Since most property owners do not have the financial means or the stamina to fight a lengthy court battle in order to recover the diminution in the value of their property, most regulatory takings are not challenged; accordingly, the government generally faces no consequences for taking property rights without paying for them. Furthermore, even when a private property owner does challenge a governmental regulation that reduces the value of private property, present regulatory takings jurisprudence is so convoluted that there is little hope of compensation.²⁰⁵

A regulatory takings compensation statute would increase the fairness and efficiency of regulatory takings jurisprudence by facilitating private property owners' access to a remedy when they allege that a governmental action results in a regulatory taking of their property.²⁰⁶ In essence, a regulatory takings compensation statute would clear away government hurdles to compensation and streamline the process by creating a less stringent and more explicit standard for determining when compensation is owed.²⁰⁷

Although the enactment of a regulatory takings compensation statute may initially spawn increased litigation to define the application and interpret the nuances of the law, the electorate must maintain perspective and not let the near-sighted fear of uncertainty and change stand in the way of adopting such revolutionary remedy. It is as a result of challenges to longstanding government practices that so many monumental changes have evolved. Here, it should be no different.

204. Debate, *Taking "Takings Rights" Seriously: A Debate on Property Rights Legislation Before the 104th Congress*, 9 ADMIN. L.J. AM. U. 253, 270 (1995); See Susan M. Stedfast, *Regulatory Takings: A Historical Overview and Legal Analysis for Natural Resource Management*, 29 ENVTL. L. 881, 883 (1999) (noting the costly and time consuming nature of regulatory takings litigation)

205. See *supra* notes 79–81 and accompanying text.

206. See CBO REGULATORY TAKINGS, *supra* note 16, at 20.

207. See *id.* at xii, 20. See also Cordes, *supra* note 81, at 226.

VI. CONCLUSION

By passing Measure 37, Oregon's electorate demonstrated that the government had gone "too far" in restricting private property in the name of the public interest.²⁰⁸ Although the government has the power to impose reasonable restrictions on private property, this power is to be used for the "public welfare," often times more expansively stated as "public health, safety, morals, and welfare."²⁰⁹ Since the benefits of such land-use regulations are enjoyed by society as a whole, society should also share the costs, rather than forcing individual property owners to bear the costs alone.

In November 2006, Washington's electorate will have an opportunity to strengthen property rights by enacting a statutory initiative, Initiative 933, which would protect property owners from uncompensated regulatory takings.²¹⁰ This statute would protect property owners' constitutional rights by restoring a balance between the government's right to regulate and citizens' right to private property; protecting property owners' reasonable expectations and economic investments; and increasing the fairness and efficiency of regulatory takings jurisprudence. Most importantly, this regulatory takings compensation statute would ensure that individual private property owners are not singled out to bear the burden of property restrictions that are designed to benefit us all.²¹¹

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

209. WILLIAM B. STOEBUCK, NONTRESPASSORY TAKINGS IN EMINENT DOMAIN 37 (1977).

210. *See* WASH. INITIATIVE 933, *supra* note 170.

211. *See* Palazzolo v. Rhode Island, 533 U.S. 606, 633 (2001).