Reflections on Oregon Measure 7

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Good evening. Thank you this invitation. I am honored by the association with the late great Governor Tom McCall. I also am honored that 1000 Friends of Oregon believes I have something to offer to all of you. 1000 Friends is a revered national institution, not only because of the fine work it does here in Oregon but for generating a "friends" movement that has spread to virtually every corner of America.

On a personal note, I want to express my admiration for Robert Liberty. In addition to being an accomplished lawyer and advocate for land use planning, he possesses one the rarest attributes in the field of conservation: a sense of humor. It is fair to observe, however, that Robert's sense of humor has been tested in recent months.

My charge this evening, as I understand it, is to discuss Oregon Measure 7 in the context of the national debate over "takings." There is a small measure of bitter satisfaction in this task. Only a few years ago, I and many others attended a conference here in Oregon to learn the ins and outs of progressive land use planning and regulation at the feet of the masters. Now Oregon apparently can use a little education from the rest of the country and, as extraordinary as it seems, even from Washington, D.C.

Measure 7

On November 7, Oregon voters, by a margin of 53% to 47%, adopted Measure 7, far and away the most extreme takings measure in the United States.

Measure 7 creates a claim for payment whenever a regulatory restriction "has the effect of reducing the value of a property upon which the restriction is imposed."[1] Only a very few exceptions are provided, for (1) "adoption or enforcement of historically and commonly recognized nuisance laws," (2) a regulation "to implement a requirement of federal law," and (3) a regulation "prohibiting" the use of property "for the purpose of selling pornography, performing nude dancing, selling alcoholic beverages or other controlled substances, or operating a casino or gaming parlor." Measure 7 creates a right to payment if the regulation "was adopted, first enforced or applied after the current owner of the property became the owner, and continues to apply to the property 90 days after the owner applies for compensation." The amount of the payment is based on "the difference in the fair market value of the property before and after application of the regulation."

On February 22, 2001, in the case of McCall v. Kitzhaber, Judge Paul J. Lipscomb of the Oregon Superior Court entered an order blocking Measure 7 from going into effect. The court ruled that Measure 7 was invalid because it violated the "full text" and "separate vote" requirements of the Oregon Constitution. That ruling is now facing the inevitable appeal. However the appeal is resolved, Measure 7 already has sent shock waves across the state and the nation.

What is a Constitutional Taking?

To help frame the issues, it may be useful to describe briefly the law of regulatory takings under the federal and state constitutions as currently defined by the courts. In the interest of brevity, I will greatly oversimplify.

First, one has to lay to one side explicit exercises of the power of eminent domain. Government not infrequently requires an owner to sell property to the public, for example, for a school or a road. In return, the government pays the owner "just compensation" for the property. Exercises of eminent domain are not devoid of legal (and especially political) controversy. But the basic scope of the eminent domain power is largely unquestioned.

Alleged regulatory takings arise from the situation where the government is exercising its regulatory authority. The owner charges that the regulation imposes such a severe restriction that it amounts to taking. In other words, the regulation goes so far that the government has actually acquired the property, despite the fact that the government did not intend to do so.

Focusing on alleged "regulatory takings," the law draws a sharp distinction between (1) a regulation authorizing the public to occupy, or physically pass over, private property and (2) a regulation that limits the use of property. A regulation that causes a permanent physical occupation of real property, such as that involved in the famous case involving Mrs. Dolan, frequently produces a compensable taking. On the other hand, a restriction on the use of the property - whether in the form of a historic landmark law, a zoning law, or an urban growth boundary -- is almost never a taking. A restriction on the use of property rises to the level of a taking, the courts generally say, only if it eliminates all or substantially all of a property's economic value. Even in that situation, no taking will occur if the regulation simply parallels "background principles" of nuisance or property law, that is, if it prohibits an owner from doing something that the owner never had the right to do in the first place.

Property rights advocates in Oregon and elsewhere, drawing inspiration from constitutional law -- but explicitly seeking to go beyond constitutional requirements - have argued that general takings legislation should be adopted providing financial payments - or regulatory relief -- to owners subject to land use and environmental restrictions.

Before turning to those proposals, which are the focus of my presentation, I want to emphasize that there is significant controversy over the proper interpretation of the constitutional takings provisions. Around the edges of the outline of takings doctrine I have provided there are a number of debatable questions. Conservative groups are filing briefs encouraging the courts to adopt a new, more expansive reading of the Takings Clause. Their efforts are being countered by other groups, sympathetic to the goals of government and the interests of community organizations, urging the courts to maintain the status quo.

Regrettably, future judicial thinking on the takings issue may be determined more by the personnel on the courts than by reasoned legal analysis or careful attention to precedent. The U.S. Supreme Court is almost evenly split on whether regulatory takings doctrine should be expanded. Three members of the Court (Justices Rehnquist, Scalia, and Thomas) have a clear ideological commitment to this goal, while two others (Justices Kennedy and O'Connor) appear sympathetic to the takings agenda but are open to opposing viewpoints. The remaining four justices are more or less content to maintain the legal status quo. A change in one seat on the Supreme Court could produce a significant change in takings doctrine. The takings issue is one of a number of reasons why the next appointment to the U.S. Supreme Court will be hotly contested.

In the states, which have primary responsibility for deciding land use issues, an equally important, if relatively little noticed struggle is being waged for ideological control of the courts.[2] Thirty-nine states hold elections to select at least some judges. Conservative business groups, including real

estate developers and natural resource companies, are playing an active role in these electoral contests in an effort to elect judges who will be more sympathetic to their interests and more willing to adopt an expansive reading of the Takings Clause.

This past November, Oregon went through a judicial election in which one of the major candidates received significant support from special interests who would benefit from an expansive judicial interpretation of the Takings Clause. That candidate failed by a narrow margin.

In the neighboring state of Washington, the Environmental Policy Project has found, more than 25% of the campaign contributions to the justices of the Supreme Court which can be identified by source were made by real estate companies and resource industries, more than from any other special interest group. In the case of one justice on the Washington Supreme Court, these interests contributed 60% of the campaign contributions identifiable by source.

The point, in short, is that for those concerned about the takings agenda, takings legislation is only part of a bigger picture.

The Federal Takings Battle - a Play in Three Acts

Turning to the policy, as opposed to the legal, debate over takings, I will first take up the debate over takings legislation in the U.S. Congress. This debate lasted for about a decade, beginning around 1990. At least from outward appearances, the debate now appears to be essentially over. This is so notwithstanding the fact that the Republican Party, whose members have traditionally been most sympathetic to the takings agenda, today control not only the White House but both chambers of Congress.

The debate over takings in Congress was a play in three acts, each act representing a separate variety of takings legislation.

The first act involved a proposal that federal agencies be compelled to conduct detailed "takings impact assessments" (TIAs) to evaluate the likelihood that a proposed action would result in a constitutional taking. The TIA bill was modeled after an executive order issued by President Ronald Reagan directing federal agencies to prepare TIAs. The legislation sought to turn the executive order into permanent law and make it enforceable in court.

The TIA proposal was presented as an ironic twist on the National Environmental Policy Act. NEPA requires federal agencies to prepare environmental impact statements before taking action that may adversely affect the environment. If federal agencies have to "look before they leap" when it comes to the environment, takings advocates argued, why shouldn't they do the same before taking action that affects citizens' private property rights.

Interest in this first variety of takings legislation petered out for several reasons, but principally because (1) environmentalists and other opponents made a fairly convincing case that the legislation would create an unnecessary bureaucratic obstacle to effective agency action, (2) there was no strong rationale for pursuing the measure once it became apparent the Clinton administration would not repeal the Reagan executive order, and (3) takings advocates' ambitions expanded, as discussed below,

The second act in the congressional takings play involved a proposal to establish a new statutory definition of taking that explicitly departed from and went beyond the Takings Clause of the Fifth Amendment. This proposal achieved its zenith when it was included as a prominent feature of the Contract with America, and, like most of the rest of the Contract provisions, hurriedly passed by the House of Representatives in the first 100 days of the 104th Congress. The measure

eventually died in the Senate. While the measure was reintroduced in subsequent Congresses, support for this version of takings legislation has waned ever since.

Because Oregon Measure 7 most closely resembles the Contract with America takings provision, the debate surrounding the Contract proposal deserves some attention. I will return to this topic in a moment.

The third act of the federal takings play involved a proposal to revise U.S. Supreme Court rulings on when and where takings claims can be filed. The Court has ruled that an owner suing a unit of local government under the Fifth Amendment must, at least in the first instance, proceed in state court rather than federal court. The Court also has ruled that, wherever the claim is filed, an owner cannot go to court until he has "ripened" the claim by pursuing the local administrative process to a final and definitive conclusion. The proposed legislation would have granted owners the option of suing initially in federal court. It also would have allowed owners to sue without pursuing the local administrative review process to a final and definitive conclusion. Not surprisingly, opponents called it the sue-local-government-early-and-often-in-federal-court bill.

This legislative effort also failed. In the 105TH Congress, the House of Representatives passed the bill by a margin of 70 votes, but the bill died in the Senate. In the 106th Congress, the House passed an essentially identical bill, this time by a smaller margin of 44 votes, and again the bill died in the Senate. In 2001, the bill has not been reintroduced. In view of the even partisan split in the Senate, supporters have apparently concluded that the legislative effort is futile, notwithstanding the election of a President who would apparently be willing to sign the bill. (Some also have speculated that the proponents are awaiting the Supreme Court's ruling in Palazzolo v. Rhode Island Coastal Council, which might partially moot the legislative effort or, conceivably, give it new impetus.)

The reasons for the third act's apparent failure are not hard to discern. As a lobbyist for the National Association of Home Builders frankly asserted, the bill's basic purpose was to "put a hammer to the head" of local government. Thus, not surprisingly, state Attorneys General, mayors, and county leaders vigorously opposed the bill. In addition, every major organization representing state and local governments - from the National Governors Association to the National League of Cities - objected to the bill.

On the merits, it was difficult for the bill's advocates to defend the idea that encouraging more lawsuits against local governments was a sensible solution, regardless of the nature of the underlying problem. It was especially hard to make this argument given that a majority of the members of Congress are committed, as a matter of general principle, to shifting power from the federal government to state and local governments. Authorizing more frequent federal court litigation against cities and towns under the federal Takings Clause obviously would have violated this principle.

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Why did the Contract with America takings legislation fail in the 104th Congress? The answers may be instructive because, as discussed, Measure 7 has more in common with the Contract takings measure than any other proposal at the federal level.

There were, in my view, three principal arguments that helped defeat the Contract takings measure. It requires emphasis, however, that the anti-takings coalition included diverse interests with a number of different viewpoints on the issue. A broad coalition formed to oppose the Contract takings measure because it would have adversely affected so many government programs in so many different ways. The coalition included state and local governments, church groups, labor unions, taxpayer groups, consumer organizations, and environmental groups,

among others. Some coalition members emphasized particular arguments which reflected their concerns while other members emphasized other arguments. For example, church groups were concerned about the moral aspects of the takings measure; unions were concerned about the implications for worker safety laws; and environmentalists saw the Contract measure as a not too subtle effort to eviscerate environmental laws. Part of the strength of the anti-takings coalition lay in the diversity of its membership and of its thinking.

With this observation in mind, the following were the anti-takings coalition's strongest arguments and dominant themes.

1. Budget Buster. The first and most important argument was that the Contract takings measure would have been enormously expensive for the taxpayers. The Clinton administration produced an estimate that the House-passed Contract takings measure would have cost taxpayers $28 billion over seven years, and it estimated that the version proposed in the Senate would have cost "several times" more. From essentially any political perspective, it was a powerful strike against the takings measure that it would have required major new expenditures financed by the taxpayers.

2. Full Employment for Lawyers. Another powerful argument was that the bill was, on its face, a lawyers' full employment act. In Congress, as in every other corner of the universe, lawyers are regarded, at best, as a necessary evil. The takings measure, by creating an expansive new cause of action against government, clearly would have produced more litigation and lined lawyers' pockets. This, too, proved a powerful argument.

3. Who Wins/Who Loses? The final principal argument focused on the potential losers and winners if takings legislation were adopted. Opponents pointed out that property owners who intended to develop or otherwise exploit property for economic gain obviously stood to gain from the bill -- either because they would receive financial payments from the public and/or because they would receive regulatory relief to which they were not entitled. These potential winners were relatively few in numbers and, by and large, very well heeled.[3]

On the other hand, opponents pointed out, almost everybody else would lose. Most significantly, in the context of a debate over a "property protection" bill, the losers included American homeowners. Strong environmental and land use measures benefit homeowners by controlling potentially harmful development in the surrounding community. By the same token, takings measures threaten homeowners' property values[4] by undermining these protections. Given that two thirds of American households, approximately 70 million families, own their own home, this argument had enormous political appeal.

Then Congressman Ron Wyden, to his eternal credit, offered an amendment to the Contract takings measure that would have excluded activities that threaten homeowners' property values. If Congress was going to act to protect property owners from diminutions in value, Wyden argued, then Congress should act to protect all owners, including homeowners. The amendment, though it ultimately failed, succeeded in sowing consternation among the advocates of the Contract takings measure and helped bring about its ultimate defeat.

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While takings bills appear to be dead in Congress, this is not to suggest that takings advocates have disappeared or that the takings idea does not continue to have enormous influence. Indeed, the case could be made that takings advocates have lost many of the major battles but are still in danger of winning the war in Congress. The reauthorization of major environmental laws, particularly the Endangered Species Act and the Clean Water Act, has been stalled for over a decade, primarily because of the takings agenda. In addition, the environmental community has

been unable to mount a credible effort to enact new legislation to address a variety of environmental problems which have recently come to the fore, such as non-point water pollution, again in part because of the takings issue. Among the few pro-active measures the environmental community has managed to move forward have been land acquisition and incentive programs, which, of course, are intended in part to buy off property rights advocates. The high cost and narrow scope of these initiatives illustrate how effectively the takings agenda has stifled environmental protection efforts. With the election of President Bush and the appointment of many avowedly "pro-property rights" officials, it is clear that the takings agenda will continue to have a powerful influence in Washington, D.C. for some years to come.

State Takings Bills

In the 1990's, takings legislation was debated in virtually every state legislature. About half the states ended up actually adopting some type of takings law. The arc of state legislative activity closely tracked the arc of congressional activity: initial legislative efforts in the early 1990's; an intense legislative push in the mid-1990's; and a petering out of takings bills in the late 1990's. Most of the significant state takings laws were enacted in 1995. Measure 7 stands out as the only significant takings measure adopted in any state in recent years.

Most of the enacted takings laws are of the assessment-type, corresponding to the first act of the debate on takings legislation in Congress. The consensus is that these measures are largely symbolic and have had minimal practical impact. In general, these laws simply attempt to reinforce the constitutional requirements, not to redefine them. The procedural requirements established by these laws are sometimes loosely defined and in some cases do not appear to be judicially enforceable.

Prior to the Oregon vote on Measure 7, takings measures were presented to the voters in two other states in the 1990's, and in both cases were defeated. In Arizona, following the enactment of an assessment-type law, a coalition of groups succeeded in placing repeal of the law on the state ballot in November 1994. By a vote of 60% to 40%, Arizona voters rejected the takings law. Similarly, in November 1995, Washington State voters rejected that state's payment-type takings law, again by a vote of 60% to 40%.

Four states have taking bills which - like Oregon's Measure 7 - explicitly go beyond existing constitutional standards: Louisiana, Mississippi, Texas, and Florida. None, however, is as extreme as Oregon's Measure 7.

As with federal takings legislation, a focus on takings or "property rights" bills tells only part of the story of how the takings agenda has influenced law and policy at the state level. There are a variety of current legislative issues that reflect the influence of the takings agenda. For several years, for example, the billboard industry has been pushing legislation to bar municipalities from using amortization ordinances to phase out unsightly billboards; these measures have the effect of making it more difficult for local governments to regulate billboards without running afoul of the Takings Clause. There also are a number of active proposals in the state legislatures to expand the statutory definitions of "vested" development rights; these bills serve to strengthen developers' property interests via-a-vis the public. More generally, in the state legislatures, as in the Congress, the takings issue has helped transform the terms of the debate over environmental and land use matters, making it far more difficult for the environmental community to advance proposals for new regulatory programs.

With these general observations in mind, I will now turn to a brief survey of the four states with laws roughly comparable to Measure 7.

Louisiana. In 1995, Louisiana adopted a takings measure amending and expanding the state's right to farm and right to forest laws.[5] The measure defines a taking as a "reduction of twenty percent or more" of the value of agricultural or forest land, and authorizes the owner to sue to recover a sum equal to the diminution in value. Significantly, an owner is not required to give up title to the property as a condition of receiving payment. If an owner prevails in a suit under the measure, the government has the option of rescinding the regulation, but the government must pay for the diminution in value while the law was in effect.

The Louisiana measure is both enormously expansive and quite limited. The 20% diminution-in-value threshold is (apart from Oregon's Measure 7) arguably the most generous takings standard in any state law. In addition, the payment requirement is triggered if the threshold is met with respect to any portion of the property, significantly increasing the likelihood that quite modest regulatory restrictions could trigger payment.

On the other hand, the measure is limited to restrictions that affect forest and agricultural land and it is limited to prohibitions or limitations on agricultural or forestry activity. Thus, the measure does not apply to any land not in forest or agricultural use. And with respect to those lands to which it does apply, the payment provision is not triggered if the restrictions do not relate to forestry or agriculture. In other words, restrictions barring the conversion of rural land to residential or commercial uses, for example, are outside the scope of the law.

In addition, the measure contains a number of rather open-ended exemptions. The measure defines a "governmental action" which triggers payment in very broad terms. But the measure then exempts the following: (1) "[t]he adoption, enactment, repeal or amendment of a statute or resolution by the legislature;" (2) "[a] governmental action directed or mandated by an order of a court of competent jurisdiction; (3) "[a]n order issued as a result of a violation of law;" and (4) "[a]ctions taken in compliance with federal law or regulation." Depending upon how these provisions are interpreted, they could significantly restrict the scope of the payment obligation.

In addition to creating a cause of action for a statutorily defined taking, the Louisiana measure directs government entities to prepare "takings impact assessments" on actions that "will likely result in a diminution in value" of forest or agricultural land. The measure includes no specific provision for enforcement of the TIA requirement (in contrast to the Texas measure, for example, discussed below).

An examination of the westlaw database and the annotations to the Louisiana statutes discloses no reported decision interpreting or applying the Louisiana takings measure. It is uncertain whether any claim has ever been filed under the measure.

Mississippi. The Mississippi takings measure,[6] enacted in 1994, is very similar to the Louisiana measure and undoubtedly provided a model for the takings measure adopted in Louisiana. The "Mississippi Agricultural and Forestry Activity Act" defines a taking to mean a prohibition or restriction on an owner's use of property for forestry or agricultural activities that results in a reduction in the fair market value of the property -- "or any part or parcel thereof" -- "by 40 percent or more." The act authorizes owners to sue for money damages and allows an owner who recovers payment to retain title to the property (unless the reduction in property rises to the "100%" level). If the government is "unable" to make a judicially mandated payment, the government action is automatically rescinded. If the government is found liable, officials have the option of rescinding the regulation, but the state must pay for the period the regulation was in place.

Like the Louisiana measure, the Mississippi act is simultaneously quite expansive and quite limited. The 40% takings threshold, combined with the fact that the economic assessment is based on "any part" of the property, means that even modest restrictions on the use of property

could result in takings. On the other hand, the act is limited to restrictions that affect forest and agricultural land and to restrictions that prohibit or limit forestry or agricultural activity. Thus, the act does not apply to land not in forestry or agricultural use and does not apply to restrictions on activities other than agriculture or forestry, such as conversions to other uses.

The Mississippi act only applies prospectively. The act also includes exceptions for nuisances, actions designed to protect public health and safety (narrowly defined), and for certain actions by the Commission on Wildlife, Fisheries and Parks. However, the act lacks some of the potentially broad exemptions included in the Louisiana measure discussed above.

So far, the Mississippi act, like the Louisiana measure, appears to have had little or no impact. According to a 1999 Lincoln Institute report, no claims have been filed under the act.[7] A search of the westlaw data base and the annotations to the Mississippi statutes reveals no reported decision citing the act. Proponents of the act reportedly are satisfied that it has served its purpose, "to put government on notice about an unacceptable level of regulation, which to date has not occurred."[8] Whether an "unacceptable level" of regulation of forestry and timber activities might have been imposed in the absence of the Mississippi act is, of course, difficult to know.

Texas. In 1995, the Texas legislature passed and then Governor (now President) George W. Bush signed the Texas Real Property Rights Preservation Act.[9] The act defines a taking as a government action that causes "a reduction of at least 25 percent in the market value of the affected private real property." It also requires government agencies to prepare takings impact assessments if an agency action "may result" in a taking as defined in the act. If an agency fails to prepare a TIA when one is required, an owner can sue to invalidate the governmental action on that basis.

The Texas takings act has several notable features. First, it is possible to read the act as providing a payment remedy not only when government imposes a restriction on the use of property but also when government authorizes development that reduces the property values of neighboring owners, such as homeowners. Second, municipalities are, by and large, exempt from the act. Third, the act does not apply to "an action... that is reasonably taken to fulfill an obligation mandated" by federal or state law. This is a potentially very broad exemption which, depending upon how it is interpreted, could narrow the act's scope considerably. Finally, unlike the other takings-payment laws, the Texas act does not authorize an owner to sue for monetary relief; the act states that "the private real property owner is only entitled to, and the government entity is only liable for, invalidation of the government action... resulting in the taking." (At the same time, the Texas law allows a state agency, at its option, to elect to pay monetary damages and to proceed with its proposed action.)

In contrast to the lack of claims filed under the Mississippi and Louisiana takings laws, some claims have been filed under the Texas act. So far as I can determine, however, no regulatory decision has been found to effect a taking and been enjoined under the act. There are four reported Texas Court of Appeals cases involving the act. In all four cases the claims were rejected. In two cases the court relied upon the mandated-by-state-law exclusion. One case involved a utility district's assessment of so-called "stand by" fees for water and sewer service.[10] and the other involved rules adopted by the Edwards Aquifer Authority to limit water withdrawals in order to protect endangered species.[11] In the third case, the court rejected an owner's attempt to use the takings act to challenge an exercise of the power of eminent domain,[12] which is expressly exempted from the act. In the fourth case, the court affirmed without discussion the trial court's rejection of a claim brought by homeowners objecting to a proposed runway expansion of Dallas/ Fort Worth Airport.[13]

On April 5, 2001, the Texas Supreme Court, in the Edwards Aquifer case, after first rejecting the petition for review, agreed to hear this case. Thus, sometime over the course of the next year, the Texas Supreme Court is likely to provide some definitive guidance on the meaning on the act.

The Court's decision could help consign the Texas takings act to continued relative obscurity. Or it could convert the act into a major weapon for challenging state rules and regulations.

Florida. In 1995 the Florida legislature passed two pieces of takings legislation, the Bert J. Harris, Jr. Private Property Rights Protection Act[14] and the Florida Land Use and Environmental Dispute Resolution Act.[15] Both of these laws raise a number of questions about how they should be interpreted. Nonetheless, it is already apparent that these laws have seriously impeded the exercise of local land use regulatory authority and undermined the implementation of the Florida Growth Management Act. As the procedures and standards for implementing the laws become clearer, the adverse impacts are likely to become more significant.

The Florida laws, especially in comparison with Measure 7, are long and complicated. I will focus on the most important features of the Bert Harris Act. The act creates a right of action against the government when it regulates the use of real property in a fashion that "inordinately burdens" an "existing use" of property. In an extraordinary example of legislative double-speak, the act defines an "existing use" to include a proposed future use, so long as it is (1) "reasonably foreseeable," (2) "nonspeculative," (3) "suitable for the subject real property," (4) "compatible with adjacent land uses," and (5) has "created an existing fair market value in the property greater than the fair market value of the actual, present use or activity on the real property." The act provides that an owner is entitled to sue for payment by showing that a regulatory restriction bars the owner from "attain[ing] the reasonable, investment-backed expectations for the existing" - i.e., proposed - "use of the real property." The payment is calculated by measuring the difference between the value of the property if the owner were permitted to "attain" the investment backed expectation for the property and the value of the property subject to the existing regulation.

What do all these legalisms mean? Their likely effect can be illustrated by describing how they might apply in the State of Oregon. Suppose an Oregon developer purchased property immediately outside the urban growth boundary. Suppose further that the developer paid somewhat more than the market value of the property based on farm or forest use and that the property was adjacent to developed property inside the boundary. If the Florida law applied, a strong argument could be made that the boundary interferes with an "existing" use and, therefore, the municipality must pay the difference between the value of the property for development and the value for farm or forest use. Furthermore, the developer apparently could assert such a claim even if the developer paid less than full development value for the property and even if the developer bought the property knowing that the boundary existed and made the investment with the specific idea of challenging the boundary. It is obvious that a few successful claims along these lines would destroy the Oregon growth management system.

It will take many years, perhaps decades, for the adverse effects of the Bert Harris Act to come into full flower, assuming the act remains in place. The act only applies prospectively, that is, to decisions on development proposals taken pursuant to laws and regulations adopted (or amended) after the effective date of the act. Thus, so long as a municipality does not change its regulations, the act does not apply. Not surprisingly, therefore, the primary effect of the act in the short term has been to chill the normal process of amending and updating land use rules. Over the longer term, the act threatens to dismantle the land use management program in Florida because, as discussed, it will make it effectively impossible for communities to control development at the urbanizing fringe.

Despite the fact that the act only applies prospectively, over 50 legal claims have reportedly been filed under the act. Many claims are based on the City of Miami's Beach down-zoning of permitted development. So far as I am aware, no court has actually ordered payment under the act, though a few cases have reportedly been settled. No appellate court has yet had an opportunity to provide an authoritative interpretation of any of the act's provisions. There are several unresolved questions about the constitutionality of the act and about whether state law may place a cap on the size of the payments that can be awarded under the act. When and if this

legal underbrush is cleared away, it is reasonable to anticipate that the number of claims filed under the act - and the consequent effects on land use planning and regulation - will increase, perhaps dramatically.

Reflections on Oregon Measure 7.

What can one say about Oregon Measure 7, looking at the measure from a national perspective, based on this quick survey of developments at the federal and state levels.

First, Oregon Measure 7 is far and away the most extreme takings measure enacted anywhere in the United States at any level of government. The takings laws in Louisiana, Mississippi, and Texas obviously do not come close. Unlike the Florida takings law, Measure 7 is retroactive and therefore would have a more significant and immediate impact. In addition, whereas the Florida law has a relatively narrow focus on development restrictions on the urban fringe, Measure 7 applies to all regulatory restrictions in all locations on essentially all uses of real property. If Measure 7 ever goes into effect, it will literally decimate land use planning and regulation in the state of Oregon.

In addition, the timing of the adoption of Measure 7 was plainly anomalous. By November 2000, political support for this type of takings bill had virtually evaporated across the country. Measure 7 was the only takings measure on the ballot in any state anywhere in the United States. No major piece of takings legislation had been enacted in any other state for several years.

Why then did Measure 7 pass and, in all places, in Oregon with its longstanding history of progressive land use planning? I am hardly qualified to provide a comprehensive answer. But, at least from an outsider's perspective, it is difficult to believe that Measure 7 represents an informed expression of the will of the majority of Oregon voters. David Broder, a distinguished reporter for the Washington Post, in his recent book, Democracy Derailed, offers a scathing indictment of the initiative process as it is practiced in Oregon and other states. He describes the citizen initiative process as a well intentioned populist reform that has been hijacked by special interests. He contrasts the kind of superficial political decision-making that occurs in the initiative process with the more careful, deliberative process that occurs when legislation has to go through the legislative branch and secure the executive's concurrence.

Broder's comments bring to mind the extensive hearings on the takings issue conducted by the late Senator John Chafee, the Chairman of the Senate Environment and Public Works Committee, during the 104th Congress.[16] Over the course of several days, the Committee heard from a range of public officials, legal scholars, economists and others. This careful, thoughtful review of the Contract takings measure penetrated the superficial appeal of the takings agenda and exposed the likely adverse consequences if the measure had been enacted. Obviously, no similar deliberative review has been conducted on Measure 7.

There are other special factors that reinforce the conclusion that the vote on Measure 7 was a problematic expression of the voters' will. In the view of many, the language of the ballot title presented Measure 7 in an inaccurately positive light. Also, there are many reasons to believe that the public did not focus closely on Measure 7 and its implications. Measure 7 was one of more than two dozen initiative measures on the ballot in November. In part because it was so extreme, many believed there was not much chance Measure 7 would pass. As a result, the measure received little press coverage until days before the election. Finally, Oregon became one of the key battleground states in the presidential race, saturating the airwaves and citizens' capacity to absorb political information.

It is possible that a majority of the voters of Oregon actually intended to adopt the most radical takings measure in the nation. But if the voters had it to do all over again, and if there were a full and fair debate about the issue, I doubt it would come out the same way.

Recommendations and Thoughts for the Future

Looking to the future, what are the lessons to be learned from Measure 7, both for Oregonians and for the rest of us?

1. Think Long Term. My first observation is that, notwithstanding the promising trend on takings legislation at the federal level and in states across the country, the takings debate is likely to continue for some time, both in Oregon and across the country. Moreover, history has shown that every victory on takings legislation is likely to be only temporary and every defeat is probably the prelude to the next round of political warfare. Constant vigilance and long-term thinking are required.

Arizona offers a cautionary example. As discussed, Arizona voters defeated an assessment-type measure in that state in 1994. That victory, especially coming in the same election cycle that produced the 104th Congress, was celebrated as a major national victory by the opponents of takings legislation. But in the years since that victory, the Arizona legislature has passed almost half a dozen measures expanding developers' property rights, including a payment bill authorizing (but not requiring) counties to provide compensation for actions that reduce the value of private property, legislation creating a private property ombudsman, a law establishing a special hearing process for land-use exactions, and legislation expanding the definition of vested rights.

Florida offers another kind of cautionary example. In that state, in the face of a significant pro-takings effort, some environmental advocates sat down and helped negotiate the terms of the Florida takings bill. But this cooperation hardly produced long-term peace. Takings advocates have reportedly attempted to pass strengthening amendments to the Bert Harris Act in each subsequent legislative session. The state's Growth Management Act has also been the object of perennial attacks. And just this week the Florida legislature, at the behest of the billboard lobby, will reportedly attempt to strip local communities of effective control over billboards.

The lesson, it seems, is that the battle has to be fought over the long-term.

2. Kick Start the Deliberative Process in Oregon. My second thought is that somehow Oregonians need to kick start a thorough deliberative process on the takings issues. Voters approved Measure 7 with little thought or debate. Now, at least from an outsider's perspective, legislators appear to be busily trying to come up with a quick fix solution to what, by almost any standard, is a fatally flawed measure. What is at risk of being lost is the opportunity to ever conduct a full and open debate about whether Oregonians actually want to revolutionize the system of property rights and jettison their longstanding commitment to land use planning and regulation. It is, in my view, a mistake to try to find a specific legislative solution before the nature of the alleged problem has received a thorough public ventilation.

There are a variety of opportunities to launch a nuanced democratic debate over the takings issue - from a series of public debates over the issue, to public conferences on the takings question, to research efforts to examine the likely consequences if Measure 7 went into effect.

The Oregon courts obviously could go a long way in helping to launch this deliberative process by upholding the injunction against implementation of Measure 7, restoring the status quo, and allowing the voters and their representatives, for the first time, to have a robust debate about takings.

3. Identify the Winners and the Losers. My third recommendation is that opponents of Measure 7 should conduct the research and analysis necessary to define, in as much detail as possible, the likely winners and the likely losers if Measure 7 were to go into effect. Who owns the private real property in Oregon? How many homeowners are there in Oregon? How many commercial building owners? How many farm and forest land owners? And how concentrated is the ownership of different types of private real property?

This analysis will almost certainly demonstrate that a relatively few large landowners would reap enormous windfalls if Measure 7 went into effect and that the vast majority of Oregonians, including taxpayers and homeowners, would be the losers. As discussed, this kind of analysis had a positive effect during the debate over national takings legislation and it would likely have the same kind of positive impact in Oregon.

4. Think Along the Temporal Dimension. Finally, I urge you to address the taking issue, not as an immutable battle between conflicting interests, but rather as a challenge about how to deal with change over time. The issue is not which side to this debate ought to prevail, but rather how society as a whole should move through history from point A to point B. As many scholars have observed, property law is, under any plausible understanding, a mutable institution that can and does adapt to changing concerns and values. Less than 150 years ago, black Americans were viewed as the property of their white owners. Within the last 100 years, laws governing maximum hours and minimum wages were viewed as an unthinkable intrusion on employers' property rights. We now live in a society that views those kinds of asserted property rights as illegitimate.

At the same time, new kinds of property interests are constantly coming into existence. For example, new intellectual property rights are being recognized and protected in order to support the efficient functioning of the new information-based economy.

Modern environmental concerns and values, along with the simple fact that there are more of us, and more of us capable of consuming more resources, have called yet again for a transformation in our conception of property. The landmark environmental and land use laws enacted in the 1970's, in Oregon, in other states, and at the national level, represent a step in the continual evolution of our property system. The "property rights" movement represents a reactionary resistance to this evolutionary change. The Luddites destroyed the efficient new weaving equipment that threatened their established way of life during the industrial revolution in Great Britain. Takings advocates, like latter day Luddites, resist the demands that new public concerns, changing values, increasing population, and technological progress impose on our system of property rights.

This perspective offers several potentially useful insights into how to address the takings issue, both over the long term and over the short term. First, as a general matter, this perspective counsels patience and calm. Social change is always difficult and contentious. But it is reasonable to expect that, eventually, antiquated claims to the right to harm land and environmental resources at the expense of neighboring property owners and the larger community will fall of their own weight.

Second, this perspective suggests that any potential policy response to takings arguments should be carefully tailored to address complaints of those who can legitimately claim to have been surprised by social change rather than the complaints of those intent on resisting social change. For example, any investor who purchased property following the enactment of SB 100 in 1973 would seem to be in a poor position to express surprise at the enforcement of Oregon's strong land use laws. On a going forward basis, there is a strong argument that all those who presently own property in the state have fully adjusted their investments expectations to anticipate possible new regulations designed to carry out Oregon's strong environmental ethic.

Third, this perspective suggests some of the limitations of public monetary buyouts or "incentives" as a way of facilitating social change. Generous distributions of taxpayer dollars, while potentially offering genuine relief to some, have the potential to fan the flames of resistance to change. Financial rewards for accommodating change can create the hope or expectation that taxpayers will pay every time the rules and regulations change. Taxpayer funded buy-outs, experience shows, have a tendency to create a sense of entitlement and an appetite for more taxpayer dollars. If one owner's regulatory obstacle creates an opportunity to seek public payment, it will hardly be surprising to see more owners come forward with more complaints about regulatory problems. At worst, a program of generous buyouts could encourage investors to seek out potential regulatory train wrecks with the specific hope of making a profit at taxpayer expense.

The goal should be to ensure that public monetary relief does not provide an incentive for continuing resistance to necessary and appropriate social change. Alternatives to financial payments that could potentially address complaints about unfair surprise but that would create less incentive to resist social change now and in the future include phasing in of regulatory restrictions over time, hardship variances and the like.

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Oregonians obviously find themselves in a serious pickle as a result of the adoption of Measure 7. Friends across the country wish you all good luck. And many stand ready to offer aid and assistance as you confront the challenges ahead.

Footnotes:

[1]The text of Measure 7 is available on the League of Oregon cities webiste, www.orcities.org.

[2] See John D. Echeverria, "Changing the Rules By Changing the Players, " 9 New York University Environmental Law Journal 217 (2001).

[3]Ownership of private real property in the U.S. is concentrated in relatively few hands. According to the best available data, 124,000 farmland owners (corporations and individuals representing about 4% of all farmland owners), hold 47% percent of all U.S. farmland. Concentration of forest land ownership is even more extreme, with fewer than 1% of the forest land owners, about 63,000 owners, owning 48% of the private forest land. The owners of the 2,000 largest forest ownerships (10,000 acres or more) represent less than .03% of forest land owners, but they hold 84 million acres or 25% of the land. See John D. Echeverria, "The Politics of Property Rights," 50 Oklahoma Law Review 351, 373 (1997) (citing data compiled by the Economic Research Service, U.S. Department of Agriculture).

[4]See 141 Cong. Rec. H2356 (daily ed.) (March 2, 1995). See also H.R. 971, Homeowner Empowerment and Protection Act of 1995, 104th Cong (1995) (introduced February 16, 1995).

[5]See La. R.S. 3:3601 et se.

[6]See Miss.St.Code 49:33-1 et seq.

[7]See Harvey M. Jacobs, " State Property Rights Laws: The Impact of Those Laws on My Lands" (1999).

[8] Id.

[9]Tex. Gov. Code Ann. 2007.001 et seq.

[10] McMillan v. Northwest Harris County Municipal Utility District No. 24, 988 S.W.2d 337 (Tex.Ct.Apps., February 18, 1999)

[11] Edwards Aquifer Authority v. Bragg, 21 S.W.3d 375 (Tex.Ct. Apps., January 19, 2000)

[12]Duncan v. Calhoun County Navigation District, 28 S.W,.3d 707 (Tex. Ct.Apps., April 24, 2000)

[13]Wilkinson v. Dallas/Fort Worth International Airport Board, 2001 WL 42264 9tx.Ct. Apps, January 17, 2001)

[14] F.S.A. 70.001 et seq.

[15]F.S.A. 70.51 et seq.

[16]See Private Property Rights & Environmental Laws: Hearing Before the Senate Committee on Environment and Public Works, 104th Cong (1995) (Senate hearing 104-299).