

# THE PERILS OF THE PROPERTY RIGHTS INITIATIVE: TAKING STOCK OF NEVADA COUNTY'S MEASURE D

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## I. INTRODUCTION

Sitting in the foothills of the Sierra Nevada, with the woodlands of the Sacramento Valley to the west and stunning Lake Tahoe to the southeast, rapidly growing Nevada County, California, was the perfect setting for a clash between environmentalists and property rights advocates. In the fall of 2002, an initiative appeared on the Nevada County ballot that would have dramatically expanded the County's liability for regulatory takings. Supporters and opponents of Measure D agreed on one thing: the measure—the nation's first such initiative to appear on a countywide ballot—had the potential to radically alter the landscape of environmental and land use regulation in Nevada County and set a powerful precedent for the rest of the country. Although Measure D was defeated at the polls in November, it added a new chapter to the ongoing debate over the obligation of government to provide compensation for losses in property value caused by regulation.

In a 1995 article on property rights laws, Harvey M. Jacobs and Brian W. Ohm observed that

[t]here are two ways to look at statutory takings legislation, and the anti-environmental and anti-government sentiments it represents. One way is through a legal lens, the second way is as an expression of cultural symbol and as part of a broader social movement.<sup>1</sup>

This Note endeavors to do both: to explore the social and political currents that led to a property rights initiative in Nevada County, and to consider why property rights initiatives, by modifying the legal definition of a "taking," pose such a profound threat to environmental and land use regulation.

Part II of this Note briefly surveys the landscape of takings jurisprudence, particularly as it has shaped the modern understanding of *when* a government regulatory action affects private property in such a way as to

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<sup>1</sup> Harvey M. Jacobs & Brian W. Ohm, *Statutory Takings Legislation: The National Context, the Wisconsin and Minnesota Proposals*, 2 WIS. ENVTL. L.J. 173, 220 (1995).

obligate the government to pay compensation. Part II also describes how the perceived inadequacy of this doctrine spawned the property rights movement during the 1980s. Part III examines the property rights legislation the movement has brought about, with a special focus on the Oregon initiative that served as a model for Nevada County's measure. Part IV chronicles the developments in Nevada County that brought a controversial land use initiative to the ballot. Finally, after highlighting the serious legal infirmities of Measure D, Part V argues that property rights initiatives will always be legally suspect, because they threaten either to eliminate effective land use regulation or to bankrupt state and local governments.

## II. THE TAKINGS ISSUE AND THE PROPERTY RIGHTS MOVEMENT

The Fifth Amendment of the U.S. Constitution prohibits government from taking private property for public use without payment of just compensation.<sup>2</sup> The constitutions of forty-seven states, including California's,<sup>3</sup> contain similar takings clauses, while three states afford protection against government takings by other means.<sup>4</sup> These takings protections do not prohibit government from taking private property for public use—they require only that the government compensate the owner of the property when it does. A critical question, then, is what constitutes a “taking” triggering the just compensation requirement?

For more than a century, this question inspired little controversy. A taking was a government interference with physical ownership, and typically one that was quite obvious—the government condemned a piece of privately owned land in order to build a road or public facility, and paid the property owner the fair market value of his land.<sup>5</sup> The only issue in these cases was whether the government's compensation—its assessment of the land's fair market value—was just. Meanwhile, the government routinely regulated private property in ways that reduced its economic value, and the courts consistently held that no compensation was due.<sup>6</sup>

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<sup>2</sup> U.S. CONST. amend. V (“nor shall private property be taken for public use, without just compensation”). The takings clause applies to states through the Fourteenth Amendment's due process clause. See *Chicago, Burlington & Quincy R.R. Co. v. City of Chicago*, 166 U.S. 226, 235–41 (1897).

<sup>3</sup> Article I, section 19 of the California constitution states that “[p]rivate property may be taken or damaged for public use only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner.” CAL. CONST. art. I, § 19.

<sup>4</sup> See ROBERT MELTZ ET AL., *THE TAKINGS ISSUE* 20 (1999). In New Hampshire and North Carolina, courts have interpreted other constitutional guarantees as requiring just compensation for takings. *Id.* at 20 n.30. Kansas has codified the federal takings clause by statute. KAN. STAT. ANN. § 26-513(a) (2000).

<sup>5</sup> See HARVEY M. JACOBS, *STATE PROPERTY RIGHTS LAWS: THE IMPACT OF THOSE LAWS ON MY LAND* 4 (1999).

<sup>6</sup> See William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 785, 792 (1995).

With the innovation and spread of zoning and environmental regulation in the twentieth century, however, the Supreme Court soon interpreted the takings clause to extend beyond physical expropriations to so-called “regulatory takings.” In 1922, the Supreme Court held in *Pennsylvania Coal Co. v. Mahon* that a Pennsylvania statute forbidding coal mining that might cause subsidence represented a compensable taking of property.<sup>7</sup> For the first time, the Court held that mere regulation of property, even for a legitimate purpose, could give rise to a takings claim. In his opinion for the Court, Justice Holmes wrote that “while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.”<sup>8</sup>

For the next sixty-five years, takings doctrine remained relatively settled, and regulatory takings claims seldom prevailed in the courts. In its 1978 decision in *Penn Central Transportation Co. v. New York City*,<sup>9</sup> the Court identified three factors to be considered in balancing the competing interests of the property owner and the state: the nature of the government action, the severity of the economic impact on the property owner, and the extent of interference with the owner’s reasonable investment-backed expectations.<sup>10</sup> Applying the *Penn Central* test, the courts consistently refused to find that a regulation had “gone too far.”

Landowners finally made some inroads before the Supreme Court in a series of decisions between 1987 and 1995. In *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, the Court held that the government must pay compensation for temporary takings.<sup>11</sup> *Nollan v. California Coastal Commission* and *Dolan v. City of Tigard* established that a taking occurs when the connection between a permit condition and the public purpose it is intended to serve is too remote.<sup>12</sup> Finally, in *Lucas v. South Carolina Coastal Council*, the Court held that a regulation that produces a 100% diminution in property value is a “per se taking” requiring compensation, unless the regulation merely codifies inherent limitations upon the owner’s title derived from background principles of state property and nuisance law.<sup>13</sup>

Rare is the case, however, that involves a per se taking; regulations that eliminate all of a property’s economically beneficial use are the ex-

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<sup>7</sup> See 260 U.S. 393, 414–15 (1922).

<sup>8</sup> *Id.* at 415.

<sup>9</sup> 438 U.S. 104 (1978).

<sup>10</sup> *Id.* at 124.

<sup>11</sup> See 482 U.S. 304, 318–22 (1987). The *First English* decision prevents a government agency from escaping the just compensation requirement simply by rescinding a regulation found to have effected a taking. *Id.* at 319.

<sup>12</sup> See *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 837 (1987) (requiring “essential nexus” between permit condition and public purpose); *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994) (requiring “rough proportionality” between condition and harm it seeks to address).

<sup>13</sup> See 505 U.S. 1003, 1029 (1992).

ception, not the rule.<sup>14</sup> In the majority of cases, the property owner has no right to compensation under the Court's current takings doctrine, even when a regulation causes a severe decrease in the value of the owner's property. As the Court held in 1993, "our cases have long established that mere diminution in the value of property, however serious, is insufficient to demonstrate a taking."<sup>15</sup> Even Justice Scalia, in his majority opinion in *Lucas*, reinforced that "in at least some cases the landowner with 95% loss will get nothing, while the landowner with total loss will recover in full."<sup>16</sup> Unless property owners can show that the value of their property has been completely (or virtually) wiped out, the Court's existing doctrine gives them little hope of success.<sup>17</sup> California has proven to be an especially hostile venue for takings lawsuits. The state's highest court has historically been sympathetic to land use regulation, viewing the use of one's land as a privilege, not a right.<sup>18</sup>

Compounding the challenge for property owners who seek compensation are the significant practical difficulties they face in bringing a takings claim. The ripeness doctrine that has developed in the takings realm requires that a regulatory agency has made a final decision applying the regulation in question to the property in question in such a way that it is clear what the agency will, or will not, allow.<sup>19</sup> To obtain such a final decision, the property owner may have to file several applications for a permit, then pursue all available opportunities for appeal of the agency's decision. Landowners with limited resources may not have the time or money to meet these preliminary requirements. The absence of a clear constitutional standard only adds to the potential for unpredictability and delay in the process.

To environmentalists, land use planners, and other proponents of government regulation, making takings compensation difficult to obtain has been essential to fostering beneficial environmental and land use regulation. The 1970s and early 1980s saw a series of sweeping environmental laws take effect, including the National Environmental Policy Act,<sup>20</sup> Clean Water Act,<sup>21</sup> Clean Air Act,<sup>22</sup> Endangered Species Act,<sup>23</sup> Resource Con-

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<sup>14</sup> See *id.* at 1018 (observing that total deprivations are "relatively rare").

<sup>15</sup> *Concrete Pipe & Prods. of Cal. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 645 (1993) (citing *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 384 (1926) (involving a 75% diminution in value), and *Hadacheck v. Sebastian*, 239 U.S. 394, 405 (1915) (92.5% diminution)).

<sup>16</sup> 505 U.S. at 1020 n.8 (emphasis added).

<sup>17</sup> See Jerome M. Organ, *Understanding State and Federal Property Rights Legislation*, 484 OKLA. L. REV. 191, 192 (1995).

<sup>18</sup> See DENNIS J. COYLE, *PROPERTY RIGHTS AND THE CONSTITUTION* 118–19 (1993). See also *id.* at 141–44 (discussing reluctance of California Supreme Court to find regulatory takings).

<sup>19</sup> See *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186 (1985).

<sup>20</sup> 42 U.S.C. §§ 4321–4370f (2000).

<sup>21</sup> 33 U.S.C. §§ 1251–1387 (2000).

<sup>22</sup> 42 U.S.C. §§ 7401–7671q (2000).

<sup>23</sup> 16 U.S.C. §§ 1531–1544 (2000).

ervation and Recovery Act,<sup>24</sup> and Comprehensive Environmental Remediation, Compensation and Liability Act.<sup>25</sup> In the wake of these landmark federal statutes came state and local land use measures establishing greenways, scenic river corridors, and growth management plans.

To others, however, these were intrusive measures representing “a string of environmental statutes that, when woven together, create a regulatory net covering virtually every aspect of property use and ownership.”<sup>26</sup> In the mid-1980s, this perspective gained strength with the rise of the property rights movement, also known as the “land rights” or “wise use” movement. The property rights movement joined miners, loggers, ranchers, and energy companies of the West with private landowners in the East and South.<sup>27</sup> A third group has also been central to the movement: conservative and libertarian thinkers who believe in limited government and free-market solutions.<sup>28</sup>

To proponents of property rights, the environmentalists’ line of reasoning produces an outcome that is fundamentally unfair. Property rights supporters contend that, if regulations provide benefits enjoyed by the public, then the public—not individual landowners—should pay for them. As the Supreme Court has held, the purpose of the takings clause is “to bar government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”<sup>29</sup> Supporters of property rights have two principal objectives: to minimize government regulation that impairs the use or value of private property, and to ensure that when regulation does lower property value government compensates the owner.<sup>30</sup> By the end of the 1980s, with the courts offering the movement little help in achieving these objectives, property rights proponents turned to their elected officials for relief.

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<sup>24</sup> 42 U.S.C. §§ 6901–6992k (2000).

<sup>25</sup> 42 U.S.C. §§ 9601–9675 (2000).

<sup>26</sup> Nancie G. Marzulla, *The Property Rights Movement: How It Began and Where It Is Headed*, in *LAND RIGHTS* 1, 8 (Bruce Yandle ed., 1995).

<sup>27</sup> Keith Schneider, *When the Bad Guy Is Seen as the One in the Green Hat*, N.Y. TIMES, Feb. 16, 1992, at E3.

<sup>28</sup> See MELTZ ET AL., *supra* note 4, at 537. Libertarian legal scholar Richard Epstein’s 1985 book *Takings: Private Property and the Power of Eminent Domain* has been widely credited as the theoretical foundation for the property rights movement. See, e.g., Lynda J. Oswald, *Property Rights Legislation and the Police Power*, 37 AM. BUS. L.J. 527, 536 (2000); Jacobs & Ohm, *supra* note 1, at 181.

<sup>29</sup> *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

<sup>30</sup> Oswald, *supra* note 28, at 536.

## III. PROPERTY RIGHTS LEGISLATION

## A. Legislation by Statute: State Property Rights Laws

The movement secured its first victory in 1988, when President Reagan issued Executive Order No. 12,630.<sup>31</sup> Modeled after NEPA's environmental impact assessment procedures, the executive order required federal agencies to assess the impact on private property rights before promulgating a regulation.<sup>32</sup> After President Reagan left office in 1989, however, property rights activists sensed that agencies had stopped enforcing the executive order.<sup>33</sup> With their support, the first piece of property rights legislation was introduced in Congress in 1990, a proposed amendment to an agriculture bill that would have codified the executive order.<sup>34</sup> In 1995, one of the main elements of the Contract with America promoted by the newly Republican Congress was the introduction of ambitious property rights bills in both chambers.<sup>35</sup> Facing a threatened veto by President Clinton, however, neither bill made it out of Congress. Although property rights bills have been introduced in every session since 1990, no federal legislation on the subject has ever been enacted.

In state legislatures, on the other hand, property rights legislation has met with considerable success. Since 1991, property rights bills have been introduced in the legislatures of every state,<sup>36</sup> and today close to half of the states have enacted property rights statutes.<sup>37</sup> These statutes have taken three general forms: assessment statutes, conflict-resolution statutes, and compensation statutes.<sup>38</sup>

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<sup>31</sup> Exec. Order No. 12,630, 53 Fed. Reg. 8859 (Mar. 15, 1988), *reprinted in* 5 U.S.C. § 601 (2000).

<sup>32</sup> *See id.*

<sup>33</sup> MELTZ ET AL., *supra* note 4, at 538.

<sup>34</sup> S. 2830, 101st Cong. (1990). The Senate voted down the proposed amendment by a 52-43 vote. 136 CONG. REC. S. 10917 (daily ed. July 27, 1990).

<sup>35</sup> *See* Private Property Protection Act of 1995, H.R. 925, 104th Cong. (1995); Omnibus Property Rights Act of 1995, S. 605, 104th Cong. (1995).

<sup>36</sup> Kirk Emerson & Charles R. Wise, *Statutory Approaches to Regulatory Takings: State Legislation Issues and Implications for Public Administration*, 57 PUB. ADMIN. REV. 411, 412 (1997).

<sup>37</sup> The total number of states that have adopted property rights legislation varies depending on one's classification of statutes. *See, e.g.*, Steven J. Eagle, *Protecting Property from Unjust Deprivations Beyond Takings: Substantive Due Process, Equal Protection, and State Legislation*, in TAKING SIDES ON TAKINGS ISSUES 507, 535 (Thomas E. Roberts ed., 2002) ("at least 22 states"); 1 DANIEL P. SELMI & KENNETH A. MANASTER, STATE ENVIRONMENTAL LAW § 5:23 (2002) (twenty-one states); Michael A. Culpepper, *The Strategic Alternative: How State Takings Statutes May Resolve the Unanswered Questions of Palazzolo*, 36 U. RICH. L. REV. 509, 521 (2002) (twenty states); Oswald, *supra* note 28, at 538 ("over one-half of the states"); Emerson & Wise, *supra* note 36, app. A at 421 (twenty-six states). California has never adopted a property rights statute.

<sup>38</sup> Kirk Emerson and Charles R. Wise identify an additional category of property rights statutes, which they call "preliminary measures." Preliminary measures include statutes that serve as symbolic statements of the legislature's support for property rights, establish commissions to study the issue, or require continuing education for public administrators.

Assessment statutes require that proposed regulations be reviewed for their impact on private property rights, by either the general agency proposing the regulation or the state attorney general.<sup>39</sup> Modeled after Executive Order No. 12,630, assessment statutes are primarily procedural, aimed at informing government decision-makers of the prospective costs of government action. A handful of assessment laws do include action-forcing mechanisms, either preventing a state agency from enacting a regulation that burdens private property rights or requiring the agency to minimize the impacts on property rights.<sup>40</sup>

Conflict resolution statutes, the most recent approach to property rights legislation, strive to streamline the process of administrative appeal. Adopting elements of alternative dispute resolution and mediation, conflict resolution statutes create a formal process for dialogue between regulatory agencies and affected landowners.<sup>41</sup> Florida's Bert J. Harris, Jr., Private Property Rights Protection Act ("Harris Act"), for example, imposes a mandatory 180-day negotiation period before a landowner may file suit against the agency responsible for a regulation that affects his property.<sup>42</sup> During this period, the Act requires a written claim by the landowner, a settlement offer by the agency, and, if the owner rejects the offer, a ripeness decision by the agency outlining the allowable uses of the property.<sup>43</sup> Once the owner receives the ripeness decision, he may proceed to court without facing any additional administrative hurdles. A separate Florida statute, the Florida Land Use and Environmental Dispute Resolution Act, establishes a special master mediation process as an alternative to the Harris Act procedures.<sup>44</sup>

The model for Measure D is the third approach: the compensation statute. Compensation statutes create a cause of action independent of the federal and state takings clauses based on a simple premise: government agencies must pay landowners when rules or regulations lower property values. Significantly, these laws require compensation in situations where current takings doctrine does not.<sup>45</sup> The key ingredient of most compensation laws is the inclusion of a trigger for compensation: an individual may file a claim for compensation with the state only when a rule or regulation diminishes the value of an individual's property to a certain degree.

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Emerson & Wise, *supra* note 36, at 413–14.

<sup>39</sup> See, e.g., KAN. STAT. ANN. §§ 77-701 to 77-707 (1997).

<sup>40</sup> MELTZ ET AL., *supra* note 4, at 543.

<sup>41</sup> See JACOBS, *supra* note 5, at 12.

<sup>42</sup> FLA. STAT. ANN. § 70.001(4)(a) (West Supp. 2003).

<sup>43</sup> *Id.* § 70.001(4)(a), (4)(c), (5)(a).

<sup>44</sup> *Id.* § 70.51.

<sup>45</sup> See, e.g., *id.* § 70.001(9) ("This section provides a cause of action for governmental actions that may not rise to the level of a taking under the State Constitution or the United States Constitution.").

Four states currently have compensation statutes in effect: Texas, Louisiana, Mississippi, and Florida.<sup>46</sup> Of these four, three statutes include numerical triggers, which require compensation when rules or regulations diminish the value of an owner's property beyond a specified percentage. Texas's Private Real Property Rights Preservation Act<sup>47</sup> permits an owner to bring a takings suit when a state action reduces the value of real property by at least 25%. If the landowner prevails in court, the state agency must either rescind the regulation or compensate the owner for the diminution in value of his property.<sup>48</sup> The statute contains broad exceptions for regulations implementing federal laws and for regulations in several distinct areas, including floodplain development and groundwater management.<sup>49</sup> Notably, the statute only applies to state agencies; cities and counties, typically the most active land use regulators, are generally exempted from the act's coverage.<sup>50</sup> The Louisiana and Mississippi statutes also contain numerical compensation triggers (of 20% and 40%, respectively), but their scope is limited to impacts on agricultural and forest lands.<sup>51</sup>

In contrast to these three state statutes, Florida's Harris Act does not use a numerical trigger for compensation; instead, compensation is due when a government action has "inordinately burdened" the use of real property.<sup>52</sup> According to the statute, an inordinate burden exists when "the property owner is permanently unable to attain the reasonable, investment-backed expectation for the existing use of the real property," or when the owner "bears permanently a disproportionate share of a burden imposed for the good of the public, which in fairness should be borne by the public at large."<sup>53</sup> The Harris Act also provides that governmental actions that are designed to prevent nuisances or that cause temporary impacts cannot give rise to takings claims.<sup>54</sup>

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<sup>46</sup> See Oswald, *supra* note 28, at 544–45. Washington enacted a compensation statute in 1995 that would have compensated property owners for any diminution in the value of their property, see Private Property Regulatory Fairness Act of 1995, 1995 Wash. Legis. Serv. ch. 98 (I.M. 164) (West), but voters repealed the statute later that year in a statewide referendum. See Rob Taylor, *The Voters Soundly Reject R-48*, SEATTLE POST-INTELLIGENCER, Nov. 8, 1995, at A1. In addition, North Carolina has long provided by statute for compensation for the taking of property rights in land under navigable waters, along with certain fishing rights. N.C. GEN. STAT. § 113-206(e) (2001). Unlike the four compensation laws discussed in this Part, however, North Carolina's statute does not appear to expand the constitutional definition of a taking. Mark W. Cordes, *Leapfrogging the Constitution: The Rise of State Takings Legislation*, 24 ECOLOGY L.Q. 187, 214 (1997).

<sup>47</sup> TEX. GOV'T CODE ANN. § 2007.002(5)(B)(ii) (Vernon 2000).

<sup>48</sup> *Id.* § 2007.024.

<sup>49</sup> *Id.* § 2007.003(b)(1)–(14).

<sup>50</sup> *Id.* § 2007.003(b)(1), (a)(3).

<sup>51</sup> LA. REV. STAT. ANN. §§ 3:3602, 3:3610 (West 2003); MISS. CODE ANN. §§ 49-33-1 to 49-33-19 (1999).

<sup>52</sup> FLA. STAT. ANN. § 70.001(2) (West Supp. 2003).

<sup>53</sup> *Id.* § 70.001(3)(e).

<sup>54</sup> *Id.*

After a flurry of activity in the mid-1990s led to the adoption of assessment, conflict resolution, and compensation statutes across the country, the legislative campaign of the property rights movement lost most of its momentum by the end of the decade. Whether due to perceived difficulties in implementation, concern with the potential price tag of property rights laws, or other factors,<sup>55</sup> no state legislature has enacted a piece of property rights legislation since the mid-1990s.<sup>56</sup> Where takings legislation has received any significant support in recent years, it has taken the form of the subject of this Note: the property rights initiative.

### *B. Legislation by Initiative: Oregon's Measure 7*

The initiative process—a method by which citizens enact legislation directly—first appeared as a Progressive era reform in South Dakota in 1898.<sup>57</sup> In the years since, twenty-two other states have adopted the initiative process.<sup>58</sup> A state or local legislative body can find itself evenly divided, dominated by moneyed interests, or unwilling to act on a politically sensitive issue. In circumstances when governing bodies have been slow to take action, the initiative has proven a useful tool for voters to enact legislation or to amend the state constitution.<sup>59</sup>

Since the amendment of the state constitution in 1911 to provide the electorate with the power of initiative,<sup>60</sup> the initiative has become central to politics and policy in California. California has enacted more ballot measures than any state except Oregon,<sup>61</sup> prompting the California Supreme Court to call the initiative power “one of the most precious rights of our democratic process.”<sup>62</sup> Nationwide, direct democracy measures have played an important role in shaping state and national policy, intro-

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<sup>55</sup> See Harvey M. Jacobs, *The Impact of State Property Rights Laws: Those Laws and My Land*, LAND USE L. & ZONING DIG., Mar. 1998, at 3, 6–7 (suggesting that these concerns have contributed to the decline in property rights laws).

<sup>56</sup> John C. Ryan, *Oregon Gets Taken*, AMER. PROSPECT, Oct. 21, 2002, at 17.

<sup>57</sup> K. K. DuVivier, *Think Globally, Act Locally: The Role of State and Local Ballot Initiatives in International Environmental Law*, 2000 COLO. J. INT'L ENVTL. L. & POL'Y 25, 29.

<sup>58</sup> *Id.*

<sup>59</sup> See *Id.* at 30–31.

<sup>60</sup> Anthony Saul Alperin & Kathline J. King, *Ballot Box Planning: Land Use Planning Through the Initiative Process in California*, 21 SW. U. L. REV. 1, 2 (1992); see CAL. CONST. art. 4, § 1 (“The legislative power of this State is vested in the California Legislature . . . but the people reserve to themselves the powers of initiative and referendum.”). Voters may use the initiative on both the state and local levels. *Id.* art. II, § 8(a) (state); *id.* art. II, § 11(a) (counties and general law cities); *id.* art. XI, § 3(b) (charter cities). The 1911 amendment also gave voters the other two tools of direct democracy: the referendum, which permits voters to reject laws enacted by the legislature, and the recall, which allows the electorate to remove a representative from office. Alperin & King, *supra*, at 2 (citing LEAGUE OF WOMEN VOTERS OF CAL., GUIDE TO CAL. GOV'T 3, 13, 19 (13th ed. 1986)).

<sup>61</sup> Ryan, *supra* note 56, at 17.

<sup>62</sup> Associated Home Builders, Inc. v. City of Livermore, 557 P.2d 473, 477 (Cal. 1976) (quoting Mervynne v. Acker, 11 Cal. Rptr. 340, 344 (Cal. Ct. App. 1961)).

ducing such statewide reforms as women's suffrage, the eight-hour workday, and term limits.<sup>63</sup> In the 2002 election, initiatives at the state level covered such varied topics as animal protection, drug policy reform, education reform, election reform, gaming, and taxes.<sup>64</sup> Although environmental and land use-related initiatives were less prevalent, state ballots in 2002 did contain measures concerning clean water bonds, transportation bonds, dam buybacks, radioactive waste dumping, and genetically modified foods.<sup>65</sup>

The most notorious land use-related statewide initiative in recent years—and an inspiration for Measure D—was Oregon's Measure 7, which appeared on the ballot in November 2000. As with Measure D two years later, Oregon's Measure 7 embodied a popular revolt against the perceived overreaching of government land use policy. Under a state law passed in 1973, all local governments in Oregon must adopt development plans that conform to state planning goals, including the requirement that all new development be located within urban growth boundaries.<sup>66</sup> This comprehensive land use planning program has earned Oregon a reputation as the "Mecca" of regional planning.<sup>67</sup> It has also been sharply criticized as a severe encroachment on private property rights. Specifically, critics maintain that the program has inflated property values within the growth boundaries while depressing those outside the boundaries.<sup>68</sup> Disillusionment with the planning program, especially in rural areas outside the growth boundaries, was a major impetus behind Measure 7.<sup>69</sup>

The central purpose and effect of the initiative was to expand dramatically the definition of a "taking" requiring just compensation. Sponsored by Oregonians in Action, a property rights organization, Measure 7 proposed to amend the takings clause of the Oregon Constitution<sup>70</sup> to provide that a state or local government must pay compensation for the passage or enforcement of a regulation that, by restricting the use of pri-

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<sup>63</sup> DuVivier, *supra* note 57, at 26.

<sup>64</sup> See INITIATIVE & REFERENDUM INSTITUTE, GENERAL ELECTION POST ELECTION REPORT 2-5 (2002), available at [http://www.ballot.org/spotlight/I&R\\_ElectionReport.pdf](http://www.ballot.org/spotlight/I&R_ElectionReport.pdf) (last visited Dec. 7, 2003) (on file with the Harvard Environmental Law Review).

<sup>65</sup> See Ballot Initiative Strategy Center ("BISC"), *Environmental Measures on the Ballot*, at <http://www.ballot.org/spotlight/enviro.html> (last visited Dec. 7, 2003) (on file with the Harvard Environmental Law Review); BISC, *2002 Initiative and Referenda Election Results*, at [http://www.ballot.org/spotlight/2002\\_Ballot\\_Measure\\_Result\\_Cliff\\_Notes.doc](http://www.ballot.org/spotlight/2002_Ballot_Measure_Result_Cliff_Notes.doc) (last visited Dec. 7, 2003) (on file with the Harvard Environmental Law Review).

<sup>66</sup> Oregon Land Use Act, S.B. 100 (Or. 1973) (codified as amended at OR. REV. STAT. §§ 197.000-.860 (2001)).

<sup>67</sup> Nicole Stelle Garnett, *Trouble Preserving Paradise?*, 87 CORNELL L. REV. 158, 169 (2001).

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 169 & n.92 (citing Oregon newspaper articles noting "rural uproar" over regulations restricting development of farmland).

<sup>70</sup> OR. CONST. art. I, § 18 ("Private property shall not be taken for public use . . . without just compensation").

vate real property, reduces its value.<sup>71</sup> Before Measure 7, the Oregon courts had interpreted the state constitution's takings clause as ordering compensation only when a regulation deprives a landowner of *all* economically viable use of the property.<sup>72</sup> Measure 7 departed from this approach, and from every previously enacted state property rights statute in the nation, by proposing to require compensation for *any* reduction in property value—without requiring either a numerical trigger or an “inordinate burden” test for compensation.

The measure did provide for three exceptions to the compensation requirement. A takings claim would not arise from (1) “adoption or enforcement of historically and commonly recognized nuisance laws,” (2) “a regulation to implement a requirement of federal law,” or (3) “a government regulation prohibiting the use of a property for the purpose of selling pornography, performing nude dancing, selling alcoholic beverages or other controlled substances, or operating a casino or gaming parlor.”<sup>73</sup> Even with these exceptions, the scope of Measure 7 remained extremely broad: as the measure itself stated, it would give rise to a takings claim whenever an owner's property value decreased as a result of a regulation imposing an “affirmative obligation to protect, provide, or preserve wildlife habitat, natural areas, wetlands, ecosystems, scenery, open space, historical, archaeological or cultural resources, or low income housing.”<sup>74</sup> With such a broad reach and no compensation trigger, Measure 7 threatened to become the “most sweeping compensation statute ever enacted.”<sup>75</sup>

Opponents of the measure cited the enormous costs projected to arise from the creation and implementation of the proposed compensation regime. A fiscal impact study conducted by state analysts, included in the state voters' pamphlet, estimated that the measure could cost Ore-

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<sup>71</sup> *League of Oregon Cities v. Oregon*, 56 P.3d 892, 905 (Or. 2002) (quoting part (a) of Measure 7, which stated, “If the state, a political subdivision of the state, or a local government passes or enforces a regulation that restricts the use of private real property, and the restriction has the effect of reducing the value of a property upon which the restriction is imposed; the property owner shall be paid just compensation equal to the reduction in the fair market value of the property.”).

<sup>72</sup> *Id.* at 906 (citing *Boise Cascade Corp. v. Bd. of Forestry*, 935 P.2d 411, 420 (Or. 1997)).

<sup>73</sup> *League of Oregon Cities*, 56 P.3d at 905 (quoting sections (b), (c) of Measure 7).

<sup>74</sup> *Id.* at 906 (quoting section (e) of Measure 7). Indeed, although they were never heard, the first two claims filed under Measure 7 demonstrated its breadth of coverage—a mining company brought a \$50 million claim against the Jackson County for being denied a permit to transport 18 million tons of sand through a historic district, and a woman filed a claim against her local government for refusing to allow her to raise stray cats on her property. See Randy Gragg, *Measure 7 Detonates Land-Use Planning*, PORTLAND OREGONIAN, Dec. 3, 2000, 2000 WL 27111 166.

<sup>75</sup> See *Oregon Supreme Court Invalidates Measure 7*, TAKINGS WATCH (Community Rights Counsel), Oct. 2002, at 1, 1, at <http://www.communityrights.org/PDFs/Newsletters/October2002.pdf> (last visited Dec. 7, 2003) (on file with the Harvard Environmental Law Review).

gon state and local governments as much as \$5.4 billion.<sup>76</sup> According to a study prepared for 1000 Friends of Oregon, a land use group that led the opposition to Measure 7, the cost of maintaining the Portland area's urban growth boundary alone could be between \$3.5 billion and \$7 billion, threatening the viability of the state's acclaimed regional planning program.<sup>77</sup>

Despite more than \$1 million spent by its opponents,<sup>78</sup> however, Measure 7 received surprisingly little publicity in the weeks leading up to election day in 2000.<sup>79</sup> In addition to being overshadowed by a contentious presidential election, Measure 7 was joined on the Oregon ballot by twenty-five other measures, including measures tackling such hot-button issues as tax cuts and gay rights.<sup>80</sup> On November 7, 2000, Oregon voters passed Measure 7 by a 53% to 47% margin. The initiative was defeated only in the urban counties along the state's Interstate 5 corridor; in rural counties located outside of urban growth boundaries, the initiative received overwhelming support.<sup>81</sup>

The measure was immediately challenged in court by landowners and local governments on a variety of constitutional grounds.<sup>82</sup> Within three months of the election, the measure was enjoined and then invalidated by the trial court,<sup>83</sup> and on October 4, 2002, the Oregon Supreme Court affirmed the trial court's holding that Measure 7 was unconstitutional.<sup>84</sup> Under the "separate vote" requirement of Oregon's constitution, a single ballot measure cannot make two substantive changes to the constitution unless they are closely related.<sup>85</sup> The court found that Measure 7 violated this requirement when it made two substantive changes that were not closely related: (1) expanding takings liability, and (2) limiting free speech protections by requiring compensation for most regulations

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<sup>76</sup> See Editorial, *The Sleeper*, PORTLAND OREGONIAN, Nov. 2, 2000, 2000 WL 27104742; R. Gregory Nokes, *Study Sees Billions in Boundary Costs If Measure Passes*, PORTLAND OREGONIAN, Oct. 17, 2000, at A1.

<sup>77</sup> Nokes, *supra* note 76.

<sup>78</sup> Peter Livingston, *Oregon's Land Use Wars*, 61-JUN OR. ST. B. BULL. 9.

<sup>79</sup> See *id.*; Garnett, *supra* note 67, at 173.

<sup>80</sup> Editorial, *supra* note 76.

<sup>81</sup> Patty Wentz, *This Land Is Their Land*, WILLAMETTE (OR.) WK., Nov. 29, 2000, at 21, available at <http://www.wweek.com/html2/lead112800.html>.

<sup>82</sup> The local governments, in *League of Or. Cities v. Oregon*, claimed that Measure 7 would have an enormous fiscal impact upon them any time they sought to regulate real property. See *League of Or. Cities*, 56 P.3d at 903. In a separate suit, *McCall v. Kitzhaber*, a group of landowners claimed that Measure 7 would lead to increased development on land in the area of their property, lowering their parcel's value. See *id.* at 902-03. The trial court consolidated the two lawsuits. See *id.* at 897.

<sup>83</sup> See *League of Or. Cities*, 56 F.3d 897.

<sup>84</sup> See *id.* at 892.

<sup>85</sup> OR. CONST. art. XVII, § 1 ("When two or more amendments shall be submitted . . . to the voters of this state at the same election, they shall be so submitted that each amendment shall be voted upon separately"); *Armatta v. Kitzhaber*, 959 P.2d 49, 64 (Or. 1998) (interpreting "two or more amendments" to include a "proposal [that] would make two or more changes to the constitution that are substantive and that are not closely related").

but not for regulations prohibiting the use of property to sell pornography.<sup>86</sup>

Built on shaky legal ground, Measure 7's compensation scheme never had a chance to take effect. Even so, its passage galvanized property rights advocates who had seen few legislative advances since the mid-1990s. The country's first statewide initiative designed to expand the scope of takings liability, Measure 7 served as an inspiration for the sponsors of Measure D, who were preparing to introduce the nation's first local takings initiative.

#### IV. NEVADA COUNTY'S MEASURE D

More than in any of the states that have passed property rights legislation—even more than in Oregon—Nevada County's property rights measure grew out of a backdrop of tension between groups with conflicting views on the region's future. Once a county of gold rush towns, later populated by ranchers, miners, and loggers, Nevada County has made an unsteady transition over the past forty years.<sup>87</sup> The 1960s brought a migration of high-tech video companies to Nevada County, a trend that continued in the 1980s and 1990s as electronics firms took root in the western part of the county.<sup>88</sup> These years also saw the beginning of an influx of nature-lovers, artisans, and senior citizens.<sup>89</sup> Although it is the least ethnically diverse county in California—in 1990, more than 97% of residents were white<sup>90</sup>—Nevada County today is anything but homogeneous, consisting, in the words of one observer, of “a fractious mix of farmers, retirees, back-to-the-land types, artists and aging hippies.”<sup>91</sup>

As the makeup of the county has changed, its politics have become progressively more polarized. Many of the county's newer residents are wealthy emigrants of the Bay Area, Sacramento, and Southern California who have fled the cities and suburbs for the county's rural setting. Having moved to Nevada County to escape the rapid pace of development elsewhere in California, these emigrants have supported slow-growth policies, hoping to keep their new communities from replicating the areas they left.<sup>92</sup> In such a swiftly growing area, however, their effort is an up-

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<sup>86</sup> According to the court, Measure 7 explicitly amended the constitution's takings clause, OR. CONST. art. I, § 18, and changed rights guaranteed by the free speech clause, *id.* art. I, § 8. *League of Or. Cities*, 56 P.3d at 905–09.

<sup>87</sup> Paul Shigley, *Local Takings Initiative Heads to Ballot*, PLANNERS TABLOID (Sacramento Valley Section, Cal. Chapter, Am. Planning Ass'n, Sacramento, Cal.), Aug.-Sept. 2002, at 3, available at <http://www.sactoapa.org/newsltr/news0208.pdf>.

<sup>88</sup> *See id.*; TIMOTHY P. DUANE, SHAPING THE SIERRA 180 (1999).

<sup>89</sup> Shigley, *supra* note 87, at 3.

<sup>90</sup> DUANE, *supra* note 88, at 78.

<sup>91</sup> Mary Lynne Vellinga, *Property Rights Battle Heats Up in Rural Nevada County*, *Calif.*, SACRAMENTO BEE, Sept. 17, 2002, 2002 WL 100570129.

<sup>92</sup> *Id.*

hill battle. Construction has replaced mining, logging, and ranching as the industry that drives the local economy.<sup>93</sup> The county's population has tripled to 93,000 over the past thirty years, and is projected to grow to approximately 133,000 by 2020.<sup>94</sup>

For years, slow-growth advocates received little sympathy from the county's five-member Board of Supervisors, historically dominated by conservative, pro-business politicians.<sup>95</sup> Things began to change in 1995, when the Board, after years of debate, adopted a comprehensive amendment to the county's general plan, which served as a long-term policy guide for the physical development of the county. The updated plan contained several new protections for environmentally sensitive areas, including provisions that discouraged development in oak groves, near streams, and on steep slopes.<sup>96</sup> The Board also opted not to include in the plan a policy recommended by property rights advocates that would guarantee protection for private property.<sup>97</sup>

The most dramatic transformation took place in the general election of November 1998, when a pair of environmentalists unseated incumbents, giving slow-growth proponents a 4-1 majority on the Board. Over the next four years, the supervisors aggressively enforced environmental and land use regulations in handling applications for development permits.<sup>98</sup> The Board also proposed several measures intended to restrict growth and protect environmentally sensitive land.<sup>99</sup> Its most controversial move was its approval in May 2000 of Natural Heritage 2020 ("NH 2020"), a two-year public planning program designed to "develop a comprehensive strategy to identify, manage, and protect natural habitats, plant and animal species diversity, and open space resources in Nevada County."<sup>100</sup>

Led by the California Association of Business, Property and Resource Owners ("CABPRO"), a property rights advocacy organization based in the city of Grass Valley in Nevada County, property rights proponents ardently attacked the program. To CABPRO's members, NH 2020 signaled the Board's intent to create open space buffer zones, wetlands areas, and wildlife habitat preserves—all measures that would im-

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<sup>93</sup> DUANE, *supra* note 88, at 180.

<sup>94</sup> Jeff Kearns, *Izzy Under Assault*, SACRAMENTO NEWS & REV., Oct. 3, 2002, available at <http://www.newsreview.com/issues/sacto/2002-10-03/cover.asp>.

<sup>95</sup> See Vellinga, *supra* note 91.

<sup>96</sup> *Id.*

<sup>97</sup> Initiative Petition, Property Owner Claims Reimbursement Process Initiative, Attachment C (Jan. 31, 2002) ("Statement of Reasons").

<sup>98</sup> Vellinga, *supra* note 91.

<sup>99</sup> See *Ballot Measure in Nevada County, California, That Could Energize the Growing National Property Rights Movement* (NPR radio broadcast, Oct. 29, 2002) [hereinafter "NPR"].

<sup>100</sup> NEVADA COUNTY PLANNING DEP'T, NEVADA COUNTY NATURAL RESOURCES REPORT para. 5 (2002), available at <http://www.mynevadacounty.com/cda/planning/nh2020/chapter1.html>.

pede development.<sup>101</sup> The opposition to NH 2020 was so bitter that in May 2002 the Board voted unanimously to discontinue the program,<sup>102</sup> after one of its leading proponents on the Board declared, “I don’t want to tear the community in half any more.”<sup>103</sup>

It was out of this pitched battle between environmentalists and property rights advocates that Measure D was born—and the Board of Supervisors was its primary target. As CABPRO’s executive director declared in an e-mail to supporters, the measure was intended to “act as ‘insurance’ against whatever the Supervisors may come up with in the future.”<sup>104</sup> A former member of the county planning commission echoed this sentiment in a letter to the local newspaper:

The Board of Supervisors in recent years has been dominated by a group who have largely ignored a sizeable segment of the population while promoting its own ideas about how the county should develop (or not develop). Those who have been ignored got hopping mad, and put on a major push to create the initiative. The majority on the Board of Supervisors have largely brought this upon themselves.<sup>105</sup>

Property rights advocates elsewhere in the United States had relied upon their state representatives to pass legislation expanding the just compensation requirement. For Nevada County residents unhappy with the actions of an environmentalist Board of Supervisors, however, to take the parallel action at the county level was simply impracticable. To enact a county ordinance would have required the approval of a majority of the same Board these residents sought to constrain. Therefore, with Oregon’s Measure 7 serving as both a model and a source of inspiration, Nevada

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<sup>101</sup> Citizens for Property Rights in Nevada County (“CPR-INC”), *NH 2020*, available at [http://www.cpr-inc.net/html/body\\_nh\\_2020.html](http://www.cpr-inc.net/html/body_nh_2020.html) (last visited Dec. 7, 2003) (on file with the Harvard Environmental Law Review). CPR-INC is a nonprofit organization that was created to oppose the implementation of NH 2020. CPR-INC, *About Us*, at [http://www.cpr-inc.net/html/body\\_about\\_us.html](http://www.cpr-inc.net/html/body_about_us.html) (last visited Dec. 7, 2003) (on file with the Harvard Environmental Law Review).

<sup>102</sup> See Grace Karpa, *Board Wants NH 2020 Done June 30*, THE UNION (Grass Valley-Nevada City, Cal.), May 8, 2002.

<sup>103</sup> Grace Karpa, *Martin Says Finish NH 2020 by July*, THE UNION (Grass Valley-Nevada City, Cal.), May 3, 2002 (reporting comment of supervisor Elizabeth “Izzy” Martin).

<sup>104</sup> E-mail from Margaret Urke, Executive Director, CABPRO, to “Margaret CABPRO” (July 25, 2001), at <http://moab.off-road.com/pipermail/ren/msg02616.html> (last visited Dec. 7, 2003) (on file with the Harvard Environmental Law Review). Her comments referred to a prior version of the initiative, submitted in July 2001. That version and a second version submitted in December 2001 were both withdrawn to make revisions. See Grace Karpa, *Group Still Refining Land Rights’ Initiative*, THE UNION (Grass Valley-Nevada City, Cal.), Jan. 8, 2002.

<sup>105</sup> See Editorial, *Measure D Won’t Solve Our Land-Use Problem*, THE UNION (Grass Valley-Nevada City, Cal.), Oct. 21, 2002 (citing July 2002 letter to *The Union* by John Lorini).

County's property rights activists focused on placing an initiative on the county ballot.<sup>106</sup>

Whereas statewide initiatives have only occasionally addressed land use issues, a substantial percentage of initiatives at the local level have concerned issues of zoning and development.<sup>107</sup> The reasons for the prevalence of local land use initiatives are twofold. First, land use regulation is one of the few truly local powers—that is, powers not significantly limited by constitutional restrictions and state law preemption.<sup>108</sup> Second, making a substantial impact on local land use planning through the conventional processes can take a considerable amount of time and energy. As one study observed, “[c]ommunity activist groups that use the initiative and referendum process feel that they can mobilize . . . to put a . . . measure on the ballot” more easily “than sustaining community involvement in protracted planning and adoption processes.”<sup>109</sup>

The majority of land use initiatives on California's local ballots have been efforts to limit construction, slow the pace of growth, and protect environmentally sensitive areas.<sup>110</sup> In the 2002 election, for instance, several Bay Area communities voted on slow-growth measures that sought to limit building heights, prohibit development of open space, or slow construction on city outskirts.<sup>111</sup> But the slow-growth movement has not been alone in using the initiative process to its advantage, as pro-development forces have also put their initiatives before the electorate. The most publicized of such initiatives, enacted in 1982, was Tehama County's Landowners Bill of Rights, which prohibited county agencies from placing certain restrictions on the use of private property.<sup>112</sup> Twenty years later, property rights forces would present an equally bold initiative to the voters of a California county.

On January 31, 2002, Citizens for Fair and Balanced Land Use (“CFBL”), CABPRO's political action committee, submitted to the Nevada County clerk a proposed ballot measure that would soon be titled the “Property Owner Claims Reimbursement Process Initiative.”<sup>113</sup> The

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<sup>106</sup> See Shigley, *supra* note 87, at 3.

<sup>107</sup> See Daniel P. Selmi, *Reconsidering the Use of Direct Democracy in Making Land Use Decisions*, 19 UCLA J. ENVTL. L. & POL'Y 293, 295, 300 (2001).

<sup>108</sup> *Id.* at 301.

<sup>109</sup> Madelyn Glickfield et al., *Trends in Local Growth Control Ballot Measures in California*, 6 UCLA J. ENVTL. L. & POL'Y 111, 137 (1987).

<sup>110</sup> Alperin & King, *supra* note 60, at 1–2.

<sup>111</sup> John King, *Differing Views in State on Handling of Growth*, S.F. CHRON., Nov. 6, 2002, at A2.

<sup>112</sup> The Landowners Bill of Rights was deemed to violate the California constitution by a California appellate court five years later. See *Patterson v. County of Tehama*, 235 Cal. Rptr. 867 (Cal. Ct. App. 1987) (opinion not officially published on direction of the California Supreme Court by order dated June 25, 1987).

<sup>113</sup> Grace Karpa, *Property Value Initiative Submitted to County—Again*, THE UNION (Grass Valley-Nevada City, Cal.), Feb. 1, 2002. County counsel prepared the ballot title and summary for the measure in early February. Grace Karpa, *Petition Backers Reach Out for Help*, THE UNION (Grass Valley-Nevada City, Cal.), Mar. 29, 2002.

initiative petition attached to the proposed initiative was signed by five proponents: CFBLU Chairman Russell Steele, CABPRO Executive Director Margaret Urke, ski ranch owner Norm Saylor,<sup>114</sup> real estate appraiser Benoni Nowland IV, and Kimberly Janousek, former president of the anti-NH 2020 group CPR-INC.<sup>115</sup> Drafted by Tahoe City attorney Gregg Lien,<sup>116</sup> the complete measure read:

The people of the County of Nevada ordain as follows:

Nevada County (the “County”) shall provide an orderly process for addressing claims for reimbursement, payable to the property owner, when it is determined that there is a reduction in the market value of an owner’s parcel.

After passage of this initiative, this process applies to proposed projects when regulatory actions or determinations by the County restrict existing use or utility, in whole or in part, of the affected parcel.

Restrictions based upon a clear and present danger to public health and safety, and traditionally recognized common law nuisance prohibitions, shall not be considered in calculating reductions in value.

A property owner seeking reimbursement pursuant to this initiative shall first seek beneficial best use of the property. This best use must be denied by the Board of Supervisors prior to filing any claim.

The Superior Court of the County shall have exclusive jurisdiction over claims made, and shall have the power to make independent findings of fact and conclusions of law, and shall not be bound by findings or determinations by the County.

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<sup>114</sup> In 2000, Saylor, nearing retirement, reached a tentative agreement to sell his 455-acre ranch in Donner Pass to an investment group for \$9 million—until the group backed out upon learning that approval for its proposed timeshare development would face an uphill battle before the Board of Supervisors. His experience was frequently cited in media coverage of the battle over Measure D. See NPR, *supra* note 99; Vellinga, *supra* note 91.

<sup>115</sup> Initiative Petition, *supra* note 97, Attachment A (“Proponents of the Initiative Petition”).

<sup>116</sup> John Dickey, *Regulation vs. Land Rights: Will Measure Aid Property Owners or Lawyers?*, THE UNION (Grass Valley-Nevada City, Cal.), Aug. 21, 2002. Lien had represented an association of Lake Tahoe Basin property owners in earlier stages of *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302 (2002), in which the Supreme Court rejected a takings challenge to a planning moratorium for the Lake Tahoe area. See *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 808 F. Supp. 1474, 1476 (D. Nev. 1992). He received assistance on an early draft of Measure D from James Burling of the Pacific Legal Foundation, a public interest law firm devoted to promoting limited government and individual rights. Dickey, *supra*.

Reimbursement shall equal the difference in market value, with and without the regulation or action complained of, and shall include reasonable attorneys' fees and costs.

If any phrase, clause or part of this initiative is found to be invalid by a court of competent jurisdiction, the remaining phrases, clauses and parts shall remain in full force and effect.<sup>117</sup>

On May 22, 2002, CFBL submitted 5922 signatures in support of the initiative, qualifying it for the general election ballot.<sup>118</sup>

In June, the Board of Supervisors commissioned independent studies of the initiative's potential fiscal and land use impacts. Assessing the potential impacts of Measure D was complicated by several significant ambiguities in the text of the initiative. First, the initiative would have compelled the County to pay compensation for actions that "restrict existing use or utility" of property, but did not define "existing use." As a preliminary matter, the use of "*existing* use or utility" was puzzling, as most regulatory takings are thought to occur when a landowner seeks—and is denied—a permit for a *proposed* use, not an existing one.<sup>119</sup> In any case, it was unclear from the text whether "existing use or utility" referred to the present use of the property, the maximum use allowable under existing regulations, or the most profitable possible use irrespective of existing regulations.<sup>120</sup> Russell Steele, executive director of Citizens for Fair and Balanced Land Use, insisted that the "existing use" would be based on existing zoning regulations—but not necessarily other County environmental restrictions.<sup>121</sup> One thing was clear: unlike the four existing state compensation statutes, which use a numerical trigger or "inordinate burden" standard for compensation, Measure D would have afforded a right to compensation even for minimal losses in property value. Washington's Private Property Regulatory Fairness Act of 1995 and Oregon's

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<sup>117</sup> Initiative Petition, *supra* note 97, Attachment B ("Proposed Ballot Measure").

<sup>118</sup> Grace Karpa, *Signatures Filed for Property Rights Initiative*, THE UNION (Grass Valley-Nevada City, Cal.), May 23, 2002. Under California elections law, to qualify for the general election ballot an initiative petition must be signed by a number of voters equal to 10% of the ballots cast in the most recent November gubernatorial election. CAL. ELEC. CODE § 9118 (West 2003). The 5463 certified signatures gathered by CFBL represented 14% of the voters in the November 1998 election. YubaNet, *Property Rights Politics in Nevada County, CA*, YUBANET, Jan. 7, 2003, at [http://www.yubanet.com/artman/publish/article\\_1349.shtml](http://www.yubanet.com/artman/publish/article_1349.shtml) (last visited Dec. 7, 2003) (on file with the Harvard Environmental Law Review).

<sup>119</sup> See Grace Karpa, *Dreadful or Fantastic? Measure Would Codify Compensation*, THE UNION (Grass Valley-Nevada City, Cal.), Apr. 30, 2002 (quoting e-mail from Roger Pilon, director of the Cato Institute's Center for Constitutional Studies).

<sup>120</sup> SEIFEL CONSULTING INC., FISCAL IMPACT ANALYSIS: PROPOSED PROPERTY OWNER CLAIMS REIMBURSEMENT PROCESS INITIATIVE ON COUNTY OF NEVADA GENERAL FUND 2-3 (2002) [hereinafter FISCAL IMPACT ANALYSIS].

<sup>121</sup> Shigley, *supra* note 87, at 3.

Measure 7—both since invalidated—represented the only other state enactments without compensation triggers.

Second, Measure D required a claimant to seek—and the Board of Supervisors to deny—“beneficial best use” of the property before filing a claim for compensation. According to the initiative’s sponsors, before bringing a claim for compensation, a property owner would first have to apply to the county planning department and other relevant county authorities for permission to carry out a particular project. If the application were rejected, the owner would have to pursue an administrative appeal as high as the Board of Supervisors.<sup>122</sup> Clearly the “beneficial best use” provision served as a ripeness requirement. The term “beneficial best use” is not defined in any state or federal statute, nor has it been used in any published court opinion in the United States.<sup>123</sup> The term of art “highest and best use,” however, typically refers to the maximum feasible and profitable use permitted under existing land use regulations.<sup>124</sup> The initiative’s use of a different term suggested that it could refer to the maximum potential use in the absence of any land use regulations.<sup>125</sup>

Equally vague was the application of Measure D’s compensation requirement to “regulatory actions or determinations by the County.” Backers of Measure D maintained that the initiative’s exemption of “restrictions based on a clear and present danger to public health and safety” and “traditionally recognized common law nuisance prohibitions” limited its scope to regulations that merely promoted “quality of life” values, including the designation of open space, scenic viewsheds, deer migration corridors, riparian areas, trail easements, and urban growth boundaries.<sup>126</sup> Although Measure D proponents claimed that the initiative would not have applied to enforcement of federal, state, or municipal laws and regulations,<sup>127</sup> however, the plain language of the initiative did not clearly exclude them.

In short, given the vagueness of the measure’s terminology, it was virtually impossible to predict exactly what government actions would have required compensation under Measure D. The County’s fiscal impact analysis narrowed the universe of potential readings of the measure to three interpretations. All three appeared to be legally feasible—but they were dramatically different in their scope and potential effect.

The first, and most conservative, interpretation suggested that compensation would only have been available for the impacts of new regula-

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<sup>122</sup> CFBL, Property Owner Claims Reimbursement Process Initiative Frequently Asked Questions para. 11 (2002).

<sup>123</sup> FISCAL IMPACT ANALYSIS, *supra* note 120, at 3.

<sup>124</sup> See DICTIONARY OF REAL ESTATE APPRAISAL 171 (3d ed. 1993).

<sup>125</sup> See FISCAL IMPACT ANALYSIS, *supra* note 120, at 2.

<sup>126</sup> See *id.* para. 7.

<sup>127</sup> See *id.* at para. 8.

tions enacted by the County after the adoption of the initiative.<sup>128</sup> This “prospective” interpretation seems to accord with one proponent’s vision of Measure D as “insurance” against future Board initiatives along the lines of NH 2020.<sup>129</sup> However, it also conflicts with the sponsors’ stated objective that the Board “amend its regulations to ease the burden already being shouldered by Nevada County residents.”<sup>130</sup> Under this reading, the supervisors could still enforce existing regulations in ways that restrict development, such as the denial of a building permit.

The intermediate interpretation would have allowed the County to enforce its current use and density requirements without compensating landowners. The County could not, however, have enacted or enforced any other zoning, land use, or environmental regulations, including height limits, setbacks, dedication requirements, design standards, and open space and resource protection policies.<sup>131</sup> The most far-reaching reading of Measure D would have allowed a property owner to receive compensation up to the value of the property without any restrictions, except for those preventing a “clear and present danger to public health and safety” or based on the common law of nuisance.<sup>132</sup>

Even after identifying the three potential interpretations, the difficulty of predicting the response of the County government, the development plans of individual landowners, and the number of claims that would be brought combined to make a viable fiscal estimate a virtually impossible task.<sup>133</sup> The consultant who prepared the fiscal impact analysis for Nevada County called it the most challenging assignment she had ever done in her twenty years of work.<sup>134</sup> After stressing the speculative nature of its analysis, the fiscal study projected that the annual cost to the County of compensating property owners under the measure would be \$3 million to \$10 million—well above the County’s unallocated general fund reserves of \$2 million.<sup>135</sup> Faced with the option of either enacting the initiative or placing it on the November ballot, the Board of Supervisors on July 9, 2002, chose to put the measure on the ballot and let the county’s voters decide in the November election.<sup>136</sup>

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<sup>128</sup> See FISCAL IMPACT ANALYSIS, *supra* note 120, at 3.

<sup>129</sup> See *supra* note 113 and accompanying text.

<sup>130</sup> CFBL, *supra* note 122, at para. 4.

<sup>131</sup> FISCAL IMPACT ANALYSIS, *supra* note 120, at 3.

<sup>132</sup> See *id.* at 4.

<sup>133</sup> See generally CONGRESSIONAL BUDGET OFFICE, REGULATORY TAKINGS AND PROPOSALS FOR CHANGE 61–66 (1998), available at <ftp://ftp.cbo.gov/10xx/doc1051/takings.pdf> (discussing reasons for difficulty of estimating cost of compensation statutes).

<sup>134</sup> Nevada County Board of Supervisors, Board of Supervisors Minutes, July 9, 2002, at 802, available at <http://docs.co.nevada.ca.us/dscgi/ds.py/Get/File-30224/20021015163608.pdf> (recording statement of Libby Seifel of Seifel Consulting Inc).

<sup>135</sup> FISCAL IMPACT ANALYSIS, *supra* note 120, at 5–6.

<sup>136</sup> See John Dickey, *Claims Initiative on the Fall Ballot*, THE UNION (Grass Valley-Nevada City, Cal.), July 10, 2002.

With the initiative on the ballot, the supervisors also considered bringing suit to challenge the initiative's legality.<sup>137</sup> The anti-initiative majority on the Board understood that their only opportunity to challenge the measure was before the November election, and before the measure became law that the Supervisors were sworn to uphold. Once the electorate approved the measure, the Board would be powerless to reject or even amend it; measures enacted by initiative may only be amended or repealed by another popular vote.<sup>138</sup> It is even possible that the Board would have a duty to defend Measure D, once enacted, if it were challenged in court—the California courts have not clearly resolved whether such a duty exists.<sup>139</sup> The four environmentalists on the Board were uniformly opposed to the initiative, but split on the wisdom of filing a pre-election challenge. Two liberal supervisors—forester and lawyer Bruce Conklin and organic farm owner Elizabeth “Izzy” Martin—were involved in tight races for reelection, and an overt denouncement of the measure by any of the supervisors carried the risk of prompting an electoral backlash that would return the Board to conservative control. With Martin and fellow Measure D opponent Peter Van Zant joining the lone conservative supervisor, Sue Horne, in the majority, the Board voted 3-2 not to file suit challenging the measure.<sup>140</sup>

In the weeks leading up to the election, the political fervor in Nevada County only intensified. The supervisors who opposed Measure D became the subjects of political mailers, roadside signs, and recall efforts.<sup>141</sup> Martin was even compared in letters in the local paper to the terrorists who attacked the World Trade Center in September 2001.<sup>142</sup>

On November 5, 2002, the following question, drafted by the county clerk, appeared as Measure D, one of two countywide initiatives on the Nevada County ballot:<sup>143</sup>

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<sup>137</sup> Although the California courts have traditionally preferred to determine the validity of voter initiatives after approval by the electorate, they have occasionally reviewed initiatives before the election. A pre-election challenge must be based on an alleged procedural defect or conflict with state law, and review is wholly within the discretion of the court. Michael P. Durkee et al., *Understanding the Different and Often Dichotomous Roles of a City and the Options Available to It When Dealing with “Growth-Related” Ballot Measures*, CAL. REAL PROP. J., Fall 2000, at 22, 25.

<sup>138</sup> CAL. ELEC. CODE § 3719 (West 2003).

<sup>139</sup> See Durkee et al., *supra* note 137, at 26–27 (discussing three California Supreme Court cases that have referred to, but not answered, the question of a local government's duty to defend an initiative approved by the electorate).

<sup>140</sup> Nevada County Board of Supervisors, *supra* note 134, at 804.

<sup>141</sup> See Kearns, *supra* note 94.

<sup>142</sup> Jenifer Ragland, *Voters to Decide Whether Growth Should Be Stopped in Its Tracts*, L.A. TIMES, Nov. 4, 2002, 2002 WL 2515364.

<sup>143</sup> The other initiative, Measure C, which proposed to continue the existing 0.125% sales tax to support the county library system, passed with 77% of the vote. Nevada County Elections Office, *Nevada County Measure C: Final—Certified Results*, at <http://election.co.nevada.ca.us/results1102/cntymeasureC.htm> (last visited Dec. 7, 2003) (on file with the Harvard Environmental Law Review).

Shall an ordinance be adopted requiring Nevada County to create a claims process to reimburse property owners when the market value of their property is reduced by County regulatory actions or determinations—not based upon a clear and present danger to public health and safety and traditionally recognized common law nuisance prohibitions—restricting existing use or utility of a parcel following denial of an owner proposed project seeking beneficial best use of the property?<sup>144</sup>

Despite having outspent opponents of the initiative by a 10-to-1 margin,<sup>145</sup> supporters of Measure D failed to win over a majority of the county's voters: Measure D was defeated, 57% to 43%.<sup>146</sup> The initiative received 15,824 votes in favor and 21,061 votes against.

What might otherwise have been a defeat for the county's property rights supporters, quickly turned into a triumph. The two supervisors who were up for reelection, Conklin and Martin, lost their seats to challengers who openly endorsed the initiative.<sup>147</sup> The result was the return of a pro-growth majority on the Board, with the potential for a marked shift in the county's land use policy. Clearly, however, many voters who sought greater protection of their private property rights by changing the makeup of the Board stopped short of endorsing Measure D. As Part V of this Note suggests, the shift in policy proposed by Measure D carried with it a price that the majority in Nevada County was not willing to pay.

## V. THE PERILS OF THE PROPERTY RIGHTS INITIATIVE

Although poorly drafted and ultimately unsuccessful, Measure D was emblematic of both the potentially sweeping reach of property rights initiatives and their significant shortcomings. This Part examines the legal infirmities that characterized Measure D, and suggests that such infirmities are not unique to this particular initiative. Finally, this Part

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<sup>144</sup> Nevada County Elections Office, *Nevada County Measure D: Final—Certified Results*, at <http://election.co.nevada.ca.us/results1102/cntymeasureD.htm> (last visited Dec. 7, 2003) (on file with the Harvard Environmental Law Review).

<sup>145</sup> William Fulton, *Property Rights Proponents Taking Their Case Directly to Voters*, CAL. PLAN. & DEV. REP., June 1, 2003, at 1, available at [http://www.mariposacounty.org/planning/General\\_Plan/Reports/California%20Planning%20&%20Development%20Report%20\(CP&DR\).pdf](http://www.mariposacounty.org/planning/General_Plan/Reports/California%20Planning%20&%20Development%20Report%20(CP&DR).pdf).

<sup>146</sup> Nevada County Elections Office, *supra* note 144.

<sup>147</sup> Conklin lost by 19 votes (3463 to 3444) to Drew Bedwell, a staunch supporter of Measure D. Nevada County Elections Office, *Nevada County Supervisor—3rd Supervisorial District: Final—Certified Results*, at <http://election.co.nevada.ca.us/results1102/cosupervisor3.htm> (last visited Dec. 7, 2003) (on file with the Harvard Environmental Law Review). Martin was defeated by Measure D supporter Robin Sutherland, a political novice who gained 4765 votes to Martin's 3735. Nevada County Elections Office, *Nevada County Supervisor—4th Supervisorial District: Final—Certified Results*, at <http://election.co.nevada.ca.us/results1102/cosupervisor4.htm> (last visited Dec. 7, 2003) (on file with the Harvard Environmental Law Review).

argues that property rights initiatives will always be legally suspect, due primarily to the dramatic impact they threaten to have on government's ability to carry out its essential functions.

Had Measure D passed, a community group might well have challenged it in court, as happened to Oregon's Measure 7. The discussion that follows is not intended to cover the universe of claims that might have been brought against the initiative; rather, it is intended to suggest that even after passage Measure D would have faced a stern legal test before taking effect—one that it would have been unlikely to survive.

While the latter two potential challenges discussed here focus on limitations placed on the power of initiative, the first two are based on the doctrine of state law preemption. When a conflict arises between a state law and a local initiative—when the initiative “duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication”<sup>148</sup>—the state law typically preempts the local measure.<sup>149</sup>

One such area is the body of law regarding tort claims against state and local government entities. The California Tort Claims Act, enacted in 1963, reestablished sovereign immunity as the rule, with liability imposed on government entities only as expressly provided by statute.<sup>150</sup> “Statute” is defined as an act adopted by Congress, the California legislature, or statewide initiative<sup>151</sup>—but not a local ordinance or initiative like Measure D.<sup>152</sup> By imposing a new form of liability on the Nevada County government (one that reached beyond the constitutional just compensation requirement), it appears that Measure D would have contradicted—and thus been preempted by—the California Tort Claims Act.

The other area where the courts could have found preemption is the body of state laws and constitutional provisions establishing and regulating the jurisdiction of the state's superior courts. Measure D purported to vest “exclusive jurisdiction” to hear claims under the measure in the Nevada County Superior Court. The initiative also stated that the court would have the power to make “independent findings of fact and conclusions of law,” and would not be bound by the County's findings or determinations. The California courts, however, have held that the superior courts “are not local or county courts, but constitute a system of state

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<sup>148</sup> *Lancaster v. Mun. Court*, 494 P.2d 681, 682 (Cal. 1972) (internal citations omitted).

<sup>149</sup> See CAL. CONST. art. XI, § 7 (“A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations *not in conflict with general laws*.”) (emphasis added).

<sup>150</sup> See CAL. GOV'T CODE § 815 (West 2003); *Williams v. Horvath*, 548 P.2d 1125, 1127 (Cal. 1976).

<sup>151</sup> CAL. GOV'T CODE § 811.8.

<sup>152</sup> See CAL. GOV'T CODE § 815 cmt. (legislative committee comment explaining that “public entities may be held liable only if a statute (not including a charter provision, ordinance or regulation) is found declaring them to be liable”).

courts.”<sup>153</sup> The California Constitution explicitly vests the power to regulate the courts’ exercise of jurisdiction in the state legislature,<sup>154</sup> and California courts have consistently rejected local regulation of the courts’ exercise of jurisdiction.<sup>155</sup> Moreover, the California legislature has adopted an extensive scheme governing the exercise of jurisdiction by the courts<sup>156</sup> and several statutes establishing the applicable standards of review for particular actions.<sup>157</sup> Through this extensive state regulation, the exercise of jurisdiction by the courts has become “so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern” preempting local regulation.<sup>158</sup>

Measure D’s third legal flaw arose out of the first paragraph of the initiative, which states that “Nevada County (the ‘County’) shall provide an orderly process for addressing claims for reimbursement.” The California Constitution authorizes the use of initiatives only to *adopt or reject* statutes and constitutional amendments.<sup>159</sup> On these grounds, it has been held that initiatives are not permitted to instruct a legislative body to enact legislation, but must enact it directly.<sup>160</sup> Measure D’s first paragraph plainly directs the Board of Supervisors to legislate, going beyond the scope of constitutional authorization.

<sup>153</sup> See *Wilson v. Walters*, 119 P.2d 340, 344 (Cal. 1941).

<sup>154</sup> See CAL. CONST. art. VI, § 4 (prescribing number of judges and providing for court officers); *id.* art. VI, § 5 (prescribing organization and jurisdiction of courts).

<sup>155</sup> See 119 P.2d at 344 (Cal. 1941) (holding that the constitution of municipal courts “is a state rather than a municipal affair”); *Slavich v. Walsh*, 186 P.2d 35, 38 (Cal. Ct. App. 1947) (finding that except for the sole question as to whether a municipal court shall exist in the municipality, “the complete control over municipal courts is placed by the Constitution in the legislature and not in the city or city and county”); *Chambers v. Terry*, 104 P.2d 663, 667–68 (Cal. Ct. App. 1940) (same). Municipal courts in California were courts that were inferior to superior courts until the two were merged into a single trial court system between 1998 and 2000. JUDICIAL COUNCIL OF CAL., 2001 ANNUAL REPORT 6–7 (2001), available at <http://www.courtinfo.ca.gov/reference/documents/ar2001-1.pdf>.

<sup>156</sup> See, e.g., CAL. CIV. PROC. CODE §§ 35–37 (preference for certain cases); *id.* §§ 165–167 (powers of judges at chambers); *id.* §§ 170–170.9 (disqualification of judges); *id.* §§ 392–403 (place of trial); *id.* §§ 1084–1097 (writs of mandate); CAL. GOV’T CODE §§ 68070 & 68071 (court rules permitted and prohibited); *id.* §§ 68200–68211 (compensation of judges); *id.* § 69508 (duties of presiding judge); *id.* §§ 69580–69615 (number of judges).

<sup>157</sup> See, e.g., CAL. CIV. PROC. CODE § 1074 (writs of review); *id.* § 1294.2 (review of arbitration decisions); CAL. GOV’T CODE § 16278 (review of funding of special districts); *id.* § 21170 (review of disability retirement determinations); CAL. BUS. & PROF. CODE § 23090.2 (review of decisions by the Department of Alcoholic Beverage Control); CAL. HEALTH & SAFETY CODE § 33334.6 (review of certain decisions by redevelopment agencies); CAL. LAB. CODE § 5952 (review of workers’ compensation appeals board determinations); CAL. PUB. UTIL. CODE § 1757 (review of public utilities commission decisions).

<sup>158</sup> *Sherwin-Williams Co. v. City of Los Angeles*, 844 P.2d 534, 537 (Cal. 1993) (internal citation omitted).

<sup>159</sup> CAL. CONST. art. II, § 8; see *AFL-CIO v. Eu*, 686 P.2d 609, 623 (Cal. 1984) (holding that initiative “powers are limited, under article II, to the adoption or rejection of ‘statutes.’”).

<sup>160</sup> *Marblehead v. City of San Clemente*, 277 Cal. Rptr. 550 (Cal. Ct. App. 1991) (invalidating citywide initiative that directed city council to amend general plan to reflect specified concepts).

Fourth, and most significantly, Measure D violated the principle that an initiative cannot interfere with an essential governmental function. The California Supreme Court has held that where an initiative would “greatly impair or wholly destroy the efficacy of some other governmental power, the practical application of which is essential,” the initiative is invalid.<sup>161</sup> Examples of governmental functions the California courts have deemed “essential” include providing suitable courthouses,<sup>162</sup> improving city streets,<sup>163</sup> granting franchises,<sup>164</sup> and meeting fiscal management responsibilities through the raising of taxes.<sup>165</sup> As discussed more fully below, Measure D threatened either to severely impede the Board’s ability to regulate land use, or to drain so much money from the county coffers as to “greatly impair or wholly destroy” the County’s provision of a host of essential services.

It may seem surprising that an initiative drafted by a land use attorney, certified for a general election, and approved by nearly half of the county’s voters could be so riddled with legal defects. But Measure D was no different in this respect from many ballot initiatives, including Oregon’s Measure 7. In part, this is a symptom of the initiative process, which limits input on the legality and practical implications of the proposed measure by excluding opponents of the measure from the drafting process.<sup>166</sup> Another reason for the legal fallibility of many initiatives is that they are often designed more to rally people around a particular philosophy than to take effect as law. Measure D was a case in point. Even as their initiative suffered defeat, property rights activists in Nevada County considered the election a major victory, as they ousted the two environmentalists from the Board of Supervisors and replaced them with property rights sympathizers.<sup>167</sup>

But if property rights initiatives appear especially legally suspect, it is because they threaten to make dramatic changes in state or local policy. The body of initiative law crafted by legislators and judges has been designed to prevent the enactment of initiatives like Measure 7 and Measure D. In Oregon, it was the requirement that an initiative must not make two unrelated changes to the state constitution that spelled doom for Measure 7. In Nevada County, it may well have been the rule that an initiative cannot interfere with “essential governmental functions” that would have been the downfall of Measure D, had it passed.

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<sup>161</sup> *Simpson v. Hite*, 222 P.2d 225 (Cal. 1950).

<sup>162</sup> *Id.*

<sup>163</sup> *Chase v. Kalber*, 153 P. 397 (Cal. Ct. App. 1915).

<sup>164</sup> *Newsom v. Bd. of Supervisors*, 270 P. 676 (Cal. 1928).

<sup>165</sup> *Birkenfeld v. City of Berkeley*, 550 P.2d 1001 (Cal. 1976); *Geiger v. Bd. of Supervisors*, 313 P.2d 545 (Cal. 1957).

<sup>166</sup> Kenneth P. Miller, *Constraining Populism: The Real Challenge of Initiative Reform*, 41 SANTA CLARA L. REV. 1037, 1052 (2001).

<sup>167</sup> Mary Lynne Vellinga, *Property Rights Activists Celebrate in Nevada County, California*, SACRAMENTO BEE, Nov. 7, 2002, 2002 WL 102881440.

The extent of Measure D's potential to alter local land use policy cannot be understood merely by looking at the examples of previous property rights enactments by state legislatures. To be sure, the states that have enacted compensation-style property rights statutes have seen little activity under the laws. In his 1999 study of the effects of state property rights legislation, Harvey M. Jacobs concluded that "the specific impacts of these laws have been minimal."<sup>168</sup> In Mississippi, one of four states with a compensation statute, not a single claim was filed in the first four years after passage of the law.<sup>169</sup> Only twenty-four cases were filed under Florida's Harris Act in its first thirty-two months—far fewer than many commentators expected.<sup>170</sup> And six years after the passage of Texas's Private Real Property Rights Preservation Act—considered by many at the time to be the nation's "strongest state takings law"<sup>171</sup>—observers studying the Act have concluded that the Act has "largely been a failure," having provided few property owners with compensation.<sup>172</sup>

One possible explanation for the paucity of claims is that, far from being failures, these compensation laws have worked exactly as they were intended. By putting government on notice about the level of regulation that is unacceptable, the statutes deter government from adopting or enforcing restrictions on property rights, thereby giving rise to few takings claims.<sup>173</sup> But the more likely explanation for the lack of activity under state compensation statutes is the absence of a connection between the adoption of the statute and the level of dissatisfaction among landowners with government regulation of their property.<sup>174</sup> Property rights laws have often been the product of small groups of ideologically conservative legislators who secure the laws' passage without a broad base of support.<sup>175</sup> Without an aggrieved constituency, the statutes have seldom been used.

Property rights initiatives, in contrast, typically originate with dissatisfied landowners and require broad public support for passage. Nevada County, for example, has "one of the most active and effective

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<sup>168</sup> JACOBS, *supra* note 5, at 1. In an earlier article presenting the preliminary results of his study, Jacobs observed that "in a selected set of states these laws appear irrelevant to what is going on politically and administratively." Jacobs, *supra* note 55, at 4.

<sup>169</sup> JACOBS, *supra* note 5, at 21.

<sup>170</sup> Ronald L. Weaver & Nicole S. Sayfie, *1999 Update on the Bert J. Harris Private Property Rights Protection*, FLA. B.J., Mar. 1999, at 49, 54.

<sup>171</sup> Robert Elder Jr., *Taking the Property Rights Plunge*, TEX. LAW., July 31, 1995, at S4.

<sup>172</sup> Christian Brooks, *Political Bluff and Bluster: Six Years Later, A Comment on the Texas Private Real Property Rights Preservation Act*, 33 TEX. TECH L. REV. 59, 62 (2001). Commentators have cited the Act's numerous exceptions to government liability, short (six-month) statute of limitations, inadequate remedies, and loser-pays provision as elements that have deterred landowners from bringing suit. *See id.* at 84–103.

<sup>173</sup> *See* JACOBS, *supra* note 5, at 21.

<sup>174</sup> *Id.* at 13–14.

<sup>175</sup> *Id.* at 12.

property rights movements in [California].”<sup>176</sup> Landowners in the county have objected strenuously to actions of the Board of Supervisors that they viewed as threatening their property values. A property rights initiative arising out of a political climate like Nevada County’s—one in which property owners have vocally expressed dissatisfaction with the extent of local land use regulation—would likely attract far more claims than have the state laws surveyed by Jacobs. Consequently, whereas traditional property rights laws have had a “minimal” impact, property rights initiatives threaten to have a significant impact on government regulation and resources.

For property rights measures as expansive as Measure D, that impact, first and foremost, is a staggering financial cost that could bankrupt state and local governments. While the potential cost of resolving these claims for compensation under a proposed law is difficult to determine with any precision, one scholar has observed that “the single factor that has most diminished the prospects of property rights bills . . . [is] the prospect of stunning fiscal obligations.”<sup>177</sup> In the words of Justice Holmes, “[g]overnment hardly could go on if, to some extent, values incident to property could not be diminished without paying for every such change in the general law.”<sup>178</sup> Studies of two federal compensation bills considered by Congress in 1995 estimated that over a seven-year period each would cost billions of dollars.<sup>179</sup> An analysis of Washington’s property rights statute, enacted in 1995, estimated that the law’s compensation provisions alone could cost local governments up to \$11 billion.<sup>180</sup> The statute was repealed by referendum in the same year.<sup>181</sup> In Nevada County, the prospect of a \$3 million to \$10 million annual outlay for compensation would have threatened critical services throughout the county, from facilities management to the provision of public safety by the sheriff’s department.<sup>182</sup> The fear of an enormous fiscal burden led the city councils of the county’s three largest cities—Nevada City, Truckee, and Grass Valley—to pass resolutions announcing their opposition to Measure D.<sup>183</sup> State and local governments

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<sup>176</sup> Karpa, *supra* note 119 (quoting attorney James Burling of the Pacific Legal Foundation).

<sup>177</sup> Joseph L. Sax, *Takings Legislation: Where It Stands and What Is Next*, 23 *ECOLOGY L.Q.* 509, 515–16 (1996) (commenting on proposed federal legislation).

<sup>178</sup> *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

<sup>179</sup> The Office of Management and Budget estimated that the compensation costs of H.R. 925, the Private Property Protection Act of 1995, would have been \$28 billion over seven years. S. REP. NO. 104-239, at 28–29 (1996). A report on S. 605, the Omnibus Property Rights Act of 1995, by the budget watchdog group Taxpayers for Common Sense projected the combined cost of its assessment and compensation provisions over seven years to be up to \$100 billion. Margaret Kriz, *Taking Issue*, 28 *NAT’L J.* 1200, 1203 (1996).

<sup>180</sup> Taylor, *supra* note 46 (reporting on study prepared by the University of Washington’s Institute of Public Policy Management).

<sup>181</sup> *See id.*

<sup>182</sup> *See FISCAL IMPACT ANALYSIS, supra* note 120, at 6.

<sup>183</sup> Vellinga, *supra* note 167.

simply cannot afford the daunting price tag that would likely attach to continued environmental and land use regulation under such a draconian regime of compensable property rights.

The alternative—ceasing all regulatory activity that could potentially reduce property values—is hardly more appealing. Experience has shown that the existence of property rights laws can have a “chilling effect” on agency regulation.<sup>184</sup> Anecdotal evidence from the first month after the passage of Florida’s Harris Act indicated that the act had discouraged local planners and regulators from open space initiatives, historic preservation efforts, and amendments to zoning ordinances.<sup>185</sup> Observers in Florida noticed a marked change in a state that had historically been at the forefront of land use planning and environmental regulation.<sup>186</sup> While Nevada County’s fiscal study assumed for the purpose of analysis that the County would not alter its regulatory behavior after the initiative’s passage,<sup>187</sup> the specter of such immense financial obligations would likely have deterred the County from issuing or enforcing regulations that were liable to diminish property values.

Paradoxically—and often overlooked by property rights advocates—a freeze in land use regulation has the potential to bring about a reduction in property values. Zoning, the centerpiece of American land use policy and a frequent target of property rights advocates, was actually the creation of business interests attempting to protect their property values.<sup>188</sup> Most home property values actually benefit from land use regulations, including those that segregate industrial, commercial, and residential uses of property.<sup>189</sup> To cite an example raised in the debate over Measure 7, Jackson County, Oregon, faced a \$50 million claim under the newly passed measure for denying mining permits to a company that intended to truck 8 million tons of sand on double-length trucks through the small town of Jacksonville, the first town in the United States designated as a historic landmark. Lacking the funds to pay such an expensive claim, the County would have had little choice but to ignore its land use regulations and issue the mining permit. The resulting parade of trucks might well have

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<sup>184</sup> Jacobs, *supra* note 55, at 4.

<sup>185</sup> See Peter Mitchell, *New Property-Rights Law Sends City Planners Scrambling for Cover*, WALL ST. J., Oct. 25, 1995, at F1; see also JACOBS, *supra* note 5, at 17 (“governmental bodies . . . seriously slowed their consideration of new plans and regulations, as well as amendments and revisions to existing plans and regulations, since it was these actions that opened government to claims under the acts”).

<sup>186</sup> JACOBS, *supra* note 5, at 23.

<sup>187</sup> FISCAL IMPACT ANALYSIS, *supra* note 120, at 4.

<sup>188</sup> JACOBS, *supra* note 5, at 26.

<sup>189</sup> See *Private Property Rights and Environmental Laws: Hearings Before the Senate Comm. on Env't and Pub. Works*, 104th Cong. 207–08 (1995) (statement of Dr. C. Ford Runge, Professor, Department of Agricultural and Applied Economics, University of Minnesota).

lowered the town's quality of life and ability to attract visitors—reducing property values for many of the town's citizens.<sup>190</sup>

Had Nevada County's Board of Supervisors been compelled to loosen its enforcement of environmental and land use protections, the County would have found it virtually impossible either to protect its natural environment or to control the already rapid pace of growth. The private interests of property owners would have conspired to prevent the County from implementing programs that benefit the public at large.

This is the danger of property rights legislation in any form: it supplants a judicially crafted takings doctrine that deliberately weighs private interests against countervailing public interests. In its place, it installs a regime that subordinates the public good to the private good. The central claim of the property rights movement—that government regulation unfairly reduces the value of private property—misunderstands the nature of the rights that attach to property ownership, and their relationship to the public rights—to clean air and water, wildlife, and natural resources—shared by all.<sup>191</sup> The property owner holds no inherent right to use property in environmentally harmful ways. As Justice Holmes observed in *Pennsylvania Coal Co. v. Mahon*, it has been “long recognized” that “some values are enjoyed under an implied limitation, and must yield to the police power.”<sup>192</sup>

With traditional property rights legislation, at least, the legislative process provides some measure of protection against a property rights proposal as radical as Measure D. First, traditional lawmaking is a relatively careful, deliberative process, involving the submission of public comments and the holding of hearings to integrate a range of perspectives on the proposed legislation. Compromises are a necessary part of the enactment of legislation. In contrast, the up-or-down vote on an initiative does not provide for the meticulous process of negotiation and revision that accompanies the typical statute or ordinance.<sup>193</sup> As Daniel Selmi has written, “the information generated by a hearing before a planning commission differs markedly from the information generated in the often-raucous public debate fostered by elections.”<sup>194</sup> Moreover, in the traditional legislative arena, the people who make the decision to create a regime of heightened takings liability are also those responsible for managing the public fisc. Legislators must confront directly the funding ob-

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<sup>190</sup> See Ryan, *supra* note 56, at 17.

<sup>191</sup> See *Private Property Rights and Environmental Laws: Hearings Before the Senate Comm. on Env't and Pub. Works*, 104th Cong. 218 (1995) (statement of Washington University in St. Louis law professor Richard J. Lazarus that “government must be able to protect the public's rights to its natural resources . . . [and] need not allow individual property owners unilaterally to convert public rights into private property”).

<sup>192</sup> 260 U.S. 393, 413 (1922).

<sup>193</sup> See Miller, *supra* note 165, at 1051–53 (noting that the initiative system limits public input, consideration of alternatives, and compromise).

<sup>194</sup> Selmi, *supra* note 107, at 309.

stacles that would result from a strict compensation system, and can be held accountable by the public for their decisions. This level of accountability might weigh heavily against the adoption of property rights legislation.

Voters, in contrast, face few of the same restrictions. They typically lack expertise in the legal jargon and practical ramifications of initiatives such as property rights measures.<sup>195</sup> Moreover, the initiative's text is defined entirely by the sponsor; although the office of the state attorney general, county attorney, or city counsel prepares the title and summary, that office has no authority to amend the proposal.<sup>196</sup> Most important, in the privacy of the voting booth, voters can promote their private interests without concern for the public good, leaving it to their representatives to figure out how to govern with their hands tied. As Mildred Wigfall Robinson has argued, in a process that allows its decision-makers to be uninformed and unaccountable, "deliberate attentive response to underlying policy and competing considerations is impossible."<sup>197</sup> Perhaps the defeat of Measure D reflected a recognition by Nevada County voters of the dangers of dramatically altering land use policy through the initiative process.

What Measure D's defeat did not signal, however, was the end of efforts to do just that. On May 13, 2003, the California secretary of state authorized land use lawyer William Walter to begin collecting signatures for a statewide "California Property Rights Initiative."<sup>198</sup> Like Oregon's Measure 7, Walter's initiative would have amended the state constitution's takings clause. In California, the takings clause prohibits private property from being "taken or damaged for public use" without just compensation,<sup>199</sup> but does not define those terms. The California Property Rights Initiative would have expanded the takings clause to define "damaged for public use" as including "unreasonable, arbitrary, dilatory, discriminatory, or oppressive" government action that causes "economic dam-

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<sup>195</sup> See Catherine Engberg, Note, *Taking the Initiative: May Congress Reform State Initiative Lawmaking to Guarantee a Republican Form of Government?*, 54 STAN. L. REV. 569, 577 (2001); Miller, *supra* note 164, at 1053 (observing that "there is serious doubt whether voters are capable of making informed decisions regarding initiatives, especially complex ones that have wide ranging impact. Polling data indicate that voters are grossly ignorant of the content of initiative measures.").

<sup>196</sup> Miller, *supra* note 164, at 1051-52.

<sup>197</sup> Mildred Wigfall Robinson, *Difficulties in Achieving Coherent State and Local Fiscal Policy at the Intersection of Direct Democracy and Republicanism: The Property Tax as a Case in Point*, 35 U. MICH. J.L. REFORM 511, 511 (2002). Robinson highlights the problems that arise when direct democracy is used to make tax cuts and other fiscal policy, concluding "the formulation of fiscal policy is unlikely ever to be a responsibility objectively discharged in the privacy of the voting booth against a broad view of state policy by a majority of voting taxpayers." *Id.* at 557.

<sup>198</sup> Press Release, Cal. Secretary of State Kevin Shelley, Proposed Initiative Enters Circulation (May 13, 2003), available at [http://www.ss.ca.gov/executive/press\\_releases/2003/03\\_026.pdf](http://www.ss.ca.gov/executive/press_releases/2003/03_026.pdf).

<sup>199</sup> CAL. CONST. art. I, § 19.

age” to a property owner.<sup>200</sup> The initiative would also have defined “taken for public use” to include government’s “adoption, application or enforcement” of a regulation that restricts the use of property, diminishes its value, and either advances no legitimate public purpose or “disproportionately or unfairly imposes the burdens of public benefits” upon the private property owner.<sup>201</sup> Like Measure D, the Walter initiative would have applied to a vast universe of state and local government actions,<sup>202</sup> contained no numerical trigger or “inordinate burden” standard, and included only narrow exceptions.<sup>203</sup> The California Property Rights Initiative will not be put to the voters of California just yet, however—the measure did not gather the required 598,105 signatures to qualify for a 2004 election ballot by the state’s deadline of October 14, 2003.<sup>204</sup>

Walter’s primary purpose in introducing a statewide property rights initiative might not have been to bring it to a vote, but to reshape the debate over the relationship between private property and public welfare. The evidence in Nevada County suggests that Measure D did just that. Even as the votes were lining up against Measure D, voters in two districts sent a clear message to the Board’s slow-growth majority. The two supervisors who were up for reelection spoke out against Measure D—and both lost their seats to challengers who openly endorsed the initiative. In the end, the return of a pro-growth majority on the Board might deliver to proponents of Measure D exactly what they wanted: the removal of obstacles to development raised by the previous Board.

One of the legacies of property rights legislation is that it has forced regulators to justify actions they take that restrict property rights, rather than relying on a presumption of reasonability.<sup>205</sup> This shift might force government officials in Nevada County and elsewhere to adopt different approaches that will achieve their goals while respecting private property. Planners and regulators might begin to consider whether certain landowners have to bear a disproportionate regulatory burden, even if it does not rise to the level of a constitutional taking.

But to go any further—to expand the scope of takings liability to the point of presenting governments with a Hobbesian choice—would interfere profoundly with those governments’ ability to promote the public wel-

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<sup>200</sup> Cal. Property Rights Initiative (Mar. 15, 2003), *available at* <http://www.caag.state.ca.us/initiatives/pdf/sa2003rf0007.pdf>.

<sup>201</sup> *Id.*

<sup>202</sup> The measure defined “regulation” in such a way as to apply to “any law, rule, ordinance, resolution, goal, or other enforceable enactment of government, whether temporary or permanent.” *Id.*

<sup>203</sup> The initiative would have applied to all the adoption, application, or enforcement of all regulations except for those implementing requirements of federal law and those that are “historically and commonly recognized nuisance laws,” with the universe of such laws “narrowly construed.” *Id.*

<sup>204</sup> Telephone Interview with Tricia Knight, Initiative Coordinator, Office of the Attorney General, State of California (Nov. 4, 2003).

<sup>205</sup> *See* JACOBS, *supra* note 5, at 15.

fare. Measure D might have met with defeat, but it served as a vivid reminder of the potential of the property rights initiative to threaten the existence of environmental and land use regulation.