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Playing the Takings Game: How Government Regulates Away Property Rights

by Timothy Sandefur, Staff Attorney, Pacific Legal Foundation

EXECUTIVE SUMMARY

The U.S. and Arizona constitutions require government to compensate property owners whenever it seizes their land. However, government often passes laws and regulations that depress property values or completely prevent the use of private property, essentially taking the property without explicitly taking title to it. In these instances, loopholes in judicial interpretation of the constitution often allow government to escape having to compensate property owners. These “regulatory takings” became so severe in Oregon that, in 2004, voters overwhelmingly approved a law called Measure 37, which required the government to pay people whenever it conscripted their land for public purposes, even if it did not seize the title outright. This law followed an earlier attempt, called Measure 7, which, despite overwhelming popular approval, was deemed unconstitutional in 2002 by the Oregon Supreme Court. But in February 2006, the court upheld Measure 37, leading many defenders of private property rights to hope that similar reform might be possible to protect home and business owners in other states.

In this report, Timothy Sandefur, author of the forthcoming book *Cornerstone of Liberty: Property Rights in 21st Century America* (Cato Institute), examines whether a regulatory takings law could be enacted in Arizona. Arizona courts, like courts across the nation, have neglected the importance of compensating property owners when the government prohibits them from using their land. Although the state judiciary has acknowledged that owners may be due compensation, it has required compensation only in those instances that “[destroy the] economic value” of a piece of property “or all but a bare residue of its value.”¹

There are several legal and political obstacles on the road to restoring protection of property rights. But in the end, this is an issue of basic fairness: government should pay people for the things it takes from them—whether it takes them outright or in the form of a land use limitation.

Playing the Takings Game: How Government Regulates Away Property Rights

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To protect owners against seizures but not against restrictions on use would be what American jurist Roscoe Pound described as “formalism,” or “mechanical jurisprudence,” which elevates form over substance and allows government to use technicalities to escape the law’s requirements.

What Are Regulatory Takings?

Like the Fifth Amendment to the U.S. Constitution, Article 2, Section 17 of the Arizona Constitution forbids the government from taking a person’s property for public use without paying just compensation. As U.S. Supreme Court Justice William Paterson explained in 1795, this requirement reflects the principle that “every person ought to contribute his proportion for public purposes and public exigencies; but no one can be called upon to surrender or sacrifice his whole property, real and personal, for the good of the community, without receiving a recompence [sic] in value. This would be laying a burden upon an individual, which ought to be sustained by the society at large.”²

The Difference Between Eminent Domain and Regulatory Takings

The obvious example of a taking of property for public use occurs when the government seizes the title to land through the power of eminent domain. But if the compensation requirement applied *only* to such cases, it would be easy for the government to evade it by letting people continue to *own* their land while diminishing the right to use and enjoy their property. As early as the 1870s, the U.S. Supreme Court sought to close this loophole when it declared that a circumstance would be “very curious and unsatisfactory” for courts to

declare “that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not *taken* for the public use.”³ In 1874, the Michigan Supreme Court agreed, noting that “to say that this is not a taking of his property, because the land *itself* is not taken...and because the title, nominally, still remains in [the owner’s possession], and he is merely deprived of its beneficial use” would be “a transparent fallacy.” After all, “of what does property practically consist, but of the incidents which the law has recognized as attached to the title, or right of property?”⁴

The recognition that property is “taken” when the government prohibits owners from using their property has come to be called the theory of “regulatory takings.” This theory not only closes a dangerous constitutional loophole; it is also a logical extension of the fact that property is more than mere belongings: property is the right of a person to *use* things. Property rights are a practical manifestation of the right to liberty.⁵ When government restricts a person’s use of property, it is essentially restricting the owner’s liberty, just as if it seized the land outright. To protect owners against seizures but not against restrictions on use would be what

American jurist Roscoe Pound described as “formalism,” or “mechanical jurisprudence,” which elevates form over substance and allows government to use technicalities to escape the law’s requirements.⁶

One way to make the right to use property clear is to employ an analogy that lawyers long ago adopted to describe property rights: the right to property is like a “bundle of sticks,” which brings together such rights as the right to sell the land, to lease it, to leave it to one’s heirs, or to keep others off it. The right to use the land is among the most important rights in this bundle; as the English jurist Sir Edward Coke put it four centuries ago, “What is land but the profits thereof?”⁷ A law that diminishes or eliminates the right to use land takes away this important “stick” from the owner’s bundle.

The Theory of Regulatory Takings

Contrary to a common misconception, the theory of regulatory takings did not originate in the 1922 case of *Pennsylvania Coal v. Mahon*.⁸ In that case, the government passed a law that prohibited coal companies from digging for coal underneath houses. This law effectively destroyed the coal company’s right to mine coal even though the company had sold the land to the plaintiffs years before the law went into effect, and at that time, the company and the homeowners had agreed to allow the company to mine underneath the houses. In an 8-to-1 decision, the U.S. Supreme Court held

that the coal company’s property had been taken because the company was no longer allowed to mine the coal as it was entitled to under that agreement. “The extent of the taking is great,” wrote Justice Oliver Wendell Holmes. “It purports to abolish what is recognized in Pennsylvania as an estate in land—a very valuable estate—and what is declared by the Court below to be a contract hitherto binding the plaintiffs.”⁹ Courts had long before recognized that when government “damaged” property, it should pay compensation, even if the title remained with the owner.¹⁰ So Justice Holmes’ statement in *Mahon*—“while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking”—did not create a new principle.¹¹

But in an important way, *Mahon* did reflect a change in the law of regulatory takings by breaking down the traditional distinction between two kinds of government action—one of which had always required just compensation, and one of which had not.

Before *Mahon*, legal thinkers had regarded the power of eminent domain as different in kind from the government’s power to regulate to protect public safety. The latter, which was called “the police power,” included the authority to prevent crimes, torts, or nuisances. Government was not required to compensate for these actions. But the power of eminent domain—the authority to provide some public good over and above the protection of individual rights—always

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required compensation.¹² Taking away a home, to which a person has a natural right, and replacing it with a post office requires compensation because the homeowner would be forced to bear the cost of providing the public with a benefit.

In his book *Takings*, professor Richard A. Epstein provided a helpful analogy for understanding this distinction: the difference between the police power and the power of eminent domain parallels the difference between the legal concepts of “self-defense” and “private necessity.” Epstein writes, “Self-defense allows one to inflict harm without compensating the person harmed, while private necessity creates only a conditional privilege which allows the harm to be inflicted but only on the payment of compensation.”¹³ Since in the former case the person is acting to protect his rights from a wrongful intrusion, he owes no compensation to the wrongdoer; but in the latter case, he is depriving an innocent person of something that rightly belongs to her and is therefore required to compensate that person. This interpretation served the principles of limited government that lay at the heart of the American founding: first, because it distinguished between government services to which one had a *right* and those that were mere *privileges*; and second, because the compensation requirement forced bureaucrats to abide by a budget, meaning that policymakers could undertake only a limited number of projects.

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The Progressives' Impact on Takings

During the Progressive Era, intellectual leaders adopted radically different principles of government: they rejected the Founders' notions of individual liberty and constitutional limitations and called for the government to take on a greatly expanded role over the economy and the use of private property.¹⁴

Three elements of Progressivism were especially important for the development of regulatory takings theory. First, Progressives rejected the idea of natural rights. In their view, rights were *not* part of the fundamental respect that everyone deserves as a consequence of his or her humanity; instead, rights were simply privileges granted to individuals by society, for society's reasons. As historian Louis Menand explains, Progressives believed that “individual freedoms are manufactured to achieve group ends.”¹⁵

At the same time that they were redefining rights, the Progressives devised the theory of “judicial deference,” which held that courts should not block legislative decisions except in the rarest circumstances.¹⁶ Because they put great stock in the legislature's ability to implement scientific, collectivist solutions to social problems, and because they viewed constitutional limits as outdated obstacles to reform, the Progressives concluded that judicial review was a scheme whereby the capitalist class prevented common people from

liberating themselves. They claimed that the wealthy and privileged controlled the courts and used that power to exploit the working class; therefore, the Progressives believed that the judiciary ought to be reformed so as to interpret the Constitution flexibly, as a “living” document, which would adapt to the demands for modern legislation and expanding government.¹⁷ In 1924, an admiring author praised Justice Holmes for recognizing “that the socialistic trend in American political thought would finally demand extensive paternal legislation.” Holmes, the author claimed, understood that “a benevolent attitude towards social reform” was necessary but also that the Constitution prohibited such legislation. Therefore, “next to amendment of the Constitution, the most feasible means of giving validity to new principles was to change the interpretation of [the Constitution’s] provisions,” and this is what Holmes and other Progressive Era judges commenced to do.¹⁸ “If my fellow citizens want to go to Hell I will help them,” wrote Holmes. “It’s my job.”¹⁹ This was a radical break from the vision of the Framers, who believed that the judiciary’s role was to act as “an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority.”²⁰

Progressive intellectuals rejected the notion that there was a categorical difference between the police power and the power of eminent domain. In their view, government actions were all the same essential principle—force. To draw

lines between some kinds of force and others was, in their view, a primitive kind of thinking based on outdated notions of rights. But since rights were now seen as government-created privileges, there was no sense in distinguishing them from the kinds of “public goods” that government provided through eminent domain. Where courts had long seen the police power and eminent domain as different in *kind*, the Progressives saw them as two opposite ends of a spectrum. Interferences with property would be considered non-compensable until they reached some unspecified point, at which they would require compensation. This vague standard greatly expanded government’s ability to control the use of private property and to impose uncompensated burdens on owners. Rather than having to pay for each distinct property right it extinguished, government was required only to compensate owners when a judge believed the law had gone “too far.” That, combined with an unclear distinction between the principles of eminent domain and the police power, meant that property owners could not rely on the security of their property rights.²¹

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What “Goes Too Far”?

But when does a regulation “go too far”? In the more than 80 years since *Mahon*, the U.S. Supreme Court has not answered that question—and for good reason. During and after the Progressive

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Era, government began interfering in private activity, and particularly in economic activity, to an ever greater degree. These changes were solidified during the New Deal, when constitutional limits on the government’s interference with the economy were almost entirely abandoned through a series of cases that formally adopted the Progressive theory of judicial restraint. This theory was named “rational basis review.”

Under “rational basis review,” a state is “free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy,” and courts will almost never intervene on behalf of private property or economic liberty.²² The almost complete abandonment of centuries-old limits on the government’s power over the economy meant that “regulatory legislation affecting ordinary commercial transactions [would] not...be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators”—an extremely rare circumstance.²³ Since that time, judicial deference has become firmly planted in American law and has fostered a tremendous expansion of government control over private property rights.

***Penn Central* and the U.S. Supreme Court’s Attempt to Fashion Regulatory Takings Rules**

Determining what kinds of regulations “go too far” had never promised to be an easy task, but once the Supreme Court had declared that government could “adopt whatever economic policy” it wanted to, the task proved virtually impossible. In the 1970s, the Court merged rational basis review with the “goes too far” rule in a case called *Penn Central Transportation Co. v. New York*, a case involving a historical preservation ordinance that prohibited the owners of the Penn Central railroad station from constructing a high-rise office building on their property.²⁴ The owners claimed that the law took away their right to use the property in the same way that the coal law violated the mining company’s rights in the *Mahon* case. But the Court rejected their argument. Admitting that clear, principled lines requiring compensation would make it more difficult for government to implement “public program[s] adjusting the benefits and burdens of economic life,” the Court declared that it would only decide what “went too far” on a case-by-case, “essentially ad hoc” basis, using a variety of vague factors.²⁵ Since the preservation ordinance did not exceed the ambiguous standards the Court set forth, there was no taking, and thus no compensation was due.

Justice William J. Brennan’s *Penn Central* opinion was heavily influenced by the work of professor Frank

Michelman.²⁶ Like his Progressive forebears, Michelman rejected the categorical distinction between police powers and eminent domain, and argued that the Constitution required compensation not for takings of property but only for arbitrary government action that unfairly interfered with “investment-backed expectations.”²⁷ This interference, along with the “economic impact” of the regulation and the “character” of the regulation, make up what is now called the “*Penn Central* test.”²⁸

The *Penn Central* test is hardly a test at all, since its factors are too vague to provide any predictable framework for analysis.²⁹ The test became even more amorphous when, a few years after its formulation, the Supreme Court added an important new term. “Investment backed expectations” became “reasonable investment backed expectations,” inviting future courts to deny compensation to property owners by declaring that a person’s expectation of using his or her property was not “reasonable” to begin with.³⁰ Loopholes like this mean that today the *Penn Central* test operates only as an illusion. As William P. Barr et. al. write, “inconsistency was inevitable” under *Penn Central*:

Regulations that cause massive economic harm to the owner are held not to go too far, whereas others with only a slight impact are found to constitute regulatory takings. As a result, the regulatory takings cases have fallen back to a

three-factor, ad hoc test that tries to get at the idea of fairness to the owner.... It is inherently vague and subjective. As it turns out, the Court has usually not considered it unfair or unjust to force owners to bear fairly heavy burdens, at least if the owner is rich.³¹

It is telling that, although the *Penn Central* test has been around for more than a quarter-century, courts have compensated property owners under that test only in extremely unusual circumstances.³²

After *Penn Central*, the Supreme Court set out two more tests for regulatory takings cases. In *Loretto v. Teleprompter Manhattan CATV Corp.*, the Court declared that compensation is due to an owner whenever a law forces the owner to admit a trespasser onto his or her property.³³ And in *Lucas v. South Carolina Coastal Council*, the Court declared that property owners were owed compensation whenever a regulation deprived the owner of the entire value of his or her property.³⁴

These two categorical rules held out the promise of some predictable, principled compensation requirements. Yet this hope, too, would be disappointed in later decades. The *Loretto* rule had been based on the recognition that the “power to exclude” trespassers from one’s property “has traditionally been considered one of the most treasured strands in an owner’s bundle of property rights.”³⁵ Yet in *Yee v. Escondido*, the Court refused to

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compensate owners of mobile home parks for a law that forced them to accept tenants on their land against their will.³⁶ And although *Lucas* held property owners are owed compensation whenever land use regulations deprive them of “all economically beneficial or productive use of land,” this rule failed to provide meaningful protection because it was easy for bureaucrats to leave property owners with some tiny token value and thus avoid having to compensate even if the regulation imposed very severe—although not complete—losses on the owner.³⁷

For example, in *Palazzolo v. Rhode Island*, the Supreme Court held that Anthony Palazzolo was not categorically entitled to compensation because the state still allowed him to build a single house on a half-acre section of his 18-acre parcel of land. Although Palazzolo’s property would have been worth more than \$3.1 million had he been allowed to build on it as he had planned, the regulation at issue decreased that value to about \$200,000—yet the state was not required to pay the \$2.9 million difference.³⁸ Thus, the only two clear and predictable rules in the field of regulatory takings were undermined, and the amorphous *Penn Central* balancing test was employed instead.

One reason for this equivocation became clear in a 2002 case involving construction in the Lake Tahoe area. A government agency charged with protecting the lake imposed a series of moratoria, which prohibited virtually all construction for 20 years. Yet while the Supreme Court had declared in *Lucas*

that such total bans entitled owners to compensation, and had held in another case that even temporary takings of private property must be compensated, it held in the *Tahoe* case that a temporary, total prohibition did *not* require compensation.³⁹ Government interferes with private property rights all the time, the Court explained, and requiring compensation for these interferences “would undoubtedly require changes in numerous practices.” Government simply cannot afford to pay for all the property it takes from people: “A rule that required compensation for every delay in the use of property would render routine government processes prohibitively expensive or encourage hasty decisionmaking.”⁴⁰

When individual citizens are unable to afford the things they want, they must budget their resources, prioritize their needs, and accept that they can’t have everything they want. But when government cannot afford to pay, it simply doesn’t have to.

This is not only unfair to property owners, but it is also ultimately harmful to democratic society as well. Requiring government to compensate property owners for regulatory burdens creates an incentive for political leaders to make careful decisions about how they limit property rights. In a case explaining why government should pay damages to people whose civil rights are violated, Justice Brennan wrote that “the knowledge that a municipality will be liable for all of its injurious conduct” would “create an incentive for officials

who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens' constitutional rights." Moreover, since "it is the public at large which enjoys the benefits of the government's activities, and it is the public at large which is ultimately responsible for its administration...it is fairer to allocate any resulting financial loss to the inevitable costs of government borne by all the taxpayers, than to allow its impact to be felt solely by those whose rights...have been violated."⁴¹

The same principles should apply when government deprives people of the right to use their property.⁴² If officials can force particular property owners to pay the cost of providing public benefits, those officials can avoid politically unpopular tax increases while promising the public "free" benefits—except that the costs are paid by individuals who lack the political strength to protect themselves. As a New York court put it, regulatory takings mean that "the ultimate economic cost of providing the benefit is hidden from those who in a democratic society are given the power of deciding whether or not they wish to obtain the benefit despite the ultimate economic cost.... In other words, the removal from productive use of private property has an ultimate social cost more easily concealed by imposing the cost on the owner alone. When successfully concealed, the public is not likely to have any objection to the 'cost-free' benefit."⁴³

Regulatory Takings in Arizona

Interestingly, while Arizona's courts, like those of other states, follow the lead of federal courts on regulatory takings issues, they have not entirely forgotten the pre-*Mahon* distinction between the police power and the power of eminent domain.⁴⁴ Since, under the police power, the government may even destroy property without compensating the owner, Arizona courts confronted with a regulatory takings case first ask whether the regulation is a non-compensable police power regulation.⁴⁵ But unlike the pre-*Mahon* understanding, Arizona courts have held that "even though [a regulation] is a valid exercise of the police power," it can still impose such a burden on a property owner as to require compensation.⁴⁶ When does this occur? The courts have rejected "set formulas" but have instead devised a test that combines the vague *Penn Central* factors with other elements.⁴⁷ The court will

inquire whether the regulation denies the owner the economically viable use of the property. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action.⁴⁸

It is difficult for litigants to prove that a regulation's impact is so severe as to leave them without reasonable returns

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on the property. The Arizona Court of Appeals has adopted the rule that a regulation is not a taking unless it “destroys [the] economic value” of a piece of property “or all but a bare residue of its value.”⁴⁹

Less Than a Total Taking...for Free?

The difficulty of an Arizonan obtaining just compensation for a regulatory taking is illustrated by considering two cases: *Corrigan v. City of Scottsdale* and *Wonders v. Pima County*.⁵⁰ In *Corrigan*, the city passed an ordinance setting aside a large area of land as off-limits to development. Joyce Corrigan owned land within this area, and the ordinance essentially prohibited her from constructing anything on her property. She sought compensation on the grounds that the government’s action was a regulatory taking.

The court began by asking whether the ordinance qualified as a police power regulation. It correctly described the police power as the authority to “safeguard the public interest” from “substantial threat[s] to public safety.”⁵¹ Although the government claimed that the regulation was intended to address public safety concerns, the court found no evidence “that a deplorable condition exists or would exist without the Hillside Ordinance...[or that] there would be a substantial threat to public safety without the ordinance. Obviously there often is and has been building in mountainous or hilly areas.... Therefore the ordinance was not a valid exercise of police power.”⁵²

Since the ordinance exceeded the police power, the court next asked “whether the ordinance denies the landowner an economically viable use of the land.”⁵³ But not every such denial is a taking: Arizona law, the court explained, will require compensation for regulatory interference only if the regulation is “confiscatory” but not if it is “merely unreasonable and arbitrary.” A regulation “will be deemed confiscatory if it effectively deprives a property owner of the beneficial use of his or her property by precluding any reasonable use of it.”⁵⁴ Because Corrigan’s property “would have no monetary value under this ordinance” and was “render[ed]...useless,” the ordinance was “confiscatory” and therefore considered a taking.⁵⁶

Although the *Corrigan* court reached the right conclusion, the requirement that a property owner prove an ordinance is “confiscatory” sets a standard that is too high for property owners who suffer less extreme—but nonetheless serious—takings. Under this rule, “the absence of a *total wipeout* of owner rights and value means that there has been no violation of the Takings Clause.”⁵⁷

Wonders v. Pima County demonstrates what happens when a property owner suffers a substantial, but not total, decrease in value from a regulatory taking. There, a property owner sought to develop subdivisions on two large pieces of property measuring 20 acres and 154 acres. But a county environmental ordinance required the

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owner, as a condition of the development permit, to establish some mechanism for “native-plant preservation.”⁵⁸ The landowner set aside some 45 acres of the larger lot as “open space,” without construction. This, the court held, was not a regulatory taking, even though it essentially conscripted these 45 acres for public purposes. Relying on the *Palazzolo* case, it declared that “when each of the two parcels is viewed as a whole, the [owner] clearly is able to make beneficial use of its land, and we therefore conclude no regulatory taking has occurred.”⁵⁹

Wonders is an example of what takings lawyers sometimes call the “relevant parcel problem.” Because courts will only find a taking has occurred if the regulation “confiscates” the property, the next question becomes how to view the property. Finding a taking will often depend on how broadly a court chooses to see the property owner’s rights. If the court focuses on the 45 acres on which construction is prohibited, the regulation is a total taking of those 45 acres, and the owner is due compensation. But if the court instead focuses on the owner’s holdings “as a whole”—which amounted to some 174 acres—then depriving the owner of 45 acres is only a relatively small burden and certainly not a total taking. Thus, even when a property owner can prove that a land use law amounts to confiscation, he may still not be able to prove that it is a taking.

Working together, the precedents established by the Arizona courts in

Corrigan and *Wonders* create a perverse incentive that encourages local governments to regulate in such a way as to impose significant burdens on property owners—but to leave them with some economically beneficial use of the property to avoid having to compensate. Anything short of outright confiscation of *every distinct interest* in the property will avoid the compensation requirement.

Exactions and Extortion in Arizona

Arizona’s regulatory takings law allows government to infringe on property rights in another important way. “Exactions” are property rights—often whole sections of land, easements, or even outright cash—that government demands from a landowner in exchange for permission to build. Unlike routine permit fees or taxes, exactions are usually assessed against particular property owners, on the theory that allowing development will impose costs on society, which the landowner must be required to alleviate. For example, creating a new subdivision may increase traffic in that area; a developer can therefore be required to pay an exaction so as to widen the streets or otherwise decrease the impact of the development. Under the Supreme Court’s decisions in *Nollan v. California Coastal Commission* and *Dolan v. City of Tigard*, the government is required to “make some sort of individualized determination that the required [exaction] is related both in nature and extent to the impact of the proposed development.”⁶⁰ The government may not simply use its

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regulatory power as a fundraiser by charging extortionate fees, for reasons unrelated to its use of their property.

Unfortunately, in the years since *Nollan* and *Dolan* were decided, courts have not followed these decisions in ways that protect property owners. One common misconception is that these cases apply only to “adjudicative” exactions (imposed by a local agency), as opposed to “legislative” exactions (which are imposed on all developments that meet certain criteria).⁶¹ If it is unfair to require a property owner to pay an exorbitant fee for the right to develop his or her land, or to pay a fee that has no relationship to the development, then it makes no constitutional difference whether that fee is imposed on individual landowners through case-by-case assessments or on all landowners meeting certain criteria through a general enactment.⁶² As an Illinois court put it, distinguishing between legislatively imposed exactions and adjudicative exactions allows the government to “skirt its obligation to pay compensation...merely by having the Village Board of Trustees pass an ‘ordinance’ rather than having a planning commission issue a permit.”⁶³

Arizona’s courts, however, have allowed this technical evasion. In *Home Builders Association v. City of Scottsdale*, the Arizona Supreme Court declared that the requirements of *Nollan* and *Dolan* do not apply when a landowner is required to pay an exaction due to a generally applicable law rather than a particularized permitting requirement.⁶⁴

The case involved a “water resources development fee” on all new developments, which added \$1,000 to the cost of a permit to construct a single-family house. The court explained that the fee was not a compensable taking and that only “individually tailored” exactions were required to meet the standards of *Nollan* and *Dolan*.⁶⁵ When “a generally applicable legislative decision by the [government]” requires a property owner to pay a fee or give up property in exchange for a development permit, that requirement needs to meet only the lax “rational relationship” standard applied to most economic regulations.⁶⁶

This is unfortunate, given the fact that these exactions substantially increase the cost of housing. The cost of permission to build is the leading cause of rising house prices in the United States—prices that have risen to record heights in many places, despite the fact that the costs of labor and materials have either decreased or remained constant.⁶⁷

Regulatory Takings Reform in Oregon⁶⁸

In 1973, in reaction to the burgeoning environmental movement, Oregon enacted one of the most sweeping land use planning schemes in the nation, known as SB (Senate Bill) 100. Intended as a model for the whole nation, this law gave the state’s Land Conservation and Development Commission power to establish “land

use goals,” which local governments were required to serve through their zoning decisions. Over the years, two of the goals—Goal 5 and Goal 14—trumped all others. Goal 5 required the preservation of “open space” and Goal 14 sought to “contain” the growth of urban areas. To serve these goals, many landowners were prohibited from even building homes on their properties so as to preserve “natural areas,” and owners of residential lots often suffered losses of as much as 90 percent of the value of their land.⁶⁹ Because of the law’s enormous economic impact on business and industry, no state ever followed Oregon’s lead. As one writer explained, Oregon

never adopted a land use plan or program to ensure economic growth of the business community. Second, the state never adopted a land use program which identifies the farm and forest resource land which truly merits “conservation,” it simply mandated that almost every rural acre be “preserved” regardless of its productivity, and banned most non-farm and non-forest uses on such acreage. Third, the state provided little in the way of plan or program for urban growth; on the contrary, it imposed barrier after barrier to growth.⁷⁰

Although legislators originally intended to develop a mechanism to compensate landowners for regulations that deprived them of the value of their property, that proposal never came to fruition.⁷¹

Land use bureaucrats, freed from the responsibility of paying for the costs of regulation, began imposing ever more severe burdens on property owners. Examples of abuse abound: Portland property owner Ed Cox’s \$50,000 residential lot was reduced to a mere \$2,000 due to environmental regulations; elderly widow Dorothy English found that she was not allowed to subdivide the property her husband had intended for them to bequeath to their children and grandchildren because the state had declared it “forest land.”⁷² When, in 1995, the Oregon Legislature passed a bill requiring compensation for owners whenever 10 percent or more of the value of their property was taken through regulation, Governor John Kitzhaber vetoed the bill, declaring that land use regulations were necessary to preserve the view of the Rose Garden on Mount Hood, in Portland. “We can all enjoy this view because it has been protected,” the governor said. “No building can be built so as to obstruct it. *There is no doubt that comes at a private cost.* But the public benefit is overwhelming—and it is overwhelmingly supported by Oregonians.”⁷³ But if the public benefits from these regulations, then the public ought to pay the cost. Otherwise, the owners of the servient land are being “called upon to surrender or sacrifice [their] whole property, real and personal, for the good of the community, without receiving a recompense in value.”⁷⁴

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The First Step of Reform: Measure 7

Angered by such incidents, Oregon

voters passed a ballot proposal in 2000 that added a section to the state constitution requiring just compensation for *any* land use regulation that deprived owners of the value of their land. This proposition, called Measure 7, passed by a vote of 53 to 47 percent, and it applied to all types of land use regulations, except for those that prohibited environmental hazards, pornographic bookstores, and other traditional nuisances.

Measure 37 required compensation for any regulation imposing an economic burden on private property, unless the regulation “restrict[ed] or prohibit[ed] activities commonly and historically recognized as public nuisances under common law”

Measure 7 adopted a clear and substantial compensation requirement for regulatory takings. Building on the pre-*Mahon* understanding of a categorical difference between eminent domain and police powers, it required government to compensate property owners for any regulation of property that “ha[d] the effect of reducing the value” of the property, unless that regulation was a “historically and commonly recognized nuisance law.”⁷⁵ Thus, limitations on the use of property that went beyond protecting the public health and safety would require compensation to affected landowners.

Despite its popularity with voters, Measure 7 was immediately challenged in Oregon courts. On October 4, 2002, the Oregon Supreme Court held that the measure violated Oregon’s “separate vote” requirement because it amended *two* sections of the state constitution in only a single canvass. Actually, the measure amended only one section: that relating to property rights. But the court declared that the measure also “change[d] the right of free expression”

guaranteed in another section because it “permit[ted] the state or a local government not to pay just compensation to private real property owners whose property decreases in value because of a regulation prohibiting the use of property for...selling pornography.”⁷⁶ In other words, because the initiative allowed government to regulate the traditional nuisance of pornography without compensating, the measure ended up treating property owners differently on the basis of “a particular type of expressive activity” (the selling of pornography), and this altered the free speech guarantee.⁷⁷

Successful Reform: Measure 37

The court’s rejection of Measure 7 struck many as a politically motivated excuse for striking down a measure that would have far-reaching implications for land use regulation. But the initiative’s proponents were undaunted; they immediately redesigned the proposal and submitted it to the voters again, as Measure 37.⁷⁸ This time, the initiative amended the statutory law rather than the constitution and thus would not run afoul of the “separate vote requirement.” But, like its predecessor, Measure 37 required compensation for any regulation imposing an economic burden on private property, unless the regulation “restrict[ed] or prohibit[ed] activities commonly and historically recognized as public nuisances under common law” or were necessary for protecting “public health and safety, such as fire and building codes, health and sanitation regulations, solid or

hazardous waste regulations, and pollution control regulations.” In addition, Measure 37 allowed local governments to enforce “solid or hazardous waste regulations, and pollution control regulations” without compensating property owners. Like its predecessor, Measure 37 was overwhelmingly approved by Oregon voters, despite the fact that opponents outspent proponents by a factor of three to one and that nearly every newspaper editorialized against it.⁷⁹

Measure 37 gave local governments a choice: when a regulation exceeded the police power—that is, went beyond protecting the general public from traditional nuisance activities—the government could compensate the owner, or “in lieu of payment,” it could “modify, remove, or not to apply [sic] the land use regulation or land use regulations to allow the owner to use the property for a use permitted at the time the owner acquired the property.” Local governments would no longer be able to impose the cost of regulation on particular property owners; they would be forced to prioritize their regulatory desires and abide by a budget.

Constitutional Challenge to Measure 37

Despite the many exceptions in its compensation requirement, Measure 37 was demonized by environmental activists, who portrayed it as part of a diabolical scheme to destroy the state’s environmental protection laws. And, like its predecessor, Measure 37 was challenged in state court immediately

after its enactment by environmental activists who alleged that it violated the state and federal constitutions in several ways. In February 2006, the Oregon Supreme Court rejected their arguments in a unanimous decision.⁸¹

Among many other things, Measure 37’s opponents claimed that the law violated the equal protection clause by treating landowners differently, depending on the time at which a land use regulation was passed; delegated legislative power to local governments in violation of separation of powers; benefited religious institutions; burdened freedom of expression; suspended the operation of the laws; violated due process; and, perhaps most astoundingly, violated the Tenth Amendment of the U.S. Constitution by limiting the state’s police power.⁸²

This last allegation was particularly revealing. Opponents of the measure argued that it limited the state’s authority to regulate and that such limits violated the Constitution: “Except for the powers expressly ceded by the states to the federal government in the U.S. Constitution,” wrote the plaintiffs, “the police power is reserved to each state by virtue of the Tenth Amendment...[and] the legislature cannot bargain away, alienate, surrender, divest, limit, or abridge that power.... Any legislative act that constrains the police power violates the Tenth Amendment.”⁸³ The Oregon Supreme Court rejected this absurd argument. Measure 37 “is an *exercise*” of the people’s power to govern, “not a *limitation* on it.”⁸⁴ The people,

Local governments would no longer be able to impose the cost of regulation on particular property owners; they would be forced to prioritize their regulatory desires and abide by a budget.

“exercising their initiative power, [may] authorize state or local entities to decide, in accordance with Measure 37, whether to pay just compensation or to modify, remove, or not apply certain land use regulations.”⁸⁵

Even more fundamental than this misconception of the people’s authority is that the plaintiffs ignored the distinction between the police power and the power to provide public benefits. “A historic, fundamental, and essential, component of the police power,” wrote the plaintiffs, “is the ability to regulate property without compensating the regulated for any resulting economic injury.”⁸⁶ But the police power only extends to the regulation of property *to protect the public from affirmative harm*; any regulation that goes beyond this is part of the power of eminent domain. Although the Oregon Supreme Court did not address this subject at length, its decision reflects the fact that the state’s judiciary continues to cling to the Progressive notion that regulations require compensation only when they “go too far.”⁸⁷

Thus, despite the fact that it upheld Measure 37, the Oregon Supreme Court still appears to lack a serious understanding of the conceptual distinction between the police power and the power of eminent domain. A regulation that, for example, forbids construction so as to leave open space for the public to enjoy a scenic view does not ensure the public welfare, health, and safety, but instead confers a value to

the state for which it ought to pay.

This problem will only grow more serious over time. The groups challenging the constitutionality of Measure 37 revealed the heart of their contention when they wrote

The Measure imposes a mandate: If the government can’t pay, it can’t regulate. At a time when public entities are facing budget shortfalls, and are cutting essential public services, that mandate effectively precludes public entities in Oregon from exercising their police power [sic] to regulate land use. *The public simply cannot afford to pay Measure 37 claims.*⁸⁸

When one cuts through the legal theories advanced by opponents of compensation for regulatory takings, one is left with this simple proposition: The regulatory state imposes so many costs on so many people that requiring it to obey the constitutional requirement of just compensation would just be too expensive.⁸⁹

Weaknesses of Measure 37

Another challenge to Measure 37 has been raised in a case called *Crook County v. All Electors, Freeholders, Taxpayers, and Other Interested Persons*.⁹⁰ This case seeks to determine what rights subsequent property owners have when a local government has chosen to waive a land use regulation pursuant to Measure 37. If a challenged land use law was “enacted prior to the date of acquisition

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of the property by the owner,” the government is not required to compensate the owner. But if an owner obtains a waiver of a regulation under Measure 37 and then sells the land to another party, is the new owner entitled to the waiver?

A similar problem has arisen in several cases that have held that property owners who obtain land after a regulation is in place are forbidden from bringing lawsuits for compensation, no matter how unreasonable the regulation might be. This “notice rule” is an outgrowth of the *Penn Central* test, under which property owners are due compensation only when a regulation conflicts with “reasonable” expectations. The theory behind the notice rule is that an owner can have no reasonable expectation of using land in a way prohibited by a regulation that existed when the owner acquired the property.⁹¹ In *Palazzolo*, the U.S. Supreme Court rejected this rule on the grounds that it would allow the government “to put an expiration date on the Takings Clause.”⁹² Yet courts have continued to apply the rule, by employing it as part of the overall *Penn Central* “fairness” consideration.⁹³ Unfortunately, this means that the government may gradually increase the uncompensated regulatory burden on property owners, taking away particular uses each time a new person buys or inherits the property.

Measure 37 does not clearly address this problem.⁹⁴ Section 8 of the measure, which covers waivers, holds that the

government may choose, in lieu of compensation, to waive the applicability of the regulation “to allow the owner to use the property *for a use permitted at the time the owner acquired the property.*”⁹⁵ The italicized phrase suggests that the measure’s authors may have expected that waivers would be a personal right of “the owner” and that such waivers would not apply once the owner transferred the property to another owner. Waivers, in other words, do not run with the land.

However, if a waiver means that an otherwise prohibited use of the property is now “permitted,” then whenever a later owner gained title to the land, that particular use would be a “permitted” use at the time of acquisition. That is, once a local government decides not to apply a regulation, barriers to that use are lifted, and subsequent purchasers obtain the property free from those barriers and with the right to use the land in ways that the waived regulation prohibited. Certainly, principles of equity would support this interpretation in many cases: if an ordinance is passed prohibiting, for instance, the construction of a building, and a waiver is obtained that allows the owner to construct a building, it would hardly be proper for a later purchaser to be forced to demolish the building.

Attorney Jona Maukonen proposes a similar “vested rights” approach to the transferability problem. When a person takes “substantial steps” toward using property in a legal way or has “incurred substantial costs” in trying to complete a project, Oregon courts will consider the

property owner as having a “vested right” in that intended use of the property, which cannot be taken away through a change in zoning ordinances.⁹⁶ Thus, Maukonen argues, if the seller has spent time and money arranging a property for a purchaser’s intended use, courts could hold that the waiver transfers to the purchaser to use the property in that way.

It remains to be seen how courts will address the question of transferability of Measure 37 waivers. Certainly any state that chooses to adopt a similar measure must word its version to avoid the perils of ambiguity.

Adapting a Regulatory Takings Measure to Arizona

Arizonans hoping for relief from the increasing weight of land use regulation might adopt a law similar to Measure 37, but they would need to address four major areas of concern. First, such a law should attempt to revive the traditional understanding of categorical distinctions between the police power and the power of eminent domain. Second, if the measure were passed as a constitutional amendment, it would have to be drafted carefully to avoid nullification under the separate amendment rule. Third, an adaptation would have to address the transferability-of-waiver problem that dogs Measure 37. Fourth, and most important, Arizonan voters would need to be willing to face down opponents determined to resist any attempt to

impose discipline on government’s regulatory authority.

The Police Power versus the Power of Eminent Domain

Arizona courts have long recognized the categorical differences between the police power and the power of eminent domain. In *Moton v. City of Phoenix*, the Arizona Supreme Court explained that the police power is the power to defend the public against actions that are “injurious to the public welfare”; when the state uses this authority, “the property is not, as a general rule, appropriated to another use, but is destroyed or its value impaired.”⁹⁷ Under such circumstances, the owner is generally not compensated. “Under the power of eminent domain,” by contrast, property “is transferred to the state to be enjoyed and used by it as its own,” in some way that “is beneficial to the public.”⁹⁸ The difference, essentially, is between defending people from an actual injury (the police power) and providing them with a good they would not otherwise have (the power of eminent domain).⁹⁹

Understanding the nature of these two powers provides guidance to courts as to what government activities do or do not require compensation. In *Moton*, for example, the city destroyed several apartments because they were unsafe and vermin infested; the city was not required to pay compensation because “there was no public use derived from the destruction of the buildings.”¹⁰⁰ But more, understanding this categorical

distinction clarifies the limits on government power. Without such a distinction, there would be no restraint on the government's authority to control the choices people make with regard to their land. The government would become the organization responsible for the use of all land in the state, and the just compensation requirement could be easily nullified.

Understanding the difference between police power and eminent domain, however, requires courts and politicians to recognize that some things are simply beyond the government's legitimate reach. As noted above, the primary reason many courts have rejected the categorical difference between police power and eminent domain is that it implicitly limits the government's power. Under the traditional understanding, if government wants to go beyond the functions of (in James Madison's phrase) "*impartially* secur[ing] to every man, whatever is his *own*," it must compensate losing property owners.¹⁰¹ By conflating the two types of power, however, government power to act without compensating expands greatly. If Arizonans are to secure meaningful protection for their property rights, understanding this difference will be essential.

The Separate Amendment Rule

The Oregon Supreme Court's decision striking down Measure 37's predecessor as a violation of the "separate vote rule" suggests that a

similar law could face a challenge under Arizona's separate amendment rule, which declares that "if more than one proposed amendment shall be submitted [to the voters] at any election, such proposed amendments shall be submitted in such manner that the electors may vote for or against such proposed amendments separately."¹⁰² Arizona courts have explained that the purpose of this rule was to "curtail the practice known as 'log-rolling,' a practice where several unrelated matters are placed together in one amendment, forcing the voter to approve, even when he disagrees with some provisions, simply to secure the passage of portions he strongly supports."¹⁰³

In *State v. Lockhart*, the Arizona Supreme Court upheld a constitutional amendment that both increased the size of the state Senate and limited future membership in the state House of Representatives.¹⁰⁴ "Clearly both relate to, and are germane to, one general subject," the court said, "*i.e.*, the composition of the state legislature, and historically the people of this state have considered that but one subject was involved, to-wit: 'The Legislature.'"¹⁰⁵ The court believed that "treating [the] legislature as a single subject in constitutional amendments" was constitutional under this requirement.

By contrast, in *Kerby v. Luhrs*,¹⁰⁷ the court struck down an amendment that changed the way public utilities were taxed, changed the ways copper mines could be taxed, and gave the Tax Commission constitutional status. "It is

evident that there are at least three distinct propositions contained therein,” the court declared,

no two of which are necessarily required for a proper operation of the third. On their face they have no direct relation *to each other*. Their only connection is that they are all embraced in a broader general subject, to wit, that of taxation.... [T]he proposed amendment...submits three separate propositions upon which each voter might, and many doubtless would, have widely different opinions, and in such a manner that they are compelled either to reject all three on account of one which they may consider vicious, or else to accept two provisions they disapprove to secure the adoption of one which meets their favor.¹⁰⁸

So long as a regulatory takings measure has internal cohesion and focuses reasonably on a single idea—namely, protecting property from improper regulation—such a measure would probably withstand a challenge on the basis of the separate amendment rule.

The basic rule, therefore, is that an amendment must focus on a single matter in such a way that the voter is not faced with essentially different, and combined, issues in a single vote. Amendments need not be too particular because “to force a breakdown and separate vote for each new provision in a proposed amendment would make the process of amending our Constitution so burdensome that it would be almost impossible to make any constitutional changes in complicated areas of our law.”¹⁰⁹ But they must not be so general that a reasonable voter would consider them as containing separate issues.

Since Measure 7 amended both the property rights provision and the freedom of expression provision of the Oregon Constitution, that state’s highest court held that it should have been subjected to two separate votes. This was a questionable holding because the measure did not seriously alter the free speech guarantee—it simply maintained the common-law rule that nuisances are subject to regulation without compensation to the owner. Arizona courts have, in general, upheld certain traditional restrictions on the use of property for adult businesses, so long as they do not seek to censor erotic expression but simply follow traditionally accepted rules regarding location and operating hours.¹¹⁰

Of course, a court that wants badly enough to invalidate an unpopular law or amendment can usually find some technical excuse for doing so. But, so long as a regulatory takings measure has internal cohesion and focuses reasonably on a single idea—namely, protecting property from improper regulation—such a measure would probably withstand a challenge on the basis of the separate amendment rule.

Solving the Transferability Problem

If a version of Measure 37 were to be proposed in Arizona, the question of whether regulation waivers are transferable to subsequent property owners would have to be addressed. The measure could be revised explicitly to address whether waived regulations will automatically return to full force on the

transfer of title, or waivers could be made enforceable by subsequent owners in a manner similar to restrictive covenants or equitable servitudes.¹¹¹ Another alternative would be to allow local governments to decide the issue for themselves. Unfortunately, the “vested rights” approach suggested by Maukonen might not be feasible in Arizona. As Jordan R. Rose and Court S. Rich have explained, Arizona case law does not provide a clear test for determining when “vesting” occurs, meaning that “landowners are left to guess” when the right to use property in a certain way has vested. To avoid this problem, any new version of Measure 37 would have to explicitly describe the circumstances under which a waiver would apply to later landowners.¹¹²

Political Realities of Adopting a Regulatory Takings Law in Arizona

In 1992, five years before the *Home Builders Association* case, the Arizona Legislature enacted the Arizona Private Property Protection Act, designed to address regulatory takings concerns.¹¹³ Surprisingly, the measure did little to change the judicial standards regarding such takings; it merely required the Attorney General’s office to supervise possible regulatory takings by the government and to adopt guidelines to help state agencies avoid such takings. The Act set forth some basic principles for the Attorney General to follow, but for the most part, these principles were unremarkable restatements of then-existing laws. Yet there were two sections that were particularly important.

First, the Act declared that “governmental action may amount to a taking even though the action constitutes less than a complete deprivation of all use or value of all separate and distinct interests in the same private property or the action is only temporary in nature.”¹¹⁴ This was a significant change in the law, reversing both the *Corrigan* rule that only a complete confiscation of the property amounted to a taking and the *Wonders* decision that less-than-total takings are not really takings at all.

Second, the Act addressed the exactions problem by declaring that *Nollan* and *Dolan* applied to “any conditions imposed on issuing [a] permit” for using property. Such conditions, the Act declared, must “directly relate to the purpose for which the permit is issued, shall substantially advance that purpose, and shall be expressly authorized by law.”¹¹⁵

Two years after the Act was passed by the legislature and signed by Governor Fife Symington, it was submitted to the voters as a referendum. Environmentalists and other special interest groups led an emotional campaign against the measure, declaring that it was a scheme by “the radical right and a few greedy business interests like big land speculators/developers” to “take away your rights!”¹¹⁶ If the measure passed, declared one argument in the 1994 ballot pamphlet, “forget about clean air, clean water and health and safety in the workplace.”¹¹⁷ Another claimed that “protections from

hazardous wastes, pesticides and toxic emissions will be undermined” if it were to pass.¹¹⁸ Perhaps most telling, a columnist for the *Arizona Republic* wrote that the law “would virtually rob natural resource agencies of the ability to enforce environmental laws...by making enforcement too expensive for the state.”¹¹⁹ Because the costs of compensating landowners for their taken property would be “monumental,” the columnist wrote, individual landowners should be required to shoulder those costs instead.

Rather than frankly acknowledge their desire to impose costs on property owners, opponents of the measure emphasized a conservative-sounding message: “Proposition 300 would mean more taxes, more bureaucracy and less protection of public health and safety.”

But rather than frankly acknowledge their desire to impose costs on property owners, opponents of the measure emphasized a conservative-sounding message: “Proposition 300 would mean more taxes, more bureaucracy and less protection of public health and safety.”¹²⁰ This, in addition to an unusual confluence of events—including one incident in which conservative icon Barry Goldwater publicly opposed the Proposition (although he later changed his mind)—allowed opponents of Proposition 300 to portray it as inconsistent with conservative values. As a result, the Act failed in November 1994 by a vote of 60 to 40 percent. Anti-property rights activists crowed years later that the 1994 election proved “that, with the right campaign strategy and enough time, property rights initiatives can be defeated anytime, anywhere.... By crafting a single, conservative message, [the anti-property rights campaign] was able to expand their support base far beyond their natural allies [and]...to define in large part the

playing field on which the fight over Proposition 300 was fought.”¹²¹

Property rights advocates, therefore, must take care to “stay on message” and must be prepared to puncture common myths about a law requiring compensation for regulatory takings.¹²² By dramatizing the importance of private property rights, understanding the many ways government interferes with them, and articulating the reasons for compensating people for the things that government takes from them, a regulatory takings measure could succeed in Arizona just as it has in Oregon. Measure 37 indicated that ordinary citizens overwhelmingly saw the state’s land use regulations as going too far in imposing the costs of public benefits on private individuals. Many voters understood Measure 37 in terms of basic fairness. Far from hostility to environmental protection, Measure 37’s supporters were, for the most part, “frustrated by the ever-expanding regulatory system, the courts’ incoherent takings law, and thwarted attempts (like Measure 7) to protect their property rights.”¹²³ Meanwhile, Arizona’s tradition of respecting the individual’s right to own and use private property is far stronger than Oregon’s. As the regulatory burden increases, it seems likely that Arizonans will understand the propriety of compensating owners when their rights to use their property are violated.

Unfortunately, the experience of Proposition 300 shows that Arizona’s strong tradition of respect for private

property rights and limited government can sometimes lead voters into rejecting the very rights they cherish. By portraying Proposition 300 as a big-government, tax-and-spend measure, the initiative's opponents were able to defeat what would have served as a substantial protection for property rights. Any future attempt to protect property owners from regulatory takings must take care to avoid being similarly mischaracterized.

Conclusion

Property rights are more than just the right to have things. They include the right to use land and other things to improve our lives and the lives of our families. As the Virginia Declaration of Rights put it, people have the right to “life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.”¹²⁴ But when government interferes with the right to use land, it takes away one of the most important “sticks” in the “bundle” of rights referred to as property. This interference often costs owners a great deal of money—and yet under the decisions of many state and federal courts, the government may escape having to pay “just compensation” for those takings. Such a situation does injustice to people who ought to have the right to use the property they have earned, and it perverts the democratic process by protecting politicians from having to make smart and fair choices about what

government may do and what government can afford. Oregon's Measure 37 is a step toward fixing this problem. It declares that the government must at least obey the constitution's “just compensation” requirement when it deprives its citizens of the right to use the land they own.

If property rights advocates remain clear about the importance of private property rights and the constitutional and moral right of property owners to be compensated for regulatory takings, Arizona could adopt a similar measure to ensure that citizens are not required individually to shoulder the cost of projects that “in all fairness and justice, should be borne by the public as a whole.”¹²⁵ When, as in the *Wonders* case, government forces a property owner to leave 45 acres of land idle so as to preserve “native plants,” government should have to compensate the owner for taking this land in everything but name.

Ensuring that government respects property owners' rights will not only protect the property owners and create incentives for government officials to make wise decisions, but it will also help to ensure prosperity in Arizona generally. No other ingredient is more important to economic health than the security of private property rights. Protecting the rights of those who invest in Arizona, and who build, create jobs, and plan for the future will help to preserve the blessings of liberty to future generations.

Ensuring that government respects property owners' rights will not only protect the property owners and create incentives for government officials to make wise decisions, but it will also help to ensure prosperity in Arizona generally.

NOTES

1. *Ranch 57 v. City of Yuma*, 152 Ariz. 218, 226 (App. 1986), quoting *Fred F. French Inv. Co. v. City of New York*, 39 N.Y. 2d 587, 596 (1976).
2. *VanHorne's Lessee v. Dorrance*, 28 F.Cas. 1012 (C.C. Pa.1795). See also *Armstrong v. United States*, 364 U.S. 40, 49 (1960). (“The Fifth Amendment’s guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”)
3. *Pumpelly v. Green Bay & Mississippi Canal Co.*, 80 U.S. 166, 177-178 (1871) (emphasis original).
4. *Grand Rapids Booming Co. v. Jarvis*, 30 Mich. 308, 313 (1874) (emphasis original).
5. Thomas G. West, *Vindicating the Founders* (Lanham, MD: Rowman and Littlefield, 2001), ch. 3.
6. Roscoe Pound, “Mechanical Jurisprudence,” *Columbia Law Review* 8 (1908): 605.
7. Edward Coke, *Institutes of the Laws of England* Part I § 1 (1608) reprinted in Steve Sheppard, ed., *The Selected Writings of Sir Edward Coke*, vol. 2 (Indianapolis, IN: Liberty Fund, 2003): 609.
8. See, e.g., *San Remo Hotel, L.P. v. City and County of San Francisco*, 125 S.Ct. 2491, 2506 n. 26 (2005) and *Pennsylvania Coal v. Mahon*, 260 U.S. 393 (1922). See also James S. Burling, “A Short History of Regulatory Takings: Where We Have Been and What Are the Hot Issues of Today,” paper, SL012 ALI-ABA 1 (2005); and Kris W. Kobach, “The Origins of Regulatory Takings: Setting the Record Straight,” *Utah Law Review* (1996): 1211.
9. *Mahon*, 260 U.S. at 414.
10. See Kobach, p. 1218 (“The requirement of compensation for nonacquisitive takings was common place in state constitutional interpretation and common-law doctrine by the end of the 1860s.”)
11. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).
12. See *Mugler v. Kansas*, 123 U.S. 623, 668-669 (1887).
13. Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* (Cambridge, MA: Harvard University Press, 1984): 109-110.
14. See Michael McGerr, *A Fierce Discontent: The Rise and Fall of the Progressive Movement in America, 1870-1920* (New York: The Free Press, 2003); Richard A. Epstein, *How Progressives Rewrote the Constitution* (Washington, D.C.: Cato Institute, 2006); and Thomas G. West, “The

- Constitutionalism of the Founders versus Modern Liberalism,” *Nexus: A Journal of Opinion* 6 (2001): 75.
15. Louis Menand, *The Metaphysical Club* (New York: Farrar Straus and Giroux, 2001): 409.
16. Michael J. Gerhardt, “The Rhetoric of Judicial Critique: From Judicial Restraint to the Virtual Bill of Rights,” *William & Mary Bill of Rights Journal* 10 (2002): 588-597.
17. The term “living Constitution” first made its appearance in a law review article in 1900: Arthur Machen, Jr., “The Elasticity of the Constitution,” *Harvard Law Review*, 14 (1900): 205. The term made its first well-recognized appearance in the Progressive book *The Living Constitution* by Howard Lee McBain in 1927 and was used the next year as the title for an article by future New Deal “Brain Trust” member Rexford Tugwell, in which Tugwell criticized the Supreme Court for striking down labor reform laws. See Rexford Tugwell, “That Living Constitution,” *The New Republic* (June 20, 1928).
18. Dorsey Richardson, *Constitutional Doctrines of Justice Oliver Wendell Holmes* (Baltimore, MD: Johns Hopkins University Press, 1924), p. 41.
19. Letter to Harold Laski (March 4, 1920) in Mark DeWolfe Howe, ed., *The Holmes-Laski Letters: The Correspondence of Mr. Justice Holmes and Harold J. Laski, 1916-1935* vol. 1 (1953): 248-249.
20. Clinton Rossiter, ed., *The Federalist* no. 78 (New York: Signet, 1961): 467 (Alexander Hamilton).
21. “In [*Mahon*], the Court’s majority abandoned [the] sharp, categorical distinction between the eminent domain and police powers. Justice Holmes blurred the distinction in an oft-quoted sentence: ‘The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.’ Government power to regulate land use had thus become a matter of degree, generating the doctrinal uncertainty that has endured to the present day.” Stewart E. Sterk, “The Federalist Dimension of Regulatory Takings Jurisprudence,” *Yale Law Journal* 114 (2004): 210.
22. *Nebbia v. New York*, 291 U.S. 502, 537 (1934).
23. *United States v. Carolene Products Co.*, 304 U.S. 144, 152-153 (1938).
24. 438 U.S. 104 (1978).
25. *Ibid.* at 124.
26. Burling, “Short History,” 27-28; Gideon Kanner, “Making Laws and Sausages: A Quarter-Century Retrospective on *Penn Central Transportation Co. v. City of New York*,” *William & Mary Bill of Rights Journal* 13 (2005): 767-768.
27. Frank I. Michelman, “Property, Utility, and Fairness: Comments on the Ethical Foundations of ‘Just

- Compensation' Law," *Harvard Law Review* 80 (1967): 1165.
28. *Ibid.* at 124.
29. Even Justice Sandra Day O'Connor has agreed that "*Penn Central* does not supply mathematically precise variables, but instead provides important guideposts that lead to the ultimate determination whether just compensation is required." *Palazzolo v. Rhode Island*, 533 U.S. 606, 634 (2001) (Justice O'Connor concurring).
30. *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979) (emphasis added).
31. William P. Barr et al., "The Gild That Is Killing the Lily: How Confusion over Regulatory Takings Doctrine Is Undermining the Core Protections of the Takings Clause," *George Washington Law Review* 73 (2005): 484.
32. John E. Fee, "Unearthing the Denominator in Regulatory Taking Claims," *University of Chicago Law Review* 61 (1994): 1536, n. 4; David F. Coursen, "The Takings Jurisprudence of the Court of Federal Claims and the Federal Circuit," *Environmental Law* 29 (1999): 823, n. 12.
33. 458 U.S. 419 (1982).
34. 505 U.S. 1003 (1992).
35. *Loretto*, 458 U.S. at 435.
36. 503 U.S. 519, 527-528 (1992). The law challenged in *Yee* allowed the tenants of mobile home trailers to sell their trailers to new tenants, while limiting the freedom of owners of the underlying land to evict these newcomers. The Supreme Court declared that the law requiring landowners to accept these newcomers did not qualify as a Lucas-style taking because "the Mobilehome Residency Law provides that a park owner who wishes to change the use of his land may evict his tenants, *albeit with 6 or 12 months notice.*" *Ibid.*, 528 (emphasis added).
37. *Lucas*, 505 U.S. at 1015.
38. *Palazzolo v. Rhode Island*, 533 U.S. 606, 609 (2001). See also James S. Burling, "Private Property Rights and the Environment after *Palazzolo*," *Boston College Environmental Affairs Law Review* 30 (2002): 61-62.
39. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987).
40. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 334-335 (2002).
41. *Owen v. City of Independence*, 445 U.S. 622 (1980).
42. See also Kanner, p. 720.
43. *Fred F. French Investing Co., Inc. v. City of New York*, 39 N.Y.2d 587, 596-597 (1976). See also *Pennell v. City of San Jose*, 485 U.S. 1, 22-23 (1988) (Opinion of Justices Scalia and

O'Connor)

44. Arizona cases following the federal courts on regulatory takings include *Ranch 57 v. City of Yuma*, 152 Ariz. 218, 226-227 (App. 1986); and *Laidlaw Waste Systems, Inc. v. City of Phoenix*, 168 Ariz. 563, 565 n. 1 (App. 1991). The Arizona Supreme Court's distinction between the police power and the power of eminent domain is recognized in *Moton v. City of Phoenix*, 100 Ariz. 23, 26 (1966).
45. *Moton*, 100 Ariz. at 27; *Laidlaw Waste Systems*, 168 Ariz. at 566.
46. *Ranch 57*, 152 Ariz. at 223.
47. *St. Joseph's*, 163 Ariz. 132, 136-137 (1989); *Circle K Corp. v. City of Mesa*, 166 Ariz. 464, 469-470 (1990).
48. *Laidlaw*, at 566 (citations omitted). *Circle K Corp.*, 166 Ariz. at 469-470.
49. *Ranch 57*, 152 Ariz. at 226, quoting *Fred F. French Inv. Co. v. City of New York*, 39 N.Y.2d 587, 596 (1976).
50. *Corrigan v. City of Scottsdale*, 149 Ariz. 553 (App. 1985) aff'd in part, 149 Ariz. 538 (1986); *Wonders v. Pima County*, 207 Ariz. 576 (App. 2004).
51. *Corrigan*, 149 Ariz. at 561-562.
52. *Ibid.*
53. *Ibid.* at 562. Note that the court relied on *Agins v. City of Tiburon*, 447 U.S. 255 (1980). In *Lingle v. Chevron U.S.A. Inc.*, 125 S.Ct. 2074 (2005), however, the U.S. Supreme Court severely restricted the degree to which *Agins* applies to regulatory takings.
54. *Corrigan*, 149 Ariz. at 562.
55. *Ibid.* at 564.
56. *Ibid.* at 565.
57. Steven J. Eagle, "Planning Moratoria and Regulatory Takings: The Supreme Court's Fairness Mandate Benefits Landowners," *Florida State University Law Review* 31 (2004): 446-447 (emphasis added).
58. *Wonders*, 207 Ariz. at 577-578.
59. *Ibid.* at 581.
60. *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994).
61. See *Ehrlich v. Culver City*, 12 Cal.4th 854, 896 (1996).
62. See *Parking Ass'n of Georgia, Inc. v. City of Atlanta*, 515 U.S. 1116, 1118 (1995) (Justices Thomas and O'Connor dissenting from denial of cert.) ("It is not clear why the existence of a taking should turn on the type of governmental entity responsible for the taking. A city council can take property just as well as a planning commission can. Moreover, the general applicability of the ordinance should not be relevant in a takings

analysis. If Atlanta had seized several hundred homes in order to build a freeway, there would be no doubt that Atlanta had taken property. The distinction between sweeping legislative takings and particularized administrative takings appears to be a distinction without a constitutional difference.”)

63. *Amoco Oil Co. v. Village of Schaumburg*, 661 N.E.2d 380, 389 (Ill. App. 1995), cert. denied, 519 U.S. 976 (1996).

64. 187 Ariz. 479, cert. denied, 521 U.S. 1120 (1997).

65. *Home Builders Ass’n*, 187 Ariz. at 485.

66. *Ibid.* at 482-483 (exaction requirement deserves “considerable deference” and must be upheld unless enacted “arbitrar[ily] and without factual justification.”)

67. See, e.g., Edward L. Glaeser et al., “Why Have Housing Prices Gone Up?” Harvard Institute for Economic Research Discussion Paper No. 2061 (2005), <http://post.economics.harvard.edu/hier/2005papers/HIER2061.pdf> (visited February 26, 2006), and Randall O’Toole, “The Planning Penalty” (American Dream Coalition, March 2006), <http://americandreamcoalition.org/Penalty.pdf> (visited May 5, 2006).

68. Much of the following is drawn from Steven G. Gieseler, Leslie Marshall Lewallen, and Timothy Sandefur, “Measure 37: Paying People for What

We Take,” *Environmental Law* 35 (2006): 79.

69. See Gieseler, Lewallen, and Sandefur, 91-94.

70. Dale Johnson, “Let’s Make the Dream Come True,” quoted in Bill Moshofsky, *Regulatory Overkill: It’s Time to Reform Land Use Regulations* (Victoria, BC: Trafford, 2004): 10.

71. Moshofsky, *Regulatory Overkill*, 35.

72. See Gieseler, Lewallen, and Sandefur, “Measure 37,” 94.

73. “Gov. Kitzhaber’s Press Release Announcing ‘Ecotake’ Bill Veto,” *West’s Legal News* 1182, August 16, 1995 (1995 WL 908895) (emphasis added).

74. *VanHorne’s Lessee v. Dorrance*, 28 F.Cas. 1012 (C.C. Pa.1795).

75. The text of Measure 7 is available online at <http://www.sos.state.or.us/elections/nov72000/guide/mea/m7/m7.htm> (visited January 2, 2006).

76. *League of Oregon Cities v. State*, 334 Or. 645, 668 (2002).

77. *Ibid.* at 672.

78. The text of Measure 37 is available online at http://www.sos.state.or.us/elections/nov22004/guide/meas/m37_ext.html (visited January 2, 2006).

79. Peyton Knight, “Property Rights:

Measure 37 to the Rescue,” *ChronWatch*, January 4, 2005, <http://www.chronwatch.com/content/contentDisplay.asp?aid=12140> (visited February 25, 2005).

80. See, e.g., “Letter to the Editor,” *Seattle Times*, May 28, 2005, claiming that Measure 37 would “pave the way for California-style sprawl to run roughshod through our communities and across [Washington] state.”

81. *MacPherson et al. v. Department of Administrative Services et al.*, 340 Or. 117 (2006).

82. See Plaintiffs’ Brief in Support of Motion for Summary Judgment, *MacPherson v. Department of Administrative Services*, no. 05C10444 (on file with author).

83. *Ibid.* at 2-3.

84. See Gieseler, Lewallen, and Sandefur, “Measure 37,” p. 98; *MacPherson*, 340 Or. at 128.

85. *MacPherson*, 340 Or. at 128

86. Plaintiffs’ Brief, 5

87. *MacPherson*, 340 Or. at 141 (“neither the state nor the federal constitution requires compensation to individuals who suffer any loss in property value as a consequence of land use regulation...it is equally true that neither constitution *forbids* requiring such compensation”).

88. Plaintiffs’ Brief, pp. 6-7 (emphasis

added).

89. Peter Douglas, environmental activist and Executive Director of the California Coastal Commission, has likewise acknowledged that many regulatory programs force individual homeowners to pay the cost of providing public benefits, but resists compensating these property owners because “there simply is not enough money to pay the bill” and “there will never be enough money.” Peter Douglas, “Shades of Green: Buying and Selling Environmental Protection,” speech delivered at Environmental Law Conference, Yosemite, October 26, 2002, p. 2 (on file with author).

90. No. 05CV0015 (Circuit Court, Crook County).

91. See generally J. David Breemer and R. S. Radford, “The (Less?) Murky Doctrine of Investment-Backed Expectations after *Palazzolo*, and the Lower Courts’ Disturbing Insistence on Wallowing in the Pre-*Palazzolo* Muck,” *Southwestern University Law Review* 34 (2005): p. 351.

92. *Palazzolo*, 533 U.S. at 627.

93. See, e.g., *George Washington University v. District of Columbia*, 391 F.Supp.2d 109, 113-114 (D.D.C. 2005).

94. See Jona Maukonen, “Transferring Measure 37 Waivers,” *Environmental Law* 36 (2006): p. 177.

95. Section 8 (emphasis added). *Bookstore v. City of Tucson*, 204 Ariz. 50 (2002).
96. Maukonen, 183.
97. 100 Ariz. 23 (1966).
98. *Ibid.* at 26.
99. See *Paalan v. United States*, 51 Fed. Cl. 738, 750-751 (2002) (noting “the distinction between the compensable exercise of...eminent domain to benefit the public and the non-compensable exercise of its police power to protect the public”).
100. *Moton*, 100 Ariz. at 25, 27-28.
101. James Madison, “Property” in J. Rakove, ed., *James Madison: Writings* (New York: Library of America, 1999): 515 (emphasis original).
102. Ariz. Const. art. XXI § 1.
103. *Hood v. State*, 24 Ariz.App. 457, 463 (1975).
104. 76 Ariz. 390 (1953).
105. *Ibid.* at 397.
106. *Ibid.*
107. 44 Ariz. 208 (1934).
108. *Ibid.* at 221-222 (emphasis original).
109. *Hood*, 24 Ariz.App. at 464.
110. See, e.g., *Empress Adult Video and Bookstore v. City of Tucson*, 204 Ariz. 50 (2002).
111. These are enforceable promises with regard to the use of land that are binding on later purchasers of the land. See generally *Powell v. Washburn*, 125 P.3d 373, 375, 2006 WL 22416 (January 5, 2006).
112. Jordan R. Rose and Court S. Rich, “Protecting Private Property: The Case for Vested Property Rights,” Goldwater Institute Policy Brief, March 1, 2004.
113. Ariz. Rev. Stat. Ann. 37-221 et seq. (1993).
114. *Ibid.* Section 37-221(B)(3).
115. *Ibid.* Section 37-222(C)(1).
116. Raúl M. Grijalva, Argument “Against” Proposition 300, available online at <http://www.azsos.gov/election/1994/General/1994.htm#300> (visited January 2, 2006).
117. *Ibid.*
118. Karen Amacker and Lynn DeMuth, Argument “Against” Proposition 300, available online at <http://www.azsos.gov/election/1994/General/1994.htm#300> (visited January 2, 2006).
119. Barry Burkhart, “State May Pay More to Control Environment,” *Arizona Republic*, May 31, 1992, p. D9.
120. Doug Kendall and Carolyn

Dorman, "Taking Community Rights by Initiative: Lessons from Oregon, Arizona and Washington," <http://www.communityrights.org/PromotesSmartGrowth/Measure7Lessons.asp> (visited January 2, 2006).

121. Ibid.

122. See Leonard C. Gilroy, *Statewide Regulatory Takings Reform: Exporting Oregon's Measure 37 to Other States* (Reason Public Policy Institute Policy Study No. 343, April 2006), esp. pp. 31-40.

123. Sara C. Galvan, "Gone Too Far: Oregon's Measure 37 and the Perils of Over-Regulating Land Use," *Yale Law & Policy Review* 23 (2005): 587, 600.

124. Va. Dec. of Rights par. 1 (1776).

125. *Armstrong*, 364 U.S. at 49.

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