What Owners Want and Government Do: Evidence From the Oregon Experiment

Cover Page Footnote
Professor of Law, University of Connecticut School of Law. Sincere thanks for helpful comments and suggestions to Hillary Greene, George Lefcoe, Jeremy Paul, Peter Siegelman, and Joseph William Singer. Thanks also to the University of Connecticut Law School Foundation for generous summer support for research on this project.

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WHAT OWNERS WANT AND GOVERNMENTS DO: EVIDENCE FROM THE OREGON EXPERIMENT

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In 2004, Oregonians decisively approved Ballot Measure 37. The measure answered the calls of critics of contemporary takings jurisprudence by requiring either compensation for losses caused by land use restrictions imposed after acquisition of the property or waivers of the restrictions. Three years later, voters acted to repeal most of Measure 37 by an even greater margin. Together the birth, brief life, and rapid demise of Measure 37 comprise an unusual natural experiment in property law. The results of this experiment go to the heart of debates about regulatory takings in property law and policy.

First, the Oregon experience resulted in a sea change in owners’ understandings of property rights. The 2004 vote reflected the popular understanding of land use restrictions as invasions of property rights. Faced with effective repeal of those restrictions, as reflected in passionate testimony before the Oregon legislature, Oregonians came to see the regulations as in fact the source of the property rights upon which they depended. In effect Measure 37 brought the background government and community support on which property rights depend into the foreground of owners’ consciousness. Second, government responses to Measure 37 challenged arguments that compensation will dispel the fiscal illusion under which governments operate and result in more efficient regulation. Rather than weigh costs and benefits, in all but one of thousands of cases, state and local governments waived regulatory restrictions rather than compensate. These decisions were made without analysis of the benefits of the regulations waived, and despite predictably negative economic results. Finally, the thousands of claims and research catalyzed by these claims complicated questions of the compensation to which owners are entitled as a matter of fairness. In many cases, owners demanded compensation although their properties had already multiplied many times in value.

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despite the challenged restrictions, and their claims of loss elided the effect of the restrictions themselves in generating the value they claimed they could reap if the restrictions were lifted.

While limited, therefore, the Oregon experiment sheds the light of lived experience on abstract debates about takings law. Together, its results challenge common understandings of the role rights, efficiency, and fairness concerns play in arguments about compensation for land use restrictions, and provide provocative evidence that they weigh against compensation in many cases.

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INTRODUCTION

On November 2, 2004, Oregon voters passed ballot initiative Measure 37 by sixty-one percent to thirty-nine percent. Hailed as yet another opening shot in the property rights revolution, the measure answered the calls of critics of contemporary takings jurisprudence by requiring compensation for losses caused by most regulatory restrictions imposed after the acquisition of the property. If the municipality chose not to compensate the owner, the regulation would be waived. Three years later, voters enacted Measure 49, intended to repeal most of Measure 37, by an even greater margin, sixty-two percent to thirty-eight percent. Together the birth, brief life, and rapid demise of Measure 37 comprise an unusual natural experiment in property law. This Article uses the results of this experiment to shed light on contemporary debates about property regulation and takings law.

The Oregon experiment complicates arguments about regulatory restrictions in three ways. First, it challenges understandings of what property rights are and how they relate to governmental regulation. The intuitive understanding of property is that it comprises a sphere of "exclusive dominion," in William Blackstone's much abused phrase, within which the government appropriately protects the owner from involuntary invasion but most governmental restrictions on use are unfair violations of a social compact. This understanding of property won the day in the passage of Measure 37, as citizens voted to fight back against the unfairness ostensibly caused by Oregon's comprehensive land use regulation. Over the three years in which Oregonians were faced with effective repeals of property regulation on neighboring parcels, these perceptions changed. Homeowners discovered that their property values would be undermined and their infrastructure overwhelmed by the emergence of subdivisions without sufficient water and sewage systems to support them. Farmers realized that their ability to continue farming would be threatened by the appearance of residences that would spray

4. Id.
5. See Elections Division, Oregon Secretary of State, Special Election Abstract of Votes, State Measure No. 49, http://www.sos.state.or.us/elections/nov62007/abstract/results.doc (last visited Nov. 14, 2009).
7. See infra notes 161–66 and accompanying text.
harmful herbicides and challenge the odors and noise caused by farming.\textsuperscript{8} All found that what they had come to accept as part of "their" property—the pastoral view, the pristine river, or the agricultural community—depended on the comprehensive zoning they had previously understood to be unfair.\textsuperscript{9}

Although Measure 49 repealed less of Measure 37 than Oregonians perhaps believed, in 2007 they decisively voted to reject its concept of property rights.

Second, the Oregon experiment challenges assertions about how compensation requirements will affect governmental action. One important set of arguments for broader compensation concerns the hypothesized effect of such compensation on governments. If governments are forced to pay for the impact of property regulation, the argument goes, they will internalize the costs of such regulation, and only go forward with regulations that are economically efficient in that their benefits outweigh their costs.\textsuperscript{10} While others have challenged the theoretical validity of such arguments,\textsuperscript{11} Measure 37 provides evidence to back these challenges. In only one claim, out of the over 7000 Measure 37 claims filed, did the state or municipality choose to compensate the property owners rather than waive the regulation.\textsuperscript{12} In every other resolved case, the state and municipal governments that received the claims did not internalize the cost or pass the burden on to the taxpayers—they simply waived the regulations. They did so despite substantial evidence that the costs of the piecemeal waivers would outweigh their benefits: they would seriously undermine Oregon's multibillion dollar agricultural industry, threaten safety and significantly increase burdens on local governments by overwhelming water and sewage systems, and reduce the value of countless owners who had purchased their homes after the regulations went into effect. Although this does not prove what governments would do under a property regime which had compensation requirements that were known at the moment the regulations were enacted, rather than retroactively created, it at least provides provocative evidence against cost-internalization arguments.

Finally, and related to the first two points, the Oregon experiment complicated arguments that compensation was necessary as a matter of fairness and distributive justice by challenging notions of what owners in

\textsuperscript{8} See infra notes 154–58 and accompanying text.
\textsuperscript{9} See infra notes 200–06.
\textsuperscript{10} See, e.g., ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 186–87 (5th ed. 2009).
\textsuperscript{11} See, e.g., Daniel A. Farber, Public Choice and Just Compensation, 9 CONST. COMMENT. 279 (1992) (arguing that public choice theory questions the cost-internalization theory); Louis Kaplow, An Economic Analysis of Legal Transitions, 99 HARV. L. REV. 509 (1986) (arguing that compensation inefficiently interferes with assessments of market risks and benefits); Daryl J. Levinson, Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs, 67 U. CHI. L. REV. 345 (2000) (arguing that governments are not subject to the same motivations as firms and do not experience costs and benefits of regulations in ways that would lead to their internalization of such costs).
fact lost. Losses caused by land use restrictions are usually understood, and were typically asserted by Measure 37 claimants, as the difference between the current value of land and the value if restrictions were removed for that individual parcel. Economically, this compensation calculus ignores the ways restrictions on neighboring parcels enhance the value of the owner’s parcel, by tightening the market for development property, coordinating land uses, and preserving the existing community. There is some evidence in the Oregon case that these regulations actually caused the value of property to increase at an equal or greater rate than it would have if not subject to restrictions. A comprehensive study of changes in land values in three Oregon counties catalyzed by Measure 37 showed that restricted Oregon parcels generally increased in value at a greater rate than those in comparable unrestricted areas of Washington State.\(^\text{13}\)

This measure of compensation also rejects other measures that—while not fully accounting for economic opportunity costs caused by the regulation—might better reflect what society would recognize as a just claim on the state. In particular, it does not consider whether the owner has accrued an otherwise just return on her investment, although this is an important factor in constitutional takings analysis. Although one might justifiably (albeit, sadly, not securely) expect the value of one’s property to increase over time, does justice demand that owners receive exponentially greater returns than they would on other investments? The above study showed that Oregon property multiplied in value even with the restrictions in place. Similarly, the most visible Measure 37 claim was made for a parcel whose value was more than 150 times what it had been when the owner had purchased it.\(^\text{14}\) The claim was based on the owner’s assertion that without restrictions, the property was worth 511 times her initial investment.\(^\text{15}\) While there are surely some who would agree that justice would entitle an owner to this entire sum, many might perceive it as a windfall not giving rise to a justice-based claim against the state.

The remainder of the Article proceeds in five Parts. Part I describes the history of the Oregon experiment and its relation to theories of when the government should compensate owners for property restrictions. Part II discusses the ways the experiment reflected and shifted public views of the

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13. See William K. Jaeger & Andrew J. Plantinga, How Have Land-Use Regulations Affected Property Values in Oregon?, Special Report 1077, at 22, 26 (2007) (showing that land values in two Western Oregon counties grew more than those in comparable Washington counties, while values of agricultural parcels in one Western Oregon county grew less, although the median growth rate was equal).

14. This example is based on the claims of campaign spokesperson Dorothy English. Mrs. English purchased thirty-nine acres with her husband in 1953 for $4500. Laura Oppenheimer, Breaking Ground: Land Owners Who Fought for Measure 37 Ready the First Cases, Oregonian, Nov. 22, 2004, at A1. In the 1970s, they sold twenty acres for $53,400, so that their investment in the remaining land was reduced to $2250. In 2004, when Mrs. English brought her claim, the land with the restrictions in place was worth $339,000, or 150.66 times $2250. Id. Without the restrictions, Mrs. English claimed, the land was worth $1.15 million, or 511.11 times $2250. Id.

15. Id.
relationship between property rights and governmental regulation. Part III discusses governmental implementation of Measure 37, explaining why the choice to waive the vast majority of regulations and the single case of compensation were predictable given what we know about political decision making. Part IV discusses the ways Measure 37 revealed the indeterminacy of measures of loss and compensation for land use restrictions, and how this impacts claims to compensation as a matter of fairness and justice.

Part V discusses what the Oregon experiment means for debates on constitutional takings law and state legislative and constitutional measures that seek to raise the federal constitutional floor. Takings law is a complicated mix of theories about fairness, efficiency, governmental competence, individual rights, community rights, and the nature of property itself. The impossibility of reaching a final agreement on any one of these, let alone all in interaction, is why the area is and will remain a subject of vehement popular and legal debate. The brief experience under Measure 37 sheds the light of lived experience on this debate. While clearly not the final word on any of these subjects, it provides valuable evidence for the continuing electoral and judicial struggles with these issues.

I. THE BIRTH, LIFE, AND DEATH OF MEASURE 37

“If the majority wants to save this stuff, then the majority should pay for it.”16 So Dorothy English, the “poster grandma” of Measure 37,17 described the regulations that prevented subdivision of her forestland property. In television and radio ads that blanketed Oregon in the weeks before the 2004 election, English told voters how Oregon’s 1973 land use laws had prevented her from subdividing the forty acres she had purchased with her husband twenty years before their enactment. “I’m 91 years old, my husband is dead and I don’t know how much longer I can fight,”18 she said in a voice alternatively described as “gravelly,”19 “pleading,”20 and “quavering.”21 “My story is a simple story, but it’s been going on for so long.”22 Although Measure 37’s opponents outspent proponents by three to one,23 on November 2, 2004, sixty-one percent of voters voted to enact it.24

16. Id.
18. Id.
22. Oppenheimer, supra note 20.
Measure 37 provided that when land use regulations enacted after purchase of the land reduced its value, the government had to either compensate the owner or waive enforcement.\textsuperscript{25} Although English's personal story provided the emotional center of the campaign, the campaign's broader message resonated with voters' instincts about property rights and governmental fairness. Nor was it the first such time Oregonians had approved such a measure. In 2000, fifty-four percent had voted to enact a similar rule as a constitutional amendment,\textsuperscript{26} but the Oregon Supreme Court later invalidated the amendment for affecting more than one constitutional provision in a single referendum in violation of the Oregon Constitution.\textsuperscript{27}

Oregonians in Action, the property rights group that spearheaded the campaign for Measure 37, claimed that the measure simply closed a "legal loophole."\textsuperscript{28} In fact, it fundamentally reworked governmental compensation requirements. While permanent involuntary invasions of land almost always require compensation under the Fifth Amendment's Takings Clause,\textsuperscript{29} courts have rarely found the same for regulatory restrictions. It was not until 1922, in Pennsylvania Coal Co. v. Mahon,\textsuperscript{30} that the U.S. Supreme Court held that regulations could ever constitute a taking.\textsuperscript{31} Mahon, moreover, was quickly followed by decisions continuing the traditional refusal to require compensation for use restrictions.\textsuperscript{32} Although the Court in 1992 suggested that one other use restriction was a compensable taking—a coastal building restriction that was stipulated to deprive the property of all economic value\textsuperscript{33}—it is only a slight exaggeration to say that under current Supreme Court precedent, the "bottom line is that the complaining property owner almost always loses."\textsuperscript{34}

\textsuperscript{25} Ballot Measure 37, OR. REV. STAT. § 197.352 (2005), amended by OR. REV. STAT. § 195.305 (2007).
\textsuperscript{26} Michael C. Blumm & Erik Grafe, Enacting Libertarian Property: Oregon's Measure 37 and Its Implications, 85 DENY. U. L. REV. 279, 300–02 (2007).
\textsuperscript{27} League of Or. Cities v. State, 56 P.3d 892 (Or. 2002).
\textsuperscript{29} See Loretto v. Teleprompter Manhattan CATV, Corp., 458 U.S. 419, 441 (1982).
\textsuperscript{30} 260 U.S. 393 (1922).
\textsuperscript{31} Id. at 415.
\textsuperscript{32} See, e.g., Miller v. Schoene, 276 U.S. 272 (1928) (finding that a requirement that property owner destroy a large number of ornamental red cedar trees on property was not a compensable taking); Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (finding that a zoning law that caused a seventy-five percent reduction in the market value of land did not constitute a compensable taking); Jackman v. Rosenbaum Co., 260 U.S. 22 (1922) (holding that a requirement that property owner remove structure on land deemed unsafe for party wall built by neighbor without compensation did not violate Constitution).
\textsuperscript{33} Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992). The Court did not rule that the measure was necessarily a taking, but held that such economic wipeouts were per se compensable unless the regulations merely implemented "background principles of nuisance and property law," and remanded to the South Carolina courts for a determination of whether the measure satisfied this standard. Id. at 1031–32.
This relative uniformity in Supreme Court results conceals significant scholarly debate, political outrage, and state legislative activity. A number of respected scholars, not all from the conservative side of the political spectrum, have suggested a broader scope for regulatory takings.\textsuperscript{35} Resistance to environmental restrictions gave rise in the 1980s to a political phenomenon, the "property rights movement," that has succeeded in changing the discourse regarding land use regulation.\textsuperscript{36} More important, the movement has resonated with voters and legislatures, resulting in the introduction of laws restricting governmental powers of eminent domain and regulation in all fifty states, and passage of such laws in twenty-seven states before 2004.\textsuperscript{37} While not directly relevant to regulatory restrictions, the Supreme Court's 2005 decision in \textit{Kelo v. City of New London}\textsuperscript{38} holding that property could be condemned for economic development purposes mobilized thirty-seven states to enact legislation or constitutional amendments seeking to restrict the purposes for which land could be condemned.\textsuperscript{39}

This state-level activity found a particularly tempting target in Oregon, which has one of the most comprehensive and coordinated land use regimes in the country. Beginning with the enactment of Senate Bill 100 in 1973,\textsuperscript{40} the state created a series of land use goals, and required municipalities to

\textsuperscript{35} The foundational conservative scholarly call is articulated in \textsc{Richard A. Epstein, Takings: Private Property and the Power of Eminent Domain} (1985) [hereinafter \textsc{Epstein, Takings}], which argues that compensation must, as a matter of the basic social compact, be paid for all governmental restrictions of property rights (broadly defined) that would not be permitted by private parties under the common law. \textit{Id.} at 36. (For Epstein's slightly more nuanced current position, see \textsc{Richard A. Epstein, Supreme Neglect: How To Revive Constitutional Protection for Private Property} (2008) [hereinafter \textsc{Epstein, Supreme Neglect}].) Works by moderate to progressive scholars suggesting some expansion of compensation for regulations include Frank Michelman's bible of takings theory, \textsc{Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law}, 80 \textit{Harv. L. Rev.} 1165 (1967) (suggesting that compensation should be provided where transaction costs are low and the risks of demoralization or unfair imposition on the powerless are high) and Michael Heller and James Krier's \textit{Deterrence and Distribution in the Law of Takings}, 112 \textit{Harv. L. Rev.} 997, 1009--11 (1999) (suggesting that compensation should be provided in cases such as \textit{Hadacheck v. Sebastian}, 239 U.S. 394 (1915), even where regulation prevents nuisance-like harm if the burden on the individual property owner is high).

\textsuperscript{36} Harvey M. Jacobs, \textit{Introduction: Is All That Is Solid Melting into Air?}, in \textsc{Private Property in the 21st Century}, supra note 34, at 1.

\textsuperscript{37} \textit{Id.} at 2.

\textsuperscript{38} 545 U.S. 469 (2005).


create plans to implement these goals.\textsuperscript{41} The most important results of the goals are as follows: most residential development is permitted only within “urban growth boundaries,” defined as the municipal areas and the areas around them determined necessary to satisfy increased residential needs over the next twenty years;\textsuperscript{42} most nonfarm uses and virtually all subdivisions are prohibited on lands designated agricultural;\textsuperscript{43} and similar restrictions exist on lands designated forest or timberlands.\textsuperscript{44} To compensate for their lesser investment value, forest and agricultural lands are subject to greatly reduced tax assessments.\textsuperscript{45} With most private land in Oregon designated as exclusive agricultural or forestland, Oregon has largely avoided sprawl, remaining a place of scenic farms, forests, and coastlands dotted with relatively dense, walkable cities.\textsuperscript{46}

Oregonians love and value their farmlands, forests, and open spaces. These are part of the “Oregon identity—and ethic,” the “Oregon mystique” that distinguishes the state from California, the big neighbor to the south.\textsuperscript{47} They even rejected three separate ballot initiatives that would have repealed the land use regulations that protected them.\textsuperscript{48} But these regulations still clashed with two deeply held understandings of property in land. First, to use Joseph Singer’s phrase, they violated the idea of property as “castle”—a sphere of personal autonomy and dominion and a bulwark against governmental abuse and domination.\textsuperscript{49} Second, they violated what Joseph Sax calls the “transformative economy” model of property,\textsuperscript{50} in which development and transformation of land is understood to maximize utility not only for the owner but for society as a whole.

Within this scheme, it is easy to understand why the argument for compensation for regulatory takings has intuitive appeal. First, proponents might assert, preventing the individual from using her property as she

\textsuperscript{41} For more comprehensive discussions of this scheme and its history, see PLANNING THE OREGON WAY: A TWENTY YEAR EVALUATION xi–xxii (Carl Abbott, Deborah Howe & Sy Adler eds., 1994) and Blumm & Grafe, supra note 26, at 285–304. The majority of Oregon’s land use planning scheme is codified at Oregon Revised Statutes chapter 197.

\textsuperscript{42} See OR. REV. STAT. § 197.296(2) (2007) (defining urban growth boundary and zoning considerations within urban growth boundaries).

\textsuperscript{43} OR. REV. STAT. §§ 215.203, .283, .284 (2007). Restrictions on new residential dwellings are slightly relaxed for lands not designated “high value” agricultural lands, but the restrictions remain extremely strict. Id. §§ 215.700, .705, .710.

\textsuperscript{44} Id. §§ 215.720–755 (restricting new residential dwellings on forestland).


\textsuperscript{46} Arthur C. Nelson, Oregon’s Urban Growth Boundary Policy as a Landmark Planning Tool, in PLANNING THE OREGON WAY, supra note 41, at 25, 33.

\textsuperscript{47} William G. Robbins, The Place We Call Home: A History of Land-Use Planning in Oregon, OR. HUMAN., Spring 2006, at 14, 14 (quoting former Oregon Governor Tom McCall and former Washington Governor John Kitzhaber) (internal quotation marks omitted).

\textsuperscript{48} Blumm & Grafe, supra note 26, at 279.


\textsuperscript{50} Id. at 1442.
wishes takes property rights by undermining autonomy in the castle. Relatedly, the individual loses her protection from governmental domination, as corrupt governmental officials or self-serving majorities may press property into service for their own ends. Second, governmental restrictions on use of property may be seen as undermining the wealth of society by preventing individuals from entering into voluntary arrangements to use their property in the most efficient and productive manner. Compensation for regulatory restrictions, according to the classic argument, solves both problems. It restores fairness and checks domination by selfish majorities by making the taxpayers pay for deprivations of property rights. Next, it encourages efficient regulation by making the government internalize the costs of its restrictions on property, so that it will choose to go forward only with efficient regulations, those that produce benefits above the reductions in property value they cause.

After a few years of experience under the Oregon experiment, however, the appeal of this scheme began to fade. Contrary to the cost-internalization theory, governments faced with compensation requirements did not choose between efficient and inefficient regulations—in all but one case, they simply waived all land use restrictions on qualifying Measure 37 claimants, despite substantial evidence that these waivers would have a devastating economic effect on agriculture, municipalities, and surrounding housing values.

Nor were the claims for what the campaign had led voters to envision: claims by families to build a few homes for themselves and their relatives on their land. Most of the claims, and the vast majority of the acreage covered, were for multi-unit subdivisions rather than the one to three homes that voters had expected. Although only one percent of the claims were for nonresidential purposes, these claims—for mining, vast resorts, and megamalls—were among the most controversial. Oregonians were not happy. By October 2006, a poll found that if permitted to vote again on Measure 37, forty-eight percent would vote no and twenty-nine percent

51. This gendered language carries a substantive point: takings test cases frequently involve female plaintiffs, see Kelo v. City of New London, 545 U.S. 469 (2005); Dolan v. City of Tigard, 512 U.S. 374 (1994); Loretto v. Teleprompter Manhattan CATV, 458 U.S. 419 (1982), perhaps because they are more sympathetic as representatives of the “home” that needs to be protected from imposition. Dave Hunnicutt, executive director of Oregonians in Action, which both spearheaded the Measure 37 campaign and represented Mrs. Florence Dolan in her successful battle against Tigard, was kidded about the effectiveness of “Hunnicutt’s widows.” Laura Oppenheimer, The Monday Profile: The Man Behind Measure 37: David Hunnicutt: Populist Lawyer Reigns in Aftermath of Land Use Reversal, OREGONIAN, Dec. 20, 2004, at A1.

52. See Prineville Writes First Measure 37 Check, supra note 12.

53. Although 42% of claims were for one to three homesites, 58% were for subdivisions of at least four homes. See HENRY R. RICHMOND & TIMOTHY G. HOUCHEN, AM. LAND INST., MEASURE 37: IS IT DOING WHAT OREGON VOTERS WANTED?, at 8 tbl.2 (2007). Subdivision claims encompassed 73.1% of all acreage affected. Id. Claims for more than ten homes covered 71% of the total acreage affected. VICTOR ATIYEH, BARBARA ROBERTS & JOHN D. GRAY, MEASURE 37 REPORT AND RECOMMENDATIONS 1 (2007) [hereinafter ATIYEH REPORT].
would vote yes; of respondents who said they had heard a lot about the measure, sixty-six percent would vote no to only twenty-six percent who would vote yes. In many cases, this appeared to reflect the changed opinions of those who had initially voted for the measure.

In January 2007, the Joint Committee on Land Use Fairness began hearings on the Governor’s proposal to delay processing of Measure 37 claims while the impact of the law could be studied. Within a few weeks, the committee decided permanent legislation needed to be considered. On February 14, 2007, committee member Senator Kurt Schrader introduced Senate Bill 588, providing that owners of land subject to regulations that prevented them from building a home and which had lost at least twenty percent of its value as a result would be permitted to build a single dwelling or receive compensation. Over the next two months, negotiations in the legislature produced the far more complex House Bill 3540. On April 17, a single hearing was held on the new bill. On June 15, the legislature, in a largely party-line vote, agreed to send Measure 49 to the voters.

Both opponents and proponents described the measure as significantly amending Measure 37. Opponents claimed that it repealed the voters’ will, while proponents claimed it limited claimants to a handful of houses. This is the description of Measure 49 distributed by the Yes on 49 campaign:

Ballot Measure 49 protects the property rights of small individual landowners by immediately allowing them up to 3 houses on their property, if the law allowed it when they bought their land. . . .

Additionally, property owners can build up to 10 houses if they can document a financial loss equal to the value of the additional houses—as voters intended with passing 37.

If property is high-value farmland, forests or places with limited water supplies—as defined in the act, then only up to 3 homesites may be added.

Ballot Measure 49 closes the loopholes and protects the places that make Oregon special, stopping the abuse of huge housing subdivisions, strip malls and industrial development where they simply don’t belong.

58. Id.
59. Id.
Following passage of Measure 49, commercial and industrial
development, as well as large subdivisions, must proceed through the
existing land use planning and development processes.\textsuperscript{60}

Similarly, the ballot language drafted by the legislature declared that a
"‘Yes’ vote modifies Measure 37; clarifies private landowners’ rights to
build homes; extends rights to surviving spouses; limits large
developments; protects farmlands, forestlands, groundwater supplies,"
while a "‘No’ vote leaves Measure 37 unchanged; allows claims to develop
large subdivisions, commercial, industrial projects on lands now reserved
for residential, farm and forest uses."\textsuperscript{61}

The No on 49 website created by Oregonians in Action described the
measure in these terms:

\textbf{MEASURE 49 IS A DIRECT ATTEMPT TO REPEAL MEASURE 37}

\ldots

If approved, Measure 49 will wipe out almost all current Measure 37
claims, and will eliminate all protection from future regulations. In short,
if Measure 49 is approved, Oregon will return to the days before 2004,
when state and local governments imposed land use regulations without
regard to the impacts that those regulations had on the property owners
being regulated.\ldots

Measure 49 makes the following drastic changes to current law:

1. Nearly every Measure 37 claimant will have their claim wiped out,
even if the claim has already been approved.\ldots

2. All protection from future land use regulations will be eliminated.\ldots

Measure 37 protects every Oregon property owner by insuring that the
rights that an owner has to use their land when it is purchased are
protected in the future. Measure 37 guarantees that when you buy a home
or property, the state and local governments cannot pass new land use
regulations that take away your rights without compensating you for the
loss, unless the new regulations are needed to protect the public’s health
and safety. If approved, Measure 49 will wipe out those protections, and
return us to the days when government would steal your property without
compensation.\textsuperscript{62}

The Yes on 49 factsheet was relatively accurate about the impact of
Measure 49 on existing Measure 37 claims, those seeking compensation
due to regulations enacted before its passage. Measure 49 eliminates the

\textsuperscript{60} Ballot Measure 49: How It Works, www.yeson49.com (on file with the Fordham
Law Review) [hereinafter Ballot Measure 49 Website].

\textsuperscript{61} H.B. 2640, 74th Leg. Assem., Reg. Sess. (Or. 2007). Oregonians in Action
unsuccessfully challenged this language and the accompanying explanatory statement as
(D. Or. Sept. 12, 2007).

possibility of relief for those prevented from putting their land to industrial or commercial uses. It also substantially changes the extent of relief available to claimants who had already filed under Measure 37. Such claimants may receive “fast track” approval to build up to three houses on their land if they could have done so when they purchased the land. This provision expands prior legislative amendments that permitted owners to build up to one home on their land. Owners may also build up to ten homes on their property, but only if they show that the parcel is not “high value” agricultural or timberland, provide appraisals proving that the land actually went down in value after passage of the challenged restriction, and establish that the number of homes requested is necessary to compensate for the loss shown by the appraisals. The one exception to these limits is that those who can prove they had gained a common law “vested rest” to use the land as they would have with the Measure 37 waiver by substantially investing in reliance on the waiver may go forward with their plans.

Although none of the campaign literature accurately described this, Measure 49 preserves much of Measure 37 for regulations enacted after its passage. The No on 49 campaign asserted that under Measure 49 “all protection from future land use regulations will be eliminated,” while Yes on 49 claimed that “[f]ollowing passage of Measure 49, commercial and industrial development, as well as large subdivisions, must proceed through the existing land use planning and development processes.” While it is true that Measure 49 eliminated claims arising from future commercial or industrial restrictions, owners may demand compensation or waiver for new regulations affecting residential, timber, or farming practices. Measure 49 does enact some important limitations on claimants, requiring appraisals proving that the value of the property went down after the regulation was enacted, that the desired use of the property is its “highest and best use,” and that any waiver of the restriction be no more than is necessary to compensate for the loss the restrictions caused. Although these restrictions will prevent some of the massive compensation demands made by Measure 37 claimants, they do not necessarily prevent building large subdivisions on a parcel as the Yes on 49 factsheet would suggest. Some commentators have argued that the compensation requirement will have a significant chilling effect on governments in modifying their land use regulations, while others have argued that as a result, Measure 49

63. See OR. REV. STAT. § 195.300(14) (2007) (describing land use regulation to include only regulations affecting residential, farm, or timber uses).
64. Ballot Measure 49, ch. 424, §§ 5, 6, 8, 2007 Or. Laws 1138, 1142–45.
68. Ballot Measure 49 Website, supra note 60.
70. Id.
71. Id. § 195.310.
does little to modify Measure 37. Whatever its significance, the impact of Measure 49 on future regulations was absent from legislative debate or campaign and press accounts of the law, and appears only at the end of the official ballot summary and explanatory statement. More relevant, therefore, is what Oregonians thought they were voting for—limiting owners to building a few homes on their land—not the complicated behemoth they actually enacted.

On November 6, 2007, Oregonians approved Measure 49 by sixty-two percent, an even wider margin than that by which they approved Measure 37. The county by county results are even more striking. Although a few counties that had strongly supported Measure 37 (particularly Jackson and Klamath counties in the south) almost as strongly opposed Measure 49, most counties that had supported Measure 37 now supported Measure 49. This effect was particularly pronounced in Oregon's fertile Willamette Valley, which alone accounted for 4397 of the 7462 Measure 37 claims. These counties have much of the high-value agricultural land subject to the most stringent development restrictions under Oregon law, and thus were among the targets of protests against land use restrictions in the Measure 37 campaign. In many of these counties, the shift was even greater than that for the state as a whole. In Yamhill County, for example, where 70% of the electorate had supported Measure 37, 63% voted for Measure 49; in Washington County, 61% had supported Measure 37 while 68% supported Measure 49; in Polk County, 60% of voters had supported Measure 37 while 65% supported Measure 49; and in Marion County, 62% had supported Measure 37 while 66% supported Measure 49. A similarly

75. Compare ELECTIONS Div., OR. SEC'Y OF STATE, NOV. 6, 2007, SPECIAL ELECTION ABSTRACT OF VOTES, STATE MEASURE NO. 49 (2007) [hereinafter MEASURE 49 VOTE], available at http://www.sos.state.or.us/elections/nov62007/abstract/results.pdf (showing a total of 1,155,374 votes on Ballot Measure 49), with ELECTIONS Div., OR. SEC'Y OF STATE, NOV. 2, 2004, GENERAL ELECTION ABSTRACT OF VOTES, STATE MEASURE NO. 37 (2004) [hereinafter MEASURE 37 VOTE], available at http://www.sos.state.or.us/elections/nov2004/abstract/m37.pdf (showing a total of 1,739,668 votes on Ballot Measure 37). The Measure 49 vote represents sixty percent of registered voters. See ELECTIONS Div., OR. SEC'Y OF STATE, STATISTICAL SUMMARY, 2007 NOVEMBER SPECIAL ELECTION (2007), available at www.sos.state.or.us/elections/nov62007/nov07stats.pdf. Even given Oregon's relatively high voter participation rates, this seems an excellent turnout for a special election. Although the turnout was only two-thirds that of the 2004 election, the 2004 vote on Measure 37 was on the same day as the closely contested Bush-Kerry presidential election while the 2007 election concerned solely Measure 49 and another ballot measure for an increased tobacco tax. See Elections Division, Oregon Secretary of State, Nov. 6, 2007 Special Election, http://www.sos.state.or.us/elections/nov62007 (last visited Nov. 14, 2009).
76. Compare MEASURE 49 VOTE, supra note 75, with MEASURE 37 VOTE, supra note 75 (showing that 62% of Jackson County voters supported Measure 37 and 60% opposed Measure 49 while 75% of Klamath County voters supported Measure 37 and 67% opposed Measure 49).
77. RICHMOND & HOUCHEN, supra note 53, at 11 (listing claims by region).
78. Compare MEASURE 49 VOTE, supra note 75, with MEASURE 37 VOTE, supra note 75.
stark shift was seen in Clackamas County, which had received the most claims of any county: 79 although 64% of voters had supported Measure 37 in 2004, three years later 65% voted for Measure 49. 80

The ultimate impact of Measure 49 is unclear. The promised “fast track” for existing claimants has proved far from fast. The exception for waivers that had ripened into vested rights has generated much litigation, with some claims being granted and others not. 81 Oregon continues to debate its land use regulations, with a Big Look Task Force charged with examining its land use system as a whole. 82 But the bottom line is that Measure 37’s radical revolution in property rights is largely defunct, replaced with a law that makes incremental, not radical, change to Oregon’s land use system. The remaining sections discuss how the experience under the law informs contemporary debates about the theory and practice of takings law.

79. RICHMOND & HOUCHEN, supra note 53, at 20–22 (charting number of claims in Willamette Valley counties).

80. Compare MEASURE 49 VOTE, supra note 75, with MEASURE 37 VOTE, supra note 75.

81. See, e.g., Corey v. Dep’t of Land Conservation & Dev., 184 P.3d 1109 (Or. 2008) (denying claim); Dep’t of Land Conservation & Dev. v. Jefferson County, 188 P.3d 313 (Or. Ct. App. 2008) (same); Frank v. Dep’t of Land Conservation & Dev., 176 P.3d 411 (Or. Ct. App. 2008) (same); AnneMarie Knepper, Vesting Claims All Processed, Linn Says, ALBANY DEMOCRAT-HERALD (Or.), Sept. 7, 2008, http://www.democratherald.com/news/local/article_e928081d-f807-5c75-a748-624474879471.html (stating that of forty-three vested rights claims filed, thirty-eight were granted). In a somewhat more bizarre decision, a federal district court declared that in invalidating the previous Measure 37 waivers, Measure 49 violated the Contract Clause of the U.S. Constitution. Citizens for Constitutional Fairness v. Jackson County, Civ. No. 08-3015-PA, 2008 WL 4890585, at *2 (D. Or. Nov. 12, 2008). The court found that the waivers were “contracts” not to continue litigation, and so could not be invalidated by Measure 49. The brief unpublished opinion is unlikely to be followed in other cases. The regulatory waiver is only loosely analogized to a settlement, and even more loosely to a binding contract characterized by consideration and mutual exchange of promises. The Contract Clause, moreover, is not an inexorable restriction even on obligations deemed contracts, but rather is subject to the states’ police power to protect public health, safety, and welfare. Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 241–42 (1978); U.S. Trust v. New Jersey, 431 U.S. 1, 22 (1977). Thus even clearly contractual obligations, such as a state railway charter providing that the railway would be immune from suits arising from injuries of its employees, Texas & N.O. R.R. Co. v. Miller, 221 U.S. 408, 415 (1911), and remedies for defaulting purchasers of state land, El Paso v. Simmons, 379 U.S. 497, 508 (1965), may be amended when necessary to serve an overriding public interest. The grant of a land development permit, while it may give rise to a vested rights claim if sufficient action is taken in reliance on the permit, is sufficiently far from traditional contract obligations and sufficiently tied to traditional exercises of police power to adjust regulation of land use that other courts are unlikely to break new ground in finding a Contract Clause violation.

82. OR. TASK FORCE ON LAND USE PLANNING, FINAL REPORT TO THE 2009 OREGON LEGISLATURE (2009) (reporting on comprehensive assessment on Oregon land use system and recommending modest changes); Peter Wong, Lawmakers Take Another Look at Rules for Land Use—Oregon’s Urban-Rural Conflict Is Decades Old, STATESMAN J. (Salem, Or.), Feb. 1, 2009, at 1A.
II. WHAT OWNERS WANT—INTUITIVE UNDERSTANDINGS OF PROPERTY RIGHTS

Perhaps the most important outcome of the brief life of Measure 37 is the way it transformed owners' understandings of what their property rights are and what creates them. Property is commonly understood as the result of individual hard work and the arena of individual action; regulation of property, in contrast, is understood as governmental confiscation of the fruits of individual labor. This Part explains the reasons for this understanding and the ways that Measure 37 flipped it, making many come to believe that regulations were a part of their property rights rather than a deprivation of them.

A. Measure 37 and Oregonians' Articulations of Property Rights

Popular understandings of property rights form an important part of takings law. Whether an action will be deemed to require compensation depends, the Supreme Court has declared, in part on the "expectancies embodied in the concept of 'property,'"83 "the understandings of our citizens regarding the content of, and the State's power over, the 'bundle of rights' that they acquire when they obtain title to property,"84 and the "rigidity to our conception of our rights in it."85 Some scholars argue that such popular understandings, rather than technocratic arguments about efficiency and governmental behavior, properly underlie most takings jurisprudence.86 But the popular understanding of property is hard to pin down; it shifts in different contexts and with different eras.87 The Oregon experiment, by abruptly removing the background rules provided by land use regulations, provided a new context within which to evaluate that understanding.

Although progressive scholars point out that "property" itself, in the sense of possessions protected by law from expropriation or invasion, owes

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86. See Bruce A. Ackerman, Private Property and the Constitution 113–67, 189 (1977) (arguing that much of takings law may be understood by taking the position of the Ordinary Observer, and that the U.S. Constitution embeds a principle of evaluating property according to ordinary social practice).
87. As many have noted, the notion that regulations comprise a compensable diminution of property rights has only emerged in the last century. See, e.g., Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 322 (2002) ("Our jurisprudence involving condemnations and physical takings is as old as the Republic ... . Our regulatory takings jurisprudence, in contrast, is of more recent vintage ... .") Others have noted that underlying conceptions of property, and with them property law, shift over time. See, e.g., Morton J. Horwitz, The Transformation of American Law, 1780–1860, at 32–34 (1977) (describing shift from a natural use to a first development theory of property); Sax, supra note 49, at 1442 (describing emergence and dominance of a "transformative economy" of property and the challenge now posed by a developing "economy of nature" model).
EVIDENCE FROM THE OREGON EXPERIMENT

its existence to the government,88 this concept usually finds little resonance with owners.89 There is something basic—whether its origins are instinctual or cultural—in the notion of “mine” that attaches to physical possessions and that sees the power of others over those possessions as inappropriate interference to be vigorously resisted.90 Therefore it is not surprising that protection against “takings” is a fundamental legal right in almost all countries,91 but demands for individual payment for “givings,” governmental contribution to property values, play almost no part in our jurisprudence.92 Condemnation of a strip of my land to build a golf course strikes at who I am as a citizen and human being; multiplication of the value of my land because it now borders the lovely golf course is a matter of luck or savvy investment, not obligation.

Measure 37 shifted this instinctual calculus. Voters went into the 2004 election seeing land use laws as governmental imposition on property; by 2007, they saw them as part of their property. Essentially, the effective repeal of regulation threw the “givings” side of the land use regulation equation from unseen background into sharp relief. 1000 Friends of Oregon, the group that spearheaded the campaigns against Measure 37 and for Measure 49, recognized that abstract arguments about land use laws would not have accomplished this. As Eric Stachon of 1000 Friends said, “Our side probably could have spent another million and still not been successful . . . . Because it was the personal stories. I think it’s going to be radically different this time.”93 And they got stories. During the hearings, the legislature was overwhelmed as Oregonians “flood[ed] the Capitol . . .

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88. See, for example, the famous definition that Felix Cohen proposed and then challenged:

[T]hat is property to which the following label can be attached:
To the world:
Keep off X unless you have my permission, which I may grant or withhold.
Signed: Private citizen
Endorsed: The state


91. Fischel, supra note 34, at 59.


93. Oppenheimer, supra note 23.
to deliver the kind of angry, pleading and tearful speeches you’d expect on abortion and same-sex marriage.\textsuperscript{94}

This testimony made clear that many, even many of those who had voted for Measure 37, now saw it as fundamentally unfair.\textsuperscript{95} Andra Bobbitt of Seal Rock came to the capital “to testify about the unfairness Measure 37 is spreading throughout our state,” declaring that the condominium-hotel-resort a Measure 37 claimant planned for her quiet coastal town “is not fair to every other property owner in this residential neighborhood.”\textsuperscript{96} Ellen Nawrocki wrote the committee that Measure 37 “is unfair to all neighbors and the citizens of this state” and made “a mockery of everything this great state once stood for.”\textsuperscript{97} Dale Siefert and Mary Blankevoort, whose rural community was subject to large claims that would double the population and traffic in the area, asked, “Where is the fairness for those of [us] who cherish this region’s unique natural and agricultural resources and its rural lifestyle?”\textsuperscript{98}

Rozelle Burcher of Falls Creek was perhaps most explicit in attacking Measure 37 as an assault on property rights:

First off, I’m not against a property owner’s rights—as long as wielding his rights does not trample on MY rights. Affecting the lifestyle I chose for my family by moving to this rural area, affecting my quality of life (I didn’t buy my property expecting to be surrounded by bulldozers, nasty runoff, and nosy neighbors), affecting MY perceived value of my property (I could have spent the same amount for a bigger, nicer house in a subdivision in town, but that was not valuable to me), affecting me and my family in a negative manner is NOT okay—how are our rights less than his? . . . Neighbors’ rights need near equal weight. Period.\textsuperscript{99}

Steve Rouse, who represented 700 community members petitioning against two mines proposed in their wine growing community, echoed this sentiment: “The property rights that were supposedly defended by Measure 37 . . .


\textsuperscript{95} See, e.g., E-mail from Rozelle Burcher to Senator Kurt Schrader (Apr. 10, 2007) (on file with author) (saying when she saw the advertisements for Measure 37, she thought it would be a good thing if a farmer could build a house or two for his kids, but “[n]eighbors’ rights need near equal weight”); Letter from Cindy Tyree, Freestyle Farm, Wilsonville, Or. to Joint Special Comm. on Land Use Fairness (Feb. 27, 2007) (on file with author) (writing that she voted for Measure 37 because she thought it would allow people to build one or two homes, not subdivisions, and she wants to be able to vote again).


\textsuperscript{97} E-mail from Ellen Nawrocki to Senator Kurt Schrader, Joint Special Comm. on Land Use Fairness (Apr. 1, 2007) (on file with author).

\textsuperscript{98} E-mail from Mary Blankevoort to Representative Patti Smith et al., Joint Special Comm. on Land Use Fairness (Mar. 18, 2007) (on file with author).

\textsuperscript{99} E-mail from Rozelle Burcher to Senator Kurt Schrader, Joint Special Comm. on Land Use Fairness (Apr. 10, 2007) (on file with author).
37 have turned against the rights of the majority in this community." Similarly, Sharon Konopa insisted, "Government regulation gives all citizens protection of their property rights. All Oregonians property rights are being violated by allowing M37 with these framework amendments and its destruction of our land use laws." Opponents of Measure 37 were in agreement: property owners had an entitlement to the land use laws that preserved the communities in which they purchased land; lifting of those laws unfairly undermined that entitlement.

The selective repeal of land use laws undermined the investment value of property as well. Paul Farmer, Executive Director of the American Planning Association, summed up the situation: "People can no longer make investment decisions or purchase their house, which is their largest single investment, with any certainty that the neighborhood values will be protected. They have no idea what may occur next door or across the street." Marilyn Allen, a composer, had purchased her home because zoning restrictions prevented subdivisions under 160 acres; she knew that zoning could change, but believed that "that it would change fairly and be the same for all, enabling us to move away should this happen"; the piecemeal removals of restrictions caused by Measure 37, however, would greatly devalue properties like hers, which were not eligible for a waiver, making it "exceedingly difficult if not impossible to afford another quiet place."

These concerns were even more pressing for farmers. David Setniker, whose family had farmed his land since 1942, testified that if the Measure 37 claims surrounding him were developed,

my ability to farm my land will be greatly diminished and my land values will be greatly decreased. I too have property that would qualify for 37 claims. But why should I be penalized for being a good steward of the land, and for trying to keep the farm intact to pass on the future generations? Victoria Avery and Michael Atherton, who had started their farming business in 1991, similarly asked, "Where is the justice for those of us who make their livelihood from farming and who purchased ground because of the zoning laws and the protections they offer?"

Many citizens, of course, did oppose repeal of Measure 37. Some spoke specifically of the resources they had already expended to develop their

100. Letter from Steve Rouse to Joint Special Comm. on Land Use Fairness (Apr. 18, 2007) (on file with author).
101. Hearing, supra note 96 (statement of Sharon Konopa).
104. Hearing, supra note 96 (statement of David Setniker).
property in reliance on successful Measure 37 claims. Others argued that land development by successful claimants would create jobs and increase prosperity. A number vigorously defended Measure 37 as a vindication of property rights. Loydee Stonebrink told the committee that “[p]roperty rights are as sacred as the sunrise and sunset. If [t]hat stops, so does life,” while Glen Stonebrink called Senate Bill 588 a “case of Prostitution of our Constitutions.” Thomas McDonald, who wanted to build a tasteful dude ranch on his land, claimed that as the nation was fighting for freedom in Iraq “we also shall be dictated to by a minority who despise property rights, just like the Iraqi people are today, by the 1000 FRIENDS OF AL-QAIDA.” Harkening to an older foreign boogie man, Ronald Whitelaw asked, “Is this the USA or the USSR?” But these voices were outnumbered in the hearings and no longer commanded public opinion in the campaign that followed.

B. Reverberations Outside Oregon

The reaction against Measure 37 spread beyond Oregon’s borders. Washington State voted on a similar measure in 2006. Initiative 933 would have required compensation or waiver for loss due to restrictions enacted after 1995, the year Washington began to implement a land use scheme similar to Oregon’s. Although early polls revealed that fifty-five percent of the electorate supported the initiative, voters ultimately rejected it by fifty-nine percent to forty-one percent. Stories from the experience under Measure 37 were central to the campaign, with Washington newspapers declaring that “Oregon could foretell our land use destiny.”

106. See, e.g., Hearing, supra note 96 (statement of George Hansen); id. (statement of Jess R. Moses); id. (statement of Bob Horning).
107. See id. (statement of Rita Sywers); E-mail from Paul Serres to Senator Kurt Schrader et al., Joint Special Comm. on Land Use Fairness (Mar. 13, 2007) (on file with author); see also Hearing, supra note 96 (statement of David Duncan) (arguing that Oregon’s land use laws were inappropriate for the current economy of Oregon).
108. See, e.g., Hearing, supra note 96 (statement of Thomas A. McDonald) (stating that Measure 37 should “be remembered and honored, as the restoration of the owners’ property rights at the time of purchasing”); Letter from Charles D. & Kay Simmelink to Senator Roger Beyer et al., Joint Special Comm. on Land Use Fairness (Mar. 14, 2007) (on file with author) (“Please understand that in the 1970’s the Oregon State Legislature took away our rights as property owners to do as we wished with our land.”).
110. Id. (statement of Glen Stonebrink) (submitted as part of statement of Loydee Stonebrink).
111. Letter from Thomas A. McDonald to Joint Special Comm. on Land Use Fairness (Mar. 6, 2007) (on file with author).
112. Hearing, supra note 96 (statement of Ronald D. Whitelaw).
113. Roesler, supra note 17.
114. Id.
116. Roberts, supra note 2; see also Roesler, supra note 17.
Less neutral local headlines used the Oregon story to condemn Initiative 933 as hiding a "snarling dog"\textsuperscript{117} and a "development 'monster.'"\textsuperscript{118}

Similar measures were also on the ballots in Idaho, California, and Arizona that November.\textsuperscript{119} These initiatives were designed to implement the strategy of the libertarian Reason Foundation, which proposed putting "Kelo-plus" measures before the voters in order to take advantage of the backlash against \textit{Kelo v. New London}\textsuperscript{120} by joining a prohibition on eminent domain for economic development to a compensation requirement for future land use restrictions.\textsuperscript{121} These measures were purely prospective, and thus more moderate than Measure 37; indeed they more closely resembled Measure 49.

The \textit{Kelo-plus} strategy should have been a successful one. In other elections that day, pure anti-\textit{Kelo} constitutional amendments passed with eighty percent support in Georgia, New Hampshire, Michigan, and South Carolina.\textsuperscript{122} Of the three \textit{Kelo-plus} measures, however, the only one to pass was that in Arizona,\textsuperscript{123} where the press had little discussion of the Oregon experience. In contrast, Idaho's \textit{Kelo-plus} proposal went down in flames.\textsuperscript{124} Press coverage and letters to the editors of Idaho newspapers highlighted the links between Proposition 2 and Measure 37.\textsuperscript{125} One local politician even echoed Oregonians in declaring that "[P]roposition 2 will take away property rights, not protect them."\textsuperscript{126} When they went to the polls on November 7, 2006, seventy-six percent of the relatively conservative Idaho electorate voted to defeat Proposition 2.\textsuperscript{127} The same day, Californians voted on Proposition 90, also an anti-\textit{Kelo} measure joined to a requirement of compensation for future regulatory restrictions.\textsuperscript{128} A

\begin{itemize}
  \item \textsuperscript{118} Tom Koenninger, \textit{Ballot Gets Development ‘Monster,’} \textit{Columbia} (Vancouver, Wa.), Aug. 9, 2006, at C7.
  \item \textsuperscript{119} Ramsey, \textit{supra} note 115. Proponents tried to get similar measures before voters in Oklahoma, Missouri, Montana, and Nevada. Rocky Barker, \textit{Proposition 2 Opposition Is Widespread}, \textit{Idaho Statesman} (Boise), Oct. 8, 2006, at 1. The Missouri measure failed to get enough signatures and the state courts struck the other three from the ballot as misleading or otherwise in violation of state requirements. \textit{Id}.
  \item \textsuperscript{120} 546 U.S. 469 (2005).
  \item \textsuperscript{122} Leonard Gilroy, \textit{By a Landslide, Americans Voted To Protect Their Property Rights}, \textit{Buffalo News}, Nov. 19, 2006, at 12.
  \item \textsuperscript{124} See, e.g., Rocky Barker, \textit{Oregon Tried Law Like Prop 2 in 2004}, \textit{Idaho Statesman} (Boise), Nov. 2, 2006, at Main 1; Ramsey, \textit{supra} note 115. A similar limitation on eminent domain had already been enacted by statute by the Idaho Legislature. Barker, \textit{supra}.
  \item \textsuperscript{125} See Barker, \textit{supra} note 124; Ring, \textit{supra} note 121; Lora Volkert, \textit{Oregon a Glimpse of Idaho’s Future}, \textit{Idaho Bus. Rev.}, Oct. 9, 2006.
  \item \textsuperscript{127} Ramsey, \textit{supra} note 115.
\end{itemize}
month before the election, polling data suggested that the proposition “strikes a chord in the heart of voters disgusted by the Kelo decision,” and was running ahead by as much as three to one.\textsuperscript{129} Again, however, local newspapers recalled the Measure 37 experience,\textsuperscript{130} and Proposition 90 too went down, albeit by only fifty-two percent to forty-eight percent.\textsuperscript{131} While the degree of unassuaged anti-\textit{Kelo} sentiment appeared to play a significant role in these votes (in Arizona, the governor had just vetoed anti-\textit{Kelo} legislation,\textsuperscript{132} the California legislature had defeated it,\textsuperscript{133} and the Idaho legislature had already enacted a weaker anti-\textit{Kelo} measure\textsuperscript{134}) the story of the Oregon experience powerfully impacted voter perceptions of property rights outside its borders.\textsuperscript{135}

### C. Conclusion

It would be a mistake to see Measure 49 or the initiative contests in other states as a simple enactment of public will. Others have noted the disconnect between voter understanding and the legal effect of popular referenda;\textsuperscript{136} voters themselves testified to their misunderstanding of Measure 37;\textsuperscript{137} and similar misunderstandings surely categorized voting in Measure 49. As discussed in Part I, the legal effect of Measure 49 was only poorly described during the campaign period. Nor was Measure 49 necessarily the preferred choice of those that voted for it; several of those testifying, for example, remarked that they would rather see claimants limited to one house per property.\textsuperscript{138} In addition, while the final vote, sixty-two percent in favor to thirty-eight percent opposed, seems overwhelming as measured against close-fought presidential elections, almost two out of five voters remained opposed to Measure 49. The seemingly decisive shift

\textsuperscript{129} Id.
\textsuperscript{131} Ramsey, \textit{supra} note 115.
\textsuperscript{132} Prop 207 Has Local Officials Worried, \textit{supra} note 123.
\textsuperscript{133} Ramsey, \textit{supra} note 115.
\textsuperscript{134} Barker, \textit{supra} note 119.
\textsuperscript{135} Stories of Measure 37 dominated the unsuccessful 2007 campaign to pass a similar measure in Alaska’s Matanuska-Wanitsa Borough as well. See Rindi White, Land-Use Debate Looks to Oregon: Prop 1: Friends, Foes of Ballot Issue Justify Stance Based on Outside Effects, ANCHORAGE DAILY NEWS, Sept. 28, 2007, at J1.
\textsuperscript{137} See \textit{supra} note 96.
\textsuperscript{138} \textit{Hearing}, \textit{supra} note 96 (statement of Sue Anne Henneck); Letter from Sarah Deumling to Joint Special Comm. on Land Use (Apr. 17, 2007) (on file with author); Letter from Sharon Konopa, City Councilor of Albany, Or. to Senator Floyd Prozanski & Representative Gregory Macpherson, Joint Special Comm. on Land Use Fairness (Apr. 17, 2007) (on file with author).
between 2004 and 2007, moreover, reflects only a shift of twenty-three percent of the electorate, less than one out of four voters. Oregon as a state remains significantly divided over questions of property regulation and compensation, and most voters likely did not fundamentally change their opinions on these questions as a result of their experience under Measure 37.139

Despite this, a significant majority of voters seemed to be in agreement. While many believed that property owners should be able to build at least one home on their property, most saw governmental land use restrictions as part of their property rights as well.140 Regulation preserved what they valued about their communities, protected their investments in their property, and prevented unfair violation of those values by their neighbors. In 2004, most Oregonians had agreed that land use restrictions were a violation of property rights.141 By 2007, most had come to believe they were an integral part of those rights.

III. WHAT GOVERNMENTS DO—COMPENSATION AND EFFICIENCY

The second important facet of the implementation of Measure 37 is what it suggests about governmental responses to compensation requirements. The classic economic argument for enhanced compensation is that if governments are forced to provide compensation for regulatory deprivations of value they will internalize the costs of such deprivations and make more efficient decisions.142 This truism fell on its face under Measure 37. The facts are simple: out of 7462 claims filed under Measure 37, in only one known case did the state or local government agree to compensate rather than waive the restriction, despite significant evidence that the waivers would result in uncoordinated and detrimental use of property.143 Although this will surprise neither political scientists nor political actors, the continued widespread adherence to the efficiency-generating effects of a compensation requirement makes it important to discuss the nature and reasons for this result.

139. Dorothy English, for example, our infamous gravelly voiced poster widow, became only more committed to freedom from governmental regulation of property use, insisting that not only could she build a multi-unit subdivision on her land, but that she did not need to comply with any state permitting procedures because they also did not exist in 1953 when she and her husband purchased their land. Laura Oppenheimer, Measure 37 'Hero' Faces a New Battle, OREGONIAN, Feb. 2, 2007, at C1.
140. See supra notes 96–106 and accompanying text.
141. See supra notes 16–27 and accompanying text.
142. See, e.g., COOTER & ULEN, supra note 10, at 186–87 (“If the state need not compensate for restrictions, then it will impose too many of them. If there are too many restrictions, then resources will not be put to their highest-valued use. Thus, uncompensated restrictions result in inefficient uses.”); see also EPSTEIN, SUPREME NEGLECT, supra note 35, at 119 (“If by chance, the diffuse social gains do outweigh the localized costs, then the ‘winners’ should be able to push the condemnation measure through, with compensation.”).
143. See Prineville Writes First Measure 37 Check, supra note 12.
A. Measure 37 Claims and Efficient Decision Making?

The argument that compensation is necessary to ensure that governmental actors regulate efficiently is the “dominant economic approach” to the takings debate. The appeal of the argument is plain. If governments need not compensate for property regulation, they need not fully account for its costs and will enact regulations whose costs outweigh their benefits. Despite important attacks on the accuracy of this assumption, the salutary efficiency effects of compensation requirements maintain their hold on academic debate. In fact, they gained new prominence in the furor following Kelo as leading property scholars suggested that increasing the compensation required for takings would act to deter otherwise “questionable” projects.

Although in populist property rhetoric rights and fairness arguments dominate over economic ones, the efficiency argument has considerable salience with the public as well. Colleen Flquetsch, for example, one of the more determined citizen opponents of Measure 49, captured this argument in one of her many letters to the Land Use Fairness Committee: “Reasonable compensation is the ONLY THING that will guarantee


145. A leading law and economics textbook provides a succinct statement (along with italics) of this principle: “Obviously, the noncompensability of regulations gives government officials an incentive to overregulate, whereas the compensability of takings makes governmental officials internalize the full cost of expropriating private property.” COOTER & ULEN, supra note 10, at 188–89; see also Lawrence Blume & Daniel L. Rubinfeld, Compensation for Takings: An Economic Analysis, 72 CAL. L. REV. 569, 621 (1984) (describing government decision making in absence of compensation requirement as operation under a “fiscal illusion”). Scholars have of course contributed important complexities to the efficiency justification for compensation requirements. Frank Michelman, in an article that remains the starting point in takings theory, recognized that analysis of the costs and benefits of a project must also include the demoralization costs to owners whose property is taken without compensation and the settlement costs of identifying and negotiating compensation. See Michelman, supra note 35. Michael Heller and James Krier more recently pointed out that deterring inefficient decisions did not require that the costs imposed on governments go to property owners, thus separating the efficiency argument from fairness arguments for compensation. Heller & Krier, supra note 35. The dominant view also recognizes that full compensation for regulatory restrictions may encourage property owners to engage in investment without concern for whether the state will eventually restrict them, thus encouraging potentially wasteful investment. See COOTER & ULEN, supra note 10, at 187.

146. See, e.g., Farber, supra note 11; Kaplow, supra note 11; Levinson, supra note 11.

reasonable and just land use laws,” she wrote.⁴⁸ “Our system is what happens when there is no need for compensation to the land owners. It has gone way overboard and become a monster!”⁴⁹

Despite the widespread adherence to this view, there is no evidence that the compensation requirement caused state and local officials to weigh the costs and benefits of the restrictions to determine which were efficient. Rather, in all but one of thousands of claims, they simply waived the restrictions rather than compensate. These waivers were made despite predictable negative economic consequences. Measure 37 claims were concentrated on high-value farmland, the basis of Oregon’s 4.6 billion dollar agricultural industry.⁵⁰ After mapping these claims, the Oregon Department of Agriculture found that they would have “major implications” for agriculture.⁵¹ The development of the claims would, the Department concluded, result in a “swiss cheese effect” of agricultural and nonagricultural land that would generate significant land use conflicts.⁵² In addition, patchwork residential development would threaten necessary agricultural growth by eliminating parcels of land that could be purchased to expand existing farms.⁵³

Farmers provided passionate testimony on the economic impact of the Measure 37 waivers. Larry Martin, a fruit grower in Oregon’s fertile Hood Valley, told the Committee that “planning and zoning are not bad words but are necessary concepts in a maturing society,” and that if farms were surrounded by residential subdivisions, they would soon be “regulated out of business.”⁵⁴ Gary Rhinehart, a Pendleton wheat farmer, testified that the claims to build hundreds of homes within two miles of him would mean drastic changes for the farm that had been in his family for over 150 years.⁵⁵ Bill Rose of Roselawn Seed, Inc., declared, “This is some of the best farmland in the world. . . . You’re going to build houses on it, and

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⁴⁸ E-mail from Colleen Fluetsch to Senator Vicki Walker et al., Joint Special Comm. on Land Use Fairness (Mar. 13, 2007, 16:01 PST) (on file with author).
⁴⁹ E-mail from Colleen Fluetsch to Senator Vicki Walker et al., Joint Special Comm. on Land Use Fairness (Mar. 15, 2007, 09:59 PST) (on file with author).
⁵¹ Id.
⁵² Id.
⁵³ See, e.g., Hearing, supra note 96 (statement of Gary Conklin, Oregon Winegrowers Association). In an interesting comment on modern agriculture, a smaller but coordinated group of farmers who reached their lands via small private airstrips sought protection against noise complaints expected from the new residents. See id. (statement of David Martin, President, Oregon Pilots’ Association); id. (statement of Robert Severance, President, Oregon Flying Farmers).
⁵⁴ Id. (statement of Larry Martin); see also id. (statement of Don Schellenberg, Associate Director of Governmental Affairs, Oregon Farm Bureau) (expressing concern about carving up agricultural lots and seeking right to farm legislation to prevent nuisance suits against farmers).
⁵⁵ See id. (statement of Gary Rhinehart).
pollute the streams?'"156 The Oregon Winegrowers Association told the Land Use Fairness Committee that the state’s $1.4 billion dollar wine industry “grew up under the protection of the state’s land-use system and its explicit promise that farmland was for farming,” and Measure 37 undermined that protection.157 Of course the timber industry, which had provided most funding in support of Measure 37 and whose claims comprised the largest portion of affected land, likely opposed modification, but as in 2004, they wisely remained relatively silent.158

Claims were also granted without regard to their impact on water and sewage systems. A significant number of claimants were granted the right to build in areas where groundwater was limited and restricted by state law.159 Water and Electric Board officials for Lane County opined that the planned developments could “imperil the quality of customers’ drinking water” in the county by escalating levels of fecal bacteria and other contaminants in the system.160 As many as 130 lawsuits were filed challenging the impact of claims on area watersheds.161

Although perhaps less compelling, the waivers also resulted in significant economic impacts on surrounding owners. While a community-wide relaxation of zoning restrictions might reduce the value of property for its current use, those losses would be at least partially offset by the additional flexibility in using one’s land.162 This was not true under Measure 37: instead, property owners who had purchased after restrictions went into effect would suddenly find their homes next to housing developments,163 large hotels,164 or even gravel mines,165 but would be compelled by land use restrictions to continue using their land as they had been. Unless the state or municipality responded by lifting zoning restrictions across an area, the land use conflict would have a permanent negative impact on the surrounding properties.

It is of course possible that some of the regulations were inefficient. But, although there is a vigorous debate about the efficiency of Oregon’s comprehensive land use laws, it does not appear that this—or any—debate was a factor in the rulings. Instead, the primary and often sole

161. Id.
163. Id.
164. Hearing, supra note 96 (statement of Andra Bobbitt).
165. Letter from Steve Rouse to Joint Special Comm. on Land Use Fairness (Apr. 17, 2007) (on file with author).
consideration was whether the claimant met the legal requirements for Measure 37. This, for example, is a description of the process in Marion County:

[L]andowners must prove their ownership and that the ownership has been continuous, and they must show that the land-use regulations have hurt the value of their land. Landowners also must show that the compensation they are seeking is reasonable. If they meet those requirements, the commissioners grant waivers to land-use regulations.\textsuperscript{166}

The dominant factor in these decisions was the lack of existing funds to pay compensation, as illustrated by the uniform justification the Lincoln County Board of Commissioners proffered for their Measure 37 decisions: “the Board finds it is in the public interest, due to the lack of resources to pay compensation, to modify, remove or choose not to apply the challenged land use regulation to the subject property and issue the ‘waiver’ to claimants.”\textsuperscript{167}

Measure 37, in short, did not dispel a fiscal illusion. Instead, it resulted in widespread and selective lifting of regulations, although the costs of these actions likely outweighed their benefits. These decisions were apparently made without consideration of their long-term economic consequences; instead they responded solely to the immediate lack of funds to pay owners for the losses claimed.

B. Measure 37 Decisions and Political Economy

Despite their divergence from cost-internalization theory, the decisions to waive regulations rather than compensate were easily understandable as a matter of political economy. As several scholars have pointed out, the argument that requiring compensation enhances the efficiency of land use decisions has little to do with the realities of governmental decision making.\textsuperscript{168} Governmental representatives are not like pure economic actors, whose interests are neatly aligned with the profits of their firms. On the benefit side, they do not (indeed ethically cannot) directly gain economically from the benefits of their actions, which instead are distributed to the public.\textsuperscript{169} Wealth maximizing land use decisions will presumably increase budgets, but only indirectly and only in the long run, as creation of an attractive locale will increase revenues, whether from property taxes on home values or on other taxes and fees imposed on

\textsuperscript{166} Timothy Alex Akimoff, \textit{Land-Use Claims Bury Marion and Polk County Staffs}, \textit{Statesman Journal} (Salem, Or.), Jan. 4, 2007, at 1A.

\textsuperscript{167} \textit{In re} Ballot Measure 37 Claim of Walter and Sara McGuire, No. 06-LURCC-06, Order No. 11-06-380 at 2 (Bd. of Comm’rs for Lincoln County, Or., Nov. 8, 2006) (approving claim to divide property into up to eighty-one acre parcels); see also \textit{In re} Ballot Measure 37 Claim of Robert and Janice Foley, No. 147-LURCC-06, Order No. 9-07-708 at 3 (Bd. of Comm’rs for Lincoln County, Or., Sept. 12, 2007) (approving claim to divide property into up to nine one-acre parcels).

\textsuperscript{168} See Farber, \textit{supra} note 11, at 279; Levinson, \textit{supra} note 11, at 345.

\textsuperscript{169} See Levinson, \textit{supra} note 11, at 355.
businesses and residents. So although compensation requirements may deter officials by demanding a choice between the regulation and other projects, the choice is not primarily between the costs and benefits of the regulation itself.\footnote{170} There may be distortions on the costs side as well, as the government charged with providing compensation may not be the same one making the land use decision.\footnote{171} Because the costs of compensation are often pushed further up the governmental ladder—as states fund municipal development projects while the federal government funds state projects and so on—they often will be spread across a much broader group than feels its benefits.\footnote{172}

Public choice theory provides another basis for questioning whether economic costs and benefits provide an effective motivation for land use decisions. Public choice theory suggests that governmental actors are less interested in maximizing governmental budgets than in maximizing political popularity and securing reelection.\footnote{173} Although ideology and beliefs about the public interest clearly play a role as well,\footnote{174} such beliefs will understandably shift to favor those who can most powerfully express their sense of the public interest. The most politically effective actions in this light are not those that maximize benefit across a broad group, but rather those that significantly affect a smaller group that is easily motivated and coordinated to act on their concerns and that can therefore more effectively command public attention.\footnote{175} Poster grandma Dorothy English and the handful of determined property owners like her were therefore far more effective in mobilizing public sympathy and political activity than any number of persuasive cost-benefit analyses could have been.\footnote{176}

The choice to waive rather than compensate makes sense even if one understands governmental officials as perfectly rational and attuned to the public interest in decision making. Economist William Fischel's
“homevoter hypothesis” provides a strong challenge to the way public choice theory applies to municipal decision making. Fischel argues that although larger entities—states, the federal government, and large cities—may be vulnerable to domination by coordinated interest groups, municipalities of less than 100,000 people behave differently. Decisions of such governments, he argues, are readily capitalized into property values and property taxes, so that homeowners are far more aware and involved than either renters or voters in state, federal, or large city governments. Officials in these communities, therefore, are extremely responsive to these “homevoters’” interests in maintaining overall community property values, and their decisions reflect this fact.

Fischel’s vision of a local government that is exquisitely sensitive to the impact of its decisions on home values provides an alternative argument for why governments chose to waive land use restrictions rather than provide compensation. If a regulation reduces the value of property or undermines its income-generating potential, this will reduce the tax base of the community. Governments feel this in reduced budgets, and homeowners in turn feel this in a greater tax burden or reduced services, which will reduce the value of their own homes. The regulation is nevertheless efficient, and makes sense for the homevoter and the government, if the restriction creates economic gains—by, for example, increasing the values of other properties in the community—that outweigh those costs. But there is no reason that the net gain should be enough both to compensate for the loss in the community tax base from the reduction in property value and to pay the affected owner directly for the costs. This in effect requires the community to pay twice for the restriction: once for the losses that are already capitalized into the value of all other properties, and again to pay the owner for her personal loss. The regulation is still efficient, but no longer makes fiscal sense for the government or the community unless the benefits of the regulation are overwhelming. Because only the rarest of restrictions

178. Id. at 4, 15.
179. Id. at 39–40.
180. See id. at 4.
181. Id. at 89.
182. This insight may be translated to decisions of larger governments as well. Take, for example, the infamous case of Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978), in which a historic preservation ordinance prevented the owners of Grand Central Terminal from building a skyscraper atop their historic Beaux Arts building. The rent from the proposed addition would have been three million dollars annually. Id. at 116. Although the owner lost the value of this rent, the city lost the taxes on this additional income and the economic benefits of this additional commercial space as well. The ordinance reflected a long-term decision that the benefits of maintaining the integrity of New York’s historic structures surpassed the losses due to this sacrifice. To compensate Penn Central for the loss in addition to foregoing the benefits of the added economic activity, however, would effectively double the cost side of the calculus and almost certainly make the ordinance inefficient.
generate benefits that are more than double their costs, even an extremely rational and informed official faced with a demand for compensation would choose the waiver option instead.183

The thousands of decisions to waive land use regulations rather than compensate were thus rational when understood either through a public choice lens or its median homevoter twist. The claimants were discrete individuals objecting to infringement of their property rights, with the power of a highly successful and passionate political campaign behind them. Their neighbors often were not aware of the nature of their claims until after they were granted, and the arguments in their favor were often diffuse ones to preserve rural quiet or prevent potential future conflicts between farmers and residential developments. In addition, because neither the state nor municipal governments had any additional funding to compensate Measure 37 claimants,184 the alternative to waiver was to deplete present budgets to maintain benefits that would be realized to the community over generations. Similarly, many localities had already sacrificed substantial tax revenue in preserving land for agricultural use; paying direct compensation beyond that would wipe out the benefits that justified this sacrifice. The decision to dismantle, parcel by parcel, the land use regime under which Oregon had thrived for thirty years, was entirely predictable in these circumstances.

It is true that some factors creating the rush to waive rather than compensate were unique to Measure 37. Officials were not faced with claims for compensation arising in a steady, slow stream soon after the regulations were enacted, as they would have been under a rule demanding compensation for prospective regulations only. The smaller number and chronologically diffuse occurrence of such claims would have made compensation more feasible.185 Under Measure 37, however, governments were suddenly subject to demands for compensation by everyone whose property had been restricted after they acquired it over the last several decades. Even had the economic costs of providing compensation for

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183. It is important to note that William Fischel himself supports broader compensation for land use regulations, FISCHEL, supra note 177, at 284–85, but not for reasons that undermine this use of his work. Fischel recommends compensation for land use regulations that demand “supernormal” density, such as ten-acre lots, id. at 272–75, but not because he believes that such restrictions are inefficient for the community imposing them. He writes that local government desires to protect property values undermine regional and state interests in providing housing and preventing sprawl, id. at 229–31, so that local communities should be forced to pay when they wish to impose such restrictions, id. at 274–75. The compensation requirement is thus a way of deterring land use decisions where local and societal interests are not aligned.

184. Akimoff, supra note 166.

185. The lack of allocated funds for compensation was apparently a significant factor in the decision to waive regulations. As an article describing the process in Marion and Polk Counties described, “No county has paid compensation to landowners, because there is no money to do so.” Id. Of course, while the volume of claims made compensation without allocated funds more difficult, it does not explain the failure of local governments to make any attempt to determine if even a limited set of the regulations were worth maintaining.
thousands of claims in a short period not been prohibitive, the administrative costs of rationally deciding between claims would have been. These factors surely stacked the deck in favor of waiver.

But the officials considering Measure 37 claims also had advantages in evaluating the costs of waiver not enjoyed by those considering new restrictions. The land use regime, and the communities it helped to create, already existed; their economic and social benefits were clear. There was also a ready-made source of political support for the regulations among the property owners who would be so vocal in the successful fight to repeal Measure 37.186 One of the witnesses before the Land Use Fairness Committee reported that her community had spent almost $20,000 trying to convince county commissioners that subdivisions claimed under Measure 37 would overwhelm the neighborhood’s water supply;187 another reported that over 700 members of his farming community had signed a petition opposing a Measure 37 claim to begin gravel mining in the area.188 In considering new regulations, in contrast, officials balance the conflicting predictions of planners, environmentalists, and developers about the impact of regulations, rather than evaluating an existing situation. In addition, while under Measure 37 the automatic investment of owners in the status quo favored maintaining the regulations, that popular attachment to the status quo runs against adoption of new regulations. Thus, while some aspects of Measure 37 claims favored waiver, other elements provided more political support for maintaining the regulations than would have existed had the measure’s scope been limited to evaluation of future restrictions.189

C. Paying the Palins

The single case in which a municipality decided to provide compensation is also illuminating. The claim pitted Grover and Edith Palin (no known relation) against Prineville, Oregon. Prineville is a small city in Oregon’s high desert, partly encircled by dramatic rimrock shooting up 300 feet from

186. Even here, however, the public was not effectively mobilized with respect to individual claims. Most county hearings on Measure 37 claims appear to have been unattended except for by the claimant; even in the Prineville Rimrock case no one besides the Palins appeared to testify on the claim. Rachel Scarborough King, Next Steps Uncertain in Prineville M37 Payout, BULLETIN (Bend, Or.), Oct. 25, 2006, available at Rachael Scarborough King, http://rachaelsking.blogspot.com/2006/10/next-steps-uncertain-in-prineville-m37.html (Oct. 25, 2006, 11:04 PST).


188. Letter from Steve Rouse to Joint Special Comm. on Land Use Fairness (Apr. 17, 2007) (on file with author).

189. This intuition regarding the chilling effect on future regulations is borne out by studies of the impact of Florida and Arizona laws demanding compensation for new regulatory restrictions. John D. Echeverria & Thekla Hansen-Young, The Track Record on Takings Legislation: Lessons from Democracy’s Laboratories 8–9, 17–21 (2008) (discussing regulatory chill caused by Florida’s 1995 Bert Harris Act and Arizona’s Proposition 207).
the valley floor. In 1963, the Palins purchased fifteen acres in Prineville that began on the valley floor but sloped upward to include two acres of rimrock land. They built their home in the valley portion, and used the rest to graze their horses. Forty years later, the Palins decided they wanted to build their retirement home on the rimrock overlooking the valley. In 1978, however, Prineville had prohibited construction within 200 feet of the rock face to prevent visual disruption of the ridgeline. The 200-foot setback cut from the Palins' wedge-shaped two acres all but a small triangle of land too small to build on. The couple filed a Measure 37 claim demanding the right to build within the setback area.

Rather than waive the restriction, the City Council decided to pay the Palins $47,000, which the city's appraiser found was the amount by which the building restriction reduced the value of the Palin land. The decision would be understandable for students of public choice theory. Instead of a choice between a determined property owner and a diffuse benefit to the public, or even a determined property owner and a handful of equally determined neighbors, the choice was between a single citizen and a highly visible public symbol. Although even here, as the Palins noted, no one from the community appeared at the council meeting on the claim, in this case the council was well aware of public opinion on the subject. As Councilor Chet Peterson stated, "It was the overwhelming point that the public made to us time and time again, 'We do not want to see homes on the rimrock.'" Rick Steber, a Prineville-based Western writer, later agreed in dramatic terms: "[I]t's almost like a ransom . . . . If you don't pay, I'm gonna kill her—or, in this case, I'm gonna build on it." From a median homevoter perspective, moreover, the decision to compensate in Prineville may be understood as one of those rare restrictions whose

192. King, supra note 186. Grover Palin apparently purchased the land to graze his horses and did not even realize at the time of purchase that it included rimrock land. Id.
193. Id.
194. Preusch, supra note 190.
195. Id.
196. Id.
197. King, supra note 186.
198. Id.
199. Id.
200. Rachael Scarborough King, Prineville To Pay First M37 Claim, BULLETIN (Bend, Or.), Oct. 18, 2006, available at Rachael Scarborough King, http://rachaelsking.blogspot.com/2006/10/prineville-to-pay-first-m37-claim.html (Oct. 18, 2006, 11:22 PST); see also King, supra note 186 (reporting statement of Councilor Bobbi Young: "I think the rimrock is extremely important to this community, it's what defines it and to allow a home built that is a visual blight, if you will, on that rimrock . . . . would be a very tough thing for me to accept.").
201. Kitch, supra note 191.
aggregate benefits, given the community’s reliance on the rimrock view, were enough to both make up for the loss in value of the property base and to directly compensate the Palins.

Equally interesting is the Palins’ reaction to the decision: fury. Economists Timothy J. Brennan and James Boyd have argued that providing compensation for regulatory restrictions may be a way to silence those who would otherwise oppose efficient regulation. Although compensation will mitigate the opposition of some property owners, and is even more likely to undermine public sympathy for their claims, it will clearly not do so in all cases. (The best known recent example of this is Susette Kelo, of Kelo v. City of New London fame, who swept up the nation in a campaign against condemnation of her pink Victorian home despite the constitutionally necessary offer of compensation. Compensation was certainly not enough for the Palins. “It wasn’t the stupid money,” Grover Palin raged, “I didn’t care about that. All I wanted to do is build a house up there.” A month later, the Palins withdrew their initial claim and filed a new one for the right to build a diner and either a motel or condominiums on the entire fifteen acres. “Edith and I wanted a retirement home; we didn’t get it, so now if we don’t get that we might as well see how much money we can get,” Grover said. “I’m looking at pretty close to $5 million.” Edith was equally defiant: “If nothing else, we’re going to give (the City Council members) a headache . . . . We’re not just going to lay down and roll over.” Again, however, the council voted to compensate, this time upping the payout to $180,000.

D. Conclusion

However one explains it, governmental responses to Measure 37 claims provide no support for the theory that requiring compensation will result in more efficient regulation. Except in the unusual Prineville case, officials routinely waived regulations rather than compensate property owners.

204. King, supra note 200.
206. Id.
207. Id.
208. Prineville Writes First Measure 37 Check, supra note 12. The difference in offers was likely not a determination of the value of the parcel with hotel development rights, but rather a resolution of the difference between the city’s appraisal of the land with building rights and a private appraisal the Palins had obtained. See King, supra note 200 (noting that the city appraised the land at $60,000 with development rights, and $12,340 without, while the Palin’s appraiser valued the land at $195,000 with development rights).
209. Prineville Writes First Measure 37 Check, supra note 12.
These waivers created a patchwork of regulated and unregulated land that undermined all beneficial effects of land use planning. Although some of the pressures on officials in deciding these claims were unique to Measure 37, other factors supporting a choice to maintain the regulations existed that would not be present in a compensation requirement for newly enacted regulations. But while these piecemeal waivers were almost certainly inefficient, they were nevertheless understandable, even predictable, whether one believes the decision makers acted to maximize political power or to serve the interests of the community as a whole.

IV. WHAT OWNERS DESERVE—COMPENSATION, VALUATION, AND FAIRNESS

Even if compensation does not improve the efficiency of land use decisions, it may be necessary as a matter of fairness and justice. As Michael Heller and James Krier have noted, compensation requirements serve both deterrence and justice interests, and the two are not necessarily aligned.210 A governmental action may be efficient, yet justice may nevertheless demand that society rather than the individual bear the costs.211 Indeed, while much recent legal scholarship dwells on the efficiency effects of compensation requirements, both the Supreme Court and popular discourse focus instead on the fairness concern.212 As Justice Oliver Wendell Holmes declared in Pennsylvania Coal, the question is usually not whether the need for the action exists but “upon whom the loss of the changes desired should fall.”213 Or, in the words of Dorothy English, “If the majority wants to save this stuff, then the majority should pay for it.”214

There are two difficulties in determining what owners are entitled to as a matter of justice or fairness. The first difficulty lies in measuring the losses caused by regulatory actions. These difficulties were highlighted by the Measure 37 claims and the research they catalyzed.215 As this section discusses, one cannot accurately assess the relevant net social impact of

211. I use the Kaldor/Hicks definition of efficiency, the definition most commonly used in legal analysis, which defines an action as efficient if its benefits outweigh its costs. Cooter & Ulen, supra note 10, at 47–48. To be Pareto efficient, the action would have to make society better off without making any individual worse off and, therefore, would always require compensation of the losses of any individual. Id. at 17.
governmental actions if one fails to account for the way such actions enhance the value of the regulated property itself by providing valuable amenities, preventing harmful externalities, and creating scarcity effects that increase demand for unrestricted property.

The second difficulty is in determining what fairness itself requires. Does justice give individuals claims against the state for whatever economic losses its actions cause? Most would agree that an owner has no fairness-based claim against the state for the economic losses caused because he cannot grow marijuana on his land, but does have a claim as a matter of justice if his home is taken to build a highway. In between, the questions are harder to answer. Measure 37 raised one particular form of this question: assuming that an owner accurately calculates the opportunity costs of a regulation, does justice compel the state to pay this entire amount if the owner is still making a healthy profit on the restricted land? Many of the Measure 37 claims were for properties whose value with restrictions in place had multiplied several times since their purchase; the owners complained, however, that the property would be worth even more without the restrictions. As discussed further below, it is not clear that fairness demands compensation for the difference.

A. The With-and-Without Measure of Justice

In assessing the impact of land use restrictions, owners and courts typically calculate the difference between the value of the land with the restriction and its value if it could be developed as the owner wished to use it. This was the standard measure of loss used by Measure 37 claimants. Dorothy English, for example, claimed compensation for the difference between the value of her land as a single parcel ($339,000) and subdivided into eight parcels ($1.15 million)—a difference of $811,000. Grover and Edith Palin did the same, initially demanding $180,000 for the loss they claimed the 200 foot setback imposed on their rimrock property. Notably, appraisers for Prineville and the Palins differed radically on their estimates of the value lost, and it is not clear which appraisal was more accurate.

The Supreme Court uses this measure of loss as well. In one of the first regulatory takings claims, Village of Euclid v. Ambler Realty Co., the 1926 case that upheld the constitutionality of zoning laws, the Court described the affected parcel as worth $10,000 per acre if developed for commercial and industrial purposes, but $2500 per acre if limited to

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216. See, e.g., ATIYEH REPORT, supra note 53, at 4 (discussing Claim M119803, which demanded $9.5 million in compensation for the difference in value between claimant’s fifty-four acres used as farmland and divided into ninety-seven half-acre lots).


218. See King, supra note 200; cf. Serkin, supra note 215, at 683 (noting that even with the same appraisal techniques appraisers can reach “wildly different results”).

residential purposes. Much later in a 2001 Supreme Court case, Anthony Palazzolo would claim $3,115,000 from Rhode Island based on the amount he alleged his wetland property was worth if it could be filled and developed into seventy-four quarter-acre homesites as he wished, versus the $200,000 in value he would retain if not. Such differences—a seventy-five percent loss in Euclid and a ninety-four percent loss in Palazzolo v. Rhode Island—lead commentators to decry the unfairness of making the individual rather than society bear the burden of “paying for the change.”

As Oregon economists William Jaeger and Edward Plantinga argued in papers analyzing Measure 37, such calculations measure only the negative impact of the restriction, holding all other effects of governmental action constant. They fail to account, for example, for governmental contributions to the value of the land, what law professors have called “givings” and economists call “amenity effects.” The value of Oregon’s low-density residential land was surely enhanced by its proximity to green open spaces protected by its zoning laws. As many of the claimants’ neighbors testified, the development restrictions were responsible for creating the communities they chose to live in. Similarly, owners’ contributions towards financing governmental water, waste disposal, and road systems would reflect the degree of demand on such systems.

Land may also benefit from its relationship to other governmental amenities that are unavailable to properties not so situated. Palazzolo’s Rhode Island waterfront property, for example, gained much of its value from its proximity to Misquamicut State Beach, a popular government-owned and maintained recreation spot. The Carolina barrier island property of David Lucas, another takings plaintiff who took his case to the

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220. Id. at 384.
221. Palazzolo v. Rhode Island, 533 U.S. 606, 616 (2001). It appears, however, that Anthony Palazzolo could not have developed the land as he wished even without the wetlands laws; during the litigation the Town testified that zoning laws prohibited dividing eighteen acres into seventy-four homesites. Palazzolo v. State, 746 A.2d 707, 715 n.7 (R.I. 2000), rev’d, 533 U.S. 606.
222. 533 U.S. 606.
226. JAEGER & PLANTINGA, supra note 13, at 2; Serkin, supra note 215, at 695–96.
227. For example, a recent report by Oregon Land Watch calculated that the costs of providing infrastructure and municipal services vastly outweigh tax revenue and other benefits for Oregon’s planned “destination resorts,” for which the Legislature has relaxed development restrictions. EBEN FODOR, FISCAL AND ECONOMIC IMPACTS OF DESTINATION RESORTS IN OREGON (2009), available at http://www.centraloregonlandwatch.org/files/Destination%20Resort%20Impact%20Study%20Revised.pdf.
Supreme Court, was valuable for residential purposes only because of governmental development of infrastructure on the island and the subsidized flood insurance and reconstruction assistance provided for properties destroyed in hurricanes.\textsuperscript{229} As farmers in exclusive farm use areas testified in the Measure 49 hearings, their land value benefited not only from the lack of conflicts with residential uses, but also from the supply of other agricultural land suitable to purchase when expansion became necessary\textsuperscript{230} (and, presumably, the preservation of a market for their land when sale was demanded).

Most Measure 37 claimants were also direct beneficiaries of governmental largesse. The 1973 land use laws provided owners of property zoned for farm and forest uses with significant tax benefits by assessing their land at special assessment rates.\textsuperscript{231} Between 1974 and 2004 municipalities gave up $4.8 billion in tax revenues from these agricultural and forestlands.\textsuperscript{232} These tax benefits, moreover, were capitalized into the prices for specially assessed parcels, increasing the price for which they sold.\textsuperscript{233} None of this public investment in the maintenance of farm and forest lands was incorporated in the damages asserted by Measure 37 claimants. While these effects will not always outweigh the losses caused by land use restrictions,\textsuperscript{234} they must be incorporated in any assessment of what society owes an owner as a matter of fairness.

An even more fundamental error was the failure to account for the scarcity effect created by the land use restrictions. Recall that Measure 37 claims were available only to those who had acquired the land before the restrictions were imposed. Under its waiver provisions, therefore, individual parcels were suddenly permitted to engage in high-density development while restrictions on surrounding properties remained the same. As the only properties with such development rights, their value was much higher than it would have been had zoning law permitted subdivision

\textsuperscript{229} Vicki Been, \textit{Lucas v. the Green Machine: Using the Takings Clause To Promote More Efficient Regulation?}, in \textit{PROPERTY STORIES} 299 (Gerald Komgold & Andrew P. Morriss eds., 2009).

\textsuperscript{230} See, e.g., Hearing, supra note 96 (statement of Gary Conklin, Oregon Winegrowers Association).


\textsuperscript{233} In some cases, the governmental investment was even more specific. Gary Rhinhart, a wheat farmer, testified to the Land Use Fairness Committee that most of the owners of lands subject to Measure 37 claims in his area were paid by the federal government to have their land planted with grass to protect water quality and protect wildlife habitats. “I see no way they lost any value,” he declared, “as they watch the grass grow.” Hearing, supra note 96 (statement of Gary W. Rhinhart).

\textsuperscript{234} As discussed below, however, a study comparing properties in Oregon and Washington suggested that, perhaps as a result of these amenity effects, restricted property was actually more valuable than similar property without such restrictions. \textit{JAEGGER & PLANTINGA, supra} note 13, at 2.
of all surrounding properties. By failing to incorporate these scarcity effects into their claims, Measure 37 claimants were effectively demanding compensation as if they were entitled to a government-created monopoly to develop land in the area.

Although it is relatively easy to calculate direct tax subsidies to the property owner, calculating the amenity and scarcity impacts of governmental actions would be a Sisyphean task. While restricting development of one’s property reduces its value, the scarcity of development rights of surrounding properties enhances it. How can the negative impact of the restriction and the positive impact of the scarcity be separated? Amenity effects pose a similar problem. How does one calculate the value of neighboring open space to the property? The impact of a thriving agricultural industry? The lack of exposure of residences to agricultural noise and smells? The lack of restrictions on farmers by unhappy homeowners? The reduction in sprawl with its increase in traffic and costs in road maintenance? Although one could create an economic model to attempt to do this, it would be difficult to have much faith in the results of such a complicated counterfactual model.

Rather than seeking to account for such factors in the abstract, property valuations are largely derived through analysis of prices fetched at recent sales for similar properties. Such prices will reflect the increase in the value of the land due to the availability of public services, nearby amenities, land use coordination through zoning, as well as the deductions due to land use restrictions. But because entire regions in Oregon—indeed, all properties in the state—are affected by the comprehensive land use scheme, there is no comparable property in the state. As Plantinga noted in 2004, these difficulties are very different from those presented in physical takings cases. Where a parcel of land is condemned, appraisers assess the value of an existing property in an existing market. To determine what the value of the property would be in the absence of regulations, in contrast, is to measure the value of an “unobservable hypothetical.”

237. Elli Pagourtzi et al., Real Estate Appraisal: A Review of Valuation Methods, 21 J. PROP. INVESTMENT & FIN. 383, 386–88 (2003). This is the gold standard in determining compensation for property as well. See United States v. 50 Acres of Land, 469 U.S. 24, 30 (1984) (stating that where there is a “robust market” for similar properties, the comparable price method is to be preferred); United States v. New River Collieries Co., 262 U.S. 341, 345 (1923) (“If it be an article commonly traded in on a market and it is shown that at the time and place it was taken there was a market in which like articles in volume were openly bought and sold, the prices current in such a market will be regarded as its fair market value and likewise the measure of just compensation for its requisition.”) (quoting United States v. New River Collieries Co., 276 F. 690, 692 (3d Cir. 1921)).
239. Id.
In order to overcome this problem, Plantinga and Jaeger joined to look over the border to similar areas in the State of Washington. While Oregon adopted land use regulations in 1973, Washington did not do so until 1990; even then its regulations were less centralized and less stringent, and were not fully implemented for another decade. Plantinga and Jaeger first chose three Oregon counties, two (Lane and Jackson counties) to the west and one (Baker) to the east of the Cascade Mountain range that divides the state. They then chose one western Washington county (Lewis) and one eastern Washington county (Kittitas) based on their similarity to the Oregon counties with respect to presence of urban centers, population and income growth, agriculture, climate, and other factors. Within the counties, parcels were divided according to whether they were inside or outside urban growth boundaries, and for the western counties according to their zoning category. For the eastern counties, only agricultural properties were selected. Purchase prices of parcels within the counties were then analyzed for each several-year period between 1972 and 2002. In the western counties, after adjusting for inflation, land values in the Oregon counties increased at a significantly greater rate than those in the Washington county, appreciating by 397% in Lane and 416% in Jackson, as opposed to 349% in Lewis County. The difference was even more striking with respect to lands outside urban growth boundaries, particularly for those restricted to exclusive farm use, where the appreciation was 456% and 533% in Lane and Jackson Counties, but 293% in Lewis County. Appreciation in the eastern counties was far more similar. The final average growth in Washington’s Kittitas County was higher than in Oregon’s Baker County (69% growth versus 6% growth), a difference the authors explain by their small sample size, but the growth in median land value was identical.

The Jaeger and Plantinga study is hardly proof of the impact of land use restrictions—as varying growth rates across the counties themselves show, many factors other than land restrictions play roles in land appreciation. But the study also provides no evidence that the restrictions seriously impede land appreciation in Oregon, and may even suggest that it enhances that value. If this is the case, why does fairness demand owners be

240. JAEGER & PLANTINGA, supra note 13, at 6.
241. Id.
242. Id.
243. Id.
244. Id. at 7.
245. Id.
246. Id.
247. Id. at 22.
248. Id.
249. The authors explain that this variation is due to the small and varying sample of Baker County properties. Id. at 24. They also note that data compiled by the USDA Economic Research Service suggest that farmland in Oregon has increased in value at rates comparable to those in neighboring states and higher than the national average. Id. at 26.
compensated for profits they claim they could realize in a hypothetical, perhaps inaccurately imagined, alternative property regime?

B. The Before-and-After Measure of Justice

In crafting Measure 49, legislatures heeded Jaeger and Plantinga’s concerns, and the testimony of others based on them, and sought to rein in exaggerated loss claims by land owners. To build more than three houses or to claim loss due to future restrictions, owners must provide appraisals of the value of the property one year before the enactment of the restriction claimed to have caused the loss and one year after its enactment. While this measure prevents the monopoly value claims made by Measure 37 claimants, it contains other difficulties and fails to resolve deeper fairness concerns in measuring compensation.

First, this measure raises practical concerns. Assuming that owners do not have their property appraised every year, appraisals—never an exact science—will still be subject to both the distortions of litigation and those of comparing prices fetched for properties perhaps years before. Second, this measure assumes that any changes in value are due to land use restrictions that give rise to the claims. As recent years have poignantly shown, property can drop in value due to market fluctuations rather than governmental actions. Similarly, measuring loss according to appraisals conducted two years apart subsumes any market-based appreciation to mitigate any losses caused by the restriction. In other words, unless the appraisal also incorporates the change in value in all properties (resurrecting the scarcity and amenity problems) governments that enacted restrictions at the cusp of a housing collapse would find themselves compelled to compensate owners for those losses as well, while those that enacted regulations at the inception of a housing boom would have to compensate owners little, if at all.

A deeper problem with this two-appraisal method is the stark chronological line it draws between restricted and unrestricted property. Zoning rarely radically contradicts existing land use; rather, it seeks to preserve and protect what is already valuable about the character of the neighborhood and prevent change that threatens that value. At the time a restriction is enacted, in other words, it reflects the dominant and valued use of property in a community. This has both economic and fairness implications. Economically, both scarcity and amenity effects likely already exist. In a farming and low-density residential community on the

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252. As owners have five years from the date of the enactment of the regulation to file a compensation claim, these appraisals may involve estimating the value of a property as much as six years prior. Id. § 195.312(4).
EVIDENCE FROM THE OREGON EXPERIMENT

verge of coming within reach of sprawl, for example, the value of a property subdivided in smaller parcels is likely higher because of the limited property put to such uses and the bucolic open spaces surrounding it. The zoning law, by fixing existing low-density development and open space, simply removes the ability of the claimant to take disproportionate advantage of these effects in order to preserve them for the community as a whole.254

This observation leads directly to the fairness concern. By measuring change in value as of the date the formal restriction is imposed, the Measure 49 calculation of compensation means that the community as a whole must pay the claimant for foregoing the opportunity to violate the existing use patterns that constitute the character of the community. Such claimants seem more like Oliver Wendell Holmes’s proverbial bad man, willing to do whatever law permits that will gain him advantage,255 than hapless poster grandmas. The bad man is surely a useful figure in legal analysis but is hardly a compelling claimant of societal compensation as a matter of fairness and justice.

C. The Role of the Return on the Owner’s Investment

If neither the with-and-without or before-and-after measures fully capture the loss the individual can fairly claim against society, this raises questions of what other measures should be considered. In particular, what role should the return on the owner’s investment play in determining the justice or her claim against the state? In no case did the Measure 37 claimants allege that the restrictions had reduced the value of the property beyond what they had paid for it. Property values in the western counties Jaeger and Plantinga studied multiplied four times between 1972 and 2002; the value of properties zoned for exclusive farm or forest use appreciated at even greater rates.256 Dorothy English’s property in the hills west of Portland appreciated even more. She and her husband had purchased the thirty-nine acres for $4500 in 1953.257 In 1974, they sold eleven acres for $26,400, and in 1977 sold another nine acres for $27,000,258 effectively reducing her investment in the remaining nineteen acres to $2250. Although land use regulations prevented further division of that parcel, at the time her face and voice were mobilizing Oregon’s voters the assessed value of the land was $339,000,259 150 times that initial investment, or 21 times in equivalent dollars. She had, moreover, already realized an elevenfold return on the land from the sales in the 1970s. Does fairness

254. In addition, as Professor Christopher Serkin points out, the risk of a pending restriction may be reflected in the cost of property for some time before the formal adoption of a zoning change. See Serkin, supra note 215, at 697–99.
256. Jaeger & Plantinga, supra note 13, at 22.
258. Echeverria & Hansen-young, supra note 72, at 53.
259. Oppenheimer, supra note 14.
really require that society pay her for restrictions that prevented her from realizing an even greater profit on her land?

D. Conclusion

As they did for the concept of property rights, the debates generated under Measure 37 and 49 highlighted the difficulty with demanding compensation as a matter of fairness. In contrast with permanent physical takings, in which the claimant loses the land altogether, governmental action impacts land value in multiple ways. A simple “with and without” calculation of the impact of any land use restriction—the standard measure for calculating loss alleged in takings cases and by Measure 37 claimants—may unfairly allow the claimant to demand societal compensation even if the same action has actually increased the value of the property. While less subject to abuse, the chronologically specific “before and after” assessment tool adopted under Measure 49 treats change in property value as reflecting effects of a single regulation and raises broader questions about whether fairness truly requires compensation for owners willing to violate dominant uses of land in an area. In addition, the evidence regarding tremendous returns on owner investments with the restrictions in place leads to questions of whether such owners are truly deserving of compensation as a matter of justice. In the same way that claims for compensation based on rights and efficiency arguments faltered under the Measure 37 regime, fairness demands regarding the allocation of loss proved less convincing as well.

V. IMPLICATIONS OF THE OREGON EXPERIMENT

Advocates of greater compensation for regulatory restrictions on property use often assert some mix of three different claims. First, restrictions on the use of property take property rights and so demand a remedy; second, requiring compensation makes governments internalize the costs of their actions and therefore promotes efficient regulation; and third, restrictions undermine the value of property in ways that it is unfair to make the owner bear alone. The experience under Measure 37 challenges each of these assumptions in important and related ways. First, with respect to property rights, the Oregon experiment underscored the degree to which property rights, as understood by the public, depend on governmental regulation as much as they are restricted by them. Next, with respect to the cost-internalization argument, Measure 37 provided powerful evidence that compensation requirements deter governmental regulation, but seriously called into question the corollary that more efficient regulation will be the result. Finally, with respect to the just-compensation argument, Measure 37 raised even more questions regarding what compensation justice truly requires. This Part uses each of these facets of the Oregon experiment to reflect on broader debates about compensation for regulatory restrictions.
A. Property Rights

The most powerful popular argument for increased compensation for regulatory restrictions is that they deprive owners of property rights. Although the argument that use restrictions are included within the protection of the Takings Clause finds little support in the original understanding of the clause, the Court has repeatedly recognized the right to use as one of the sticks in the bundle of rights that together comprise "property." More important, this notion of property rights initially deeply resonated with owners and voters. If "property," as one of the less famous Founders famously declared, "is the guardian of every other right," deprivation of property rights strikes hard at the individual sense of the democratic compact. And as the Oregon legislature saw in the debates over Measure 49, there is something about property rights that stirs public opinion and passion as few other things can.

These same debates, however, highlighted the extent to which there are real, felt rights on both sides. The Supreme Court has long recognized that legislatures are empowered to restrict use to resolve conflicts between property rights without compensation. Although this power is not

260. See, e.g., Epstein, Takings, supra note 35, at 10–12, 57 (using Lockean conception of natural rights of individual against sovereign to argue that any governmental diminishment of the rights of the owner that would not be permitted a private individual at common law is within the scope of the Takings Clause); Steven Geoffrey Gieseler, Leslie Marshall Lewallen & Timothy Sandefur, Measure 37: Paying People for What We Take, 36 Envtl. L. 79, 82 (2006) ("Property is part of a familiar triad—along with life and liberty—that has as its essence the right to self-actualization. The reason that a traditional condemnation requires compensation is that it unfairly deprives a person, without her consent, of the right to use her faculties as she sees fit. Regulatory takings are no different.").


264. See Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1024 (1992) ("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." (internal quotation marks omitted)); Miller v. Schoene, 276 U.S. 272, 279 (1928) ("[T]he state was under the necessity of making a choice between the preservation of one class of property and that of the other wherever both existed in dangerous proximity. . . . When forced to such a choice the state does not exceed its constitutional powers by deciding upon the destruction of one class of property in order to save another which, in the judgment of the legislature, is of greater value to the public.").
limited to prohibitions of nuisances, some have suggested that legislative prohibitions that do not replicate nuisance law or other common-law prohibitions on title demand compensation. The Measure 49 debates showed that owners' commonsense understanding of their rights in property went much further than this. It included far more than a narrowly Lockean freedom of action plus a few background common-law principles preventing unreasonable harms. Rather, it was the product of the complex web of neighbor, community, and governmental action as well. Oregonians insisted on their rights to maintain those restrictions and prevent their neighbors from using their property to transform their communities, even when the planned uses were far from nuisances or activities with an impact on public health and safety. This effect provides support to claims that a "social relations" or "propriety" understanding of property plays an important part of the public consciousness and legal tradition.

Importantly, however, this understanding was not initially part of most owners' intuitive sense of property rights. Rather than a conflict between property rights, the 2004 vote on Measure 37 was seen largely as a contest between property rights and environmental and administrative interests, with predictable results. It took the absence of the background rules of social coordination for owners to see that these too comprised part of their property. Once those stories were known, however, they powerfully motivated voters, deciding not only Oregon's 2007 election, but also the 2006 elections in Washington, California, and Idaho. In invoking the

265. Miller, 276 U.S. at 280 ("We need not weigh with nicety the question whether the infected cedars constitute a nuisance according to the common law; or whether they may be so declared by statute."); see also Goldblatt v. Town of Hempstead, 369 U.S. 590, 593 (1962) (stating in case upholding challenge to ordinance prohibiting future mining at a quarry that it was not of controlling significance "that the use prohibited is arguably not a common-law nuisance"); Reinman v. City of Little Rock, 237 U.S. 171, 176 (1915) (holding in case rejecting challenge to ordinance barring operation of existing livery stable that "the argument that a livery stable is not a nuisance per se ... is beside the question" and the only limitation on the municipal power was that the "power [could not be] exerted arbitrarily, or with unjust discrimination").

266. See, e.g., Epstein, Takings, supra note 35, at 36 ("On Lockean principles the government stands no better than the citizens it represents on whether property has been taken, so a simple test determines, not the ultimate liability of the government, but whether its actions are brought within the purview of the eminent domain clause."); see also Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 145 (1978) (Rehnquist, J., dissenting) (arguing that historic preservation ordinance preventing building above a certain height wrought a taking because the ordinance did not prohibit a nuisance); cf. Lucas, 505 U.S. at 1029 (holding that where a restriction wipes out all economic benefit of land the limitation demands compensation unless it inheres in the title of the land via nuisance or other common law principles).


269. See supra notes 114–36 and accompanying text.
“expectancies embodied in the concept of ‘property,’” therefore, both legislatures and courts should recall that they include a reliance on government action to preserve community conditions, but that this expectation will rarely—unless the threat to those regulations becomes concrete—become conscious. Further they should recognize that if (as the subsequent section will discuss) compensation requirements significantly reduce the likelihood of governmental restrictions, in effect the compensation requirement will result in deprivation of the property rights of some to vindicate the rights of others.

B. Efficiency

If populist arguments focus on rights, economic arguments focus on the efficiency effects of requiring compensation for regulatory restrictions. The experience under Measure 37 provided support for those who argue that requiring compensation will not necessarily increase regulatory efficiency. While the unique nature of the Oregon experiment—the flood of compensation requests for already enacted regulations—limits the general applicability of its results, these results correspond to both theories about governmental behavior and the experience of jurisdictions with solely prospective compensation requirements. Compensation requirements clearly did deter land use restrictions, but without any calculation of the social good those restrictions produced. If compensation simply deters without improving, the relevant question shifts to whether the legal system should systematically deter all land use regulation, or whether there are particular actions that are especially suspect and whether this subset can be addressed through more narrowly tailored measures.

Some, of course, would argue that governmental regulation in general is inefficient interference with market processes, so that anything that reduces such regulation is desirable. Compensating property owners directly, however, is only a blunt and inefficient tool to achieve this end. In Oregon, for example, compensation requirements (not surprisingly) resulted in an abundance of expensive red tape. Firm opponents of regulation may desire more direct and less expensive means of achieving their ends, such as supermajority requirements for land use legislation or government-mandated studies of their costs and benefits. Still, the effectiveness of the compensation requirement of undoing regulatory restriction in Oregon (at least until voter revolt) may be appealing to this group.

All but the most committed free-marketeers, however, recognize the necessity of some regulation and seek instead simply to achieve better

271. ECHEVERRIA & HANSEN-YOUNG, supra note 72, at 8–9, 17–21 (providing examples of the chilling effect that Florida and Arizona prospective compensation laws have had on passage and implementation of land use restrictions).
272. Cf. Heller & Krier, supra note 35, at 1006–09 (suggesting that in some cases a general distribution rather than specific distribution to the harmed individuals may be the best way to achieve deterrence).
regulations. If a general compensation requirement will not have this salutary effect, concerned policy makers might more profitably turn to reforms designed to address specific weaknesses in land use regulation. Is the concern really about governmental imposition on discrete insular minorities? Policy makers might then wish to protect and enhance the ability to bring disparate impact challenges to zoning decisions. Is the concern about domination of the political process by well-connected individuals? Policy makers might act to improve the procedural fairness and transparency of decisionmaking processes, or apply heightened scrutiny to decisions whose circumstances suggest particular concerns along these lines. Or is the concern that NIMBY-ism will lead municipalities to enact low-density requirements that exclude the poor and encourage sprawl? States might then modify their zoning enabling acts to address these issues directly, by requiring municipalities to include a certain amount of high-density zoning within their borders or, as Oregon does, by largely confining housing to Urban Growth Districts. One might even try to take advantage of the quasi-market processes of pollution cap-and-trade systems, by allowing communities to pay to purchase exemptions from higher density requirements from other municipalities.

None of these proposals will be attractive to those whose primary concern is making zoning decisions more like the cost-benefit calculus of market decisions. The problem is that general compensation requirements do not have this effect either. Indeed, to the extent that some regulations do go forward, they will likely, as Measure 37 did, add layers of inefficiency to an already imperfect process. If the Measure 37 effect is generalizable outside its circumstances, it suggests that those concerned with land use regulations should focus directly on the sources of their concern, rather than on the unwieldy and ineffective remedy of widespread compensation.


274. Compare City of Cuyahoga Falls v. Buckeye Cmty. Hope Found., 538 U.S. 188 (2003) (holding defendant city was entitled to summary judgment on claim that by first enacting ordinance permitting building of low income housing complex, then revoking ordinance after voter-led initiative, city violated Fourteenth Amendment), with Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926 (2d Cir.), aff'd, 488 U.S. 15 (1988) (holding that zoning plan limiting multiunit housing to largely minority neighborhoods had disparate impact in violation of the Fair Housing Act), and Dews v. Town of Sunnyvale, 109 F. Supp. 2d 526 (N.D. Tex. 2000) (holding that low-density zoning plan had illegal disparate impact against minorities and was motivated by discriminatory intent).

275. Justice Kennedy has suggested more stringent review along these lines for improper influence in eminent domain for economic development. Kelo, 545 U.S. at 493 (Kennedy, J., concurring); see also FARBER & FRICKEY, supra note 173, at 72 (arguing that public choice theory suggests there should be a “safe harbor” for governments against takings challenges where the action burdens a powerful and well-defined group to provide a diffuse societal benefit).

276. Such a solution may well, of course, fail to address the concentration of low-income voters in particular municipalities but would both make communities bear the costs of their exclusionary decisions and provide an effective substitute for property taxes for higher density locales.
C. Fairness

If rights and efficiency do not resolve the regulatory takings muddle, we are left with perhaps the thorniest problem of all—when fairness demands a public remedy for individual losses. The experience under Measure 37 spoke to this problem only indirectly, by questioning how to fairly calculate loss. Evaluating loss is complex even for physical takings, and answers to the question often entail resolution of the broader questions inherent in takings law itself.\textsuperscript{277} Determining whether and what compensation is demanded for regulatory restrictions is even more challenging, as it is far less clear what protection owners are entitled to demand against regulatory change. This section does not seek to resolve these questions, but simply shows the ways debates over compensation under Measure 37 underscored the old concepts of “reciprocity of advantage”\textsuperscript{278} and legitimate “investment-backed expectations”\textsuperscript{279} in evaluating land use restrictions.

In legislating that compensation was required for zoning laws, Measure 37 and laws like it went beyond what even the most procompensation scholars and jurists have argued that justice demands.\textsuperscript{280} It is generally accepted that land use restrictions enforced across neighborhoods ensure an average reciprocity of advantage that undermines claims to compensation against the state.\textsuperscript{281} Research catalyzed by Measure 37 emphasized why this is so: general regulations produce both amenity and scarcity effects that substantially mitigate any claims of injustice. While it will often be difficult, if not impossible, to fully calculate the net effect of all governmental actions on a single parcel, this very complexity suggests that such regulations “simply ‘adjust[] the benefits and burdens of economic life’” rather than cause a compensable taking.\textsuperscript{282}

But the Measure 37 experiment evaluation of compensable losses raised questions that challenge not only state legislative measures but debates in the Supreme Court as well, by exposing the difficulties of fairness demands that do not incorporate the reasonable return on the owner’s investment in the property. The most visible Measure 37 claimants had used their property for the purpose for which they had purchased it for many years, and its value had increased to many times their initial investment. Does justice demand public recompense if subsequently enacted regulations

\textsuperscript{277} Serkin, \textit{supra} note 215, at 742; \textit{see also} Michelman, \textit{supra} note 35, at 1167.
\textsuperscript{278} Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).
\textsuperscript{280} \textit{See}, \textit{e.g.}, \textit{id.} at 139–40 (Rehnquist, J., dissenting) (distinguishing between landmark law and zoning laws whose burdens were justified by an average reciprocity of advantage); \textit{Epstein, Supreme Neglect, supra} note 35, at 99–100 (distinguishing between regulations that impose disproportionate burdens on a few and those that impose reciprocal burdens and benefits and presumptively do not require compensation).
\textsuperscript{281} \textit{Penn Cent.}, 438 U.S. at 140.
\textsuperscript{282} Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1017 (1992) (quoting \textit{Penn Cent.}, 438 U.S. at 124); \textit{see}, \textit{e.g.}, \textit{Pa. Coal}, 260 U.S. at 413 (“Government 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.”); \textit{Epstein, Supreme Neglect, supra} note 35, at 99–100.
prevent them from realizing more profit still? Or does the fact that the most valuable use of the land has shifted to one that was not sufficiently profitable at the time of purchase, but is not legal at the time of desired development, violate the implicit bargains property owners make with the state? Outside Oregon, these questions frequently arise with respect to wetlands litigation, which often involves owners who have purchased large tracts of land, sold or developed upland portions of it, and now seek compensation because the law prohibits them from developing the remainder that has only now become profitable to fill.283 In such cases it seems that the problem of postacquisition regulation arises precisely because the state is sensibly acting to prevent an increasingly problematic land use that would not have been economically feasible for the owner to exploit before.

Seen this way, the regulatory change looks far less like an unjust burden than the expected action of the government in managing changing demands on the land. This is not to say that governments cannot seek to ameliorate the impact of their actions on owners. Indeed, some financial recognition may be necessary to secure the passage of restrictive legislation. In Oregon, the State gave up substantial tax revenue for lands in exclusive farm or timber use.284 In New York, the City provided landmarked buildings with the ability to sell their development rights to properties that wished to build above general height limitations.285 In Rhode Island, Palazzolo could have made an open-space gift of his wetlands property to generate as much as $157,500 in federal tax deductions.286 But these benefits need not directly match some ill-defined measure of loss caused by the regulations, nor is there a clear argument that basic fairness demands it.

VI. CONCLUSION

Takings law is a famously irresolvable puzzle. It involves “fundamental questions of political life,”287 invoking directly the relationships between the individual, the community, and the state, between the home and the marketplace. It would be hard for one short-lived popular initiative to solve the continuing conundrum of when and what governments must pay owners in regulating their land. But the Oregon experiment, limited as it was,
provided on-the-ground evidence to help future legislators, courts, and scholars move beyond abstract theory and see a radically different approach to regulatory restrictions in practice.

By turning the constitutional approach to regulatory takings on its head and requiring compensation for all losses due to postacquisition regulation, the Oregon experiment allows us to look at property through a new lens. Through this lens, classic arguments regarding rights, efficiency, and fairness were upended as well. It was government action—not freedom from it—that protected owners’ rights to their castles; compensation requirements did not lead to efficient land use regulation but simply shut it down; and even claims to unjust losses seemed hollow, attempts to hold communities hostage to reap unexpected windfalls from their investments.

The lessons to be drawn from this new perspective appear little different from the current jurisprudence in the Supreme Court, which seems to acknowledge that governmental regulation is incorporated in an owner’s expectancies with regard to property and that compensation requirements will often prevent beneficial governmental action. Even the Court’s *Lucas v. South Carolina Coastal Council* decision, bemoaned as creating a categorical rule for certain regulatory takings, has arguably catalyzed greater attention to the background principles that limit all owners’ justifiable expectations in their property. There is nevertheless no consensus, either on the Court or in the public arena. The Supreme Court’s decisions rejecting regulatory takings claims are marked by sharp dissents, and popular revolts against laws perceived as unjust have had even more success in state legislatures.

The lessons of the Oregon experiment speak to those who sympathize with these movements, recognizing the validity of governmental regulation, but concerned about the rights of those subject to its burdens. These lessons make clearer that the choice is often not between regulation with compensation and regulation without but, rather, between regulation and no

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288. See, e.g., id. at 1396–97 (describing longstanding judicial consensus that supports “broad governmental authority to adjust the benefits and burdens of economic life” and “commitment to ad hoc factual inquiry”); Joseph William Singer, *The Ownership Society and Takings of Property: Castles, Investments, and Just Obligations*, 30 Harv. Envtl. L. Rev. 309, 327–28 (2006) (describing the years since Lucas v. South Carolina Coastal Council as ones in which “the heart of regulatory takings law seems to have been taken over by the investment or ‘justified expectations’ model”).


regulation. They suggest that losses claimed are often not part of what an owner can justifiably assert as her rights. Most important, they indicate why this is so: property rights depend on the actions of one's neighbors, one's community, and one's government in seeking (however imperfectly) to protect them.