CONSTITUTIONAL, POLITICAL, AND PHILOSOPHICAL STRUGGLE: MEASURE 37 AND THE OREGON URBAN GROWTH BOUNDARY CONTROVERSY

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I. INTRODUCTION

In 2004, Oregon voters approved Measure 37. Measure 37 provided that “governments must pay owners, or forgo enforcement, when certain land use restrictions reduce property value.” In 2005, Judge Mary James ruled that the measure was illegal. On appeal, the Oregon Supreme Court reversed Judge James’s ruling, reinstating the law. While Judge James’s ruling was short-lived, it embraced an interesting argument about the government’s scope of power in restricting property rights.

Oregon’s land-use regulations immediately before 2004 forced local governments to set clear boundaries between urban and rural lands, and to constrain development to the former. Some argued that such restrictions were a taking in violation of the Fifth Amendment. Measure 37 reflected their position and forced local govern-
ments to compensate for any diminution in land value resulting from regulation. This Comment explains why this position in support of Measure 37 is a misconception and why the development scheme in Oregon did not amount to a taking.

The opponents of the measure also looked to the Constitution to argue that the new law should be invalidated by the courts. They claimed that the results of the measure—exempting their neighbors from long-standing property restrictions—removed some of their property rights. Taking a slightly different angle, they claimed that the interference with property rights was happening without their having due process. However, the implication was that a taking occurred. This Comment also explains why the opponents of the measure were wrong to look to the Constitution to invalidate the new law.

The specifics of this constitutional misunderstanding aside, this Comment argues that, stepping back from the fray, one can observe the interplay of property, liability, and inalienability rules in the underlying land-use debate. The measure's effect was to remove an inalienability rule from the regulatory scheme. This Comment explains that no other inalienability rules—specifically constitutional protections—prevent that modification. However, this Comment also argues that this type of regulation is precisely the circumstance where governments should, as a policy matter, (re)implement inalienability schemes to prevent uncoordinated metropolitan growth.

Part II discusses Oregon's unique history of land-use planning regulations. Part III examines relevant constitutional law and how that law bears on the presence or absence of an urban growth boundary. Part IV examines the underlying scheme of property, liability, and inalienability rules at play and makes the policy argument that an inalienability rule is appropriate in this circumstance.

II. MEASURE 37 IN CONTEXT

The history of land-use planning in Oregon is relevant to understand the foundation of the present-day debate between proponents and opponents of Measure 37.

6 This Comment's historical account mainly concerns itself with the generation that launched current land-use restrictions, as they are most relevant to the political climate. In some respects, the contrast I describe between the aspirations vis-à-vis the public good in the second half of the twentieth century and the vector on which voters aligned themselves in 2004 may be more of a reversion. See William G. Robbins, In Search of Western Lands, in LAND IN THE AMERICAN WEST: PRIVATE CLAIMS AND THE COMMON GOOD 3, 7 (William G. Robbins & James C. Foster eds., 2000) ("Until late in the nineteenth century... the function of federal land policy [in the West generally, and in Oregon specifically,] was the orderly distribution of public lands to private ownership. Land, after all, was the great temptation to those who conceived of property, security, and status in terms of landed real estate.").
A. The Genesis of Land-Use Regulation in Oregon

In 1979, Oregon voters authorized the creation of a metropolitan service district.7 “Metro” would be the planning arm to ensure compliance with Oregon’s statewide planning goals. Those goals were initially approved by the legislature in 1973 when they codified Oregon Revised Statutes Section 197.005, the Comprehensive Land Use Planning Coordination Act, requiring metropolitan areas to enact smart growth policies.

Oregon in the early 1970s was at an awkward stage of its development, both excited by its emerging prominence and wary of an influx of newcomers.8 In 1971, then Governor Tom McCall famously declared: “Come and visit [Oregon] again and again. But for heaven’s sake, don’t come here to live.”9 Two years later the New York Times spotlighted the comment, criticizing McCall for giving Oregon a negative reputation and discouraging businesses from moving to the state.10 In many respects, this tension has never subsided: Oregon headquarters two of the largest athletic shoe companies in the world as well as several technological innovators,11 yet its restrictive land-use policies heavily constrain expansion of its metropolitan area.

The history of Portland-area urban freeways gives an instructive perspective on the city’s unique approach to land use. Like most metropolitan areas in the 1970s, Portland intended to use funds from federal transportation subsidies to extend its freeway network to expand its metropolitan area.12 Portland had even begun purchasing homes in the southeastern quadrant of the city to ease the implementation of the plan. However, community activists in Portland launched a successful campaign to block the freeway, insisting that

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7 See AM. PLANNING ASS’N, GROWING SMART LEGISLATIVE GUIDEBOOK: MODEL STATUTES FOR PLANNING AND THE MANAGEMENT OF CHANGE 6-7 to -11, 6-15, 6-26, 6-100 to -104 (phases I & II, interim ed. 1998), reprinted in LOCAL GOVERNMENT LAW 486, 489 (Gerald E. Frug et al. eds., 3d ed. 2001) (describing the creation of the metropolitan service district known as “Metro”).

8 One can make the case that Portland has always been at awkward stages of development. See Carl Abbott, Urbanism and Environment in Portland’s Sense of Place, 66 Y.B. ASS’N PAC. COAST GEOGRAPHERS 120, 122 (2004) (“One of [Portland’s] radical virtues .. has been to conserve or even recreate the best from previous generations of city making while accommodating economic and demographic change.”).


11 See In Some Industries, Portland Area Has Certain Magnetism, in Rethinking Portland, PORTLAND TRIB., July 25, 2006, at 11 (detailing clusters of business activity in high-tech and active wear, including Nike and Adidas).

12 This is a different course of action from that chosen by most cities. See PETER DREIER, JOHN MOLLENKOPF, & TODD SWANSON, PLACE MATTERS: METROPOLITICS FOR THE TWENTY-FIRST CENTURY 92, 92–132 (2d rev. ed. 2005) (discussing pervasive federal subsidization being used to finance sprawling growth practices).
the road would benefit suburbanites at the expense of fragmenting vibrant urban neighborhoods.\textsuperscript{13}

Neil Goldschmidt, then a legal aid lawyer, helped lead the charge, emphasizing “the importance of strong schools and neighborhoods in keeping the middle class in a city.”\textsuperscript{14} Shortly thereafter, Goldschmidt centered a successful campaign for mayor,\textsuperscript{15} on the idea that the core of a city should not be sacrificed to subsidize outward expansion into the suburbs.\textsuperscript{16} This was counter-revolutionary, as it refuted the post-war conceptualization of the suburb as a cure for urban

\textsuperscript{13} See \textit{infra} Part III (arguing at length that the activists’ general assertions were valid).

\textsuperscript{14} Bob Young, \textit{Highway to Hell}, WILLAMETTE WEEK, Mar. 9, 2005, at 12-13. Young’s article also discusses how the community activists were inspired by Jane Jacobs’s book, THE DEATH AND LIFE OF GREAT AMERICAN CITIES (Vintage 1992) (1961). Jacobs’s work is regarded as a highly provocative examination of how cities function and includes a normative examination of how city planners should respond to that functioning. One account of her work is particularly instructive at explaining the impact her writing had on the Portlanders fighting the freeway:

Her neighborhoods are not the areas on street maps that city planners have been forced to create in order to delineate the boundaries for formal neighborhood consultation. For her the neighborhood is a place of overlapping networks created by the habits of nearby residents. Some residents range at some distance, theirs is a large embrace, others move just along a single street. The residents’ sense of neighborhood is thus an ever-shifting definition.

The city district is also an amorphous area, something less than a municipality, larger than a neighborhood. She imagines it as an area where some politician takes on the role of advocate and deal-maker, someone who can get essential tasks done that the municipal bureaucracy is either not doing, or doing poorly.


\textsuperscript{15} See Tom Wicker, \textit{Mr. Mayor at 31}, N.Y. TIMES, May 25, 1972, at 45 (documenting Goldschmidt’s opposition to freeways). This is discussed in vivid detail in the story:

The new Mayor regards the problem of the automobile as mortal. “I know they say the American will never give up his car or his right to drive it when and where he pleases,” he says, “but if that’s so the city is dead anyway.” This is not only because of noise, air pollution and traffic jams, he believes, but because the inevitable result of unchecked auto traffic is freeways.

If an urban freeway destroys or damages a neighborhood, many of its people move to the suburbs; that means the freeway is often obsolete or overcrowded as soon as it opens; so more freeways have to be built, which means the destruction of more neighborhoods; and so on.

\textit{Id.} Goldschmidt later became the Secretary of Transportation under President Carter. \textit{President’s Choices For Transportation and H.U.D. Reported,} N.Y. TIMES, July 27, 1979, at A1.

\textsuperscript{16} See Young, supra note 14 (recounting Goldschmidt’s view that it was unfair that “[c]ity residents would pay [for the freeway], sacrificing their neighborhoods, schools and tax base. Suburban commuters would reap the benefits [of the freeway] with a slightly shorter commute.”). This stance was in some respects deferential to urban planning goals of an earlier time. See, e.g., Robert H. Freilich & Bruce G. Peshoff, \textit{The Social Costs of Sprawl,} 29 URB. LAW. 183, 183-84 (1997) (reflecting upon colonial urban planning which “emphasize[d] urban community,” as compared with later suburbanization efforts).
blight. Portland instead earmarked its highway funds for the construction of a light-rail system.

In 1973, the Oregon legislature responded to anti-sprawl sentiment by drafting legislation creating "a statewide planning agency to prescribe planning goals and objectives to be applied by state agencies, cities, counties and special districts throughout the state." Oregon voters ratified the planning law in the election of 1976. Then, in 1979, Portland became the first—and, to date, the only—city governed by a multi-county regional government. Although to comply with chapter 197 of the Oregon Code all Oregon cities had to implement growth boundaries and conduct land-use planning for the future, Portland is the largest city in Oregon, and so faces unique problems implementing the plan. Accordingly, "Metro" was granted the power to implement the goals of Section 197.005 and others articulated by the statewide planning commission for the three-county metropolitan area of Portland. Immediately, the district established an urban growth boundary, setting an outer spatial limit on growth.

B. Practical and Political Impacts of the Urban Growth Boundary

Since the 1970s, these growth boundaries in Oregon, particularly in Portland, have shoehorned a burgeoning population into an ever...

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17 See DREIER ET AL., supra note 12, at 59-60 (discussing the factors which contributed to the immense growth in suburban sprawl in the mid-1950s).
18 See Carl Abbott, The Portland Region: Where City and Suburbs Talk to Each Other—and Often Agree, 8 HOUSING POL’Y DEBATE 11, 24 (1997) ("Most of the federal money [for the proposed freeway] was transferred to build a successful fifteen-mile light-rail line from downtown to the eastern suburb of Gresham.").
19 OR. REV. STAT. § 197.005(4) (2005).
20 See Some Interesting Referendums, N.Y. TIMES, Oct. 31, 1976, at E18 (discussing the "disturbing possibility that Oregon voters will undo their state’s excellent land-use planning law").
21 See, e.g., OR. REV. STAT. § 197.010(1) (a) (2005) ("In order to assure the highest possible level of liveability in Oregon, it is necessary to provide for properly prepared and coordinated comprehensive plans for cities and counties, regional areas and the state as a whole. These comprehensive plans . . . [m]ust be adopted by the appropriate governing body at the local and state levels . . .").
22 The Portland area had dabbled in regional governance since as early as 1925. See Carl Abbott & Margery Post Abbott, A History of Metro: Historical Development of the Metropolitan Service District (May 1991), http://www.metro-region.org/article.cfm?ArticleID=2937. The article leads with the question "How old is Metro?" and its first six sections discuss the various precursors to the official regional government that was constituted in 1979. Although the freeway controversy provides context for the creation of Metro in this Comment, it did not directly bring about Metro’s creation. Rather, both of these events appear to be symptoms of ongoing efforts in the Portland area to grow responsibly.
more densely populated tract of land.  

However, as the area has become more crowded, not all of Oregon's current residents have continued to support the long-standing restrictions. The allure of developing areas tantalizingly close to the city center is tremendous.

To be sure, many Oregonians are convinced by arguments for "smart growth." However, there is a classic and strong counter-current of arguments in support of private property rights onto which the opponents of the urban growth boundary latch. The opponents emphasize property rights, freedom of choice, and the market economy as they label the state's planning goals as interventionist and an unwelcome moralizing affront to individual freedom. At a basic level, critics maintain that property restrictions allow the government to effectuate social engineering without compensating landowners for the benefits that they impart to the rest of society. The specific instruction to local governments in Oregon is to "demonstrate that its . . . regional plan provides sufficient buildable lands within the urban growth boundary . . . to accommodate estimated housing needs for 20 years." Some feel that Oregon governments effectuate a taking in violation of the Fifth Amendment of the Federal Constitution when they pursue the statutory directive.

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24 See Daniel Brook, How the West Was Lost, LEGAL AFF. Mar.–Apr. 2005, at 44, 45–46 ("[O]ur total metropolitan footprint is about half of what it would be in another metropolitan area of similar population.").

25 See CFM RESEARCH, OREGON LAND USE STATEWIDE SURVEY: A REPORT FOR OREGON BUSINESS ASSOCIATION AND INSTITUTE OF PORTLAND METROPOLITAN STUDIES, TOLUAN SCHOOL OF URBAN STUDIES AND PLANNING, PORTLAND STATE UNIVERSITY 20 (Mar. 2005) (delivering statistics that fifty-nine percent of those voting for Measure 37 still found it crucial for Oregon to "protect[] land for the future needs").

26 What these benefits are is often debated. Critics of sprawl generally cite Portland as a locality where the common pattern of economic segregation and a depressed ring of neighborhoods surrounding the central city area, often found in big cities with expansive suburbs, has not taken hold. See DREIER ET AL., supra note 12, at 61 (identifying Portland and Minneapolis as examples of successful regional governance and cooperation); see also DAVID RUSK, CITIES WITHOUT SUBURBS 85 (1993) (discussing the potential for regional governance to stabilize the ill effects of sprawl).


28 U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation."). The seminal work on what "just compensation" truly means is Frank I. Michelman's article entitled Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 HARV. L. REV. 1165 (1967). Generally, Michelman posits that we should examine takings from a utilitarian perspective and realize that the demoralization and settlement costs may outweigh the economic gain of a taking. Under this rubric he concludes that we are incapable of compensating for particularly capricious and demoralizing redistributions. See id. at 1213–14 (discussing the costs and benefits of takings). Michelman's article seems less instructive for regulatory takings than physical takings, since it seems that the demoralizing capacity of a regulation of exclusion is far less than uprooting an individual or family.
The debate over whether this claim is true surfaces, in part, because of the economics at stake: with large sums of money hanging in the balance, proponents of "smart growth" seek to use every legal tool to open the area for development. Oregon's development policies favor maintaining green space outside the city limits over maximizing individual landowner profit. Thus, property restrictions forbid millions of dollars worth of development on the outskirts of the city and in those portions of the nearby Columbia River Gorge that would not otherwise be federally protected. Land value at the divide between urban and rural is high, particularly where people hope to gain more "elbow room" after housing supplies are increased through in-fill because the growth policies prevent them from spreading outward.

C. Measure 37's Response to the Urban Growth Debate

Backers of Measure 37 sought to end the restrictions on development. "If housing supplies cannot accommodate demand," they implored voters, "why should landowners just outside the city boundaries be artificially prevented from responding to that demand, especially if they've owned their property since before the government came along and restricted their use of the land."

Within that framework, the law seems to presuppose that by enacting or enforcing land-use policies, the government withdraws rights previously vested in the property owner. Conceptually, the law appears premised on a myopic interpretation of the general principle in Penn Central Transportation Co. v. New York City. That case set forth a

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29 See generally Brook, supra note 24 (discussing selective expansion of the Portland Urban Growth Boundary to include some farms, but not the farm of one woman who had planted a large number of trees on her property).

30 Zoning is hardly the only input contributing to density. See, e.g., Michael Lewyn, How Overregulation Creates Sprawl (Even in a City Without Zoning), 50 WAYNE L. REV. 1171, 1177–91 (2004) (discussing the role that building codes play in affecting land development patterns in Houston, an area with no zoning restrictions at all).

31 See Blaine Harden, Anti-Sprawl Laws, Property Rights Collide in Oregon, WASH. POST, Feb. 28, 2005, at Al (discussing a 210-acre parcel which is worth $8,000 an acre with farmland restrictions, but which is estimated to be worth $284,000 an acre if it could be converted into an 800-house development).

32 Abbott, supra note 18, at 33 ("The mid-1990s have brought a rising awareness within the city of Portland that increased density will consume existing local open space and vacant land. With thousands of new housing units inside the city limits, many residents fear that there will be no breathing space, no rest for the eye.... [Suburban parks] are great for hikers, mountain bikers, and weekend excursions. They are less useful for inner-neighborhood kids and summer youth programs."). But see The 2006 Men's Journal 50 Best Places To Live, MEN'S J., Apr. 2006, at 54–55 (naming Portland the top city in the "Best of the Best" category and noting that "compared to West Coast cousins Seattle and San Francisco, Portland is an out-and-out bargain").

standard requiring governmental compensation of landowners for regulatory takings that adversely impact "investment-backed expectations." The Oregon statute reads:

(1) If a public entity enacts or enforces a new land use regulation or enforces a land use regulation enacted prior to December 2, 2004, that restricts the use of private real property or any interest therein and has the effect of reducing the fair market value of the property, or any interest therein, then the owner of the property shall be paid just compensation.

(2) Just compensation shall be equal to the reduction in the fair market value of the affected property interest resulting from enactment or enforcement of the land use regulation as of the date the owner makes written demand for compensation under this section. The law gives landowners who owned their property prior to the imposition of land-use restrictions the right to petition for compensation. This right remains intact for family members (defined to include corporate entities owned by family members) of those who owned the land at the time of the imposition of growth restrictions. Thus, the law appears to deal a devastating blow to the continued implementation of Oregon's growth policies.

The law's rhetoric is fascinating: it presumptively considers every diminution of land value caused by a state regulation to be an unconstitutional taking, necessitating compensation or exemption. In fact, as this Comment will explain, these measures are simply constitutional regulatory restrictions on property use. Conversely, legislative abandonment of these restrictions is constitutional. Constitutionally, Oregon can take either approach; the Constitution, however, cannot resolve the normative question of what the government should do.

III. CONSTITUTIONALITY OF OREGON'S CHANGING LAND-USE REGULATIONS

The law of takings originates in the Fifth Amendment prohibition of taking "private property . . . for public use, without just compensation." Oregon's land-use policies are the type of public use subject to the Fifth Amendment. The state removes some of the bundle of rights from some property owners by prohibiting certain uses of their land. This section explains that Oregon's land-use laws—both before and after Measure 37's passage—did not and do not impair the con-

34 Id. at 124.
36 Id. § 197.352(11)(A) (outlining the definition of "family member").
38 U.S. CONST. amend. V.
stitutional rights of landowners by restricting their development activities.\textsuperscript{39}

\textbf{A. Doctrinal Foundation of Takings Law}

As an initial matter, the Takings Clause’s original meaning apparently referred exclusively to physical takings.\textsuperscript{40} It is only more recently that takings law has been expanded to encompass some categories of non-physical takings.

1. Lucas \textit{and the Penn Central Balancing Test}

\textit{Lucas v. South Carolina Coastal Council}\textsuperscript{41} saw the Supreme Court order compensation at the margin for landowners denied “all economically beneficial or productive use of land.”\textsuperscript{42} But that case also

\textsuperscript{39} In \textit{Dolan v. City of Tigard}, 512 U.S. 374 (1994), the Supreme Court found one Oregon land use restriction unconstitutional. As part of its efforts to comply with ORS Chapter 197, \textit{see supra note 21}, the City of Tigard required a business owner to dedicate a portion of her land as a pedestrian thoroughfare as a condition to the construction of a new store on her property, 512 U.S. at 377–80. Somewhat famously, the Supreme Court struck down this requirement. Despite its apparent relevance to this Comment, \textit{Dolan} relies more broadly on the unconstitutional conditions doctrine than on Takings Clause doctrine. Therefore, the case is set aside for the remainder of this Comment.

My constitutional analysis builds upon Professor Michael Lewyn’s analysis of the same topic. \textit{See generally Michael Lewyn, Sprawl, Growth Boundaries and the Rehnquist Court, 2002 Utah L. Rev. 1} (discussing the constitutionality of Oregon’s land-use laws). Extensive review is necessary in light of the current litigation in Oregon concerning Measure 37. Lewyn, in short, concludes that urban growth boundaries in Oregon are probably constitutional as they are not total takings and also because they rarely interfere with landowners’ investment-backed expectations. \textit{Id.} at 51–52. However, his analysis had no reason to contemplate the current reciprocal problem of investment-backed expectations in light of an effort to sloppily and partially effectuate an abolition of land-use legislation. Unpacking and developing his analysis will help this author create a rubric under which to analyze the current constitutional controversy.

\textsuperscript{40} \textit{See, e.g., William Michael Treanor, The Original Understanding of the Takings Clause and the Political Process, 95 Colum. L. Rev. 782, 782} (1995). Treanor goes on to discuss an 1888 critique which objected to the importance that courts placed on physical property, protesting that “[w]e must... look beyond the thing itself, beyond the mere corporeal object, for the true idea of property.” \textit{Id.} at 799 (quoting \textit{John Lewis, A Treatise on the Law of Eminent Domain in the United States} § 59, at 54 (Chi., Callaghan & Co. 1888)); \textit{see also} Harry N. Scheiber, \textit{The “Takings” Clause and the Fifth Amendment: Original Intent and Significance in American Legal Development, in The Bill of Rights: Original Meaning and Current Understanding} 233, 242 (Eugene W. Hickock, Jr. ed., 1991) (“[C]ourts... narrowed drastically the very concept of a ‘compensable taking’ so as to exclude altogether nearly all forms of consequential, incidental, or indirect damages.”); John F. Hart, \textit{Land Use Law in the Early Republic and the Original Meaning of the Takings Clause, 94 NW. U. L. Rev. 1099, 1100–01} (2000) (refuting the notion that modern regulatory takings case law reflects original intent and asserting that “[m]any land use laws of the founding era imposed severe economic burdens, yet compensation for such losses was never paid”). \textit{But see Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1030} (1992) (holding that a state’s bar on all economically beneficial use of property is a taking).

\textsuperscript{41} 505 U.S. 1003.

\textsuperscript{42} \textit{Id.} at 1015.
featured an extensive debate about the historical foundation of the decision.

Justice Blackmun’s dissent laid out a historical account of regulatory takings and argued that no purely regulatory takings had ever been compensable. However, the majority opinion explained that while Americans’ experience may have been contrary to the Lucas Court’s current reading of the Takings Clause, that experience was itself “out of accord with any plausible reading of [the Takings Clause].” Accordingly, the Court held that a regulation that strips property of all economic value is compensable. Lucas built on prior rulings that compensation was required where restrictions on the manufacture of intoxicating beverages and the mining of coal destroyed value for property owners; it defined the law for the extreme case and stated that such a case would give rise to a claim for compensation.

Substantively, Lucas adopted the balancing test from Penn Central Transportation Co. v. New York City. That test is used to “determin[e] whether a land use regulation is intrusive enough to constitute a ‘taking’ . . . .” The test scrutinizes the degree to which a regulation is intrusive by examining whether significant economic harm is caused, the degree to which this economic harm affects reasonable investment-backed expectations, and the extent to which the regulation “adjust[s] the benefits and burdens of economic life to promote the common good.”

2. Historical Supreme Court Approaches to Zoning Restrictions

The Supreme Court has historically deferred to municipalities enacting zoning laws, perhaps acknowledging the previously discussed disjunction between originalist and current understandings of regulatory takings. Twice in the 1920s, the Supreme Court refused to or-

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43 Id. at 1057 (Blackmun, J., dissenting) (“[T]he Fifth Amendment’s Takings Clause originally did not extend to regulations of property, whatever the effect.”).
44 Id. at 1028 n.15 (majority opinion).
45 Mugler v. Kansas, 123 U.S. 623, 674 (1887). Mugler is also important because it extends the Takings Clause to state governments through the Fourteenth Amendment. Id. at 665.
47 438 U.S. 104, 124 (1978) (introducing a test to determine when a land-use regulation becomes a taking).
48 Lewyn, supra note 39, at 9. This test, as Professor Lewyn expounds, has been recently affirmed and clarified by Palazzolo v. Rhode Island, 533 U.S. 606 (2001), in which the Court explained that Lucas acts as an exception to the Penn Central balancing test, which does not need be applied in cases of complete denial of economically beneficial or productive uses of a plaintiff’s land. Lewyn, supra note 39, at 9 n.60.
49 Penn Central, 438 U.S. at 124.
50 That is, recognizing that municipalities historically had no limits on the regulations they could enact without the action being considered a taking.
der cities to rezone areas merely because the landowners could garner greater economic benefit if zoned differently. In Zahn v. Board of Public Works, the Court emphasized that "[t]he Common Council of the city . . . concluded that the public welfare would be promoted by constituting the area [with restrictions on private commercial development] . . . ." The Court has since emphatically reiterated that the desire of a landowner to use property differently from how it is zoned is not sufficient to force a government to rezone that land. Thus, the Court recognizes both zoning and development restrictions to be acceptable government regulations that do not venture into the takings category.

Even more recently, the Supreme Court reinforced this line of cases, concluding that a municipal zoning ordinance intended to promote open spaces was not a taking. In Agins v. City of Tiburon\textsuperscript{54} landowners purchased undeveloped land. The land was subsequently zoned to prohibit the erection of more than five single-family homes on the five-acre tract of land.\textsuperscript{55} Citing Penn Central, the Court ruled that this rezoning could not be a taking because it did not deny a landowner all economically viable use of land.\textsuperscript{56}

Further, the Court also reasoned that the ordinance advanced legitimate state interests.\textsuperscript{57} This latter construction is particularly instructive as the Court stated that the ordinance was valid because it advanced a governmental purpose. This extended the "police power" to the goal of preserving open space.\textsuperscript{58} Advancing this strain of argument, the Court stated: "[t]he specific zoning regulations at issue are exercises of the city's police power to protect the residents of


\textsuperscript{52} Zahn, 274 U.S. at 328.

\textsuperscript{53} City of Eastlake v. Forest City Enters., Inc., 426 U.S. 668, 674 n.8 (1976) ("It is hornbook law that '[m]ere diminution of market value or interference with the property owner's personal plans and desires relative to his property is insufficient to invalidate a zoning ordinance or to entitle him to a variance or rezoning." (quoting 8 EUGENE MCQUILLAN, THE LAW OF MUNICIPAL CORPORATIONS § 25.44, at 143 (3d ed., rev. vol. 2000))).

\textsuperscript{54} 447 U.S. 255 (1980).

\textsuperscript{55} Id. at 257.

\textsuperscript{56} Id. at 260 ("Although the ordinances limit development, they [do not] prevent the best use of appellants' land . . . .").

\textsuperscript{57} Id. at 261.

\textsuperscript{58} See generally Audrey G. McFarlane, The New Inner City: Class Transformation, Concentrated Affluence and the Obligations of the Police Power, 8 U. PA. J. CONST. L. 1 (2006) (discussing in greater depth the constitutional and policy considerations involved in urban planning and the police power).
Tiburon from the ill effects of urbanization. Such governmental purposes long have been recognized as legitimate.\(^{59}\)

Finally, Professor Michael Lewyn has observed that \textit{Palazzolo v. Rhode Island}, when read in light of Justice O'Connor's concurrence, develops by exclusion the idea of what is a total taking.\(^{60}\) He concludes that the case stands for the proposition that "a regulation allowing a landowner to build one house on eighteen acres of land is not such a 'total' taking."\(^{61}\) For example, under this analysis a total taking would not be found in a common situation around Portland: land regulated by ordinance to farm use, even though it would be more economically beneficial to its owner if developed into a new housing subdivision.

\textbf{B. Substantive Due Process Implications of Takings Law: A Path (Arguably) Taken but (Unquestionably) Abandoned}

The case law relevant to the constitutionality of Measure 37 is not limited to those cases dealing specifically with takings. The specific constitutional property rights issues raised by the parties to the Measure 37 litigation requires a due process analysis as well. In fact, Professor Lawrence Berger has presented a compelling argument that takings analyses have actually been couched in substantive due process terms since \textit{Penn Central}.\(^{62}\)

Professor Berger claimed that \textit{Mugler v. Kansas}, an 1887 Supreme Court case, foreshadowed the evolution of takings law into a substantive due process analysis.\(^{63}\) He noted that the Court warned potential litigants that it would not accept at face value a government's claim that a regulation had strong relationship to public ends; rather, they would look to the "substance of things."\(^{64}\) Berger accordingly linked \textit{Mugler} to the dreaded "Lochner-izing" and followed this strain of argument through \textit{Pennsylvania Coal}, \textit{Village of Euclid}, and \textit{Agins}.\(^{65}\) He ultimately concluded that takings would be found only where the government regulation failed to substantially advance a government interest.\(^{66}\)

\(^{59}\) \textit{Agins}, 447 U.S. at 261 (emphasis added).

\(^{60}\) Lewyn, \textit{supra} note 39, at 16.

\(^{61}\) \textit{Id.}

\(^{62}\) \textit{Id.}

\(^{63}\) \textit{See generally} Lawrence Berger, \textit{Public Use, Substantive Due Process and Takings—An Integration}, 74 NEB. L. REV. 843 (1995) (posing that the Supreme Court has unnecessarily intertwined takings and substantive due process rules on several occasions).

\(^{64}\) \textit{Id.} at 847.

\(^{65}\) \textit{Id.} at 847-48 (citing \textit{Mugler v. Kansas}, 123 U.S. 623, 661 (1887)).

\(^{66}\) \textit{See id.} at 848, 856-57, 863-67 (summarizing cases where a substantive due process inquiry was incorporated into a takings analysis).

\(^{67}\) \textit{Id.} at 883–85.
Recently, however, the Supreme Court rejected Berger's interpretation. In *Lingle v. Chevron U.S.A. Inc.* the Court clarified the field, emphatically stating:

Although a number of our takings precedents have recited the "substantially advances" formula minted in *Agins*, this is our first opportunity to consider its validity as a freestanding takings test. We conclude that this formula prescribes an inquiry in the nature of a due process, not a takings, test, and that it has no proper place in our takings jurisprudence. The Court held that the inquiry should instead be centered around "the magnitude or character of the burden a particular regulation imposes upon private property rights... [and] how [the] regulatory burden is distributed among property owners." The Court reasoned that a taking is equally onerous to two property owners, one of whom is burdened by an ineffective regulation and one burdened by an effective regulation. The Court emphasized that the Takings Clause, when it mandates compensation, presupposes that a taking was for a proper governmental purpose. The Court in *Lingle* instead supported the Takings Clause jurisprudence of *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles* and *Armstrong v. United States*. The relevant inquiry is thus whether the burden to the property owner is appropriate, not whether the burden is an acceptable consequence given what the government is attempting to accomplish through the regulation creating the burden. Notably, however, the Court did not reject the result of *Agins*, and empathized with its reliance on the language of *Village of Euclid* and *Nectow v. Cambridge*. Thus, it is the method and explanation—but not the outcome—of *Agins* that is no longer good law.

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68 Id. at 540.
69 Id. at 542.
70 See id. at 543 (explaining that the "substantially advances" test is not an appropriate takings test because it places too much emphasis on the effectiveness of the regulation at issue).
71 Id.
73 364 U.S. 40, 49 (1960) (holding that the Takings Clause demands compensation for those who are burdened by a taking when justice demands that the general public should bear the burden); see also *Lingle*, 544 U.S. at 543 (relying on relevant precedent to explain why the "substantially advances" test is distinct from the inquiry into whether a regulation effects a taking).
74 See *Lingle*, 544 U.S. at 541 ("When viewed in historical context, the Court's reliance [in *Agins*] on *Nectow* and *Euclid* is understandable.").
75 A recent student comment posits that Oregon voters were inclined to pass Measure 37 due, reportedly, to arbitrary and inconsistent rulings which reject the *Penn Central* balancing test and rely only on the *Lucas* standard of a denial of all economically viable use. Sara C. Galvan, Comment, *Gone Too Far: Oregon's Measure 37 and the Perils of Over-Regulating Land Use*, 23 YALE L. & POL'Y REV. 587, 594–95 (2005); see also Edward J. Sullivan, Reviewing the Reviewer: The Impact of the Land Use Board of Appeals on the Oregon Land Use Program, 1979–1999, 36 WILLAMETTE L. REV.
Additionally, in *Lingle* the Court noted that *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, a recent case that had also relied on *Agins*, had done so only in dicta. The *Tahoe* case represents a stronger argument in support of the constitutionality of zoning restrictions—as it involved a temporary moratorium on all building—than does *Agins*, which involved a permanent restriction on some types of building. The implications of these two cases will be examined in the next section.

C. Application and Implications to Pre-Measure 37 Law

The reviewed case law clarifies and updates the constitutionality of urban growth boundaries in general. Urban growth boundaries, particularly as Oregon has constituted them, are constitutional. The Oregon laws restricting development are part of a cohesive plan to gradually develop the region. They place limited burdens on landowners that do not remove all value from the land. Accordingly, they appear unassailable on constitutional grounds.

Professor Lewyn provided impeccable reasoning in this area as well. He noted that Oregon landowners outside of urban growth boundaries are substantially less encumbered in their use of property than were the landowners in *Palazzolo*, and, therefore, cannot be construed as victims of a total taking under *Lucas*. The conclusion appears the same under the *Penn Central* balancing test. Citing the longstanding nature of Oregon’s urban growth boundaries, Professor Lewyn posited that it would be a rare case where there were in fact

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441, 441 (2000) (analyzing the pattern of land-use decisions under Oregon planning laws). While this was a political analysis, had the Court not rejected the due process theory of takings, this analysis could theoretically have supported claims about the constitutionality of the urban growth boundary.

535 U.S. 302, 342 (2002) (holding that a temporary moratorium on building surrounding Lake Tahoe was not a compensable taking because it did not dispossess the owner or affect the owner’s right to exclude others). Interestingly, now-Chief Justice John G. Roberts, Jr., argued the case before the Court in favor of respondents—that is, presenting the prevailing argument that the restriction was valid. Then-Chief Justice Rehnquist wrote a dissenting opinion in the case, arguing that the regulation should be considered a taking because of the indeterminacy of the moratorium on building. *Id.* at 343–44 (Rehnquist, C.J., dissenting). Justices Thomas and Scalia joined Chief Justice Rehnquist in a 6-3 split of the Court.

Lingle, 544 U.S. at 546.

Professor Lewyn did not address the substantive due process analysis of Professor Berger, which I found compelling. In light of the Court’s 2005 ruling that undercut much of Professor Berger’s analysis, any debate over the relevance of this reasoning to Professor Lewyn’s article became moot. However, given the constitutional reasoning employed by the Oregon court in rejecting Measure 37, the analytical framework of Professor Berger was essential for my analysis. See MacPherson v. Dep’t of Admin. Servs., No. 00C15769, slip op. at 22 (Or. Ct. App. Oct. 14, 2005), http://www.oregon.gov/LCD/docs/measure37/macpherson_opinion.pdf.

Lewyn, *supra* note 39, at 17–18 (reasoning that if the restrictions at issue in *Palazzolo* were not a total taking under *Lucas*, then the restrictions in Oregon could not be construed as such).
any investment-backed expectations to impair. Oregon's compensation law ostensibly applies only to those who have owned their land before the regulation was imposed.

This conclusion is tenuous, though, because it groups those who inherited land with original owners. The measure's supporters claim that both sub-categories had a portion of their bundle of property rights taken away with the land-use regulations of the 1970s. However, even if we presume that a taking occurred, we can update Professor Lewyn's line of reasoning with Tahoe to show that even the restrictions against landowners and those in direct line of inheritance are constitutional. Tahoe upheld a restriction on pre-existing property rights that placed a moratorium on building in a specified area. Thus, Tahoe prevents the Oregon landowners to whom Measure 37 would apply from escaping the rubric of Penn Central. This supports the conclusion that the state can constitutionally impose zoning restrictions on any land so long as the restriction comports with the Penn Central balancing test and does not strip land of all economic value.

D. Application and Implications of the Post-Measure 37 Regime

Thus far, this Comment has analyzed the constitutional standing of potential Measure 37 claimants vis-à-vis the land restrictions as they stood prior to the approval of the measure in 2004. The tenor of the argument changed with Measure 37: instead of the constitutional deference toward the power of the state to enact regulations for the public good, the analysis shifted such that in order to enact any further land-use planning laws in the future, litigation would no longer center on whether the zoning law passes constitutional muster under Penn Central and its progeny. Rather, the state must litigate the issue of whether the zoning law diminishes the value of a parcel of property at all in order to avoid paying compensation to the landowner. This effectively eliminates the category of noncompensable regulatory takings in Oregon.

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80 See id. at 20 (noting that because urban growth boundaries have existed for over two decades in Oregon, it is unlikely that they would frustrate the investment-backed expectations of landowners).
81 Tahoe, 535 U.S. at 341–43 (rejecting petitioners' facial challenge to a moratorium on building, in part, because the moratorium was unlikely to single out individual landowners and because its duration was reasonable).
82 This conclusion is tempered by the Oregon Attorney General's interpretation of the new law. See Letter from Stephanie Striffler, Special Counsel to the Att'y Gen. of Or., to Lane Shetterly, Dir., Or. Dep't of Land Conservation and Dev. 2 (Feb. 24, 2005), available at http://www.oregon.gov/LCD/docs/measure37/m37dojadvice.pdf. The letter states in relevant part: In other words, before deciding to grant relief to a Measure 37 claimant, a public entity must determine at least that:
The necessity of such takings has been categorically recognized by the Supreme Court: "Land-use regulations are ubiquitous and most of them impact property values in some tangential way—often in completely unanticipated ways. Treating them all as per se takings would transform government regulation into a luxury few governments could afford." Indeed, the Supreme Court has noted that "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." To deny a government the ability to enact regulations is to call into question the fundamentals of the social contract between property owner and government. To take the analysis back several layers, governments are instituted to provide security to property rights which would otherwise be precarious in a state of nature. In return for the added security, property owners give up some of their rights to the property. As the quote from the Supreme Court indicates, it would be absurd for the property owner to use the mechanisms of government to renegotiate this social contract and insist on no government diminution of his property rights. But this is precisely what Measure 37 purports to do.

So, as a policy matter, the compensation scheme that the Oregon law installs is absurdly libertarian by the Supreme Court's standard. Even the conservative Justices dissented in Tahoe because they considered the taking at issue in Tahoe a total taking. They argued that the land-use regulation went too far for a lack of compensation to be justifiable. Thus, it seems that Measure 37 is really a bare policy and political enactment, not an initiative required to remedy any perceived wrongs under the Federal Constitution.

But does the new law run afoul of the Federal Constitution? Those contesting the statute insist that it does. They agree with the analysis that Oregon's smart growth policies are constitutional (and

- the claimant acquired the affect property before the law in question was adopted;
- the law restricts the use of the property in question;
- the law reduces the fair market value of the property in question;
- the law is not one that regulates activities that are commonly and historically recognized as a public nuisance;
- the law is not one that protects public health and safety; and
- the law is not required to comply with federal law.


\(^{84}\) Tahoe, 555 U.S. at 324.


\(^{86}\) See Tahoe, 535 U.S. at 355-56 (Rehnquist, C.J., dissenting) (opining that the moratoriums on building at issue completely deprived landowners of economically beneficial use of the land).

\(^{87}\) Id.
which the measure's backers disagree with). But one of their avenues of complaint is to reason that to remove the smart growth scheme would violate the Constitution.

In February 2006, the Oregon Supreme Court struck down Judge James's opinion. They only very briefly discussed Judge James's reasoning, and flatly concluded that she was wrong. I agree, and further develop the conclusion that there is nothing constitutionally infrm about the law. However, the sections that follow develop the intricacies and ironies of Judge James's constitutional analysis. I explain how and why she was wrong legally, but right from a policy standpoint. Regardless of its constitutionality, Measure 37 is foolish policy that reverses Oregon's historically intelligent commitment to combatting sprawl. It enthrones a policy likely to depress home values and to erode many of the regional amenities that helped generate the very impetus for landowners to want to develop land outside of urban growth boundaries.

IV. THE MARION CIRCUIT COURT APPROACH

The Marion Circuit Court opinion concluded that the new law was unconstitutional, and, by implication, that the old law was constitutional. This section summarizes and analyzes those since-overruled holdings.

A. Synopsis of the Court Opinion

On October 24, 2005, Judge Mary Merten James ruled on cross-motions for summary judgment in the Marion County Circuit Court. The plaintiffs in the case included Hector MacPherson, president of Bannockburn Farms, Inc., as well as several other farm and property owners, and 1000 Friends of Oregon, a nonprofit organization which opposed Measure 37 when it went before voters in the November 2004 election. The plaintiffs each made distinct claims, and Judge James examined each to establish their standing.

David T. Adams, one of the farmers, owned land adjacent to a landowner subject to the measure's exemptions. Adams's neighbor

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88 MacPherson v. Dep't of Admin. Servs., 130 P.3d 308, 322 (Or. 2006).
89 Id. at 321 (claiming the lower court erred because her conclusions were based on faulty underlying conclusions).
90 Hector MacPherson is a third-generation dairy farmer who has been cultivating farmland since World War II. Since the 1960s, MacPherson has been active in state land-use planning, and was a state senator for several decades. He was active in pushing through the 1973 land-use restrictions. See American Planning Association, Former Oregon State Senator Receives National Planning Award, Mar. 17, 1999, http://www.planning.org/newsreleases/1999/ftp0317.htm (offering a brief biography of MacPherson).
had successfully applied for the exemption and was taking "steps to subdivide his land, by clear-cutting and bulldozing the land . . . [which] . . . destroyed a wildlife corridor and adversely affects the watershed." Another neighbor could potentially do the same thing. As a result, Adams claimed, the amount and quality of water that would be accessible to his land would suffer. He also asserted that the roads around his home would "see increased traffic, causing . . . increased noise, pollution, risk of accidents, and the potential that emergency services will be delayed." Additionally, Adams predicted that "[t]he educational system will be further strained, which will result in the shifting of tax monies from other programs to schools, or to increased taxes." Even if the development were not allowed to proceed, Adams asserted, the claimants would have to be compensated and those monies would "be drawn from tax revenues paid by Adams that would otherwise be used to provide services that would benefit him."

Additional plaintiffs made claims based on the incompatibility of residential development adjacent to their farm use, decreased land value, potential for new residents on subdivisions complaining about frequent farming-related noise, and general harmfulness to the business model of farming.

Judge James concluded that landowners adjacent to property being developed under zoning waivers granted by the new law had standing to sue. She did not immediately conclude that plaintiffs whose land was not adjacent to land that had been granted an exemption had standing, however. Nonetheless, she indicated the analysis must include the tax consequences of any refusal to grant exemptions, and therefore she extended standing to all plaintiffs.

Judge James then analyzed the plaintiffs' motion for summary judgment. In attempting to do judicially what they could not politically, the plaintiffs included claims that Measure 37 was:

1) impairing the legislative body's plenary power,

2) violating the Oregon Constitution's equal privileges and immunities provision,

3) violating the Oregon Constitution's provisions on suspension of laws,

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92 Id.
93 Id.
94 Id. (citation omitted).
95 Id. at 4.
96 Id.
97 Id.
98 Id. at 5–6.
99 Id. at 8.
4) violating provisions on sovereign immunity,
5) impairing free speech,
6) compensating religious institutions,
7) violating separation of powers,
8) impairing federal constitutional procedural due process, and
9) impairing federal constitutional substantive due process.100

The first claim asserted was that Measure 37 impairs the legislature, by preventing the legislature from enacting zoning regulations without compensating landowners.101 Judge James agreed and found that by placing limitations on the legislature’s ability to use its power to regulate, the measure has prohibited the body from exercising its “plenary power.”102 Relying on Supreme Court decisions in Northern Pacific Railway Co. v. Duluth103 and Stone v. Mississippi,104 which both stand for the proposition that states could not make deals with private organizations that limited their police power, Judge James concluded that “if Measure 37 prohibits the legislative body from exercising its plenary power to regulate for public welfare, health, or safety, it is an unconstitutional curtailment of legislative power.”105 Judge James then noted that Measure 37 would require the government to “pay to govern.”106 The government, she said, could not constitutionally be “forced to choose between exercising its plenary power ... or paying private parties to comply with the law.”107 James went on to distinguish Measure 37 from other legislation having a fiscal impact and found constitutional significance in the need to expend funds only after laws had been passed and only when the legislature actually attempted to enforce them (i.e., when landowners would not be permitted to build on lands zoned as outside an urban growth boundary).108 On that basis, Judge James struck down the law.109

100 The second claim (violation of Oregon Constitution privileges and immunities) was accepted by Judge James, who agreed that the measure gave one group of property owners rights not afforded to other property owners. Id. at 14-15. The third claim (violation of Oregon Constitution suspension of laws provisions) was also accepted in part because the zoning laws would be suspended for some landowners but not for others. Id. at 16. The fourth claim (sovereign immunity) was rejected, and the fifth claim (Oregon state freedom of speech) was ruled not justiciable. Id. at 16-17. The sixth claim (compensation to religious institutions) and seventh claim (separation of powers) were also dismissed. Id. at 18-19.
101 Id. at 10.
102 Id. at 11.
103 208 U.S. 583, 598 (1908) (voiding a contract that limited police powers on public policy grounds).
104 101 U.S. 814, 817-18 (1879) (explaining that the legislature cannot curtail its own police power).
105 208 U.S. 583, 598 (1908) (voiding a contract that limited police powers on public policy grounds).
106 Id.
107 Id.
108 Id. at 11-12.
Next, the procedural due process claim was predicated on the inability of those affected by land-use decisions reached under Measure 37 to have safeguards allowing them notice and an opportunity to be heard before the decisions were made. Judge James noted:

The serious and imminent risk of an erroneous deprivation of property interests that are impacted by a government entity's decision on a Measure 37 claim, and the fact that a predeprivation hearing, with notice and the opportunity of property owners near the Measure 37 claimants' land to be heard could prevent the improvident exemption or nonapplication of land use rules, obligates governments to provide property owners near a Measure 37 claimant's property with notice and the opportunity to be heard before the public entity decides the claim. . . . [N]either the Measure nor the regulation afford the property owner any modicum of relief. . . . Measure 37 does not permit any discretion to deny a waiver request (excepting to pay the landowner to comply with the law, which governments are financially unable to do.) Thus, at the very least, the procedural due process right of Adams [the plaintiff whose neighbor had already begun developing his land pursuant to a Measure 37-generated waiver] has been violated because the procedural protections are inadequate if they exist at all.

Thus, Judge James concluded that on federal procedural due process grounds Measure 37 could not survive.

Next, Judge James turned to the federal substantive due process issues. The plaintiffs urged that Measure 37 "does not serve a legitimate state interest and, in any event, the valuation scheme for compensation . . . has no rational relationship to the state's interest." The adjoining landowners' interest, which would diminish in value if their neighbors were allowed to develop their own property, entitled them to the protection of substantive due process provisions. Judge James conceded that a deferential standard of review would apply in analyzing whether the government could have had a legitimate reason for acting as it did when analyzing whether the plaintiffs were entitled to the protection of the courts. Employing her earlier conclusion that Measure 37 unconstitutionally impaired the state's plenary power, Judge James reasoned that "the government, through the initiative process, could not have had a legitimate reason for enacting Measure 37, because, as described earlier, the compensation provision of Measure 37 impedes the exercise of the plenary power. As such, Measure 37 violates plaintiffs' substantive due process rights."

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109 Id. at 12 ("Because Measure 37 currently imposes limitations on government's exercise of plenary power to regulate land use in Oregon, it is unconstitutional.").

110 Id. at 21.

111 Id.

112 Id. at 22.

113 Id.
B. Constitutional Assessment of the Court’s Opinion

The Oregon Supreme Court eventually overturned the circuit court’s ruling that Measure 37 was unconstitutional, but it is fascinating to understand how and why the reasoning was deficient. As noted earlier in this Comment, Justice Holmes noted in Pennsylvania Coal Co. v. Mahon that “[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.”\(^{114}\) The Oregon measure, the court concluded, prevents the government from using this regulatory power. Judge James cited two lesser-known cases in support of the need for governments to exercise their police powers.\(^{115}\) However, those cases differed in significant ways from the situation in this case: Holmes was analyzing new legislation. In contrast, James addressed modifications to the legal standard of interference a taking must meet in order for relief to be mandated. That, in and of itself, is less significant than the corollary on which much of Judge James’s reasoning rests: she accepted the plaintiffs’ argument that the consequences of the exemptions (or payouts) would affect their property rights sufficiently that their due process rights would be implicated. So, the plaintiffs in this case were pointing at other citizens and saying that the way the government was handling its interactions with those citizens (and which facially had nothing to do with the plaintiffs) impaired the due process rights of the plaintiffs.

Ironically, their analysis failed to account for the foundation that makes the Oregon urban growth boundaries constitutional in the first place. Judge James was correct to accept the premise of the plaintiff’s argument that their property rights were intertwined with those of the landowners that gained development rights under Measure 37. However, to correctly understand the constitutional implications of the law it is necessary to understand that whether urban growth boundaries in general impair constitutional rights and whether Measure 37 (a law removing an urban growth boundary) impairs constitutional rights are not analytically distinct analyses. Both represent different forms of diminution of value.

The operation of Measure 37—removing the secondary protection that a landowner gets from the restrictions his neighbor is subject to—is identical to a regulatory taking. It is a quasi-legislative decision\(^ {116}\) that alters land-use regulations and affects land values. This

\(^{114}\) 260 U.S. 393, 413 (1922).

\(^{115}\) See generally N. Pac. Ry. Co. v. Duluth, 208 U.S. 583 (1908); Stone v. Miss., 101 U.S. 814 (1879). Both cases contain references to the fact that the government cannot contractually limit its ability to perform actions in exercise of its police power.

\(^{116}\) As previously discussed, this was enacted through the Oregon initiative process.
form of regulation—exempting for cause specific plots of land—should clearly be analyzed under the same regulatory takings scheme of analysis. Under Judge James's formulation, the essence of Measure 37's constitutional infirmity was that it authorized the government to allow individuals to develop their land in a way that adversely affected neighboring land.

V. WHY THE CONSTITUTIONAL ISSUES ARE SECONDARY AND FRAME THE QUESTION INCORRECTLY

The constitutional law claims were the initial foil for opponents of the Measure 37 regime. However, since they failed, it is appropriate to step back and understand the structure of the regulatory regime. It is through this lens that this Comment reaches its conclusion that the pre-Measure 37 regime was ideal from a policy—if not from a constitutional—point of view.


This section argues that the ultimate failure of attempts to overturn Measure 37 as unconstitutional does not categorically mean that future attempts to avoid the granting of exemptions will fail. A constitutional infirmity was a worthwhile initial attempt at a sweeping solution. That failing, background rules exist and offer piecemeal protections for smart growth policies.

The controversy surrounding Measure 37 and urban growth boundaries can be better understood by examining it through the legal and economic framework that Guido Calabresi and Douglas Melamed presented in 1972, building upon the work of Ronald Coase. Their article helps illustrate that the constitutional argument is not the only way to approach this topic. Instead there are additional civil law claims that pursue the same goals.

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117 This section borrows from and builds upon a paper written for a course in legal theory taught by Professor Claire Finkelstein, with guest lectures by Professor Leo Katz, in Spring 2005. While the thoughts and application to this topic are original, I am unquestionably indebted to Professors Finkelstein and Katz for guiding my exploration of the topic.

118 Difficulties associated with administering the claim system may result in legislative modification in January 2007. See Laura Oppenheimer, Flood of Claims Soaks State with Land-Use Worries, OREGONIAN, Dec. 5, 2006, at A1 (describing the practical problem of administering a high number of claims).

1. The Foundation of Coase

Coase popularized the theory of property rules. He suggested that rights should be treated as commodities to be bought and sold rather than the government protecting existing entitlements. His preference for such rules was premised on the claim that government action in protection of property rights was less efficient than having property rules in place. Coase argued that it was foolish to view an expansion of governmental regulation as the solution to property rights dilemmas. Rather than heavily regulating, Coase argued that governments should (at most) simply grant entitlements. He wrote that, in a world with no transaction costs, property rights would ensure that entitlements move to their most highly valued locations, regardless of their initial allocation. In contrast with clumsy governmental assignment through intervention, under an entitlement-based system, whoever valued the right more would purchase it from the other party.

Coase also suggested that Pigou's claim that property rights were best protected by government action was illogical. He considered it foolish to first attribute any success in the regulation of entitlement to government involvement, but then, second, to bemoan that the system was far from ideal and ask what additional government action would improve things. Coase reasoned that if governmental action was not producing the desired results, more governmental actions could not be the solution. Accordingly, Coase shifted the paradigm by asking what would happen if, instead, the government took no action, allowing individuals to negotiate a solution.

As an example, Coase hypothesized about two parties, a farmer and a rancher, living side by side. Not being very neighborly, the rancher's cattle trample the farmer's crops. Under Pigou's scheme, the government would step in and force the rancher to realize the full economic consequences (externalities) of his decision to raise cattle by forcing him to compensate the farmer for the crop loss. Coase found this inefficient, that is, if court interactions were the only way to resolve such an issue, then each season the farmer would

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121 See id. at 97–114 (describing in greater detail Coase's proposed limited role of government in individual property rights).


123 See COASE, supra note 120, at 135.
plant the crops, content to profit either by harvesting and selling or by watching the crops get trampled and then suing.\textsuperscript{124} In a world with no transaction costs, Coase posited that there was no need to have such inefficiencies. If the state uses a property rule to protect the ability to grow crops in the area the cattle habitually trampled, then the property right can be exchanged. If the right to use the land is more valuable to another party, then a property rule would unobtrusively allow the rancher to buy the rights to the land and leave it barren to avoid waste.

Coase demonstrated that the goal of society should not be to eliminate crop-trampling (or pollution for that matter) outright. Rather, it should be to interfere minimally and encourage property owners to reach rational solutions given mutually exclusive uses of the land. Coase demonstrated that there are often situations where one party will profit a certain amount from the damage he inflicts on the other party. Without transaction costs, nothing prevents actors from discovering precisely where the good is most valued and exchanging property rights in a way that makes both parties better off. If the state wants to affect distribution (acknowledging that transaction costs do exist) then that work should be done in the initial allocation of the entitlement, rather than with later regulation.\textsuperscript{125}

2. Calabresi and Melamed

Calabresi and Melamed expanded on this analysis and articulated categories of rules that can be used to understand adversarial intra-party interactions where entitlements are present: property rules, liability rules, and inalienability rules.\textsuperscript{126} Each category associates with property ownership different types of rights. The authors noted that in some situations transaction costs may be too high to allow the economic fluidity on which Coase’s theories rely.

Calabresi and Melamed accepted Coase’s assertions but developed them for more practical applications. Coase had been forthright that his ideas only applied when there were no transaction costs. Calabresi and Melamed fleshed out how they thought Coase’s ideas translated into a world with transaction costs.\textsuperscript{127} They observed that because markets never perform perfectly, in many situations other solutions function better than property rules to reach efficient and distributionally sound results.

\textsuperscript{124} \textit{Id.} at 144-49.
\textsuperscript{125} \textit{Id.} at 97.
\textsuperscript{126} Calabresi & Melamed, \textit{supra} note 119, at 1089 (discussing the benefits of integrating legal relationships that are commonly studied in separate subject areas).
\textsuperscript{127} See \textit{id.} at 1093 (noting the potential importance of administrative efficiency and transaction costs).
One alternative, liability rules, involves price fixing, wherein people are compelled to enter into transactions where transaction costs might otherwise have prevented efficient market function. Instead of a free market negotiation over the price of an entitlement, the government sets the price. Liability rules are especially valuable where there are too many actors and so an efficient solution cannot be reached. Calabresi and Melamed considered such rules to be closely tied to property rules, but as a distinct class that is required to reach economically efficient results because of the shortcomings of particular markets. This conceptualization was important for how it diverged from Coase, observing that in some situations, the most economically efficient results can actually be reached through something other than property rules. This defeats the holdout problem: if the owner of one of ten plots of land knows that her plot of land is essential to a project then she might try to get an artificially large amount for her land, knowing that a large project cannot go forward until she consents to the sale. If the group is buying, one may have the free-rider problem: some may refuse to contribute, knowing that they cannot be barred from later enjoying the benefits of the purchase. These difficulties prevent some markets from yielding the "preferred" outcome.

Liability rules also exist and yield more efficient results in situations like auto accidents, where any negotiation would take place after the "transaction." With a system of liability rules, the state can set the price for specific goods when the market cannot do so efficiently. In such a system, if one's entitlement is invaded, then the invader of that entitlement is required to compensate the injured party.

Calabresi and Melamed also explained that in addition to enhancing efficiency, liability rules promote a favorable distribution of entitlements. They gave the example of a factory employing poor workers stationed close to a wealthy residential neighborhood. The factory uses cheap coal and could eliminate the offensive pollution by using higher quality coal. Calabresi and Melamed observed that traditionally one only thinks of three ways of addressing the conflicting desires to pollute and be free from pollution. They involve either the factory or the homes having a property right to use the land as they wish, or for the homes to have a liability rule protecting them from pollution. Calabresi and Melamed observed that, in reality, giving the homes the right to be free from pollution unless they agree to sell that right would likely drive the factory out of business. This may be economically efficient, but the factory workers are harmed when the factory is put out of business. Forcing the factory to pay a set amount

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128 Id. at 1106.
to continue polluting could likewise put the factory out of business. A property rule for the factory could result in the workers keeping their jobs, but it could be inefficient because of the previously mentioned collective action problems.\textsuperscript{129}

Calabresi and Melamed articulated another solution: protect the factory’s right to pollute by a liability rule. This way, if the homeowners wish to stop the pollution, they are assessed an amount that would compensate the factory for switching to more expensive, cleaner coal. This way of selecting the initial entitlement and the rule that protects it would be the only way to produce both favorable distribution and efficiency results.\textsuperscript{130}

All this said, liability rules should not always be used. Calabresi and Melamed clarified specific situations where they may appropriately be used, but Coase’s essential point—that property rules should probably be used more—was not disturbed. Once a liability rule is introduced it interferes with the free market and prevents the market from determining where resources go. Parties may value their entitlements more highly than the state accounts for in price fixing because market transactions are the only way for market value to truly be determined—value is really shorthand for \textit{expressed} value. Calabresi and Melamed do not dispute these problems; they simply explain situations where liability rules are economically justified in the presence of transaction costs.\textsuperscript{131}

The third category, which is highly relevant in comparing the tactics of parties in the Measure 37 litigation, are inalienability rules.\textsuperscript{132} Such rules \textit{prohibit} the transfer of certain entitlements, removing them from the market. These rules are classified in Calabresi and Melamed’s article as “moralism[s].”\textsuperscript{133} Calabresi and Melamed identified two situations that prompt use of inalienability rules: first, where a transaction creates too many externalities, and, second, where the externalities would be difficult or impossible to calculate.\textsuperscript{134} They depicted inalienability rules as a more extreme version of the reasons for moving from property to liability rules.

Calabresi and Melamed suggested two efficiency-related justifications for inalienability rules. There can be self-paternalism where actors enter into restrictive pacts, like a bill of rights (thus saying that in the future, although they may be tempted to impair certain rights, they wish to prevent themselves from being able to rush to impair

\begin{itemize}
\item \textsuperscript{129} \textit{Id.} at 1121.
\item \textsuperscript{130} \textit{Id.}
\item \textsuperscript{131} \textit{Id.} at 1125 (acknowledging that their approach may not apply to many areas of the law).
\item \textsuperscript{132} \textit{Id.} at 1111 (discussing the application of inalienability rules to the pollution problem).
\item \textsuperscript{133} \textit{Id.} at 1112.
\item \textsuperscript{134} \textit{Id.} at 1111–12.
\end{itemize}
those rights). There can also be true paternalism, which is based on the idea that one party may know better than another party what is best for the other party.

Inalienability rules actually represent alteration of the underlying entitlement, and not everyone thinks that inalienability rules should exist. In arguing for property rules in nearly every situation, Judge Richard Posner rejected the notion that there are markets where inalienability rules properly displace property rules. With the caveat that coerced contracts should be unenforceable, he was willing to allow a contract to provide for person A's knees to be broken if he fails to repay a loan to person B. Posner conceded that this position violates traditional notions of morality. But he says that there is no reason to assume that such a contract must have been coerced. He would view such an agreement as wealth maximizing for those involved.

3. Oregon's Scheme

Measure 37's backers and the voters who approved now-Oregon Revised Statutes Section 197.352 rejected Oregon's urban growth boundaries, which were provided for by an inalienability rule. Such boundaries establish a fixed point where no further growth can take place, regardless of the political exigencies of the day. Properly conceived, such a rule reflects the exorbitant transaction costs involved in figuring out who should pay for sprawl as well as the public good that is a well-planned city with such amorphous attractions as "quality of life." The regulatory takings jurisprudence reflects a scheme that accommodates this sort of governmental intrusion on the private sphere. An urban growth boundary reflects the conclusion that the cost of allowing unrestrained development is harmful to cities. Urban growth boundaries prevent development outside of certain areas, but as a corollary, they encourage growth within the "urban" boundary. Measure 37 abandoned Oregon's choice from the 1970s to create an inalienability rule vis-à-vis urban growth.

135 Id. at 1113.
136 Id. at 1113–14.
138 Id. at 135–36.
139 Id. at 134.
140 There are lingering questions as to whether inalienability rules are actually economically justifiable.
141 This proposition was expounded before. The Metro regional government's mode of operation is precisely to plan growth. A necessary part of planning growth is restricting growth at some times in some places. See Rusk, supra note 26, at 85 (discussing the potential for regional governance to stabilize the ill effects of sprawl).
Now, a mix of property and liability governs. First, a liability rule provides that the individual property owner is entitled to use his land as he sees fit and that any action that impairs that right must result in compensation. Under this rule the government makes a determination of whether the application of its urban growth boundary to the landowner's parcel is worth the amount that must be paid. If not, the restriction is lifted. Second, if the government lifts the restriction, typical property rights and rules are operative. Property owners, if they wish to prevent their neighbors from building, can purchase the property development rights, just as Coase suggested would happen.

To clarify, the constitutional analysis set forth earlier in this Comment illustrated that the inalienability rule of urban growth boundaries in Oregon was constitutional. Judge James concluded that altering the scheme—abandoning the inalienability rule framework—constituted a taking from those who had relied on and/or were currently benefiting from the scheme. I argued, however, that there was no inalienability rule preventing the removal of the protections of the original inalienability rule. Removing the protections of the original inalienability rule simply forces property owners to use the underlying property and liability rules—which never disappeared and were merely superseded—to prevent their neighbors from developing land in a way that harms them.

There are two ways that this scheme affects value, which I previously claimed are not altogether analytically distinct. That is, the claims are either related to increased tax burdens, which compensate for continued regulation on neighboring land, or to direct diminution of value because of exemption-enabled development on neighboring parcels. Each choice lowers land value by making the

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142 Calabresi & Melamed, supra note 119, at 1106–10 (arguing that both property and liability rules are necessary within the context of eminent domain).

143 This is, of course, an atypical liability scheme. As discussed at length, the federal standard is that the individual is entitled to compensation only if a total taking has been enacted.

144 That said, the fear of opponents of the measure is that cash-strapped local governments will not have the wherewithal to compensate anyone.

As I will discuss in analyzing the policy implications, the inalienability scheme is most likely more appropriate in this situation because this calculation does not account for the government's essential role of preventing harm. If police officers had to pay an attorney's hourly rate during a traffic stop, it would be absurd and would prevent traffic cops from carrying out their essential function of ensuring vehicular safety. That the government has to show that it can pay the appropriate price to be the government is absurd.

145 There is nothing in the statute to indicate that development would in any way be exempted from common law rules regarding property. Thus, the claims of the plaintiffs in MacPherson v. Department of Administrative Services, No. 00C15769 (Or. Ct. App. Oct. 14, 2005), available at http://www.oregon.gov/LCD/docs/measure37/macpherson_opinion.pdf, would be ripe for a common law suit regardless of their bearing on the constitutional question.
property subject to a greater amount of state or local tax or to nuisance.

But this is self-defeating for any regulatory takings claim advanced by landowners whose neighbors are attempting to develop. If the government is attempting on average to maximize property values, the choice of whether to compensate under Measure 37 or to exempt would be one of economics. The choice under the scheme is between reducing property values by increasing taxes or reducing property values by increasing congestion, pollution, and sprawl in the vicinity. Assuming the government makes the economically advantageous choice, property values will on average decrease less under the chosen approach to a Measure 37 claim. In any case, the reduction in land value can never be a 100% reduction and, accordingly, the regulatory takings claims would fail. Thus, as previously discussed, urban growth boundaries are legitimate precisely because of the regulatory takings framework that holds that only complete takings are compensable.

B. Policy Arguments and Practical Concerns Indicating that Inalienability Rules are Appropriate in this Circumstance

However, to step back, I assert that from a policy perspective—viewed now through the lens of inalienability rules—the original decision to create urban growth boundaries was the correct one, and it seems rash for Oregon voters to have so dramatically altered the development landscape for the future. It is true that Judge James’s ruling came to erroneous constitutional conclusions and is likely an inappropriate exercise of judicial power. The Oregon Supreme Court was correct to overturn her decision on constitutional grounds. However, as a matter of policy, the most appropriate course of action for Oregon and other states seeking to avoid sprawl is to plan for the future by limiting space for development. From a policy perspective, urban growth boundaries are appropriate uses of inalienability rules. They capture public goods that property and liability rules are incapable of adequately accommodating. Thus, Measure 37 appears to be bad policy, whatever its constitutional standing.

The chief reason why urban growth boundaries are good policy is that they reduce sprawl. The normative characteristics of reducing sprawl are complicated. Much of the analysis is beyond the scope of this work. The basic framework, though, is presented here.

146 Given two identical houses (save for the amount of taxes to be paid each year), the one requiring more expenditure will be valued less. Likewise, if the hypothetical is altered with another pair of houses, one will confront a more undesirable environment.
One scholar has identified ten traits of suburban development that critics refer to as "sprawl":

(1) unlimited outward extension, (2) low-density residential and commercial settlements, (3) leapfrog development, (4) fragmentation of powers over land use among many small localities, (5) dominance of transportation by private automotive vehicles, (6) no centralized planning or control of land uses, (7) widespread strip commercial development, (8) great fiscal disparities among localities, (9) segregation of types of land uses in different zones, and (10) reliance mainly on the trickle-down or filtering process to provide housing to low-income households.147

Thus, not all suburban growth is necessarily sprawl. Sprawl, as I use the term, is the failure of growth to proceed in a manner consistent with the notion of the city as a public space. Cities are inherently communal ventures, created by a social contract. So, existentially, cities are areas where private citizens converge.148

Some proponents of suburbia argue that sprawl is not problematic. Earlier this decade, one author wrote that he did not think that there was a single instance of sprawl under a definition similar to the one referenced.5149 This author insisted that suburban areas all provide these amenities to its citizens and recited statistics and praised the virtues of allowing citizens to follow through with their preferences for suburban living.150 But this account does not respond to the problem that suburbs benefit from proximity to cities and absorb positive externalities. The author asks the wrong question. We should not ask if suburbs are bad for the people who live there. Instead, we should scrutinize whether they are bad for the metropolitan region. Suburbanites would likely concede that they derive benefit from their proximity to cities.151 However, they are less likely to con-
cede that the inverse is true: cities absorb negative externalities from suburban sprawl.\textsuperscript{152} The recognition of this fact directs us towards a policy preference for smart growth and the potential conclusion that Calabresi and Melamed's inalienability rules are an advantageous solution to problems of urban policy.

Sprawl amplifies the problem of ex-urban areas drawing resources from cities without shouldering the true costs of those resources. The rapid expansion of infrastructure puts strain on cities. Some commentators claim that this expansion is a free market expression of preferences by those who live in the suburbs.\textsuperscript{155} However, there are several convincing explanations for movement to the suburbs that question this assertion. National transportation policy has been to heavily subsidize the development of freeways, and to tax gasoline at a much lower rate than other nations do.

National overdependence on oil has been noted by several diverse sources.\textsuperscript{154} Because national transportation policy has historically pursued certain goals, it is now a political challenge to reverse course. However, the claim that suburban growth is a free-market expression of preferences raises questions of whether this is a cause or effect of national transportation policy.\textsuperscript{155}

Development in the suburbs decreases the ability of cities to develop comprehensive methods of mass transit. Low density suburbs cannot support efficient mass transit. Automobile transportation becomes the only available way to get from place to place, which clogs the roads, and increases the amount of time spent going to and from work. The social and psychological effects of this situation have been noted. Cities must foot the bill for the roads that allow people to leave their boundaries.\textsuperscript{156} In scrambling to reduce traffic, they reflexively expand road capacity, which fuels the problem, coaxing more people into suburbia. As noted earlier, Oregon pursued a different path in the 1970s, funneling money into mass transit rather than their freeway system. The light-rail system built with these funds has

\textsuperscript{152} Suburbs are by definition an extension of a specific metropolitan area, but something distinct from it as well. This seems to define a parasitic relationship: a partner only for the benefits that can be derived from the city, but bearing no responsibility for the ills.

\textsuperscript{155} See generally Bolick, supra note 149, at 860–66 (noting that a cornerstone of Americanism is the freedom to choose where one lives).

\textsuperscript{154} Most notably, President Bush made reference to an addiction to oil in his 2006 State of the Union Address. State of the Union, 42 WEEKLY COMP. PRES. DOC. 141, 150 (Feb. 6, 2006) ("America is addicted to oil . . . [and] [t]he best way to break this addiction is through technology.").

\textsuperscript{155} See Dreier et al., supra note 12, at 105 (discussing the "arranged marriage with the automobile" in America).

\textsuperscript{156} Portland, of course, diverted federal freeway funding. See supra Part II.A.
been systematically expanded since it first opened in the 1980s.\textsuperscript{157} Thus, even as it restricted the rate of suburban growth, Portland has been able to ensure more mass-transit options for those who live in the outskirts of the metropolitan area, ensuring an efficient means for citizens to commute.

There are other harms of sprawl as well. It reduces the accountability of citizens to their fellow citizens. To avoid paying for social services to the needy, citizens can move away from the problems. Regional governance has been noted for its capacity to limit the efficiency of such relocation.\textsuperscript{158} By defining what is urban and rural, Oregon policy was able to better ensure that the citizens could not, in effect, shoplift the benefits of cities without having to pay for the costs of the city.

One author scoffed at the notion that suburbs are capable of replacing cities:

It may seem odd to argue that place matters when technology appears to have conquered space. Americans are highly mobile. Cars and planes have made it possible for us to travel more quickly than ever before. Telephones, computers, cable networks, and, above all, the Internet enable us to engage many aspects of society without leaving our homes. \ldots E-Commerce makes it hardly necessary to drive to the mall anymore. Every day, more people work at home instead of commuting to the office. \ldots Cities, some argue, are becoming obsolete.

In fact, this idea is nonsense. As places of intense personal interaction, cities are as important as ever. If technology were truly abolishing space and time, real estate values would flatten out. \ldots [Rather,] over 80 percent of all of Americans have chosen to live in metropolitan areas, not the countryside.\textsuperscript{159}

Indeed, the fact that land values are high in "rural" areas in Oregon underscores that it is desirable to live near cities, but not necessarily to live in them (which would require paying for the benefits generated by the city).\textsuperscript{160} Under Tiebout's analysis, this implies that

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  \item See Mark Allen Hughes, \textit{Let Philadelphia Go}, PHILA. DAILY NEWS, July 25, 2000, \textit{reprinted in GREATER PHILA. REGIONAL REV.}, Fall 2003, at 4, 5–7 (discussing how a fragmentation of the city of Philadelphia would decrease the ability of suburbs to avoid paying for positive externalities they receive from the city); see also Robert P. Inman, \textit{Should Philadelphia's Suburbs Help Their Central City?}, 2003 BUS. REV. 24, 32–34 (discussing how cities and suburbs may be able to benefit from using a regional economic model rather than a city-based model).
  \item Dreier \textit{et al.}, supra note 12, at 3–4.
  \item By this I mean the development value of the rural land. The rural land is more valuable insofar as it could be used to build more housing. In recent years, cities generally have begun to return to vogue. See Paul C. Brophy \& Jennifer S. Vey, BROOKINGS INST., \textit{SEIZING CITY ASSETS: TEN STEPS TO URBAN LAND REFORM} 1 (2002) (noting a recent increased interest in residing and working in cities); see also Richard Florida, \textit{The Rise of the Creative Class: And How It's Transforming Work, Leisure, Community and Everyday Life} 243–48 (2002) (dis-
Oregon cities have positioned themselves well in the competitive economy of intercity competition for residents, and that success in fact created the economic pressures that generated intense support from some landowners for Measure 37's passage.161

One of the main effects of sprawl is economic segregation. "It is hard to say exactly how much the demand for suburban housing represents 'flight from blight' instead of a simple matter of taste for housing further out."162 However, by reducing the ease with which one can geographically flee from "blight," it becomes possible to support any counter-blinit efforts. If policymakers discourage growth outside urban growth boundaries, it facilitates gentrification. Such a policy better acknowledges that land is finite.163 Ultimately, social and environmental concerns underscore that land use should not be perceived as an exclusively private venture.164

For all of these reasons, I close with reference to Frank Michelman’s thoughts from 1978 on how we can reconcile our desires for private property interests with the public good position I have advocated as a policy matter. He discussed how market failure can take place when citizens are paralyzed by collective action problems and fail to provide services that they would all prefer to receive.165 To advocate against the operation of the free market in this instance is not to argue against the free market’s general operation. Rather, in a free market, property and liability rules neither force sprawl areas to compensate the metropolitan region for positive externalities nor pay for their own negative externalities:

The idea is to view government as one of two great sub-systems—the private market is the other—which together are supposed to achieve an individualistically optimal allocation of resources. Individuals come to market, so to speak, each with her or his own current endowment of preferences, abilities, and property claims. . . . Under behavioristic indi-

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162 DREIER ET AL., supra note 12, at 91.

163 To be sure, gentrification is not without some difficulties. First, it is a slow process. Much of the attraction of a brand new subdivision is that when the housing stock is first being sold, there is no crime: it is a new neighborhood and so there are no existing residents to perpetrate crimes. This is a tremendous attraction. Gentrification, by contrast, involves existing housing stock and necessarily is a gradual process. Second, it displaces existing residents.

164 I leave discussion of the environmental concerns, which I suspect are many, to other authors who can better support assertions that sprawl harms the environment. To put it succinctly, the increased presence of asphalt, cars, and building on larger and larger tracts of land comes at the cost of green space and necessarily impacts the ecosystem.

individualism, efficient resource allocation has for certain occurred only when all costs are borne, and all benefits enjoyed, by those who choose to produce them or have them produced. The virtue of a free market is the tendency it generates toward this state where externalities are all “internalized” by voluntary exchange transactions. Yet markets can sometimes fail to realize the optimum condition of complete internalization. Such failure is associated with unusual difficulty (high transaction costs) in striking a bargain or [through collective action problems].166

Because of the vast array of externalities, inalienability rules are best suited to the reconciliation of private and public needs insofar as metropolitan planning is concerned. These specific policy concerns illustrate some of the many reasons why it is difficult to understand the true costs are of an unorganized frenzy of suburban growth.

VI. CONCLUSION

The framework under which land-use rules are developed has lasting impact. That framework directly impacts the development of our cities, for better or worse. Oregon presents a compelling case-study for the social forces that can result in a restrictive land-use regime characterized by urban growth boundaries. Such boundaries, although they may be considered unfair to existing landowners, are constitutional. Under the Constitution, only total deprivation of economic use requires compensation. An urban growth boundary does not restrict landowners so completely.

In 2004, Oregon voters approved Measure 37. The resulting law required governments to compensate landowners for the loss of their land’s value. Many Oregonians comfortable with the restrictive land-use regulations cried foul, claiming that opening up certain land for development would impair their own investment-backed expectations. However, incident to the conclusion that urban growth boundaries are constitutional is the inescapable corollary that abandoning such boundaries does not result in a taking.

Instead of looking to the Constitution to validate their objections, proponents and opponents of urban growth boundaries should rely on existing schemes of property, liability, and inalienability rules when arguing for particular (de)regulatory schemes. As this Comment demonstrates, there are many overriding policy considerations that make the deregulation of Measure 37 questionable. Suburban sprawl may sacrifice the livability of the entire metropolitan area and inefficiently allocate costs and benefits to a region’s residents. As a result, a return to the inalienability regime of urban growth boundaries, as it existed in 2004, may be the wisest choice.

166 Id. at 155 (footnotes omitted) (emphasis added).