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Note, Searching for Balance in the Aftermath of the 2006 Takings Initiatives

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HANNAH JACOBS

Searching for Balance in the Aftermath of the 2006 Takings Initiatives

ABSTRACT. The partial regulatory takings movement seeks to compensate private landowners when regulations diminish their land values. This movement has grown in recent years, particularly at the state level. Scholars have focused thus far on the cost of compensation and its effect on the regulations that governments enact or enforce. In addition to exploring those concerns, this Note argues that partial regulatory takings regimes threaten to constrain residents' ability to influence their communities' growth and character. The greatest impact could fall on low-income communities, many of which contain disproportionate levels of undesirable land uses and lack adequate financial resources to influence land use planning in the absence of regulatory solutions or alternative venues. To address these problems, state and local governments should implement what I call a "regulatory balances" regime, strengthening participatory planning venues and funding the resulting measures.

AUTHOR. Yale Law School, J.D. expected 2007; Dartmouth College, A.B. 2002. I send my heartfelt gratitude to my fiancé, Samuel Wiseman, for his constant support and help—from editing to organization to encouragement—throughout this process. Thanks also to my parents for their patience; to Josh Berman for the topic suggestion; to Adam Dressner, Andrea Gelatt, Grace Leslie, and Matthew Splitek for assistance with sources; and to Will Baude, Megan Ceronsky, Nicole Johnson, and other members of the Property, Social Justice, and the Environment Seminar for constructive discussion. Finally, many thanks to David Spohr and Professor Carol Rose, and to Annie Decker and the other editors of *The Yale Law Journal*, for their invaluable editing and reviewing assistance.



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INTRODUCTION

The United States is currently in the midst of a growing movement—at both the national and the state level—pursuing partial regulatory takings reform.¹ This movement, which has emerged as a response to perceived government abuses, seeks to extend current Fifth Amendment takings doctrine to give property owners a claim to compensation whenever government regulation causes even slight decreases in the value of their property. One recent change of heart highlights the growth of this movement: in 2006, Arizona voters approved an initiative—the Private Property Rights Protection Act²—that had the same purpose of mandating compensation for partial regulatory takings³ as a 1992 act that Arizona voters repealed by referendum in 1994.⁴ California, Idaho, and Washington saw similar initiatives on the ballot in 2006.⁵

Government action inevitably results in gains and losses for different groups of people. Viewed optimistically, and under the assumption that state and local governments are not corrupt, the very essence of government action is an attempt to serve the public good.⁶ Whether because interest groups fight

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1. See, e.g., Nancie G. Marzulla, *State Private Property Rights Initiatives*, 46 S.C. L. REV. 613, 615 (1995) (noting that property owners are “aggressively seeking relief, passing laws that require prior assessment of the potential ‘takings’ implications of new rules” and “introducing bills that ease the litigation burden facing the state and the property owner by clarifying when compensable takings have occurred”); see also *infra* Section I.A (discussing the growth of state initiatives and legislation).
 2. Proposition 207 (Ariz. 2006) (to be codified at ARIZ. REV. STAT. §§ 12-1131 to -1138), available at [http://www.azsos.gov/election/2006/General/BallotMeasureText/PROP%2020X%20\(I-21-2006\).pdf](http://www.azsos.gov/election/2006/General/BallotMeasureText/PROP%2020X%20(I-21-2006).pdf).
 3. *Id.* sec. 3, § 12-1134(A).
 4. See Private Property Rights Protection Act, 1992 Ariz. Sess. Laws 369 (repealed 1994); Lynda J. Oswald, *Property Rights Legislation and the Police Power*, 37 AM. BUS. L.J. 527, 537 (2000) (discussing the 1994 repeal); R. Andrew Branan, *Raising Arizona: How Campaign Message Discipline Extinguished the First Flames of the Property Rights Prairie Fire*, CAMPAIGNS & ELECTIONS, June 1995, at 36, 36, 39 (discussing the defeat, by 60% of the vote, of the 1994 proposition to retain the law).
 5. Proposition 90 (Cal. 2006), available at http://www.voterguide.ss.ca.gov/pdf/prop90_text.pdf; Proposition 2 (Idaho 2006), available at <http://www.idsos.state.id.us/elect/inits/o6inito8.htm>; Initiative Measure No. 933 (Wash. 2006), available at <http://www.secstate.wa.gov/elections/initiatives/text/i933.pdf>.
 6. This Note views government action as falling somewhere between the public interest and public choice models of government. Government action attempts to achieve “public or objective values and ends for human action” through deliberation and majority rule, as well as to meet the conflicting, self-interested goals of influential individuals. See Frank I.

for legislative change⁷ or because legislators are committed to the public welfare,⁸ the overall effect of legislation may be one of relatively balanced gains and losses,⁹ or takings and “givings,”¹⁰ that result in some level of fairness for everyone. Of course, governments do not always achieve a regulatory balance.¹¹

Nevertheless, the partial regulatory takings solutions designed to respond to this mismatch, real or perceived, are too extreme—from the 2006 ballot initiatives and state bills to Oregon’s already costly Measure 37, which became effective in 2004.¹² By raising regulatory costs and by failing to provide an alternative to regulation, the regimes could stifle government regulation and prevent individuals from influencing the growth and character of their neighborhoods—and in some cases already have.

This Note proposes a remedy that lies between the status quo and the recent regulatory takings proposals. Through what I call a “regulatory balances” planning process, states should address the impact of state and local government action on private property owners, including low- and middle-income groups. This regime would distribute regulatory burdens more evenly by supporting community participation in local planning processes;¹³ by

Michelman, *Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy*, 53 *IND. L.J.* 145, 148-49 (1977-1978).

7. See *id.* at 172 (describing the normative public choice theory that sufficient opportunity for interest group representation—e.g., “logrolling”—can ensure overall regulatory balance).
8. See, e.g., KENNETH J. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* 22 (2d ed. 1964) (stating that the aim of society is to “maximize . . . social utility or social welfare”); see also *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978) (finding that government actions for the public good, such as a public program “adjusting the benefits and burdens of economic life to promote the common good,” are less likely to be considered takings under the Fifth Amendment).
9. See, e.g., C. FORD RUNGE ET AL., *LINCOLN INST. OF LAND POLICY, GOVERNMENT ACTIONS AFFECTING LAND AND PROPERTY VALUES: AN EMPIRICAL REVIEW OF TAKINGS AND GIVINGS* 24 (1996) (“[G]overnment actions affect land and property values every day, in myriad ways, both positively and negatively.”).
10. See, e.g., Abraham Bell & Gideon Parchomovsky, *Givings*, 111 *YALE L.J.* 547, 549-50 (2001).
11. See, e.g., *id.* at 550, 554; see also RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 210 (1985) (noting that if each regulation results in a loss, the combination of regulations only can result in “a larger negative sum”).
12. As of April 12, 2007, landowners in Oregon had filed claims totaling approximately \$15 billion. Or. Dep’t of Land Conservation & Dev., *DLCD Measure 37, Summaries of Claims*, http://www.oregon.gov/LCD/MEASURE37/summaries_of_claims.shtml (last visited Apr. 24, 2007).
13. “Community” throughout this Note refers to a group of residents within a given planning area, whether a neighborhood, town, or district within a city, who care about the character of the area in which they live (even if only temporarily) and who are likely to call that area “home.”

funding projects that stem from this planning; and by forming institutions that would oversee local planning systems, answer concerns, and provide alternatives to property rights litigation.

Part I describes the growing partial regulatory takings movement, analyzes the potential costs of this movement, and provides an overview of government responses to successful regulatory takings initiatives. Part II investigates the major flaws of both regulatory takings regimes and the status quo—including limitations on community planning mechanisms and greater inequities for communities that rely upon these mechanisms. Part III then suggests procedural and substantive mechanisms to address those problems.

I. THE PARTIAL REGULATORY TAKINGS MOVEMENT

The idea that a regulation's diminution of private property value can result in a taking dates back as far as the 1922 case of *Pennsylvania Coal Co. v. Mahon*.¹⁴ An organized partial regulatory takings reform movement, however, is a recent phenomenon. This Part discusses the growth of that movement.

A. *The Rise of State Takings Reform Legislation*

Although the partial regulatory takings reform movement has grown through action at both the federal and state levels,¹⁵ most of the success has been in the states, while significant federal efforts largely have failed. In 1988, President Reagan issued Executive Order No. 12,630, which required federal government agencies to assess the takings implications of regulatory actions.¹⁶ Members of Congress subsequently introduced federal regulatory takings legislation that would have forced the federal government to compensate landowners for diminished property values resulting from federal agency action,¹⁷ but Congress failed to approve any of the proposals.

14. 260 U.S. 393, 415 (1922) (Holmes, J.) (explaining that some regulation “goes too far” and therefore constitutes a taking of private property).

15. See, e.g., JAMES W. ELY, JR., *THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS* 154 (2d ed. 1998) (chronicling how the movement “gained momentum” in state legislatures and Congress during the 1990s and was not quelled by the judiciary’s independent attempts to bolster private property rights).

16. 53 Fed. Reg. 8859, 8862 (Mar. 15, 1988).

17. E.g., Threatened and Endangered Species Recovery Act of 2005, H.R. 3824, 109th Cong. § 13 (2005); Omnibus Property Rights Act of 1995, S. 605, 104th Cong. § 204(a)(2)(D) (1996); Private Property Protection Act of 1995, H.R. 925, 104th Cong. § 3 (1995); Just

Takings-related initiatives and legislation at the state level have been more successful.¹⁸ While most proposed initiatives have contained provisions concerning both eminent domain and regulatory takings,¹⁹ this Note focuses on the takings provisions.²⁰ Regulatory takings initiatives appeared on ballots in Arizona, California, Idaho, and Washington in 2006,²¹ and voters proposed regulatory takings measures in states such as Missouri, Montana, Nevada, and Oklahoma in 2005 and 2006.²²

Compensation Act of 1993, H.R. 1388, 103d Cong. § 5(a), (c) (1993); *see also* Marzulla, *supra* note 1, at 630-31.

18. This Note defines “initiatives” as measures that appear on state ballots; it uses “legislation” to refer to all other proposed statutory or constitutional reforms that do not take effect through direct voter approval or rejection. For summaries of state legislative action, see Harvey M. Jacobs & Brian W. Ohm, *Statutory Takings Legislation: The National Context, the Wisconsin and Minnesota Proposals*, 2 WIS. ENVTL. L.J. 173, 184, 208-20 (1995); Marzulla, *supra* note 1, at 633-35; Michael A. Culpepper, Comment, *The Strategic Alternative: How State Takings Statutes May Resolve the Unanswered Questions of Palazzolo*, 36 U. RICH. L. REV. 509 (2002); Carl P. Marcellino, Note, *The Evolution of State Takings Legislation and the Proposals Considered During the 1997-98 Legislative Session*, 2 N.Y.U. J. LEGIS. & PUB. POL’Y 143, 149-69 (1999); and Harvey M. Jacobs, *The Impact of State Property Rights Laws: Those Laws and My Land*, LAND USE L. & ZONING DIG., Mar. 1998, at 3, 3-4.
19. Despite the differences between eminent domain and regulatory takings, seven of the eight states that attempted partial regulatory takings reform in 2005 and 2006 through ballot measures joined the two issues in one measure. *See infra* notes 20-22. Although eminent domain has created much of the public backlash, many supporters of the regulatory takings movement have argued that regulatory takings are identical or strikingly similar. *See infra* notes 117-118 and accompanying text.
20. The regulatory takings provisions have been more contentious than those concerning eminent domain. *See, e.g.*, Jeff Brady, *Western Voters Consider Property Rights Changes*, NPR, Sept. 19, 2006, <http://www.npr.org/templates/story/story.php?storyId=6102255> (quoting one opponent who described the takings component as the most “insidious element” of the initiatives, as well as a proponent who argued that the takings issue was the most important element of Proposition 2); Leonard C. Gilroy, *The Western Property Rights Wildfire*, REASON.ORG, Aug. 7, 2006, http://www.reason.org/commentaries/gilroy_20060809.shtml (describing the addition of regulatory takings to eminent domain issues within the initiatives as a political risk, because voters widely supported eminent domain reforms but there was “vocal opposition” to the regulatory takings component).
21. Proposition 207 (Ariz. 2006) (to be codified at ARIZ. REV. STAT. §§ 12-1131 to -1138), *available at* [http://www.azsos.gov/election/2006/General/BallotMeasureText/PROP%2020X%20\(I-21-2006\).pdf](http://www.azsos.gov/election/2006/General/BallotMeasureText/PROP%2020X%20(I-21-2006).pdf); Proposition 90 sec. 3, § 19(a)(1) (Cal. 2006), *available at* http://www.voterguide.ss.ca.gov/pdf/prop90_text.pdf; Proposition 2 §§ 1, 4 (Idaho 2006), *available at* <http://www.idsos.state.id.us/elect/inits/06inito8.htm>; Initiative Measure No. 933 §§ 1, 3 (Wash. 2006), *available at* <http://www.secstate.wa.gov/elections/initiatives/text/i933.pdf>.
22. Constitutional Amendment to Article I Eminent Domain, 2006-34 (Mo. 2006), *available at* <http://www.sos.mo.gov/elections/2006petitions/ipEminentDomainI-34.asp>; Constitutional Amendment to Article I—Eminent Domain (Version 2), 2006-36 (Mo. 2006), *available at*

But after all of the ruckus, only Arizona's Proposition 207 won at the ballot box. Courts in Oklahoma and Nevada found that the initiatives violated state single-subject rules.²³ A Missouri court found that the fiscal note summary of the official ballot initiative on regulatory takings and eminent domain was insufficient,²⁴ and the Montana Supreme Court struck down the state's regulatory takings and eminent domain initiative based on a finding of unconstitutional signature collection.²⁵ For those initiatives that reached the ballots, the majority of voters in California, Idaho, and Washington rejected them.²⁶ Voters also rejected a local regulatory takings measure in Napa County, California, that preceded California's Proposition 90.²⁷

The failure of several initiatives to reach ballots, as well as voters' rejection of three initiatives in 2006—one of which failed by a very slim margin²⁸—by no means indicates that state and local regulatory systems will remain unaffected in coming years. The strong base of national support to modify judicial interpretations of regulatory takings,²⁹ coupled with increasing wariness about government control over private property and the failure of the courts to adequately check this control,³⁰ continues to fuel regulatory takings reform.

<http://www.sos.mo.gov/elections/2006petitions/ipEminentDomainI-36.asp>; Initiative No. 154 §§ 1(2)(a), 5(1) (Mont. 2006), available at <http://sos.mt.gov/ELB/archives/2006/I/I-154.asp>; Nevada Property Owners' Bill of Rights § 1 (Nev. 2005), available at http://www.sos.state.nv.us/nvelection/int_ref/NvPropOwnBOR.pdf; Initiative Petition No. 382, State Question 729 (Okla. 2005), available at <http://www.sos.state.ok.us/documents/questions/729.pdf>.

23. See *Nevadans for the Prot. of Prop. Rights, Inc. v. Heller*, 141 P.3d 1235, 1250 (Nev. 2006) (striking down the just compensation portion of the petition under the single-subject rule); *In re Initiative Petition No. 382*, 142 P.3d 400, 409 (Okla. 2006).
24. See *Crim v. Sec'y of State*, No. 06AC-CC00211 (Mo. 19th Jud. Cir. Ct. Apr. 27, 2006); *Petitioners Drop Appeals for Fall Ballot Measures*, COLUMBIA DAILY TRIB. (Mo.), Sept. 6, 2006, at 2A, available at <http://www.columbiatribune.com/2006/Sep/20060906Newso26.asp>.
25. See *Montanans for Justice v. State*, 146 P.3d 759, 759 (Mont. 2006).
26. See Bruce McPherson, Cal. Sec'y of State, Statement of Vote 76, http://www.ss.ca.gov/elections/sov/2006_general/complete_sov.pdf (last visited Apr. 25, 2007); Sam Reed, Wash. Sec'y of State, 2006 General Election Results, <http://vote.wa.gov/Elections/general/Measures.aspx> (last visited Apr. 25, 2007); Ben Yursa, Idaho Sec'y of State, November 7, 2006 General Election Results, http://www.idsos.state.id.us/elect/RESULTS/2006/general/tot_stwd.htm (last visited Apr. 25, 2007).
27. See Patrick Hoge, *Losers Now Eye November*, S.F. CHRON., June 8, 2006, at B-5; Napa Valley Land Stewards Alliance, *The Fair Payment for Public Benefit Act*, <http://www.landstewards.org/fairPayment/FairPayText.pdf> (last visited Apr. 25, 2007).
28. In California, 52.4% voted no on the property rights initiative. See McPherson, *supra* note 26.
29. See *infra* notes 41-44 and accompanying text.
30. See discussion *infra* Subsection I.C.1.

Indeed, although many local and state governments have opposed takings reform,³¹ some politicians have endorsed it.³² Republican groups in California and Washington supported the regulatory takings initiatives in their states, as did the Libertarian Party of California.³³ Legislatures in Florida, Louisiana, Mississippi, and Texas have passed legislation providing compensation opportunities for partial regulatory takings.³⁴ Alaska,³⁵ Georgia,³⁶ Maine,³⁷ Minnesota,³⁸ and Montana³⁹ also have attempted unsuccessfully to implement regulatory takings legislation. And at least seventeen states require

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31. See No on 90, We Oppose Proposition 90 the Taxpayer Trap (Nov. 6, 2006), http://backyard.noprop90.com/get_resource.php?table=resource_j393od_16z5xo&id=j394bp_1600zo (listing the California Democratic Party, the California Republican League, the Log Cabin Republicans, and the San Francisco Women's Political Committee as officially opposing the proposition); Vote No on Proposition 207!, Endorsements (Nov. 3, 2006) (unpublished manuscript, on file with author) (listing at least seventeen current and former government officials and politicians officially opposed to Proposition 207).
 32. See, e.g., Arizona HOPE, Please Vote YES on Prop. 207, <http://www.hopeforarizona.com> (last visited Apr. 25, 2007) (listing under "Supporters" four U.S. Representatives, eleven state senators, eighteen state representatives, and two county officers).
 33. See, e.g., Prop. Fairness Coal., Endorsements, <http://www.propertyfairness.com/endorsements.htm> (last visited Apr. 25, 2007) (noting that the Benton-Franklin Mainstream Republicans officially supported the Washington initiative); Protect Our Homes Coal., Endorsements, <http://www.90yes.com/endorsements> (last visited Apr. 25, 2007) (listing as supporters, among others, the California Congress of Republicans, the California Republican Party, the California Republican Assembly, the Libertarian Party of California, two U.S. Representatives, thirteen state senators, twenty-nine state assembly members, six mayors, two mayors pro tem, four county supervisors, and nine councilmembers).
 34. FLA. STAT. ANN. § 70.001 (West 2004); LA. REV. STAT. ANN. § 3:3610 (2005); MISS. CODE ANN. § 49-33-9 (1999); TEX. GOV'T CODE ANN. § 2007.024 (Vernon 2000).
 35. H.B. 484, 22d Leg. (Alaska 2002); see Alaska Legislature, Journal Text for HB484 in the 22nd Legislature (Feb. 19, 2002), http://www.legis.state.ak.us/basis/get_jrn_page.asp?session=22&bill=HB484&jrn=2318&hse=H (describing the last action as a committee referral).
 36. S.R. 1040, 2005-2006 Leg. (Ga. 2006); see Ga. Gen. Assembly, SR 1040 (Oct. 11, 2006), http://www.legis.ga.gov/legis/2005_06/sum/sr1040.htm (describing the last action as a second reading).
 37. L.D. 886, 121st Leg. (Me. 2003); see State of Me. Legislature, Summary of LD 886, <http://janus.state.me.us/legis/LawMakerWeb/summary.asp?ID=280009138> (last visited Apr. 25, 2007) (noting that the bill was declared dead on May 21, 2003).
 38. H.F. 2773, 80th Leg. Sess. (Minn. 1998); see JOURNAL OF THE HOUSE, 80th Leg. Sess. 7248 (Minn. 1998), available at <http://ww3.house.leg.state.mn.us/cc/journals/1997-98/jo223078.htm#7248> (noting that the bill was voted to be "returned to its author").
 39. S.B. 397, 58th Leg. (Mont. 2003); see Mont. Legislature, Detailed Bill Information, [http://laws.leg.mt.gov/pls/lawso3/lawo203w\\$.startup](http://laws.leg.mt.gov/pls/lawso3/lawo203w$.startup) (search by "Bill Type and Number") (last visited Apr. 25, 2007) (describing the bill as "[p]robably [d]ead").

governments to assess the impacts of potential takings before enacting legislation.⁴⁰

Furthermore, influential individuals and national libertarian organizations with ample resources for further reform efforts have been the strongest backers of the state movements in Arizona, California, and Idaho. For example, lawyers who drafted Oregon's Measure 37⁴¹ helped write other states' initiatives,⁴² and national libertarian groups such as Americans for Limited Government, Fund for Democracy, and America at Its Best provided millions of dollars to support the initiatives in Arizona, California, and Idaho.⁴³ In Washington, state and county farm bureaus and individual owners of farms, dairies, and orchards provided approximately 59% of the funding for the failed Initiative Measure No. 933 ("Initiative 933").⁴⁴

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40. See Oswald, *supra* note 4, at 542; see also Steven J. Eagle, *The Birth of the Property Rights Movement*, POL'Y ANALYSIS, Dec. 15, 2005, at 1, 26-27, available at <http://www.cato.org/pubs/pas/pa558.pdf> (discussing "[t]akings impact assessment . . . statutes" enacted in Delaware, Idaho, Indiana, Kansas, Louisiana, Michigan, Montana, North Dakota, Tennessee, Texas, Utah, Washington, and West Virginia).
 41. Or. Sec'y of State, Measure 37, http://www.sos.state.or.us/elections/nov22004/guide/meas/m37_text.html (last visited Apr. 25, 2007).
 42. See Telephone Interview with Tim Keller, Executive Dir., Inst. for Justice, Ariz. Chapter, in Tempe, Ariz. (Nov. 1, 2006). Tim Keller worked with lawyers who wrote Oregon's Measure 37 to draft the eminent domain portion of Arizona's Proposition 207. See also Keith Aoki et al., *Trading Spaces: Measure 37*, MacPherson v. Department of Administrative Services, and *Transferable Development Rights as a Path out of Deadlock*, 20 J. ENVTL. L. & LITIG. 273, 292 (2005) (describing how property rights groups brought the individuals behind Measure 37 and Measure 7, a similar initiative struck down by courts following voter approval, to various states to assist with initiatives).
 43. See Debra Bowen, Cal. Sec'y of State, Campaign Finance, <http://cal-access.sos.ca.gov/campaign/committees/Detail.aspx?id=1283731&session=2005&view=received> (last visited Apr. 25, 2007) (displaying the significant contributions of groups such as Fund for Democracy and Americans for Limited Government); Jan Brewer, Ariz. Sec'y of State, Notifications of Contributions to Ballot Measure Committees, <http://www.azsos.gov/election/2006/Info/ballotmeasurenotifications.htm> (last visited Apr. 25, 2007) (displaying, on pages two through eight, the significant contributions of groups such as Americans for Limited Government); Idaho Sec'y of State, Campaign Finance, Search by Candidate or Committee Name, <http://www.sos.idaho.gov/eid/cansarc.htm> (search 2006 Political Action Committees for contributions to "This House Is My Home") (last visited Apr. 25, 2007) (showing a total of \$585,000 in contributions from America at Its Best and \$237,000 from Fund for Democracy).
 44. See Wash. Pub. Disclosure Comm'n, Detailed Contributions, <http://www.pdc.wa.gov/servlet/ContServlet> (search under "Candidate/Committee" for "Property Fairness Coalition") (last visited Apr. 25, 2007). Americans for Limited Government contributed less to the campaign, approximately 30% of its total funding. See *id.*

Supporters at all levels asserted that their regulatory takings reform agenda would not end with the 2006 elections.⁴⁵ The California Secretary of State already has approved the circulation of a new property rights initiative, the California Property Owners Protection Act.⁴⁶ As one leader of Americans for Limited Government pledged, “Where the initiatives to . . . protect homes and churches have come up short, you can be sure that we’ll be back, stronger than before. This is a movement that will continue to grow.”⁴⁷

B. Defining Partial Regulatory Takings Regimes

The emerging partial regulatory takings movement has several underlying goals. First, it focuses on regulations—particularly land use laws—that affect real property. Second, it broadens compensation opportunities by reducing substantive and procedural burdens for compensation claimants and by providing narrow exemptions and waivers from the compensation requirement. These lowered barriers result in high compensation and administrative costs.

1. Targeting Land Use Regulations

The partial regulatory takings measures that have been proposed or adopted primarily target laws that negatively affect owners who have real property and who could profit from development.⁴⁸ Many of these reforms

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45. See LEONARD C. GILROY, REASON FOUND., STATEWIDE REGULATORY TAKINGS REFORM: EXPORTING OREGON’S MEASURE 37 TO OTHER STATES (2006), <http://www.reason.org/ps343.pdf>; Prop. Fairness Coal., Thank You!, <http://www.propertyfairness.com/index.htm> (last visited Apr. 25, 2007) (“We may not have won at the ballot box, but *this fight isn’t over!* We have set the stage for legislative efforts . . .”).
46. Cmty. Rights Counsel, *Here We Go Again: New Regulatory “Takings” Measures in the States*, COMMUNITY RIGHTS REP., Jan. 2007, at 2, available at <http://www.communityrights.org/PDFs/Newsletters/January%202007.pdf>.
47. Ams. for Ltd. Gov’t Found., *Americans for Limited Government Win Major Victories Across the Nation*, <http://www.getliberty.org/VictoriesAcrossNation.pdf> (last visited Apr. 25, 2007) (quoting Howie Rich); see also Patrick Hoge, *Eminent Domain: Supporters Plan To Try Again, Maybe in 2008*, S.F. CHRON., Nov. 9, 2006, at A-20 (discussing Proposition 90 supporters’ claim that Howie Rich will support future efforts at eminent domain reform).
48. See FLA. STAT. ANN. § 70.001(2) (West 2004) (private real property); MISS. CODE ANN. § 49-33-9(1) (1999) (“forest or agricultural land” and its “products”); OR. REV. STAT. § 197.352(1) (2005) (private real property); TEX. GOV’T CODE ANN. § 2007.002(5)(B)(i) (Vernon 2000) (private real property); Proposition 207 sec. 3, § 12-1134(A) (Ariz. 2006) (to be codified at ARIZ. REV. STAT. § 12-1134(A)), available at [http://www.azsos.gov/election/2006/General/BallotMeasureText/PROP%2020X%20\(I-21-2006\).pdf](http://www.azsos.gov/election/2006/General/BallotMeasureText/PROP%2020X%20(I-21-2006).pdf) (private property rights).

have been prospective, targeting new land use regulations or advocating compensation requirements when governments enforce existing laws. For example, Arizona's Proposition 207 allows compensation claims only for land use laws enacted after an owner acquires the property and after the proposition's effective date.⁴⁹ Idaho's Proposition 2 contained nearly identical language,⁵⁰ and California's proposition applied only to laws that "damaged"⁵¹ property after the partial regulatory takings language took effect.⁵² Other reforms, however, have contained retroactive compensation requirements. Washington's Initiative 933 applied to land use regulations that existed as of January 1, 1996.⁵³ Oregon's statute requires compensation for claims based not only on the enactment of new regulations but also on the enforcement of any land use regulation enacted before the effective date.⁵⁴

Both retroactive and prospective partial regulatory takings regimes can restrict community planning options. Retroactive regulatory takings initiatives undermine governments' ability to apply or enforce existing regulations. Residents purchasing property within a zoning district would have no guarantee that the uses within that district actually would be limited to those listed on a zoning map. In other words, local governments that faced high compensation claims when they attempted to enforce an existing zoning ordinance potentially would permit nonconforming uses in the area rather than enforce the ordinance. Prospective regulatory takings laws, by contrast, mainly prevent future land use planning regulation. These measures particularly affect areas that might need more zoning laws, such as those growing rapidly into previously unzoned or lightly zoned regions.

2. *Low Barriers to Claims*

In addition to targeting land use regulations, the partial regulatory takings regimes tend to have low barriers to claims. This Note defines partial regulatory takings regimes to include any laws that set lower thresholds than

49. Ariz. Proposition 207 sec. 3, § 12-1134(A), (B)(7).

50. See Proposition 2 § 4(5), (6)(e) (Idaho 2006), available at <http://www.idsos.state.id.us/elect/inits/o6inito8.htm>.

51. Proposition 90 sec. 3, § 19(a)(8) (Cal. 2006), available at http://www.voterguide.ss.ca.gov/pdf/prop90_text.pdf.

52. *Id.* sec. 6.

53. Initiative Measure No. 933 § 2(2)(b)(i) (Wash. 2006), available at <http://www.secstate.wa.gov/elections/initiatives/text/i933.pdf>.

54. OR. REV. STAT. § 197.352(1) (2005).

do the courts⁵⁵ for the diminution in value sufficient to constitute a taking. For example, Mississippi places the compensation threshold at a 40% reduction of fair market value,⁵⁶ Texas at 25%,⁵⁷ Louisiana at 20%,⁵⁸ and Oregon at any diminution in the fair market value of the private property.⁵⁹ None of the 2006 state initiatives articulated a precise threshold,⁶⁰ thus creating the most striking departure from existing law. The trend in the takings reform movement has been toward decreasing or, most recently, eliminating the threshold values that trigger the right to compensation. Given the negligible or nonexistent threshold values in some of these states—for example, in Oregon and Arizona⁶¹—private property owners could make a compensation claim if a regulation caused a mere 0.5% decrease in the fair market value of their land.

If the cost of pursuing a claim outweighed the amount of compensation, many landowners would not bother to bring actions for such small losses.⁶² Most of the state initiatives and legislation, however, would impose few bureaucratic obstacles for compensation claimants, meaning that a staggering

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55. Courts have not set a specific minimum threshold diminution of value required to find a taking, although they generally require either the complete destruction of “economically productive or beneficial uses,” *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1030 (1992), a finding of physical invasion, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 421 (1982), or a taking under the *Penn Central* balancing test, *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978). Some courts have suggested an actual numeric threshold, such as a 75% diminution in property value. *Cienega Gardens v. United States*, 67 Fed. Cl. 434, 470 (2005); *see also infra* notes 96-102 and accompanying text (discussing the regulatory takings doctrine in more detail).
 56. MISS. CODE ANN. § 49-33-7(h) (1999).
 57. TEX. GOV'T CODE ANN. § 2007.002(5)(B)(ii) (Vernon 2000).
 58. LA. REV. STAT. ANN. § 3:3602(11) (2005).
 59. OR. REV. STAT. § 197.352(2).
 60. *See* Proposition 207 sec. 3, § 12-1134(A) (Ariz. 2006) (to be codified at ARIZ. REV. STAT. § 12-1134(A)), available at [http://www.azsos.gov/election/2006/General/BallotMeasureText/PROP%2020X%20\(I-21-2006\).pdf](http://www.azsos.gov/election/2006/General/BallotMeasureText/PROP%2020X%20(I-21-2006).pdf); Proposition 2 § 4(5) (Idaho 2006), available at <http://www.idsos.state.id.us/elect/inits/o6inito8.htm>; Initiative Measure No. 933 § 3 (Wash. 2006), available at <http://www.secstate.wa.gov/elections/initiatives/text/i933.pdf>. *But see* Proposition 90 sec. 3, § 19(b)(8) (Cal. 2006), available at http://www.voterguide.ss.ca.gov/pdf/prop90_text.pdf (partially defining the threshold by requiring compensation for regulations that cause “substantial economic loss to private property”).
 61. OR. REV. STAT. § 197.352(2) (providing that any reduction in fair market value may trigger compensation); Ariz. Proposition 207 sec. 3, § 12-1134(A) (same).
 62. Telephone Interview with Farrell Quinlan, Former Vice President, Ariz. Chamber of Commerce & Indus., in Phoenix, Ariz. (Nov. 1, 2006) (arguing that landowners will not bother to bring a compensation action for a 10% diminution in land value).

number of claims could ensue if landowners with small, moderate, or large claims chose to follow through.⁶³

The remaining procedural restraints governing claims typically include time limitations, filing specifications, proof standards, and occasionally ripeness requirements. While some states such as Florida require landowners to enter settlement negotiations and to consider agency ripeness decisions before making an official compensation claim in court,⁶⁴ many of the recent partial regulatory takings proposals—both successful and unsuccessful—only require landowners to make written claims to a state agency. The most generous provisions allow landowners to receive compensation based on a preenactment assumption that a law will damage property value⁶⁵ or to make claims without submitting proof that they planned to engage in a prohibited or regulated use.⁶⁶

Under most regimes, landowners have sufficient (and typically ample) time to bring claims for compensation. Some partial regulatory takings regimes identify windows of time for takings actions—essentially serving as statutes of limitations that determine when a claim is time-barred.⁶⁷ Under Arizona's Proposition 207, for example, landowners have “three years [from] the effective date of the land use law” to bring a compensation claim.⁶⁸ In Texas, landowners must file contested takings cases against state agencies or political subdivisions within 180 days after they “knew or should have known” of the

63. Although class actions could hypothetically allow the government to compensate numerous landowners at once, many of the claims under the proposed partial regulatory takings regimes require nonjudicial action and therefore do not offer mass processing options for claims.

64. See FLA. STAT. ANN. § 70.001(5)(a)-(b) (West 2004).

65. See Cal. Proposition 90 sec. 3, § 19(a)(1) (allowing the government to take or damage private property “only when just compensation . . . has first been paid to, or into the court for, the owner”); Wash. Initiative Measure No. 933 § 3 (requiring agencies to pay private property owners for damage prior to the application of regulations).

66. E.g., Ariz. Proposition 207 sec. 3, § 12-1134(D) (stating that property owners do not need to submit a “land use application” proving that they wish to use their land in a manner prevented by a regulation in order to make a demand for compensation under that regulation); Proposition 2 § 4(5) (Idaho 2006), available at <http://www.idsos.state.id.us/elect/inits/o6inito8.htm> (using identical language).

67. Oregon's law requires landowners to make compensation demands within two years of the enforcement of the regulation or the effective date of December 2, 2004, whichever is later, and it requires the government to provide just compensation if the disputed regulation continues to apply to the property 180 days after a written demand. OR. REV. STAT. § 197.352(5)-(6) (2005). Idaho proposed 120 days for owner action and ninety days for government payment. Idaho Proposition 2 § 4(9).

68. Ariz. Proposition 207 sec. 3, § 12-1134(G).

agency action's impact on their land.⁶⁹ Other regimes fail to specify any such limitations period. The Louisiana and Mississippi statutes, for instance, have no time limitations on landowner actions.⁷⁰ This style of open-ended allowance for landowner claims confounds government planning. Absent further administrative or judicial interpretation,⁷¹ landowners could bring claims several years after the application or enforcement of government regulations, thus hindering governments' ability to identify when compensation claims might impact future budgets and how large these claims might be.

Additionally, some of the laws even suggest that private property can decrease in value at the moment the regulation is proposed.⁷² The failed initiatives in California and Washington, for example, would have required compensation to property owners *before* the government enacted or enforced a regulation that purportedly would diminish property values.⁷³ The "preemptive payment" requirements are problematic because it is difficult to determine, before the enactment and application of a regulation, how property values will change.⁷⁴ A regulation requiring an owner to maintain a portion of her land in open space may decrease her land value immediately, but the land values of the entire neighborhood (and the long-term value of the owner's land) may rise because of the attractive open space and the greater scarcity of land created by the regulation.⁷⁵

In a similar vein, under several statutes and initiatives, compensation claimants need not submit proof that they intended to use their land in a manner barred or limited by a regulation.⁷⁶ Thus, the speculative claims for

69. TEX. GOV'T CODE ANN. §§ 2007.021(b), .022(b) (Vernon 2000).

70. See LA. REV. STAT. ANN. § 3:3610(A)-(B), (D) (2005); MISS. CODE ANN. § 49-33-9(1) (1999).

71. Courts, for example, may apply parallel statutes of limitations.

72. By contrast, current Takings Clause doctrine does not require compensation either before the enactment or application of regulations that have the potential to damage land or before actual physical invasion. See *Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1, 11 (1990).

73. See *supra* note 65.

74. See, e.g., *Vill. of Belle Terre v. Boraas*, 416 U.S. 1, 10 (1974) ("As is true in most zoning cases, the precise impact on value may, at the threshold of litigation over validity, not yet be known.").

75. See, e.g., William K. Jaeger, *The Effects of Land-Use Regulations on Property Values*, 36 ENVTL. L. 105, 112-14 (2006) (discussing the "amenity effects" of land use regulations); Edward J. Sullivan, *Year Zero: The Aftermath of Measure 37*, 36 ENVTL. L. 131, 140 (2006) ("[I]t is by no means a certainty that land-use regulations reduce market land values.").

76. OR. REV. STAT. § 197.352(7) (2005) ("[N]or shall the failure of an owner of property to file an application for a land use permit . . . serve as grounds for dismissal, abatement, or delay of a compensation claim"); Proposition 207 sec. 3, § 12-1134(D) (Ariz. 2006) (to be

just compensation under a partial regulatory takings regime would require a great deal of guesswork—a cost that state governments would bear.

3. *High Resulting Costs*

As discussed in Subsection 2, low procedural barriers to regulatory takings claims allow large numbers of potential claims. This creates high administrative costs for governments and delays the processing of claims, which detracts from the benefits offered by the compensation system.

Oregon's partial regulatory takings regime is a case in point. Under Measure 37, property owners have two years to bring claims after a regulation has been enacted or enforced, and they need not submit an application for a land use permit when they request compensation.⁷⁷ Additionally, to trigger the compensation review process, claimants only need to make a "written demand for compensation . . . to the public entity enacting or enforcing the land use regulation."⁷⁸ The sheer number of claims under any system similar to Oregon's may force governments to waive the application of most regulations rather than to compensate claimants or challenge questionable claims. As of April 12, 2007, property owners had filed a total of 6680 claims totaling approximately \$15 billion.⁷⁹ And as of March 2006 (the most recent date available), county and state governments receiving these claims had waived—rather than paid—all uncontested damages claims.⁸⁰

Although Florida has not maintained regular records of claims and claim costs, preliminary data suggest that Florida's Private Property Rights Act also has inspired expensive compensation claims. In 2003, Miami-Dade County

codified at ARIZ. REV. STAT. § 12-1134(D)), available at [http://www.azsos.gov/election/2006/General/BallotMeasureText/PROP%2020X%20\(I-21-2006\).pdf](http://www.azsos.gov/election/2006/General/BallotMeasureText/PROP%2020X%20(I-21-2006).pdf); Proposition 2 § 4(5) (Idaho 2006), available at <http://www.idsos.state.id.us/elect/inits/o6inito8.htm>.

77. OR. REV. STAT. § 197.352(5).

78. *Id.* § 197.352(4).

79. Or. Dep't of Land Conservation & Dev., *supra* note 12. Oregon's Measure 37 went into effect on December 2, 2004. On October 14, 2005, the Marion County Circuit Court found the measure to be invalid, but the Oregon Supreme Court reversed this decision. *MacPherson v. Dep't of Admin. Servs.*, No. 05C10444, slip op. at 23 (Marion County, Or., Cir. Ct. Oct. 14, 2005), available at <http://www.ojd.state.or.us/mar/documents/Measure37.pdf>, *rev'd*, 130 P.3d 308 (Or. 2006). The court's decision became effective on March 13, 2006. Sheila A. Martin, Measure 37 in Oregon: A Status Report 2 (Jan. 23, 2007), http://www.pdx.edu/media/i/m/ims_M37pptJan07.pdf. In the four months between the two court decisions, landowners still filed claims against counties but not against the state.

80. Steven W. Abel, Stoel Rives LLP, Presentation on Oregon Ballot Measure 37 (Mar. 2, 2006), <http://www.stoel.com/showarticle.aspx?Show=1826> (noting that each claim to date has been contested or waived).

alone faced as many as 258 claims under the Act,⁸¹ and by June 23, 1998, developer claims relating to floor-to-area ratio (the allowed height of a building based on the plot size where the building is located) and to unit bonus reductions totaled nearly \$40 million.⁸² These claims have concluded in a variety of ways. One, for example, resulted in a settlement involving partial waiver of development restrictions imposed by a local referendum,⁸³ while another led to discussions for cash settlement between the government and the property owner.⁸⁴

In addition to low barriers to claims, the fact-finding and administrative procedures required of governments under partial regulatory takings regimes make these compensation systems costly. The government must incur the costs of transacting not only with the individuals bringing takings claims but also with the owners of adjacent or nearby property who might be affected.⁸⁵

Florida's procedures for compensating landowners provide a vivid example of the layered administrative procedure that exists for processing landowners' regulatory takings claims.⁸⁶ After receiving a landowner claim, the government agency must then notify all parties who participated in the claim action and any owners of property bordering the claimant's property that a claims process has commenced.⁸⁷ The statute also requires the agency to make a written settlement offer within the 180-day period between an owner's filing of a claim

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81. See Mitchell Pellecchia, *Bert J. Harris Act Still Looms over Alaska Parcel Concessions*, *Miami Beach*, MIAMI SUN POST, July 1, 2004, available at <http://www.miamisunpost.com/archives/2004/07-01-04/ninethstoryfrontpage.htm>.
82. Ronald L. Weaver & Nicole S. Sayfie, *1999 Update on the Bert J. Harris Private Property Rights Protection*, FLA. B.J., Mar. 1999, at 49, 49. The final status of these claims is unclear, but for earlier claims under the Act settled before litigation, Florida cities have allowed developers to skirt regulations. *Id.* at 52.
83. See *id.* at 52 (discussing how Fidelity Federal Savings Bank and the city of West Palm Beach reached a settlement permitting Fidelity to construct two fifteen-story buildings but not a proposed six-story parking structure, all of which a city referendum had previously denied).
84. See *id.* at 53 (describing how Kolar, an automobile service station, and the city of Sarasota discussed a cash settlement agreement after the company claimed to have suffered an \$84,000 decrease in property values due to city enforcement of a zoning ordinance that disallowed Kolar's nonconforming use).
85. See, e.g., *MacPherson v. Dep't of Admin. Servs.*, 130 P.3d 308, 313 (Or. 2006) (discussing a plaintiff's complaints of harms imposed by Measure 37 waivers granted for a neighbor's land).
86. See, e.g., Stacey S. White, *State Property Rights Laws: Recent Impacts and Future Implications*, LAND USE L. & ZONING DIG., July 2000, at 1, 6 (discussing "significant administrative expenses" in Florida).
87. FLA. STAT. ANN. § 70.001(4)(b) (West 2004).

and a court action.⁸⁸ During this period, if the property owner does not accept the settlement offer, the agency must “issue a written ripeness decision identifying the allowable uses to which the subject property may be put.”⁸⁹ Following a claimant’s rejection of the settlement offer and the ripeness decision, the claimant may file a compensation claim in the Florida circuit courts, and the statute provides detailed requirements for the courts’ review of these claims.⁹⁰

Oregon’s claims process also involves a multistep administrative response, requiring the state’s Department of Administrative Services to provide written notice to owners within the vicinity, to review the claim, and to forward it to all agencies that have enforced or enacted the challenged land use regulation.⁹¹ The agencies involved must then produce a draft report with preliminary determinations on the merits, followed by a comment period and a final report by the Department and the agencies.⁹² Initial estimates of the costs of these administrative activities are high.⁹³

C. *Why Now?*

Courts have applied regulatory takings analyses for years. So why has this movement recently grown stronger? This Note argues that the partial regulatory takings movement is gaining strength for three reasons: (1) a belief that the courts and the takings precedents have not sufficiently addressed government overreach and the inequitable burdens of regulation; (2) discontent with environmental and land use laws; and (3) the strength of national libertarian involvement and information campaigns that connect regulatory takings issues to eminent domain.

88. *Id.* § 70.001(4)(a), (c).

89. *Id.* § 70.001(5)(a).

90. *See id.* § 70.001(5)(b), (6)(a)-(b).

91. *See* ORCP 21 Motions To Dismiss at 4, *Bergey v. Wash. County*, No. C053203CV (Wash. County, Or., Cir. Ct. June 15, 2006), available at http://www.doj.state.or.us/hot_topics/pdf/measure37/bergey_orcp_rule_21_motions_to_dismiss.pdf (describing the claims process).

92. *See id.*

93. *See* Bill Bradbury & Randall Edwards, Estimated Cost to Taxpayers (n.d.), in Or. Sec’y of State, Measure 37: Argument in Opposition, http://www.sos.state.or.us/elections/nov22004/guide/meas/m37_opp.html (last visited Apr. 25, 2007) (projecting \$344 million in annual administrative expenses for the state and local governments).

1. *Inequitable Burdens and a Weak Judicial Status Quo*

All of the 2006 regulatory takings initiatives voiced a common concern: that regulations unduly burden landowners without proper compensation.⁹⁴ For some, this discontent stems in part from a belief that judge-made regulatory takings doctrine fails to address these burdens adequately.⁹⁵

Justice Holmes's admission in *Pennsylvania Coal Co. v. Mahon* that some regulations "go[] too far,"⁹⁶ and thereby constitute takings of private property, suggested a spectrum of regulatory intrusiveness: some regulations have acceptable impacts on private owners, while others require compensation.⁹⁷ Subsequently, in *Penn Central Transportation Co. v. New York City*, the Court developed three factors for determining when regulatory impacts on private property owners merit compensation.⁹⁸ Admitting that the *Penn Central* analysis was essentially "ad hoc,"⁹⁹ however, the Court held in *Lucas v. South Carolina Coastal Council* that a regulation's destruction of all "economically

94. Proposition 207 sec. 2(A)(4) (Ariz. 2006), available at [http://www.azsos.gov/election/2006/General/BallotMeasureText/PROP%2020X%20\(I-21-2006\).pdf](http://www.azsos.gov/election/2006/General/BallotMeasureText/PROP%2020X%20(I-21-2006).pdf) ("[T]he state and municipal governments of Arizona consistently encroach on the rights of private citizens to own and use their property . . ."); Proposition 90 sec. 1(b) (Cal. 2006), available at http://www.voterguide.ss.ca.gov/pdf/prop90_text.pdf ("State and local governments have undermined private property rights through . . . the regulation of private property . . ."); Proposition 2 pmbl. (Idaho 2006), available at <http://www.idsos.state.id.us/elect/inits/o6inito8.htm> ("State and municipal governments of Idaho consistently encroach on the property rights of its private citizens . . . especially as a result of the enactment and enforcement of land use laws that . . . [reduce] the fair market value of their property."); Initiative Measure No. 933 § 1 (Wash. 2006), available at <http://www.secstate.wa.gov/elections/initiatives/text/1933.pdf> ("[G]overnmental restrictions on the use of property have increased substantially, creating hardships for many, and destroying reasonable expectations of being able to make reasonable beneficial use of property.").
95. See, e.g., Eagle, *supra* note 40, at 3 ("Across the nation, dozens of grassroots advocacy groups . . . have arisen because officials have aggressively disregarded property rights and courts have done little to vindicate those rights."); see also *infra* note 103 (highlighting the discontent with court takings decisions expressed in California Proposition 90).
96. 260 U.S. 393, 415 (1922).
97. But see Oswald, *supra* note 4, at 530-31 (arguing that the Supreme Court is wrong to characterize takings as actions that cross an "invisible line" on a "continuum" that runs from "physical confiscation of property," i.e., traditional eminent domain, to "valid police power action").
98. 438 U.S. 104, 124 (1978) (specifying as the three factors the "economic impact of the regulation on the claimant," the regulation's interference with the claimant's investment-backed expectations, and the "character of the governmental action"); see also Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 538-39 (2005) (discussing these factors).
99. 438 U.S. at 124.

productive or beneficial uses of land” would negate the need for a case-specific analysis, constitute a “total taking,” and require compensation.¹⁰⁰ The Court in *Loretto v. Teleprompter Manhattan CATV Corp.* created another categorical exception to *Penn Central*’s balancing test when it held that the physical invasion of property constitutes a taking.¹⁰¹ And in *Lingle v. Chevron U.S.A. Inc.*, the Court affirmed the existence of three categories of regulatory takings: government actions that fail to meet the *Penn Central* balancing test, that deprive private property of “all economically beneficial us[e],” or that physically invade or appropriate private property.¹⁰²

For advocates of partial regulatory takings regimes, however, this body of law fails to ensure that governments will compensate property owners for losses sustained from regulatory takings.¹⁰³ Current doctrine establishes a higher minimum threshold of value diminution than do the proposed legislative definitions of takings, thus allowing government regulation to devalue a large portion (up to at least 75%) of a landowner’s property¹⁰⁴ without any accompanying compensation. Even under *Lucas*, a property owner will not receive compensation if the regulation proscribes a land use “not part of his title to begin with,”¹⁰⁵ and a court must also inquire into the nature of the proposed uses before awarding compensation.¹⁰⁶ Similarly, although the Court refined the “goes too far” standard by holding that a taking occurs when the government physically invades or occupies property,¹⁰⁷ most regulations affecting real property do not include this kind of intrusion.¹⁰⁸ And the Court’s broad statement that “a ‘taking’ may more readily be found” for “physical invasion” than for an adjustment of “benefits and burdens . . . to promote the

100. 505 U.S. 1003, 1030 (1992).

101. 458 U.S. 419, 421 (1982).

102. 544 U.S. at 538-39 (alteration in original) (quoting *Lucas*, 505 U.S. at 1019).

103. See, e.g., Proposition 90 sec. 1(c) (Cal. 2006), available at http://www.voterguide.ss.ca.gov/pdf/prop90_text.pdf (“The courts have not required government to pay compensation to property owners when enacting statutes . . . , laws, rules or regulations not related to public health and safety that reduce the value of private property.”); Eagle, *supra* note 40, at 15-19.

104. See *supra* note 55.

105. 505 U.S. at 1027.

106. A court should consider the harm to the public and neighboring lands caused by a landowner’s proposed property uses; the “social value” of these uses and whether they are appropriate for the property in question; and the availability of alternatives to the harmful uses. *Id.* at 1030-31.

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

108. See, e.g., *id.* at 426 (stating that government physical intrusions are “restriction[s] of an unusually serious character”).

common good”¹⁰⁹ fails to reassure property owners that their property will escape this court-supported reshuffling of burdens.

2. *Growing Distaste for Environmental and Land Use Laws*

In addition to concerns about perceived judicial failures to resolve unfair burdens, advocates of partial regulatory takings regimes have frequently voiced opposition to laws controlling land uses, which often have environmental goals. Many of the advertisements for the 2006 initiatives criticized local laws that limited land development¹¹⁰ or prevented landowners from using or enjoying their property.¹¹¹ This concern has also been expressed outside of advertising campaigns. Although residents with established roots in a community may worry about growth, they may also worry that new restrictions will not match their goals. Farmers and ranchers, for example, have expressed distaste for newcomers or “city folks” who modify their own property and then enact environmental reforms to prevent others from doing the same.¹¹²

Some therefore argue that the critics of the growing bodies of land use regulation and environmental laws “laid the seeds for the current statutory takings movement.”¹¹³ If true, this connection may support William Fischel’s view that the demand for compensation increases as the marginal benefits of regulations decrease.¹¹⁴ In other words, the movement may arise in part from

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

110. See, e.g., *Ad—Debbie Richards* (Internet broadcast Oct. 27, 2006), http://www.youtube.com/watch?v=K4dUdh_WOEQ (transcript on file with author) (featuring a landowner who argues that the government will take her house and give it to a developer and that Proposition 207 will force the government to pay property owners whose property has been damaged); *YES on Prop 2 Commercial Idaho ThisHouseisMYHome.com* (Internet broadcast Oct. 27, 2006), http://www.youtube.com/watch?v=WpgTF_ou9tM (transcript on file with author) (“Proposition 2 says politicians can’t take your home and give it to developers. And if they reduce your property value they must compensate you for it.”).

111. *YES I-933 (Washington Farm Bureau)* (Internet broadcast Nov. 3, 2006), <http://www.youtube.com/watch?v=8RuL92EKnv4> (transcript on file with author) (portraying, for example, one landowner’s complaint that the government would not allow him to walk on several acres of his own land).

112. See, e.g., William Yardley, *Anger Drives Property Rights Measures*, N.Y. TIMES, Oct. 8, 2006, at 34; Telephone Interview with Heather Hansen, Executive Dir., Wash. Friends of Farms & Forests, in Olympia, Wash. (Oct. 25, 2006) (discussing farmers’ frustration with city residents who impose their environmental goals on rural populations).

113. Jacobs & Ohm, *supra* note 18, at 180.

114. See WILLIAM A. FISCHEL, *REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS* 88-89 (1995).

property owners' belief that zoning and land use controls yield decreasing marginal benefits.

3. *Connections to Eminent Domain*

In addition, proponents of partial regulatory takings regimes have argued that government abuse of eminent domain powers connects directly to regulatory abuse. In its 2005 *Kelo v. City of New London* decision, the Supreme Court affirmed a city's use of eminent domain to condemn land for private use with the intent of benefiting the public.¹¹⁵ This decision sparked a nationwide reaction during the 2006 elections, as voters demanded assurance that the government would not take private property for private development purposes.¹¹⁶ Supporters of the partial regulatory initiatives consistently embedded the regulatory takings issue within arguments about eminent domain.¹¹⁷ Regardless of whether joining these two issues is appropriate,¹¹⁸

115. 545 U.S. 469, 488-89 (2005).

116. Voters in many states approved constitutional amendments and initiatives that limited eminent domain powers. See, e.g., Div. of Elections, Fla. Dep't of State, November 7, 2006 General Elections, <http://election.dos.state.fl.us/elections/resultsarchive/DetailRpt.Asp?ELECTIONDATE=11/7/2006&RACE=A08> (last visited Apr. 25, 2007) (showing 69% voter approval of Florida's eminent domain constitutional amendment); Fla. Dep't of State, Proposed Constitutional Amendments To Be Voted on November 7, 2006, at 10, http://election.dos.state.fl.us/initiatives/pdf/2006_prop_consti_amend.pdf (last visited Apr. 25, 2007) (allowing the government to transfer private property to a "natural person or private entity" only when 60% of each legislative house supports the transfer); Or. Sec'y of State, Initiative, Referendum and Recall: 2000-2006, <http://bluebook.state.or.us/state/elections/elections22a.htm> (last visited Apr. 25, 2007) (providing a count of yes and no votes for a measure limiting eminent domain); Or. Sec'y of State, Measure 39, http://www.sos.state.or.us/elections/nov72006/guide/meas/m39_text.html (last visited Apr. 25, 2007); S.C. State Election Comm'n, 2006 Statewide Constitutional Amendments, http://www.scvotes.org/2006/08/14/2006_statewide_constitutional_amendments (last visited Apr. 25, 2007); S.C. State Election Comm'n, South Carolina Election Results, <https://statereports.essvote.com/webresults/results?electionSelect=51&reportScope=ST&reportType=SUMMARY> (last visited Apr. 25, 2007) (providing a count of yes and no votes for Constitutional Amendment 5, which prohibited the use of eminent domain for economic benefit unless the condemnation was for public use); see also Terry Pristin, *Voters Back Limits on Eminent Domain*, N.Y. TIMES, Nov. 15, 2006, at C6.

117. See *supra* note 110.

118. Opponents have argued that eminent domain served as a Trojan horse for the regulatory takings issue, while some proponents have expressed a belief that the two issues are inherently connected. Compare Brady, *supra* note 20 (describing initiative opponents' views that initiative writers had dishonestly wedded the takings issue to the unrelated eminent domain issue), with Telephone Interview with Neil Derry, San Bernardino City Councilmember, Ward 4, in San Bernardino, Cal. (Nov. 3, 2006) (arguing that regulatory

these advertisements demonstrate the belief that government overreach requires immediate action through regulatory takings and eminent domain legislation.

D. Government Responses to the Costs of Partial Regulatory Takings Regimes

The regulatory takings movement already has changed government policy. The low procedural and substantive barriers to claims, and the high compensatory and administrative costs that result, are likely reasons for this change. This Section discusses four ways in which governments may respond to partial regulatory takings regimes, as well as the implications of those options. It concludes that governments will likely continue to react to partial regulatory takings claims in two primary ways: regulatory inaction and waiver of regulations for landowners who demand substantial compensation. Of course, the actual effects of the growing partial regulatory takings movement will vary based on how state and local governments respond. Most importantly, if governments under partial regulatory takings regimes cannot raise taxes and continue regulating at their accustomed level, the type and quantity of land use regulations may change substantially.

1. Universal Payment

Under a partial regulatory takings regime, governments can continue to regulate if they simply pay all legitimate compensation claims. But this scenario is unlikely. Partial regulatory takings regimes force state and local governments to become economic actors, although the extent to which they actually behave as wealth-maximizing “firms” is disputed.¹¹⁹ Regulation becomes a purchasing game, in which governments determine whether they should “purchase” (i.e., enact or enforce) a given regulation after investigating the “price” of enacting or enforcing it (i.e., the amount that they and their constituents would pay) and the opportunity costs of not doing so. Many scholars believe that forcing the government to internalize the cost of regulation is beneficial. Internalization can prevent “excessive government action”¹²⁰ and can force

takings are very similar to eminent domain, in that the government may regulate land to the point at which the owner no longer can use the land).

119. See, e.g., Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 354-57 (2000).

120. Robert Cooter, *Unity in Tort, Contract, and Property: The Model of Precaution*, 73 CAL. L. REV. 1, 21 (1985).

governments to consider regulatory alternatives more carefully,¹²¹ thus encouraging them to follow “normal democratic processes” and to respond to taxpayer concerns.¹²²

Yet some authors have argued that governments differ from typical firms in key ways and thus will not respond to costs as firms do.¹²³ These authors claim that governments seek the path of least political resistance and have a duty to regulate. If they must internalize costs by compensating property owners for takings, they may continue to regulate but pass on the costs to taxpayers generally rather than to concentrated interest groups.¹²⁴ At least one local government under a partial regulatory takings regime has chosen to “regulate and pay” despite the high costs. The town of Eustis, Florida, passed costly historic preservation laws despite potential compensation requirements under Florida’s partial regulatory takings regime.¹²⁵

If governments pass on the costs of regulation to all taxpayers rather than to a burdened few, perhaps only those regulations most beneficial to the public (i.e., those with benefits that outweigh their costs) will be successful. I argue, however, that other factors are likely to persuade governments under partial regulatory takings regimes to reject payment as a way to resolve takings claims. As discussed in the following two Subsections, the types of partial regulatory takings regimes proposed in 2006 could create administrative costs and tasks so burdensome that they would overwhelm governments, causing them to avoid certain land use regulations altogether or to waive them whenever a landowner made a claim, as has typically occurred in Oregon.¹²⁶ As the Supreme Court has stated, treating land use regulations “all as *per se* takings would transform government regulation into a luxury few governments could afford.”¹²⁷ Even if governments can deflect the costs of compensation by

121. See BRUCE A. ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* 54-56 (1977).

122. *Pennell v. City of San Jose*, 485 U.S. 1, 22 (1988) (Scalia, J., concurring in part and dissenting in part).

123. See, e.g., Levinson, *supra* note 119, at 354-57.

124. See *id.* at 375-76; see also ROBERT C. ELLICKSON & VICKI L. BEEN, *LAND USE CONTROLS: CASES AND MATERIALS* 145-46 (2005) (summarizing various views on government internalization of costs).

125. See Tyler E. Chapman, Note, *To Save and Save Not: The Historic Preservation Implications of the Property Rights Movement*, 77 B.U. L. REV. 111, 141-42, 149 (1997); Rick Reed, *Eustis Marches Ahead with Historic Districts*, ORLANDO SENTINEL, Aug. 19, 1995, at 1.

126. See Abel, *supra* note 80 (noting that Oregon’s government had waived each uncontested claim as of March 2006).

127. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 324 (2002).

passing them on to the taxpayer base, raising taxes is politically unpopular.¹²⁸ Furthermore, as discussed above, the administrative costs of processing and analyzing each compensation claim may be prohibitive for governments and may thus encourage regulatory inaction.

2. *Inaction*

Local and state governments can avoid the costs of compensation merely by not taking new regulatory action or not enforcing existing regulations. Ignoring the noneconomic costs, this is the cheapest and easiest route; it requires no processing of landowner claims and no payment. Yet government inaction also has its costs, including loss of municipal control over detrimental land uses.¹²⁹ Following passage of Florida's partial regulatory takings regime, for example, Palm Beach abandoned efforts at development control in an agricultural reserve area, West Palm Beach did not enact a height limit ordinance on buildings, and Fort Lauderdale ended plans to revise its zoning code.¹³⁰ One author has suggested that partial regulatory takings laws decrease regulatory action in Florida (as they did in Arizona under that state's previous private property protection legislation) when "development pressures are strong" and administrative agencies have the power to pass regulations that may substantially diminish property values.¹³¹ Other analyses, however, imply that rather than forcing government inaction, partial regulatory takings regimes inspire more cooperation between government agencies and constituents when agencies regulate.¹³²

128. Justice Scalia might support such a result, given that he has argued that the Takings Clause "require[s] [subsidies] to be applied, in general, through the process of taxing and spending, where both economic effects and competing priorities are more evident." *Pennell v. City of San Jose*, 485 U.S. 1, 23 (1988) (Scalia, J., concurring in part and dissenting in part).

129. The extent to which a lack of regulation actually affects land use planning depends on the existence of feasible alternative planning mechanisms, as discussed in further detail *infra* Section II.A.

130. See Kristen M. Fletcher et al., Property Rights and Takings Legislation in the Gulf States: Just the Beginning or Is the Revolution Over?, <http://www.olemiss.edu/orgs/SGLC/MS-AL/takings.htm> (last visited Apr. 25, 2007).

131. Jacobs, *supra* note 18, at 3-4.

132. See White, *supra* note 86, at 7-8.

3. Waiver

A middle ground between inaction and universal compensation is selective waiver, whereby the government chooses to enforce a regulation for some landowners and to waive it for others. While some proposals, such as California's Proposition 90 and Idaho's Proposition 2, did not permit waiver or failed to mention the waiver option,¹³³ the two most recently enacted partial regulatory takings regimes explicitly permit waiver. Oregon allows governments, "in lieu of payment of just compensation," to "modify, remove, or not to apply the land use regulations to allow the owner to use the property" as was permitted before the regulation.¹³⁴ Arizona's Proposition 207 has a similar provision.¹³⁵

In Oregon, waiver is not only allowed but is, for all practical purposes, required. The director of Oregon's Department of Land Conservation must waive the imposition of a regulation for each landowner who has made a compensation claim unless the legislature has enacted legislation that provides funds for the claim.¹³⁶ Thus, the potential compensation costs are extremely high (approximately \$15 billion¹³⁷), but actual payment has not occurred. Although the costs of a given *individual* claim for compensation may be low, the government, which does not have prior authorization from the legislature for any of the claims,¹³⁸ has no option but to waive. The simple assertion by a claimant that a regulation has, "on the balance of probabilities," caused her

133. Proposition 90 (Cal. 2006), available at http://www.voterguide.ss.ca.gov/pdf/prop90_text.pdf (mentioning waivers only in the jury waiver context); Proposition 2 (Idaho 2006), available at <http://www.idsos.state.id.us/elect/inits/o6inito8.htm> (failing to mention waivers).

134. OR. REV. STAT. § 197.352(8) (2005). Waivers have been the most contentious legal issue relating to Measure 37. See Abel, *supra* note 80.

135. Proposition 207 sec. 3, § 12-1134(E)-(F) (Ariz. 2006) (to be codified at ARIZ. REV. STAT. § 12-1134(E)-(F)), available at [http://www.azsos.gov/election/2006/General/BallotMeasureText/PROP%2020X%20\(I-21-2006\).pdf](http://www.azsos.gov/election/2006/General/BallotMeasureText/PROP%2020X%20(I-21-2006).pdf) (implying the waiver option by stating that "[i]f a land use law continues to apply to private real property more than ninety days" after the written compensation demand, "the owner has a cause of action for just compensation," and adding that any waiver "runs with the land"). Local governments' ability to waive regulations in Arizona of course will vary depending on courts' future decisions regarding the scope of the waiver provision.

136. OR. ADMIN. R. 660-002-0010(8)(c) (2007), available at http://arcweb.sos.state.or.us/rules/OARS_600/OAR_660/660_002.html; see also Sullivan, *supra* note 75, at 143 (discussing the regulation's requirements).

137. See *supra* note 12 and accompanying text.

138. See Sullivan, *supra* note 75, at 143 (observing that, under the regulation requiring prior legislative authorization of funds, the government has "no ability to pay").

property value to diminish therefore forces the government to waive the regulation for that owner.¹³⁹ With a waiver option, governments can continue enacting regulations knowing that they can choose not to apply them to property owners who make compensation claims for loss.

The core problem with waivers is that they can undermine public interests that regulations are intended to protect. For example, if a local government implements an open space ordinance to create an area for wildlife habitat and human recreation but waives the application of the ordinance for even a small percentage of landowner claimants, then a checkerboard could result, rendering the regulation essentially ineffective. To address this problem, some states have imposed conditions on waivers. Florida, for example, allows a governmental entity to settle with a private claimant by issuing a “modification, variance, or special exception to the application of a rule . . . as it would otherwise apply to the subject real property,” but it requires that “the relief granted shall protect the public interest served by the regulations at issue.”¹⁴⁰ Notably, Florida also provides an alternative to waivers, permitting the government to settle for “[I]and swaps or exchanges.”¹⁴¹ This option could solve the checkerboard problems in the open space hypothetical, as the government could provide the objecting landowner with development rights in an area outside of the proposed open space boundaries.

4. Exemptions

Finally, state and local governments can attempt to redraft their regulations in order to fit specified exemptions from the partial regulatory takings laws. All existing and proposed partial regulatory takings measures contain some exemptions, typically for nuisance and obscenity laws. Arizona and Oregon have exempted from the compensation requirement laws applying to public health and safety;¹⁴² compliance with federal law;¹⁴³ pornography, nude

139. *Id.* (discussing a claimant’s ability to obtain a waiver simply by alleging “some reduction in the fair market value of the subject property”).

140. FLA. STAT. ANN. § 70.001(4)(d)(1) (West 2004).

141. *Id.* § 70.001(4)(c)(4).

142. OR. REV. STAT. § 197.352(3)(B) (2005); Proposition 207 sec. 3, § 12-1134(B)(1) (Ariz. 2006) (to be codified at ARIZ. REV. STAT. § 12-1134(B)(1)), available at [http://www.azsos.gov/election/2006/General/BallotMeasureText/PROP%2020X%20\(I-21-2006\).pdf](http://www.azsos.gov/election/2006/General/BallotMeasureText/PROP%2020X%20(I-21-2006).pdf) (exempting public safety laws, including those relating to “fire and building codes, health and sanitation, transportation or traffic control, solid or hazardous waste, and pollution control”).

143. OR. REV. STAT. § 197.352(3)(C); Ariz. Proposition 207 sec. 3, § 12-1134(B)(3).

dancing, and obscenity;¹⁴⁴ sex offender housing, illegal drug sales, and liquor control;¹⁴⁵ and historic common law public nuisances.¹⁴⁶ The initiative drafters in Idaho proposed similar exemptions for regulations concerning nuisance, public safety, and compliance with federal laws.¹⁴⁷ The remaining initiatives would have exempted public safety laws¹⁴⁸ as well as some laws limiting “nuisance” activities associated with obscenity or environmental harms.¹⁴⁹ Most attempted to limit the exemptions by requiring the public entity enacting or enforcing a regulation to prove that the exemption applied to the proposed law¹⁵⁰ or by requiring the exemptions to be narrowly construed.¹⁵¹ The extent to which governments will claim these exemptions is unclear, but in Oregon it appears that state and county governments only rarely have claimed the public health and safety exemption.¹⁵²

The nuisance exemption creates the most uncertainty for agencies attempting to determine whether a regulation will require compensation under a regulatory takings statute. Agencies issuing regulations will not typically know, prior to a court ruling on the issue, whether proposed regulations will qualify as limitations on nuisance.¹⁵³ Some of the proposed initiative language narrows “nuisance” to specific activities, such as the “abatement of specific conditions on specific parcels.”¹⁵⁴ The key limitation, whether defined by the courts or by partial regulatory takings initiatives, is that a nuisance, viewed *ex ante*, rarely includes government regulation of broad activities, such as industry, that only have the potential to cause harm. Many zoning regulations that govern the type and scale of land uses in a neighborhood are not nuisance regulations but rather exercises of the police power to protect the general

144. OR. REV. STAT. § 197.352(3)(D) (addressing only pornography and nude dancing); Ariz. Proposition 207 sec. 3, § 12-1134(B)(4) (covering all three categories).

145. Ariz. Proposition 207 sec. 3, § 12-1134(B)(4).

146. OR. REV. STAT. § 197.352(3)(A); Ariz. Proposition 207 sec. 3, § 12-1134(B)(2).

147. Proposition 2 § 4(6)(a)-(d) (Idaho 2006), available at <http://www.idsos.state.id.us/elect/inits/o6inito8.htm>.

148. See Proposition 90 sec. 3, § 19(b)(8) (Cal. 2006), available at http://www.voterguide.ss.ca.gov/pdf/prop90_text.pdf; Initiative Measure No. 933 § 2(2)(c)(i)-(ii) (Wash. 2006), available at <http://www.secstate.wa.gov/elections/initiatives/text/i933.pdf>.

149. Cal. Proposition 90 sec. 3, § 19(e).

150. See Ariz. Proposition 207 sec. 3, § 12-1134(C); Idaho Proposition 2 § 4(8).

151. See Wash. Initiative Measure No. 933 § 2(2)(c).

152. See Sullivan, *supra* note 75, at 155.

153. See, e.g., *id.* at 157 (discussing how agencies attempting to use the nuisance exemption must “guess” the outcome of “difficult case law in an equitable setting”).

154. Cal. Proposition 90 sec. 3, § 19(e); see also Wash. Initiative Measure No. 933 § 2(2)(c)(i)-(ii).

welfare.¹⁵⁵ Thus, governments will likely be unable to invoke the nuisance exemption for many zoning regulations and, because of the high costs of these regulations under a partial regulatory takings regime, will be less likely to enact or enforce them.

II. COMMUNITY IMPACTS: INEQUITY AND LIMITED PARTICIPATION

By forcing state and local governments to consider how public regulations affect property owners, and by making them pay for regulations that decrease private property values, the partial regulatory takings initiatives spare some individuals from burdens more appropriately borne by the general public. However, by increasing the costs of land use planning, the regimes also limit governments' ability to implement necessary land use planning regulations. This Part argues that constraining the ability of governments to achieve land use planning through regulation has two major negative effects. First, it limits the capacity of communities to influence the character of their neighborhoods. Second, it increases existing inequities among neighborhoods trying to limit the presence of undesired land uses. These effects are particularly important given low-income communities' lack of sufficient alternatives to zoning regulations.

A. Zoning and Neighborhood Character

As discussed above, governments faced with a partial regulatory takings regime are likely to waive specific applications of their land use laws or to enact and enforce fewer zoning laws in the first place. This reluctance to regulate would extend both to "preventive" zoning intended to limit undesirable land uses and to "positive" or "proactive" zoning laws that require basic levels of infrastructure, impose aesthetic standards, or support housing for low-income residents. This Section argues that zoning provides an important means for residents to influence the character of their neighborhoods and that limited zoning therefore negatively impacts neighborhoods.

Viewed in its most ideal sense, zoning provides a deliberative process through which people can express their preferences about the growth and

155. See *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388-89 (1926) (differentiating between, but upholding, zoning laws "excluding from residential sections offensive trades, industries and structures likely to create nuisances"—i.e., laws that specifically targeted nuisance—and those requiring the exclusion "in general terms of all industrial establishments").

character of their community.¹⁵⁶ The prevalence of zoning laws¹⁵⁷ suggests that residents may indeed have nonfinancial interests in the planning and coordination of their communities. And participation in governing one's own community is not a recent phenomenon; its value has been recognized for centuries.¹⁵⁸ Zoning regulations can be seen to preserve "collective values" and to protect "a neighborhood from encroachments by land uses inconsistent with its character."¹⁵⁹ Courts also have given credence to the view of land use planning as a deliberative tool¹⁶⁰ to preserve overall neighborhood character (not just individual properties). For example, they have upheld procedural measures that give all community members "a voice in decisions that will affect the future development of their own community"¹⁶¹ as well as government actions that "preserve the . . . nature of a community and . . . maintain its aesthetic and functional characteristics through zoning requirements."¹⁶²

Admittedly, one should not be too idealistic about community participation. There is error in "indifference to the empirical realities of municipal governments"¹⁶³ and in assuming that residents within a community view themselves as interdependent rather than self-interested.¹⁶⁴ But people

156. See, e.g., *James v. Valtierra*, 402 U.S. 137, 142-43 (1971) (stating that a procedure requiring referendum approval of public housing projects "ensures that all the people of a community will have a voice in a decision"); Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 CAL. L. REV. 837, 890-91 (1983) (fitting piecemeal land use zoning decisions within a "mediation" model, under which communities through the local government request accommodations from developers to reach desired goals, such as the preservation of park space or a "familiar community landmark"); Eric H. Steele, *Participation and Rules—The Functions of Zoning*, 11 AM. B. FOUND. RES. J. 709, 713 (1986).

157. See, e.g., Bradley C. Karkkainen, *Zoning: A Reply to the Critics*, 10 J. LAND USE & ENVTL. L. 45, 46 & n.6 (1994) (discussing the universality of zoning laws).

158. See, e.g., Rose, *supra* note 156, at 883-84 (describing participation as a "particularly venerable legitimator of local government," and recalling that "the Antifederalists . . . advocated a government of local participation and citizen control").

159. Karkkainen, *supra* note 157, at 68.

160. See, e.g., *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 340-41 (2002) (discussing the importance of "protecting the decisional process" for a regional plan, and finding that a rule penalizing long deliberations would "disadvantage those landowners and interest groups who are not as organized or familiar with the planning process").

161. *Valtierra*, 402 U.S. at 143.

162. *Sylvia Dev. Corp. v. Calvert County*, 48 F.3d 810, 821 n.3 (4th Cir. 1995).

163. Roderick M. Hills, Jr., *Romancing the Town: Why We (Still) Need a Democratic Defense of City Power*, 113 HARV. L. REV. 2009, 2019 (2000) (reviewing GERALD E. FRUG, *CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS* (1999)).

164. See *id.* at 2020.

generally do care about participation to the extent that it affects where they live. Residents of all income groups become attached not only to their personal home or living space¹⁶⁵ but also to the traits of their surrounding neighborhood. Even if not interdependent in spirit, residents—whether homeowners or renters—“selfishly” care, for example, about the appearance of their street or the neighborhood park where their children play in the summer. Farmers want to ensure that enough agricultural land exists to support supply and business networks in their region.¹⁶⁶ Public zoning proceedings allow residents to express their desires for the preservation of the characteristics that they most strongly value and to develop a degree of consensus around core community issues.¹⁶⁷

Preventive land use regulation or its functional equivalent is important in determining the compatibility of land uses within a neighborhood—a significant component of community character. At the parcel-by-parcel level, studies have found zoning laws to be positively correlated with property values because they prevent the diminution in value from mixed and incompatible land uses.¹⁶⁸ Consider the following stylized hypothetical. A new zoning ordinance is enacted that limits an area to single-family residential and agricultural uses. Neighbor A claims that she had planned to subdivide her land to build a condominium complex and that her property value has now

165. See Margaret Jane Radin, *Residential Rent Control*, 15 PHIL. & PUB. AFF. 350, 362 (1986) (discussing residents’ interest in remaining in an “established” home).

166. E.g., Telephone Interview with Bob Hart, Vice President, Bd. of Skagitonians To Preserve Farmland, in Mount Vernon, Wash. (Oct. 25, 2006) (discussing how, in his rural Washington county, without zoning, the key players in the agricultural system would leave and take the necessary support network with them). *But see* FISCHER, *supra* note 114, at 282 (arguing that residents in rural areas “dislike zoning” because they want to preserve future land development opportunities).

167. See, e.g., Rose, *supra* note 156, at 887–90 (discussing mediation and consensus surrounding competing community values in local land use decision-making); Ariel Graff, Comment, *Calibrating the Balance of Free Exercise, Religious Establishment, and Land Use Regulation: Is RLUIPA an Unconstitutional Response to an Overstated Problem?*, 53 UCLA L. REV. 485, 519 (2005) (arguing that developing a comprehensive zoning plan “forces residents to mediate between conflicting values and arrive at a consensus that accurately captures local sentiments”).

168. See, e.g., Stephen Malpezzi et al., *New Place-to-Place Housing Price Indexes for U.S. Metropolitan Areas, and Their Determinants*, 26 REAL EST. ECON. 235, 263 (1996) (finding that regulations drove up “quality adjusted” rents and housing prices); Janet Furman Speyrer, *The Effect of Land-Use Restrictions on Market Values of Single-Family Homes in Houston*, 2 J. REAL EST. FIN. & ECON. 117, 125 (1989) (finding that, controlling for relevant factors, housing prices are higher in Houston neighborhoods with restrictions similar to zoning laws).

decreased by \$1 million.¹⁶⁹ The local government chooses to waive the ordinance for Neighbor A. Now suppose that Neighbor B owns a small nursery at which customers enjoy fresh produce, clean air, and a pleasant view. Neighbor B has no claim to compensation when Neighbor A develops her land, blocks the pleasant view, and casts shade upon Neighbor B's crops. Neighbor B's most feasible option is to bring a costly nuisance suit that is unlikely to succeed.¹⁷⁰ In other words, if property values are highly interdependent, when a partial regulatory takings regime provides full restoration for loss, the burden might shift to neighbors who will then suffer from governmental inaction—or, if the government pays rather than waives, who will face a higher tax bill. One landowner's gain will be another's loss.¹⁷¹

Preventive zoning is necessary not only to avoid negative neighbor-to-neighbor impacts but also to prevent disproportionate levels of unwanted uses in certain communities. Under regulatory takings regimes, landowners make compensation claims for disparate uses prevented by zoning regulations, not just for moderate neighborly annoyances;¹⁷² these regimes could therefore reduce the benefits that preventive zoning typically offers in its moderation of highly disparate land uses. Substantially disparate uses are likely to affect land values throughout a neighborhood, even if moderately mixed uses are not. Studies have shown that property values can be strongly interdependent when nonresidential uses, such as industry, exist near residential areas.¹⁷³ Preventive

169. For examples of claims similar to this hypothetical, see Sheila A. Martin & Katie Shriver, Documenting the Impact of Measure 37: Selected Case Studies (Jan. 2006), http://www.pdx.edu/media/i/m/ims_M37brainerdreport.pdf.

170. See, e.g., Denis J. Brion, *An Essay on LULU, NIMBY, and the Problem of Distributive Justice*, 15 B.C. ENVTL. AFF. L. REV. 437, 461-64 (1988) (discussing the difficulty of applying nuisance laws to various environmental disputes, such as when structures cast shadows on neighboring land).

171. This argument, of course, assumes that the initial regulation was in fact efficient (i.e., that it did not substantially diminish property values). If the government frequently regulates in ways that are negative-sum in order to placate powerful rent-seekers—as takings advocates claim—then requiring compensation would appropriately discourage such negative-sum regulation.

172. See, e.g., Measure 37 Database Search, <http://www.upa.pdx.edu/IMS/currentprojects/m37/index.php> (set “Development Requested” to “Industrial,” set “Values Returned” to 50, and check “Display individual claims”) (last visited Apr. 25, 2007). As of April 25, 2007, property owners had submitted sixty-seven claims for requested “Residential Commercial Industrial,” “Residential Industrial,” “Industrial,” and “Commercial Industrial” developments; the claims involved approximately 12,496 acres and \$674 million in compensation requested. *Id.*

173. See David M. Grether & Peter Mieszkowski, *The Effects of Nonresidential Land Uses on the Prices of Adjacent Housing: Some Estimates of Proximity Effects*, 8 J. URB. ECON. 1, 15 (1980) (“[A]s one might expect, heavy industrial activity or public housing projects can have

zoning or a similar alternative, therefore, is necessary to control industrial-residential combinations, protecting nearby property values or reducing the likelihood of externalities from incompatible uses.

When uses are not highly incompatible, proponents of partial regulatory takings may argue that zoning laws are unnecessary and costly. Mildly incompatible¹⁷⁴ land use such as multifamily homes abutting single-family homes, for example, may not lower neighboring property values,¹⁷⁵ and zoning therefore may be unnecessary to regulate these uses. This Note argues, however, that even if slightly incompatible land uses do not reduce property values, property owners will be frustrated by their inability to influence (through zoning) proposed uses on neighboring lands that, although only a mild annoyance, may substantially affect their enjoyment of their own land.

In Oregon, the partial regulatory takings regime has affected residents' ability to participate in government planning decisions for neighboring properties. Before Measure 37, changes to neighboring properties typically required public participation or proof that a land use change met a minimum standard, such as public welfare or unusual hardship.¹⁷⁶ Under Oregon's partial regulatory takings regime, however, governments can now waive regulations without any public input—a process that Keith Aoki and others have described as the “private veto power”¹⁷⁷ of the government. Neighbors have no legally defined opportunity to voice their concerns about the effect of zoning waivers “on neighboring properties or the surrounding community.”¹⁷⁸ Florida has avoided this participatory void to some extent by requiring official notice to all neighboring landowners whenever one landowner submits a

adverse effects upon the prices of nearby residential property.”); see also John P. Crecine et al., *Urban Property Markets: Some Empirical Results and Their Implications for Municipal Zoning*, 10 J.L. & ECON. 79, 94 (1967) (illustrating the interdependence of property values associated with significantly incompatible uses with the example of a glue factory at Park Avenue and 50th Street in New York City).

174. Note that some authors have disputed the categorization of “incompatible.” See, e.g., JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* 14, 153 (1961) (arguing that cities require “a most intricate and close-grained diversity of uses that give each other constant mutual support,” including industry, and suggesting that mixed uses provide welcome diversity, not incompatibility).

175. See, e.g., Crecine et al., *supra* note 173, at 93-96 (concluding that land values in Pittsburgh are highly independent); Frederick H. Rueter, *Externalities in Urban Property Markets: An Empirical Test of the Zoning Ordinance of Pittsburgh*, 16 J.L. & ECON. 313, 330 (1973) (reaching a similar conclusion).

176. See Aoki et al., *supra* note 42, at 296.

177. *Id.*

178. *Id.*

claim¹⁷⁹ but has failed to provide participatory options for these landowners. Regulations of Oregon's Department of Administrative Services require similar notice to neighbors¹⁸⁰ but also suffer from a dearth of participatory measures. Another option to improve residential input when governments waive regulations would be to provide mediation for landowners through a local ombudsman's office. But partial regulatory takings regimes, with the exception of Florida's and Oregon's limited neighbor notice requirements and Arizona's advocate for property rights¹⁸¹ (who has limited powers¹⁸²) do not provide landowners with such options.

Finally, zoning regulations not only can improve property values or the character of a community through preventive measures but also can create positive measures in the form of aesthetic benefits or "amenity effects"¹⁸³ through, for example, historic landmark preservation laws and environmental standards.¹⁸⁴ Additionally, they can provide basic infrastructural services and ensure the provision of equitable housing for low- and middle-income groups through inclusionary zoning.¹⁸⁵ These benefits could be lost under the restrictions of a partial regulatory takings regime.

B. Zoning and Low-Income Communities

In the absence of alternative mechanisms, partial regulatory takings regimes will make it difficult for communities to realize the benefits of zoning. It can be challenging to implement proactive zoning-type requirements without government control, particularly because of collective action problems.

179. FLA. STAT. ANN. § 70.001(4)(b) (West 2004).

180. See ORCP 21 Motions To Dismiss, *supra* note 91, at 4 (describing the requirement that the Department notify landowners within the vicinity of a claimant's property after a claim has been submitted).

181. ARIZ. REV. STAT. ANN. § 41-1312 (2004).

182. *Id.* § 41-1313(A)(2)-(3), (B)(2) (allowing the advocate to appear on behalf of property owners in "judicial, legislative, or administrative" tribunals, to "[a]dvise property owners" on takings issues, and to "[r]eceive complaints and inquiries from private property owners" regarding takings).

183. Jaeger, *supra* note 75, at 112-13.

184. See, e.g., Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 308-10, 342 (2002); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 109 n.5 (1978).

185. See Home Builders Ass'n of N. Cal. v. City of Napa, 108 Cal. Rptr. 2d 60, 62 (Ct. App. 2001) (discussing mandatory set-asides of affordable housing); Jennifer M. Morgan, Comment, *Zoning for All: Using Inclusionary Zoning Techniques To Promote Affordable Housing*, 44 EMORY L.J. 359, 377-79 (1995) (discussing density bonuses, which encourage the provision of low-income housing).

Moreover, alternatives to preventive zoning are often inadequate for low-income neighborhoods because such neighborhoods are at a financial disadvantage when they rely on private action.¹⁸⁶ As a result, constraints on zoning are particularly worrisome for low-income communities.

Although the evidence of the importance of preventive zoning for neighbor-to-neighbor impacts is mixed, at a minimum, preventive zoning for unwanted neighboring developments allows neighbors of all incomes to prevent unsightly or disturbing uses near their properties. The need for preventive zoning to address more severely incompatible uses seems especially clear because it allows communities to monitor and influence¹⁸⁷ the development of locally undesirable land uses (“LULUs”) within their boundaries.¹⁸⁸

Some types of preventive zoning can be detrimental to low-income and minority residents,¹⁸⁹ but I argue that preventive zoning measures to control the most noxious of neighboring uses are essential for these groups. Overwhelming evidence shows that low-income and minority communities currently shoulder a disproportionate burden of LULUs, such as waste disposal sites. This trend has been discussed extensively in the environmental justice literature.¹⁹⁰ Developers may encourage (and governments may allow) the

186. See, e.g., Jon C. Dubin, *From Junkyards to Gentrification: Explicating a Right to Protective Zoning in Low-Income Communities of Color*, 77 MINN. L. REV. 739, 779 (1993) (“[A]ppropriate zoning protection [in low-income communities] is a critically important government service in determining the quality of a community’s residential environment.”).

187. See, e.g., Craig Anthony (Tony) Arnold, *Planning Milagros: Environmental Justice and Land Use Regulation*, 76 DENV. U. L. REV. 1, 109-10 (1998) (“[G]rassroots environmental justice activists might seek zoning map amendments to change more intensive use designations in their neighborhoods to less intensive use designations, a technique known as ‘downzoning.’”); Vicki Been, *What’s Fairness Got To Do with It? Environmental Justice and the Siting of Locally Undesirable Land Uses*, 78 CORNELL L. REV. 1001, 1068-71 (1993) (discussing the pros and cons of dispersion ordinances, which limit “excessive” concentrations” of LULUs within a neighborhood or create minimum distance requirements between LULUs as a way to decrease their impact).

188. See, e.g., Dubin, *supra* note 186, at 779 (“[A]ppropriate zoning protection is a critically important government service in determining the quality of a community’s residential environment.”).

189. See, e.g., EPSTEIN, *supra* note 11, at 264 (discussing the exclusion of “minority racial or ethnic groups” from purchasing land “in suburban communities that have strict minimum acreage requirements”); Dubin, *supra* note 186, at 741-43 (noting that discriminatory zoning can separate minority communities from other populations and then deprive them of basic zoning protections).

190. See, e.g., GEN. ACCOUNTING OFFICE, GAO/RCED-83-168, SITING OF HAZARDOUS WASTE LANDFILLS AND THEIR CORRELATIONS WITH RACIAL AND ECONOMIC STATUS OF SURROUNDING COMMUNITIES 3-4 (1983), available at <http://archive.gao.gov/d48t13/>

siting of LULUs in low-income and minority neighborhoods, and low-income and minority residents may also move to areas with LULUs for economic reasons.¹⁹¹ When residents have moved to the nuisance, they still need a voice in future decisions regarding the regulation of existing LULUs and the siting of new ones.¹⁹² Agencies and private developers consider the level of potential local opposition when siting LULUs,¹⁹³ and sitings unsurprisingly tend to occur in areas with low political resistance.¹⁹⁴ Partial regulatory takings regimes may limit the meager regulations available to fight against LULUs, thus further tying residents' hands. This can perpetuate the cycle of inequitable burdens.

Communities have several options through the zoning process to challenge unwanted uses, such as the siting of a landfill or industrial facility near a residential area. Interested parties can lobby a planning commission or town board not to approve the site plan, rezone the property to industrial use, or grant a special exception to a developer.¹⁹⁵ However, under a partial regulatory takings regime (particularly a retroactive one), these measures may be too costly for the government to follow. And in a community that is quickly growing and has few existing zoning regulations, a prospective partial regulatory takings regime may discourage a government from enacting regulations that limit unwanted uses to strictly delineated areas.

121648.pdf (noting that in three of the four hazardous waste landfill sites investigated, African-Americans made up more than 50% of the surrounding census areas, and, in all four of the communities surrounding the sites, the black population had a lower mean income than all other races combined); Vicki Been, *Locally Undesirable Land Uses in Minority Neighborhoods: Disproportionate Siting or Market Dynamics?*, 103 YALE L.J. 1383, 1384-86 (1994) (summarizing the relevant literature and discussing the "proven correlation" between LULUs and both race and class); Benjamin A. Goldman & Laura J. Fitton, *Toxic Wastes and Race Revisited 2* (1994), <http://www.cfpa.org/publications/pdf/toxicwastes.pdf>. Whether siting decisions *cause* this extra burden on low-income and minority communities is less clear.

191. See, e.g., Been, *supra* note 190, at 1397; Richard J. Lazarus, *Pursuing "Environmental Justice": The Distributional Effects of Environmental Protection*, 87 NW. U. L. REV. 787, 808 (1993).
192. Cf. Lazarus, *supra* note 191, at 818-19 (discussing lower environmental quality in minority areas resulting from "less generous cleanup remedies, lower fines, slower cleanups, or more frequent [and unenforced] violations of pollution control laws").
193. See *id.* at 816 (discussing how the EPA's "capacity assurance requirements" lead state agencies and private companies to consider "the potential for effective, local political opposition").
194. See ROBERT D. BULLARD, *DUMPING IN DIXIE: RACE, CLASS, AND ENVIRONMENTAL QUALITY 3* (2d ed. 1994); Been, *supra* note 187, at 1002.
195. See Arnold, *supra* note 187, at 110 ("[A] low-income minority neighborhood might contain several parcels zoned for heavy industrial use in close proximity to residences, schools, churches, health care facilities, and the like. Residents might seek to rezone some or all of these parcels for less intensive, yet economically viable, commercial uses.").

Alternative venues for participation in this type of preventive action against unwanted uses are more costly for low-income communities, and the constraints on zoning likely to result from partial regulatory takings regimes will disproportionately harm these communities. Wealthy communities are likely to fare better than poorer communities in developing alternative options to land use regulation.¹⁹⁶ To oppose a company attempting to build a factory nearby, residents can organize, advertise in newspapers, put up lawn signs, and carry out a full campaign. If they are unable to prevent the development, they can bring nuisance suits or move away. But low-income communities do not have the same financial resources to use these nongovernmental methods. Although they have succeeded in opposing LULUs through grassroots campaigns and political action,¹⁹⁷ they are nevertheless at a participatory disadvantage because of the high costs of organizing.¹⁹⁸

In the realm of community planning for preventive measures, states have already recognized the particular need for consensus when contentious uses are proposed. New York has “Fair Share Criteria,” for example, which attempt to distribute city facilities fairly, to make allocation proposals based on “sound planning, zoning, . . . and systematic planning process[es],” to “foster consensus building,” and to “monitor[] neighborhood impacts of facilities once they are built.”¹⁹⁹ Yet current government processes and alternative resources to fight proposed undesirable uses are all inadequate. A study in New York, for example, found that the complications of applying for zoning changes make it difficult for small neighborhood organizations to participate effectively in the system and that most applicants are “real estate developers and/or governmental entities.”²⁰⁰ Limited participatory opportunities in existing regulatory processes may be most acute for residents without vested landowner interests—such as tenants—who tend to be transient and who face organizational obstacles.²⁰¹

Just as communities (particularly wealthy ones) can potentially implement alternatives to preventive zoning that allow them to address unwanted uses, private communities can develop their own “proactive” zoning requirements

196. See, e.g., Brion, *supra* note 170, at 439-40.

197. See Been, *supra* note 187, at 1003-04.

198. See *id.* at 1002 (“[L]ocal protest can be costly, time-consuming, and politically damaging.”).

199. *Silver v. Dinkins*, 601 N.Y.S.2d 366, 369 (1993) (discussing the purpose of the Fair Share Criteria).

200. Juliana Maantay, *Zoning Law, Health, and Environmental Justice: What’s the Connection?*, 30 J.L. MED. & ETHICS 572, 583 (2002).

201. See, e.g., Clayton P. Gillette, *In Partial Praise of Dillon’s Rule, or, Can Public Choice Theory Justify Local Government Law?*, 67 CHI.-KENT L. REV. 959, 987-88 (1991).

through private covenants or other nongovernmental means.²⁰² But such “private zoning” measures are typically difficult to implement. While a community is likely to rally against a proposed undesirable use in its town (through a measure similar to preventive zoning), private parties will show less support for potentially costly infrastructure or other amenity-based measures (similar to proactive zoning).²⁰³ Public choice theory suggests that the same problems of inaction could result even with governmental intervention,²⁰⁴ but this Note argues that local governments can, at times, overcome public choice problems arising from uneven interest group representation and act for the “general good” of the community.²⁰⁵ Private measures are unlikely to address the positive zoning needs of low-income residents because of collective action problems. The benefits of inclusionary zoning, for example, can be strong for minority and low-income residents. Limited zoning could therefore affect these neighborhoods most acutely, as many lack adequate infrastructure and services²⁰⁶ as well as affordable housing.²⁰⁷

Whether through proactive zoning, preventive zoning, or zoning alternatives, communities need a means by which to plan the development and growth occurring in their neighborhoods. Yet existing structural, financial, and land use inequities exacerbate the difficulties of implementing community planning measures when partial regulatory takings regimes limit the available government solutions.

202. See, e.g., Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 713 (1973) (discussing covenants that cover “affirmative and negative obligations” and their potential to promote efficiency).

203. See, e.g., Michelman, *supra* note 6, at 155-56.

204. Public choice theory suggests that only small and powerful groups that will experience large benefits from a law will throw their resources into lobbying for that law. See RANDALL BARTLETT, *ECONOMIC FOUNDATIONS OF POLITICAL POWER* 155 (1973).

205. See, e.g., Melvyn R. Durchslag, *Village of Euclid v. Ambler Realty Co., Seventy-Five Years Later: This Is Not Your Father's Zoning Ordinance*, 51 CASE W. RES. L. REV. 645, 659 (2001) (describing two studies of zoning in rural Wisconsin in which the government's main concern was public health and safety and in which “special interest politics” had little influence).

206. For discussion of the inadequate infrastructure in low-income neighborhoods, see, for example, BULLARD, *supra* note 194, at 5; and John J. Betancur & Douglas C. Gills, *Community Development in Chicago: From Harold Washington to Richard M. Daley*, 594 ANNALS AM. ACAD. POL. & SOC. SCI. 92, 102 (2004), which observes how improvements within the central business district of Chicago are “taking place at the expense and to the neglect of low-income neighborhoods.”

207. Also note that zoning can increase property values and thereby harm low-income residents. Cf. Robert C. Ellickson, *The Irony of “Inclusionary” Zoning*, 54 S. CAL. L. REV. 1167 (1981) (arguing that inclusionary zoning may be detrimental to low-income groups).

III. A MORE EQUITABLE SOLUTION: REGULATORY BALANCES

Regulatory change is necessary in states both with and without partial regulatory takings regimes. In states without partial regulatory takings regimes, zoning, which is currently the most prevalent land use planning mechanism,²⁰⁸ reduces the negative externalities of unwanted neighboring uses and allows participation-based planning for growth and community character. However, zoning also has its costs in the form of uneven burdens for some property owners. Those hardest hit may be landowners such as farmers, who rely directly on the use of their land but face conservation measures or similar regulations that severely limit its use. Without some type of remedy for this loss, such as compensation for setting aside land or implementing conservation measures, their income-earning potential is substantially curtailed. In states with partial regulatory takings regimes, however, different problems arise. Limiting or freezing zoning measures by increasing their cost (without providing alternatives to community planning) is not a just solution because of the burdens it creates for many groups, particularly those in lower income brackets.

To address the problems of insufficient participation in community planning and the resulting inequities, as well as substantial yet uncompensated regulatory burdens, this Note proposes a “regulatory balances” regime. The purpose would be to give multiple community groups a voice, including landowners concerned with regulatory burdens on their property and tenants or homeowners who may desire more regulation. States operating under the status quo should improve and supplement existing planning structures. States operating under partial regulatory takings regimes should implement effective governmental and nongovernmental mechanisms as alternatives both to costly regulations and to costly compensation claims.

This “regulatory balances” approach differs from the balancing test often used by courts in regulatory takings cases that asks whether “individual losses are ‘outweighed by’ social gains.”²⁰⁹ Instead, the proposal here focuses on the process values of land use planning and on alternative substantive solutions. Building off existing alternatives to partial regulatory takings, I

208. See ERIC DAMIAN KELLY, *MANAGING COMMUNITY GROWTH: POLICIES, TECHNIQUES, AND IMPACTS* 13 (1993) (discussing the prevalence of zoning); Ellickson, *supra* note 202, at 692 (noting that more than 97% of cities with populations of more than 5000 people use zoning).

209. Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law*, 80 HARV. L. REV. 1165, 1193 (1967).

suggest three specific measures that could be implemented to create this system of regulatory balances. First, we should support the development of neighborhood input groups. Second, we should create local offices similar to existing ombudsmen's offices to provide information and arbitration-type services and to monitor the effectiveness of the regulatory balances system as a whole. Third, to address the inequities of the current regulatory system as well as those caused by partial regulatory takings regimes, I propose a fund, maintained through voluntary and mandatory contributions, for conservation and other neighborhood improvement measures.

A. Proposed Solutions in the Current Literature

Scholars recently have proposed a range of community planning processes. Some have argued that existing zoning mechanisms, although not the only tool for planning, allow sufficient community determination of neighborhood character.²¹⁰ As I argued in Part II, while zoning currently offers insufficient participatory mechanisms, it provides a solid base that can be modified and supplemented with improved procedural measures. In a more radical proposal, Robert Nelson has suggested that state legislatures should encourage, as an alternative to zoning, the development of "private neighborhood associations," which would "own and manage the common elements in existing neighborhoods."²¹¹ However, I have already noted the difficulties of collective action associated with private planning.

Others have focused on common law mechanisms. Robert Ellickson has suggested a covenant and nuisance-based alternative to reduce the costs of random growth within neighborhoods.²¹² He has proposed that communities implement specific nuisance rules and "Nuisance Boards"²¹³ to regulate and adjudicate nuisance questions through fact-finding hearings. These boards also would establish nuisance rules, damages awards, and other mechanisms similar to but less costly than nuisance suits.²¹⁴ In a proposal related to Ellickson's and Nelson's ideas, Richard Epstein has suggested that the

210. See Arnold, *supra* note 187, at 3-4 (arguing that communities can use the "land use planning model of environmental justice"—a combination of zoning tools—to protect their neighborhoods).

211. Robert H. Nelson, *Privatizing the Neighborhood: A Proposal To Replace Zoning with Private Collective Property Rights to Existing Neighborhoods*, 7 GEO. MASON L. REV. 827, 879 (1999).

212. See Ellickson, *supra* note 202, at 694.

213. *Id.* at 762.

214. *Id.* at 763.

common law offers superior planning mechanisms to zoning.²¹⁵ Nuisance suits and other common law measures, however, may not adequately address future concerns about the character and growth of neighborhoods. Participatory measures must be broader than the limited and sometimes costly court-based participation required of nuisance actions. Ellickson's Nuisance Boards, of course, could decrease the typical costs of nuisance actions but may be too limited in scope for the proactive, broad-based community planning that I argue for in this Note. As discussed above,²¹⁶ the common law definition of nuisance does not cover many *ex ante* restrictions on industrial development and other LULUs, because complainants cannot prove actual harm in advance.

Other authors have suggested mechanisms closer to the regulatory balances regime that I propose. Sheila Foster, for example, has proposed a "deliberative model of participation in the siting process"²¹⁷ and has stressed the need for networking and collaboration among grassroots movements.²¹⁸ Yet communities will fare better if grassroots movements can operate under a layered system of options for community planning that includes specific governmental mechanisms to address low-income land use planning needs as well as the inequitable burdens that may result from regulation. For positive land use goals, such as inclusionary zoning, some authors have suggested broad, comprehensive plans at the national or state level to impose fair share obligations on municipalities²¹⁹ or to require the provision of minimum levels of low-income housing.²²⁰ I build upon such recommendations but suggest that the key needs in this area are funds targeted specifically to low-income neighborhoods.

215. See Richard A. Epstein, *A Conceptual Approach to Zoning: What's Wrong with Euclid*, 5 N.Y.U. ENVTL. L.J. 277, 290-91 (1996).

216. See *supra* Subsection I.D.4.

217. Sheila Foster, *Justice from the Ground Up: Distributive Inequities, Grassroots Resistance, and the Transformative Politics of the Environmental Justice Movement*, 86 CAL. L. REV. 775, 834 (1998).

218. See *id.* at 840.

219. See John Charles Boger, *Toward Ending Residential Segregation: A Fair Share Proposal for the Next Reconstruction*, 71 N.C. L. REV. 1573, 1573-74 (1993).

220. See Robert L. Liberty, *Abolishing Exclusionary Zoning: A Natural Policy Alliance for Environmentalists and Affordable Housing Advocates*, 30 B.C. ENVTL. AFF. L. REV. 581, 589-91 (2003) (arguing for the benefits of Oregon's land use planning system, which sets "mandatory state land use planning policies," or goals, implemented through local zoning regulations—such as requiring governments to encourage affordable housing by allowing various densities and residences in each community).

B. A More Balanced Alternative

The existing proposed alternatives or improvements to zoning fail to fully address the problems caused by the growing number of partial regulatory takings regimes and by the status quo. I identified the most substantial problems above as (1) insufficient opportunities for communities to participate in and influence the community planning process, and (2) uneven burdens on low-income communities caused by this dearth of meaningful participation as well as by insufficient alternatives to regulatory options. Additionally, I discussed other problems associated with the regulatory takings ballot initiatives in 2006, such as landowners' inability to effectively address the impacts of regulatory waivers on neighboring lands; piecemeal land uses created by waivers; unusually low procedural barriers to claims; and the frequent inability of governments to exempt zoning regulations from takings claims. I therefore propose a three-pronged regulatory balances regime that offers alternative solutions.

1. Improved Mechanisms for Participation

As argued above, participation in planning the development and character of one's community—whether through zoning or alternative mechanisms—is an essential component of any planning regime.²²¹ Current zoning processes do not consistently permit sufficient access by low-income and minority participants. Zoning processes could be improved to allow all members of a community to participate and to give input, whether they are real estate developers, mobile home owners, apartment dwellers, farmers, or small business owners.

a. Neighborhood Input Groups

The State of Washington originally wrote its Growth Management Act (GMA) in 1990 with the goal of allowing communities to participate in the land use planning process and tailor the process to their unique needs.²²² The

221. Cf. ARROW, *supra* note 8, at 89 (noting that the process by which society makes choices is “especially important if the mechanism of choice itself has a value to the individuals in the society”).

222. See WASH. REV. CODE ANN. § 36.70A.010 (West 2003) (“It is in the public interest that citizens, communities, local governments, and the private sector cooperate and coordinate with one another in comprehensive land use planning.”); *id.* § 36.70A.020(11) (expressing an intention to “[e]ncourage the involvement of citizens in the planning process”).

Act created growth management hearing boards in 1991 to help accomplish these goals.²²³ In practice, however, the planning process has continued to be top-down.²²⁴ Rural communities with declining populations have tended to adopt the same growth management strategies as cities, such as Seattle, that are experiencing rapid growth.²²⁵ Residents also have complained that the boards largely have ignored some of the GMA's goals, such as recognizing the need to support "natural resource industries" like farming.²²⁶ Bob Hart, a nurseryman and former county commissioner in rural Washington, has attributed this problem to the appointment of board members who are nearly exclusively focused on environmental issues.²²⁷

For a true local planning system to emerge, neighborhood input groups should be formed to serve as liaisons between the public and the planning and zoning boards. These groups could be similar to New York City's community boards, which provide an official body through which residents can propose zoning changes and can respond to others' proposals.²²⁸ Unlike New York's community boards, however, the input groups could be required to conduct public hearings for each significant proposed zoning or regulatory change that could substantially affect property or living conditions within the neighborhood. Additionally, the groups could consist of a combination of elected and appointed members and could have a rotating membership that at any given time would include representatives from various community interests. In Washington, for example, the board could include low-income residents; representatives of natural resource interests, such as farmers and timber businesses; real estate developers; and environmental and tribal interests.

When zoning regulations are constrained by partial regulatory takings regimes, the neighborhood input groups should focus on planning measures that distribute burdens in the most equitable manner possible—regulations that are less "expensive" yet still accomplish community planning goals. These boards also could be helpful as watchdogs to ensure that governments do not simply waive regulations or fail to regulate.

223. See *id.* § 36.70A.250; Wash. Growth Mgmt. Hearings Bds., The Growth Management Act, <http://www.gmhba.wa.gov/gma/> (last visited Apr. 25, 2007).

224. See Telephone Interview with Heather Hansen, *supra* note 112.

225. See *id.*

226. See WASH. REV. CODE ANN. § 36.70A.020(8) (setting forth the goal to "[m]aintain and enhance natural resource-based industries, including productive timber, agricultural, and fisheries industries"); Telephone Interview with Bob Hart, *supra* note 166.

227. See Telephone Interview with Bob Hart, *supra* note 166.

228. See Maantay, *supra* note 200, at 584.

To address the problems created by waivers under a partial regulatory takings regime, the input boards could adopt a waiver policy similar to those created under Florida's Bert J. Harris Act²²⁹ and Oregon's administrative rules,²³⁰ requiring notice to landowners when a landowner makes a compensation claim on a neighboring piece of land. The input boards could provide a mechanism through which neighboring landowners could express their concerns about the activities that might emerge if the government waived the regulation for a claimant. The boards could encourage landowners to reach a compromise for partial waiver (somewhat similar to Florida's modified waivers²³¹) that would prevent local governments from waiving land use regulations that neighbors deemed to be particularly important. Additionally, the boards could solicit suggestions for land-swapping schemes similar to those allowed in Florida. Through this method, a landowner making a compensation claim in a regulated conservation area, which would be fragmented if the government waived the regulation, could receive development rights for another parcel in a less regulated area.

b. The Ombudsman "Plus"

To further encourage community participation and to monitor the effectiveness of a state's regulatory balances regime, one or several individuals, depending on community size,²³² should hold positions similar to that of an ombudsman. This ombudsman "plus" would answer residents' questions regarding regulatory burdens, ensure that residents and the government communicated when disputes arose, and facilitate arbitration if necessary. This officer also would oversee the town planning process to make sure that it operated smoothly and fairly.²³³

Utah's experience with an ombudsman has proven quite successful and provides a helpful model. Utah formed the Office of the Property Rights Ombudsman in 1997,²³⁴ and since then the state has not seriously considered

229. FLA. STAT. ANN. § 70.001(4)(b) (West 2004).

230. See *supra* note 180.

231. See FLA. STAT. ANN. § 70.001(4)(d)(1) (allowing agencies to implement mechanisms such as variances or special exceptions to laws as an alternative to full waivers).

232. Size is an important consideration. Cities could create several ombudsman positions to shrink the representative/resident ratio. See, e.g., Hills, *supra* note 163, at 2025-26 (discussing how smaller governments may promote democracy).

233. The ombudsman would, for example, monitor the use of community planning funds discussed *infra* Subsection III.B.2.

234. See David Spohr, *Take a Look at This Bill. Please*, 23 ENVTL. F. 21, 21 (2006).

any major regulatory takings measures.²³⁵ The Utah ombudsman is a disinterested, accessible attorney who answers questions from private property owners (and sometimes local agencies) about property rights disputes.²³⁶ Additionally, the ombudsman can assist with conciliation and mediation, “express a non-binding evaluation of the facts and law” underlying a property dispute, and force private arbitration between governments and property owners once property rights disputes are ripe.²³⁷ These efforts help avoid the high legal fees and lengthy court battles that otherwise would ensue when property interests clashed.²³⁸ And local agencies often do change their actions following discussions with the property owner and the ombudsman. The Utah Department of Transportation, for example, reduced its condemnation rate by about 50% over several years as a result of ombudsman activity.²³⁹

An institution providing ombudsman-like services in other states could similarly allow input into the planning process and help parties avoid court battles over regulation. In Florida, which requires property owners to consider settlement offers from the government agency responsible for a regulation before bringing a claim in court,²⁴⁰ parties have avoided litigation in some disputes.²⁴¹ The proposed ombudsman under a regulatory balances system would provide not only advice and mediation services but also the monitoring services discussed above. An ombudsman alone, however, can prove insufficient, particularly if she lacks the authority to resolve land use disputes. Arizona, for example, has an advocate for property rights²⁴² with

235. See E-mail from David Spohr, Senior Deputy Ombudsman for Rural & Unincorporated Affairs, Metropolitan King County Council, Wash., to author (Nov. 28, 2006, 21:08:00 EST) (on file with author).

236. See Spohr, *supra* note 234, at 22.

237. Office of the Prop. Rights Ombudsman, What Can the Ombudsman’s Office Do for Me?, <http://propertyrights.utah.gov/doforme.html> (last visited Apr. 12, 2007).

238. See Spohr, *supra* note 234, at 25 (“A single court case avoided can fund dozens—if not hundreds—of efforts by an agency to resolve its disputes out of court.”).

239. See Craig M. Call, Ombudsman’s Report on Private Property (June 2003), http://web.archive.org/web/20050902192242/http://www.utahpropertyrights.com/annual_report.htm.

240. FLA. STAT. ANN. § 70.001(4)(c), (6)(a) (West 2004).

241. See GA. SENATE RESEARCH OFFICE, FINAL REPORT OF THE SENATE INVERSE CONDEMNATION STUDY COMMITTEE 5 (2005), available at http://www.legis.state.ga.us/legis/2005_06/senate/publications/inversecondemnation.pdf (discussing how the Bert J. Harris Private Property Protection Act facilitates pre-suit settlements).

242. See ARIZ. REV. STAT. ANN. § 41-1312 (2004).

duties somewhat similar to those of the Utah ombudsman,²⁴³ yet voters still overwhelmingly approved a partial regulatory takings regime in 2006. The Arizona advocate's duties are much more limited than the Utah ombudsman's role,²⁴⁴ which may partially explain the comparative success of the Utah ombudsman. If all else fails, litigation still might arise, but the ombudsman can bring parties to the table to ensure that their voices are heard and that they are treated "fairly, with dignity."²⁴⁵ And because an ombudsman's services are free,²⁴⁶ unlike those of the court system, they are accessible to all parties.²⁴⁷

The ombudsman "plus" would be particularly important in states with partial regulatory takings regimes. Many landowners would likely have questions about the validity of their claims or about methods for preparing claims if the government created higher procedural barriers within the claims process. The ombudsman could answer potential claimants' questions and prevent the submission of frivolous claims, thus decreasing burdens on administrative agencies. Additionally, the ombudsman could assist the government in determining whether proposed regulations fell under a category exempted from regulation, thus allowing the government to identify less costly regulations and to better predict its future budgets.

2. Addressing Inequities: Funds for Community Projects

In addition to developing an ombudsman position and creating neighborhood input groups to ensure community participation in the planning process, local governments should create a mechanism—separate from the general tax base and managed by an elected body—to fund community land use measures. As discussed above, low-income neighborhoods in particular suffer inequities caused by limitations on zoning

243. See *supra* note 182.

244. See ARIZ. REV. STAT. ANN. § 41-1313(A)(2)-(3), (B)(2); Call, *supra* note 239.

245. Spohr, *supra* note 234, at 25.

246. See Office of the Prop. Rights Ombudsman, What Is an Ombudsman?, <http://propertyrights.utah.gov/> (last visited Apr. 25, 2007) ("There is no charge for consultation with an Ombudsman. We deal with property rights and land issues state-wide, involving any unit of state or local government.").

247. Note, however, that even process-oriented laws, such as those creating an ombudsman position or mandating settlement negotiation before a compensation claim is filed, can have similar effects to the barriers created by the court system. If, for example, the laws limit access to the process or excessively constrain resolution options, some potential users of the system may face high obstacles to participation. The ombudsman "plus" position would therefore require careful development. See Jacobs, *supra* note 18, at 6.

under partial regulatory takings regimes because they lack the financial resources that would support sufficient alternatives to zoning.²⁴⁸ Additionally, other communities feel disproportionately burdened by regulations that prevent them from using their land for income-producing activities, and they demand compensation as a remedy.

The need for a community land use funding mechanism has become apparent in the recent debates over partial regulatory takings. In Washington, even opponents to Initiative 933 voiced lingering concerns about the burdens imposed on property owners by the GMA and its accompanying ordinances.²⁴⁹ Harvey Jacobs of the University of Wisconsin has suggested that while some fear that regulatory takings measures would “open doors to big developers,” in fact “[m]ost people sympathize with small landowners whose modest plans for their property have been stymied by growth management rules.”²⁵⁰ Jacobs has suggested, as a middle-ground option, that rural landowners be “compensated” with development credits when a state or local regulation restricts development on their land. The landowners could then sell these credits to developers who wished to increase density in urban areas.²⁵¹ King County, Washington, already has used this system for some projects: developers wishing to add floors to condominiums in urban areas contribute to an account for the conservation of rural lands.²⁵²

A community-based fund geared toward land use measures would address problems of inequity by (1) providing compensation for landowners severely burdened by regulations (the definition of which could be determined on a community-by-community basis), and (2) supporting infrastructure projects, preventive zoning regulations or zoning alternatives, and other community measures that would result from an improved planning process.

Communities could use the fund to compensate owners whose property was clearly burdened by a new regulation pursuant to an established threshold value determined by the community. For example, if a community wished to prevent a farmer from clearing a large portion of her land for pasture and to preserve this uncleared portion for open space, it could use money from the fund to compensate her for the uncleared acreage through “conservation rights.” These conservation rights would resemble

248. See *supra* Section II.B.

249. See Eric Pryne, *Middle Road on Property Rights*, SEATTLE TIMES, Nov. 13, 2006, at B1.

250. *Id.* (quoting Jacobs).

251. See *id.*

252. See *id.*

development easements (development rights purchased and then taken out of use). But here the government simply would pay the farmer for the burden of regulation rather than purchase the farmer's development rights and place them in a trust. Similar transferable systems of actual development rights could be used for developers claiming diminished property values from regulation. This type of transferable compensation system could provide a more balanced distribution of funds at lower cost than a traditional partial regulatory takings system.²⁵³

To address fairness issues for those with less property (or no real property of their own), a portion of the fund, such as 25% of its total value, should be earmarked to support projects resulting from regulations and rules that improve low-income areas within the community, such as affordable housing measures and infrastructure construction and maintenance. A portion of this 25% could also support mechanisms that allow low-income neighborhoods meaningfully to influence the LULU siting process.

The funding base in a regulatory balances regime could come from mandatory contributions from developers who receive development "bonuses" (such as permission to build additional square footage); from permit application fees and other revenues of day-to-day zoning business; and from voluntary contributions by groups with targeted regulatory desires, such as land conservation interests. Additionally, in areas with partial regulatory takings regimes, municipalities could consider getting voter approval for a tax on development gains under the system—i.e., landowners would pay an excise, income, or property tax when they received a waiver after submitting a compensation claim. This would be contentious and complex to implement but would likely generate more revenues with which to implement conservation easements or similar growth management mechanisms in communities that have developed conservation planning goals.

This type of tax system has been proposed for some municipalities in Oregon, where owners would be taxed for the "windfall" that occurs when a municipality expands an urban growth boundary, thus allowing the "full range of urban development" in an area formerly limited to low-density residential, farming, or forestry use.²⁵⁴ Robert Liberty has suggested that the

253. To ensure cost savings, the government would have to create a market that gave development rights real value. See MARTIN A. GARRETT, JR., *LAND USE REGULATION: THE IMPACTS OF ALTERNATIVE LAND USE RIGHTS* 84-87 (1987).

254. Robert Liberty, *Give and Take over Measure 37: Could Metro Reconcile Compensation for Reductions in Value with a Regional Plan for Compact Urban Growth and Preserving Farmland?*, 36 ENVTL. L. 187, 203-04 (2006).

tax could support conservation easements or improve infrastructure and capital improvements in the urban areas created by the expansion of the boundary.²⁵⁵ The funds thus would originate from the entity that received a “bonus” property right rather than from the entire tax base, and they would be used to directly reduce the effects of development in nearby areas.

Another method to generate funds in states with partial regulatory takings regimes would be a fee for takings claims. This would impose a slight barrier to claimants, thus preventing the danger of overwhelming governments with thousands of potentially frivolous claims. True, the funds raised through the systems proposed above would not come close to reaching Oregon’s approximately \$15 billion in claims.²⁵⁶ But it would allow communities to avoid waiving all claims.

Communities could also reduce claim amounts to a more manageable value by implementing procedural barriers in addition to a claims fee. Similar to Florida’s system,²⁵⁷ local rules could require claimants to consider a settlement offer from an agency and could ensure that issues were ripe prior to bringing a claim for compensation to a higher body, such as a court. Finally, communities could decrease claim numbers by expanding the categories of regulation exempted from compensation requirements. All of these mechanisms would reduce the number and value of claims to a more manageable amount than Oregon’s \$15 billion while still allowing for funds to compensate both low-income communities and the residents most severely burdened by regulation.

CONCLUSION

A regulatory balances system could provide a more reasonably priced and fair approach to regulatory impacts on private property. This approach would take into account regulatory harms and benefits to all individuals, not just the “propertied” class. It would allow individuals to plan the character of their communities, to communicate their concerns to the government, and to voice their belief that they had been disproportionately burdened by government regulation or inaction. It would encourage the government, as a result of these expressed concerns, to seek less burdensome alternatives. And it would provide a system that focused on compromise rather than on costly litigation. Such a regime could provide relief from the current partial regulatory takings

255. See *id.* at 219-20.

256. See *supra* note 12.

257. See FLA. STAT. ANN. § 70.001(5)(a)-(b) (West 2004).

system, which is too expensive and which poses the threat of halting some types of community planning in their tracks, further harming some communities that already face heavy burdens.

The ombudsman approach and systems that create more “even” transfers of development and conservation rights provide a strong starting point for an effective regulatory balances regime. While an ombudsman or a regime of tradable development or conservation rights would require a state to hire several attorneys or to create an institution to monitor trades, neither would necessitate the massive administrative infrastructure required of a regulatory takings regime. And the proposed options would promote fairness by increasing participation while decreasing its costs.

We have models on which to build. We also have a great need to improve the interaction between governments and private individuals in the realm of property rights, as shown by the inflammatory divides that have emerged alongside the growing partial regulatory takings movement. It is time for a renewed focus on ensuring that all residents have a voice in determining the future of their communities.