A FIELD OF GREEN? THE PAST AND FUTURE OF ECOSYSTEM SERVICES

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INTRODUCTION

In understanding the power and challenge of ecosystem services, it is best to start our story fifteen years ago, beneath the blazing Arizona desert sun. There, on September 26, 1991, walking through a crowd of reporters and flashing cameras, eight men and women entered a huge, glass-enclosed structure and sealed shut the outer door. Their 3.15 acre miniature world, called Biosphere II, had been designed with no expense spared to re-create the conditions of the earth (presumably, named Biosphere I). Biosphere II sought to re-create a truly self-sustaining environment, complete with designer rainforest, ocean, marsh, savanna, and desert habitats. The eight plucky adventurers, so-called "Bionauts," intended to remain inside this micro-world for two years. By sixteen months into their adventure, however, oxygen levels had plummeted 33%, nitrous oxide levels had increased 160-fold to levels causing brain damage, ants and vines had overrun the vegetation, and nineteen of the twenty-five vertebrate species had gone extinct, as well as all of the pollinators. The experiment was abandoned.[1]

What went wrong? With a budget in excess of $200 million, the designers of Biosphere II had tried to establish biological systems capable of re-creating the basic services that support life itself — services such as purification of air and water, pest control, renewal of soil fertility, climate regulation, pollination of crops and vegetation, and waste detoxification and decomposition. These services of nature, known as "ecosystem services," are often taken for granted, yet are absolutely essential to our existence, as the inhabitants of Biosphere II ruefully learned.[2]

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[1] Thomas H. Maugh, *2 Years Inside a Living Lab -- Is it Science or a Stunt?*, L.A. TIMES, Sept. 23, 1991, at 1; David Tilman and Joel Cohen, *Biosphere 2 and Biodiversity: The Lessons So Far*, 274 SCI. 1150, 1150 (Nov. 15, 1996); Tim Radford, *The Buck Stops Here: How Do You Calculate the Real Value of the Earth's Life Support System,* GUARDIAN, Mar. 6, 1997, at 6.

[2] In addition to those listed above, other ecosystem services include mitigation of floods and droughts, biodiversity, and cycling of matter. NATURE'S SERVICES: SOCIETAL DEPENDENCE ON NATURAL ECOSYSTEMS 3 (Gretchen Daily ed., 1997) [hereinafter Daily].

Created by the interactions of living organisms with their environment, ecosystem services provide both the conditions and processes that sustain human life. Given their obvious importance to our well-being, one might assume that ecosystem services would be prized by markets and protected by regulators. With rare exception, however, neither is true. The basic reasons for this lack of recognition are three-fold.

I.

The first is ignorance. In today's society, we enjoy the benefits of food and services at the swipe of a credit card that past kings and emperors could only have imagined, yet we tend to forget where these come from. Is it really surprising that many children, when asked where milk comes from, reply without hesitation, "the supermarket"?[3] Modern society's dissociation between computers, cars and clothing on the one hand and biodiversity, nutrient cycling, and pollination on the other, is very real and hard to overcome for an increasingly urbanized population.

Ignorance of ecosystem services extends beyond the general public, however. To design policy instruments that protect services or manage the landscape to provide services, we have to understand service provision on a local ecological scale — how they are generated and how they are delivered. We have a pretty good idea that clear-cutting a forest, for example, will dramatically weaken the ecosystem services of nutrient retention, water purification, and floodwater control. But, thankfully, most management action does not involve wholesale destruction of an area. Much more common is marginal change — how will cutting twenty percent of *this* forest in *this* place impact water quality, flooding events, or local bird populations? In most cases involving a change in land use, whether it is forests, wetlands, or some other area, we simply do not know the answer.

This lack of knowledge is due in part to the lack of relevant data and in part to the difficulty of the task. Ecosystem level experiments are difficult and must be lengthy in order to gain reliable data. More fundamentally, scientific research to date has focused much more on understanding ecosystem processes than determining ecosystem services. Also, how an ecosystem works is

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[3] *See, e.g.,* Tyrone Cashman, *Where Does it Come From? Where Does it Go?* MEDIA VALUES, Summer 1990, at 12, *available at* http://www.medialit.org/reading_room/articles49.html; Roberta Mazzucco, *From the Farm to Your Table: Where Does Our Food Come From?* 7 YALE-NEW HAVEN TEACHERS INSTITUTE, (1997), *available at* http://www.yale.edu/ynhti/curriculum/units/1997/7/97.07.07.x.html.

not the same as the services it provides.[4] This has started to change, with studies of service provision in managed landscapes being published in prominent journals, but it is a recent trend.[5]

The second obstacle to recognition and protection of services is economic. Most ecosystem services are public goods. All those who live in a country with secure borders and low crime rates, for example, benefit whether they pay taxes or not. Similarly, those who live downstream from wetlands benefit from the role wetlands play in slowing floodwaters, whether they have paid to conserve the wetlands or not. In fact, many ecosystem services, ranging from flood control and climate stability to pollination, provide such non-exclusive benefits.[6] It's not hard to find markets for ecosystem goods (such as clean water and apples), but the ecosystem services underpinning these goods (such as water purification and pollination) are free. The services have no market value for the simple reason that no markets exist in which they can be bought or sold. As a result, there are no direct price mechanisms to signal the scarcity or degradation of these public goods until they fail (at which point their hidden value becomes obvious because of the costs to restore or replace them). When we buy a wetland property, we pay for location and scenic beauty, not its role as a nursery for sea life or filter of nutrients. These remain positive externalities. Such circumstances make ecosystem services all too easy to take for granted.

This was tragically evident in the recent flooding in New Orleans. The wetlands that could have slowed the floodwaters were steadily degraded over time through pipelines, development and channelization of the Mississippi, which starved the wetlands of sediment.[7] As floodwaters rose in New Orleans, people realized the importance of services that could have been provided by wetlands, but this recognition was too little and too late.

A further economic obstacle to the creation of service markets, in particular, is the problem of collective action. Markets for ecosystem services can only be established if there are discrete groups of buyers (service beneficiaries) and sellers (service provid-

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[4] Claire Kremen, *Managing Ecosystem Services: What Do We Need to Know About Their Ecology?*, 8 ECOLOGY LETTERS 468, 468 (2005) (stating that "we have little ability to predict how much land must be protected and how nearby land use must be restricted to provide water of sufficient quantity and quality"); Telephone Interview with Gretchen C. Daily, Associate Professor, Department of Biological Sciences, Stanford University (Jan. 14, 2003).

[5] *See* page 150, *infra.*

[6] They are also non-rival, in that one person's enjoyment and consumption of the services does not impair another's benefits.

[7] Dennis Hirsh, *Wetlands' Importance Now Made Clear*, ATLANTA JOURNAL-CONSTITUTION, Sept. 12, 2005, at A11.

ers). Otherwise, transaction costs become too high for contract formation. The public goods nature of many services makes this a real concern. Biodiversity, for example, benefits agriculture through the insurance service of genetic diversity and benefits pharmacology through provision of antibiotics and other medicinal compounds.[8] The problem is that we all gain from these benefits, yet there is no sufficiently discrete class of beneficiaries with whom we can negotiate, and the transaction costs of gathering enough beneficiaries together to negotiate for the service are too high. Thus, it is no surprise that private purchasers of biodiversity's benefits are hard to come by, which explains why there are so few true markets for biodiversity. As a result, if a land use provides valuable ecosystem services, but they are widely enjoyed by diffuse beneficiaries, it is unlikely that a market for services will arise in the absence of government intervention.

As a final point, it is worth noting that ignorance and public goods — the barriers to market creation — are related. Markets create knowledge. We have a very advanced understanding of how to manage farmland to maximize production of cash crops for the simple reason that *they are cash crops*. It pays to manage land efficiently for crop production. We have a much poorer understanding of how to manage land for service provision, not because services have no value, but because landowners cannot capture any of the value their landscape provides. Agricultural markets provide very clear signals to farmers of the value of clearing remnant vegetation to grow more crops; but there are no markets for biodiversity, water quality, or flood control to reflect the loss in benefits once the land is cleared.

The final obstacle is institutional. As any environmental law class points out in the first session, political jurisdictions rarely align with ecologically significant areas such as watersheds. The straight lines of state, county, and municipal borders do not track ecologically significant boundaries. As a result, efforts to manage landscapes that ensure service provision are easily confounded by collective action problems. In a fascinating break from this practice, New Zealand and a number of Australian states in the last decade have created catchment management bodies that exercise land use planning authority throughout an entire watershed,[9] but these remain a rare exception.

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[8] Roughly one in four pharmaceuticals are derived from plant sources and another one in four from animals and microorganisms. *See* Norman Myers, *Biodiversity's Genetic Library*, *in* Daily, *supra* note 2, at 259, 263.

[9] Tasman District Council et al., Integrated Catchment Management for the Motueku River, Project Summary, http://icm.landcareresearch.co.nz/site_details/programme_ summ-

Given these barriers to recognition, assessment, and management of ecosystem services, it should come as no surprise that our laws do not explicitly protect ecosystem services. Legal protection of ecosystems simply was not a primary (or even secondary) objective when our basic environmental laws were drafted over two decades ago. Generally speaking, our pollution laws (e.g., the Clean Air Act[10] and Clean Water Act[11]) rely on human health-based standards. Our conservation laws (e.g., the Endangered Species Act[12] and Marine Mammal Protection Act[13]) are species-specific. Planning under our resource management laws (e.g., the National Forest Management Act[14] and Federal Land Policy and Management Act[15]) must accommodate multiple and conflicting uses. Of course, parts of these laws, such as the Clean Water Act's Section 404 wetlands permit program and use of water quality standards,[16] the Endangered Species Act's critical habitat provisions,[17] and the National Forest Management Act's use of indicator species such as the spotted owl,[18] clearly can help to conserve ecosystem services. The point, though, is that these laws were not primarily intended to provide legal standards for conservation of natural capital and the services that flow from it and, as many authors have pointed out, in practice they usually do not provide such standards.[19]

II.

How might we use laws to protect ecosystem services? Let's start with a hypothetical landscape. Water moves through a for-

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ary.htm, (describing Moteuku River Catchment Authority's purpose) (last visited Jan. 31, 2005); Sydney Catchment Authority, About the Sydney Catchment Authority, http://www.sca.nsw.gov.au/about (describing SCA's history and purpose) (last visited Jan. 31, 2005).

[10] 42 U.S.C. §§ 740–7671(q) (2000).

[11] 33 U.S.C. §§ 1251–1387 (2000).

[12] 16 U.S.C. §§ 1531–1544 (2000).

[13] *Id.* §§ 1361–421(h).

[14] *Id.* §§ 1600–1614.

[15] 43 U.S.C. §§ 1701–1785 (2000).

[16] Clean Water Act § 404, 33 U.S.C. § 1344 (2000).

[17] 16 U.S.C. § 1533 (2000).

[18] *Id.* § 1604(g)(3)(B).

[19] *See, e.g.*, J.B. Ruhl, E*cosystem Services and the Common Law of "The Fragile Land System,"* 20 NATURAL RES. & ENV'T 3, 4 (Fall 2005); David W. Burnett, *New Science But Old Laws: The Need to Include Landscape Ecology in the Legal Framework of Biodiversity Protection*, 23 ENVIRONS ENVTL. L. & POL'Y J. 47, 68-69 (Fall 1999); Oliver A. Houck, *On the Law of Biodiversity and Ecosystem Management*, 81 MINN. L. REV. 869, 880-83 (1997); J.B. Ruhl, *Biodiversity Conservation and the Ever-Expanding Web of Federal Laws Regulating Nonfederal Lands: Time for Something Completely Different?*, 66 U. COLO. L. REV. 555 (1995).

ested upper watershed, down through a farming valley, and into a lake that provides drinking water for a nearby community. There is mounting concern over nutrient levels in the lake. Water authority engineers want to build a treatment plant. Other engineers, however, believe that nutrient levels could be reduced at a much lower cost if farmers put in fencing alongside the streams on their property. This would allow vegetation to grow along the stream banks and, in the process, capture many of the nutrients flowing toward the stream. When choosing which legal or policy instrument to use in changing the behavior of the farmers, the government can draw from a toolkit of five basic strategies. I like to call these the "Five Ps" — prescription, penalty, persuasion, property rights, and payment.

Through *prescription*, the government relies on command-and-control regulation, mandating certain behaviors, proscribing others, and imposing penalties for noncompliance. "Thou shalt put in place streamside fencing, or else . . ." Financial *penalties* and charges modify behavior through the financial signals of taxes and fees. Such an approach does not ban certain activities outright but, rather, makes them more expensive (such as charging per meter of unfenced stream). *Persuasion* relies on an information approach, educating landholders of the consequences of their management practices on the landscape and informing them of alternate approaches. The goal of this approach is self-regulation — explain to farmers the benefits they will receive by stabilizing their stream banks. The fourth approach is one of *property rights*. This instrument relies on privatization and allocation of access to a resource, whether a right to a particular catch in a fishery or the ability to emit a quantity of air pollution. In our example, one could require farmers either to put in a certain percentage of streamside fencing or hold the equivalent of fencing allowances that could be traded. The final approach is *payment*. This usually takes the form of a subsidy, either as a direct payment or tax break, justified by a public goods argument — society at large benefits from these activities, but because of market failures, does not pay for them. Though less attractive than regulation because of its impact on government budgets, such an approach is often popular with landholders for obvious reasons. Indeed, this is the approach we have primarily used in America when promoting streamside fencing.[20]

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[20] *See* CONGRESSIONAL RESEARCH SERVICE, REP. NO. 98-451, ANIMAL WASTE MANAGEMENT AND THE ENVIRONMENT, (1998) (describing subsidy programs for riparian buffers on farms).

Thus there are a number of strategies to choose from in designing governmental intervention to ensure streamside fencing. One could, however, view the issue from a totally different perspective. Why not, one might argue, simply recognize this situation for what it is — the provision of valuable services to consumers — through an explicit arrangement of payments for services rendered? Put another way, why not treat farmers' provision of ecosystem services as no different from their provision of other marketable goods? Farmers are certainly well accustomed to contractual arrangements for their agricultural products. Why not treat the provision of water filtration services as a market transaction, where farmers manage their land through streamside vegetation and grass swales to "grow the crop of water quality," much the same as dairy and potato farmers do for their cash crops? In many respects, provision of ecosystem services would be no different than supplying traditional farm produce with the level of compensation dependent on the quality and level of services provided.

III.

While this may seem like a crazy idea, there are numerous ecosystem service markets operating around the globe. The best known is in America. In the early 1990s, a combination of federal regulation and cost realities drove New York City to reconsider its water supply strategy. New York City's water system provides about 1.2 billion gallons of drinking water to almost nine million New Yorkers every day.[21] Ninety percent of the water is drawn from the Catskill/Delaware watershed, which extends 125 miles north and west of the city.[22] Under amendments to the federal Safe Drinking Water Act, municipal and other water suppliers were required to filter their surface water supplies unless they could demonstrate that they had taken other steps, including watershed protection measures that protect their customers from harmful water contamination.[23]

Presented with a choice between provision of clean water through building a filtration plant or managing the watershed, New York City easily concluded that the latter was more cost effective. It was estimated that a filtration plant would cost between

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[21] ERIC A. GOLDSTEIN & MARK A. IZEMAN, THE NEW YORK ENVIRONMENT BOOK 138 (1990); *See also* NEW YORK CITY DEP'T OF ENVTL. PROT., 2004 DRINKING WATER SUPPLY & QUALITY REPORT 2, *available at* http://www.nyc.gov/html/dep/pdf/wsstat04.pdf.

[22] N.Y. CITY INDEP. BUDGET OFFICE, THE IMPACT OF CATSKILL/DELAWARE FILTRATION ON RESIDENTIAL WATER AND SEWAGE CHARGES IN NEW YORK CITY 3 (Nov. 2000), *available at* http://www.ibo.nyc.ny.us/iboreports/waterreport.pdf.

[23] Safe Drinking Water Act, 42 U.S.C. §§ 300g-1(b)(7)(C) (2000).

$6 billion and $8 billion to build.[24] By contrast, watershed protection efforts, which would include not only the acquisition of critical watershed lands. but also a variety of other programs designed to reduce contamination sources in the watershed, would cost only about $1.5 billion.[25] Acting on behalf of the beneficiaries of the Catskills' water purification services, New York City chose to invest in natural, rather than built, capital. But New York City is not alone. Costa Rica's Ministry of Environment and Energy charges 20,000 water consumers near San José a small surcharge on monthly water bills.[26] The funds are used to pay upper watershed farmers who have agreed to conserve and manage their forests.[27]

Costa Rica has also launched a nationwide scheme of payments for provision of ecosystem services, known as Pagos por Servicios Ambientales (PSA).[28] The PSA permits the government to enter into binding contracts with landowners for the provision of four services: sequestration of carbon, water quality and quantity (i.e., for drinking, irrigation or hydroelectric power), biodiversity conservation, and aesthetic beauty for ecotourism.[29] By the middle of 2000, roughly 200,000 hectares of forest were being managed for service provision in exchange for payments.[30] An additional 800,000 hectares had been proposed for conservation management but were not included in the program because of inadequate funding.[31]

In Australia, the state of Victoria's Department of Natural Resources and Environment has developed a program, known as BushTender, to conserve native vegetation remnants on private property.[32] In exchange for payments from the state government, the landholders commit to fencing off and managing an agreed amount of their native vegetation for a set period of time.[33] The program is based on the model of the Conservation Reserve Pro-

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[24] GRETCHEN DAILY & KATHERINE ELLISON, THE NEW ECONOMY OF NATURE 63 (2004) [hereinafter DAILY & ELLISON].

[25] *Id.*

[26] *Id.*

[27] *Id.* at 65.

[28] *Id.* at 37-40.

[29] *Id.* at 42.

[30] *Id.*

[31] It is important to note, however, that most of the land has been managed for biodiversity, not water services. This is due primarily to the available resources and numbers of willing buyers. The World Bank, with a $32 million loan, and the Global Environment Facility, with an $8 million grant, has provided the means to pay for biodiversity conservation. *Id.*

[32] *See* GARY STONEHAM ET AL., AUCTIONS FOR CONSERVATION CONTRACTS: AN EMPIRICAL EXAMINATION OF VICTORIA'S BUSHTENDER TRIAL 12-13 (2002), http://eprints.anu.edu.au/archive/00002198/01/stoneha1.pdf.

[33] *Id.* at 10-11.

gram (CRP) in the United States, the largest ecosystem service payment scheme in the world.[34] CRP provides annual rental payments and shares the cost of conservation practices on farmland.[35]

There are many other examples I could present,[36] but these are sufficient to make two basic points. In virtually every robust service market, the government plays a central role. Moreover, because of public goods and collective action barriers, in most markets there is only one buyer. Put simply, most successful service markets to date operate as *monopsonies*, with a dominant buyer for multiple service provider sellers. The reason biodiversity conservation contracts proved so successful in Costa Rica was the dominant role played by the World Bank and the Global Environment Facility as a single, surrogate purchaser who stepped in with millions of dollars to purchase services on behalf of the world. The success of BushTender was also due to it being a monopsony. This was equally true in the Catskills, where New York City's Water Authority was the single purchaser for water purification. Whether for biodiversity or clean water, the government pays for these services on behalf of the citizenry. Such actions are entirely appropriate, it should be noted, since they correct the market failure posed by public goods.

Because most service markets function as monopsonies, these effectively take the form of a *payment scheme*. But payment schemes for ecosystem services, indeed for any services, raise difficult issues that need to be confronted. There are good reasons, after all, that "payments" and "subsidies" are four-letter words to many economists. Indeed, payment schemes can lead to what some might view as quite disturbing policy implications: are we paying the right people? Are we sending messages that encourage or undermine an ethic of land stewardship? Are we effectively paying for rights that landowners never had?

IV.

If one thinks back to our example with water passing through a valley and paying farmers to put in riparian fencing, after a moment's reflection, the payment for services suggests a tension. Those farmers who have already put in riparian fencing no longer have a significant potential for increased service provision

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[34] FARM SERVICE AGENCY, FACT SHEET: CONSERVATION RESERVE PROGRAM (April 2003), http://www.fsa.usda.gov/pas/publications/facts/html/crp03.htm.

[35] *Id.*

[36] *See* The Katoomba Group's Ecosystem Marketplace, http://ecosystemmarketplace.net/pages/section_landing.news.php. (providing a comprehensive list of examples).

and, as a result, are unlikely to be paid. Should every landholder who provides environmental services be paid? Given a finite budget, the answer to this would seemingly have to be "no." It is hard to imagine a practical scheme, for example, that pays everyone whose vegetation reduces nutrient flow in the watershed. If one seeks to pay for discrete cases of ecosystem service provision, clearly some land uses are more important than others. But how should one decide who gets paid and who does not? And more troubling still, should government pay those who, in many respects, may be *causing* the problems?

Should landholders who currently provide services (and have little runoff) or those whose properties pose the greatest nutrient problems (and hence the greatest potential for increased service provision) receive ecosystem service payments? Posing these questions more fundamentally, what is the proper paradigm for ecosystem service provision by farmers? Should we think of farmers as polluters, and therefore subject to the polluter pays principle, the touchstone for much of modern environmental policy? If so, they presumably should not be paid, but regulated or taxed instead. Or, by contrast, are farmers potential providers of valuable services who are as deserving of payments as water treatment plant operators?

To frame this dilemma more starkly, imagine two adjacent farmers, A and B, who raise cows for a dairy operation on gently rolling land beside a stream that flows into a reservoir. Concerned over stream bank erosion, five years ago Farmer A constructed fencing alongside her streams, creating a ten-foot riparian buffer on either side of the bank. This change in land management has significantly reduced the amount of nutrients and soil washing off her land and, consequently, has reduced the eutrophication and turbidity downstream. Farmer B, by contrast, has continued to manage her land much the same way as her predecessors, with nutrient and soil runoff after large storm events affecting water quality in the downstream reservoir. Should the water supplier be willing to make ecosystem service payments to address eutrophication and turbidity control? If so, which farmer should receive payments, and how much?

There is no easy answer to this conundrum. A partial answer, though, lies in consideration of property rights. If one can demonstrate easily that farmers do *not* have the right to allow their manure and soil to run off into watercourses, then paying them is poor policy. Simply enforcing existing property rights should be sufficient. In most cases, though, it is not clear whether

farmers have this right or not. It takes time to change traditional practices, and transitional payments can be used to ease the shift.

In evaluating the relative merits of this argument, it is helpful to consider whether it makes sense in any other setting. Take a step back, for example, and consider this in the pollution context. What would your immediate reaction be to a proposal that we should pay a factory to stop polluting because we all benefit from clean air? Dumb idea? But are farmers any different, in that the service they provide by putting in riparian fencing is really little more than reducing the contribution of their cows to eutrophication downstream? Payments to the factory only seem silly because the duty of care for factory pollution has clearly been established. Pollution laws already limit emissions. As a result, if we want them to improve upon the current standard to obtain even cleaner air, we essentially *do* pay them. In the US Environmental Protection Agency's regulatory innovation program during the Clinton Administration, known as Project XL, the agency promised greater flexibility (an administrative law payment of sorts) in exchange for superior performance.[37] Trading schemes under the Clean Air Act provide a similar lesson.[38] When initial sulfur dioxide permits are distributed based on historical emissions rather than auctioned off, existing plant owners are effectively allocated permits to pollute. Companies that emit less than permitted are rewarded by being allowed to sell their excess allowances to other sources.

Another major concern over payments is that of moral hazards. Recall that Farmer A carefully managed her land, putting in riparian fencing on her own initiative to prevent stream bank erosion, while Farmer B followed traditional practices, allowing her cows to graze in the stream and not putting in fencing. At first glance, paying Farmer B to improve her property through riparian fencing makes good sense. This will reduce pollution loading in the reservoir. But how can this be described as an ecosystem services payment scheme? On its face, this seems to be paying more for the *lack* of ecosystem services. That is, Farmer A is already providing services but will receive less than Farmer B, who currently provides few. The key point to recognize is that we are not really paying for ecosystem services but, rather, for *improvements in service provision*.

Our goal, after all, is improved water quality. In that respect, we should value most those actions that improve the water

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[37] U.S. ENVTL. PROT. AGENCY, WHAT IS PROJECT XL?, http://www.epa.gov/projectxl/file2.htm.

[38] Clean Air Act, 42 U.S.C. § 7651 et. seq. (2000).

quality on the margins. Those will primarily be actions taken from today forward that improve the status quo. Through this view, then, we should pay more initially to the Farmer Bs of the world who change their land use than to the Farmer As who have already made the improvements, for the simple reason that the actions of Farmer B will lead to greater marginal improvements.

This approach, however, may pose a problem known as a "moral hazard." If we say people are being paid to provide a service, then how can we ignore those who already provide it? What kind of message does that send? Are we not essentially paying off the bad actors and thereby encouraging undesirable behavior? More generally, how do we equitably account for the baseline that is already out there? Those farmers who have already made the investments and managed their land responsibly may not receive any payments. Only those who have been less responsible will benefit, the argument goes, creating a disincentive to land stewardship. Responsible land managers can become dispirited if those who employ less responsible land management practices effectively are paid for doing so. This surely is not conducive to the kind of land management ethic we are trying to encourage.

These are not easy challenges to answer. One response, though not entirely satisfying, is simply that life's not fair. Governments subsidize some agricultural activities more than others all of the time. Sugar cane growers in Florida may receive more federal money than grain farmers in South Dakota; peanut growers in Georgia may receive more advice from extension services than apple growers in Washington. Moreover, neither subsidy politics nor markets are based on equity. Markets are designed to exploit differences among buyers and sellers, not remove them. A market that seeks to eliminate heterogeneity will be a flat market.

Nonetheless, there is a likelihood of unnecessary payments. In other words, a payment scheme will attract bids not only from those who are willing to change their land management practices because of the payments, but also from those who would have made the changes in any case, but appreciate a handout when they can get one. However, this problem of "consumer surplus" may not be very large in practice, because presumably most people who would change land management on their own have already done so.[39]

These points address issues of equity, though, not of perverse incentives. Of possibly greater concern is the likelihood that

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[39] The use of a reverse auction, as in the Australian BushTender scheme, will also reduce the cost of these payments, because these farmers' bid prices should be quite low (in the sense that they would have done it for free, but some payment is better than none).

the Farmer Bs of the world will delay improving their land management practices in the expectation that they will eventually be paid to do so. In the extreme, one might imagine farmers actively *worsening* their land management practices to increase payments for their potential service provision.

To place this in a more domestic setting, imagine that your condo association wants to address the problem of noisy parties by having the loud apartment owners place a restrictive covenant in their leases.[40] Would offering payment to the noisy neighbors in exchange for restrictive covenants be a good solution? Not if it created a perverse incentive for other neighbors to start cranking up their stereos so they also could be bought off or, worse yet, if word got around and heavy metal fans moved into the building expressly so they could be paid to use headphones. Indeed, a standard economic criticism of subsidies is that they can unwittingly reward the very behavior they are trying to suppress.[41]

Moving back to the landscape, if the relative value of payments is low compared to losses from strategic behavior, then moral hazards are less likely a problem. Once one moves away from moral hazard actions that impose costs, however, the problem becomes more difficult, as in the case of biodiversity conservation. There may be little direct cost in switching to crops or field management that degrade critical habitat, and moral hazard concerns cannot be as easily dismissed.

A related concern over creating markets for ecosystem services centers on the impact this might have on the public's norms toward land stewardship.[42] Do public payments for service provision send the message that private provision is unnecessary or not valued? Government payment programs may risk undermining the land ethic by commodifying environmental stewardship, making responsible land management turn on money instead of fundamental values. Once payments become commonplace, they risk eroding common notions of an environmental duty of care and discouraging private investment in the environment by creating

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[40] This example was adapted from Jonathan B. Wiener, *On the Political Economy of Global Environmental Regulation*, 87 GEO. L.J. 749, 782 (Feb. 1999).

[41] In their well-known book on environmental economics, for example, Baumol and Oates set out an economic proof showing that subsidies given to a polluting industry are counterproductive. WILLIAM J. BAUMOL & WALLACE E. OATES, THE THEORY OF ENVIRONMENTAL POLICY 221-24 (2d ed. 1988).

[42] Barton H. Thompson, Jr., *Markets for Nature*, 25 WM. & MARY ENVTL. L & POL'Y REV. 261-277 (2000).

[43] MIKE YOUNG ET AL., DEPARTMENT OF SUSTAINABILITY AND ENVIRONMENT, DUTY OF CARE: AN INSTRUMENT FOR INCREASING THE EFFECTIVENESS OF CATCHMENT MANAGEMENT 15 (2003), *available at* http://www.vcmc.vic.gov.au/Web/Docs/Duty%20of%20care-final.pdf.

the impression that environmental stewardship is the duty of governments rather than individuals.[43]

Laws clearly can influence norm formation, though in complicated and often indirect ways. In the final analysis, it is helpful and humbling to consider the thoughts of Aldo Leopold — the famed ecologist and the most influential American writer on conservation. While Leopold would have welcomed the commitment of funds for conservation payments, John Echeverria notes,

> [H]e thought the "fallacious doctrine that government must subsidize all conservation" would ultimately "bankrupt either the treasury, the land, or both." Public ownership "can cover only a fraction of what needs to be done, and then only awkwardly, expensively, and with frequent clashes of interest." At the end of the day, he thought that those concerned about the problem of maintaining the health of the land had to grapple with the reality of private land ownership. "The basic problem is to induce the private landowner to conserve on his own land, and no conceivable millions or billions for land purchase can alter that fact, or the fact that so far he hasn't done it." [44]

V.

While ecosystem service markets have presented perhaps the most exciting developments in the field, three recent events are well worth noting as well, for they may have significant implications for conservation of ecosystem services.

The first was a conference held at Stanford this past May, where representatives of the Nature Conservancy and World Wildlife Fund met with ecosystem service experts from a range of fields to brainstorm over how a services perspective could change the way these groups do business. It is still far too early to speculate whether these organizations will adopt such a perspective, but there clearly is interest.

The main change from a greater focus on ecosystem services, one might think, would be a reconsideration of which land should be protected and how it should be protected. Rather than the traditional focus on the biodiversity value of protected lands,

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[44] John Echeverria, *What Would Aldo Leopold Say?: An Ambiguous Environmental Victory in the House of Representatives,* TOM PAINE.COM, May 11, 2000, http://www.tompaine.com/Archive/scontent/3094.html.

conservation organizations could perhaps fully protect a smaller area, while working with landowners over a larger area, to manage their lands productively. The goal would be to do this in a manner that ensures provision of services, whether its biodiversity conservation, pollination, et cetera. The net result would be a greater focus on managing the human-dominated landscape, growing out of the realization that, as important as fully protected refuges are, much biodiversity resides in managed landscapes.

An ecosystem services perspective also holds the potential to provide streams of income to support land conservation and biodiversity-friendly land management. It's too early to speculate on the extent to which these and other conservation groups will seriously consider how a focus on service provision, rather than biodiversity alone, could change their traditional strategies toward the conservation value of working landscapes. It is worth noting, though, that the World Wildlife Fund has been working on small-scale payments for environmental services for quite a while, usually through getting people to pay for forest cover with arguments about water, or coral reefs with arguments about fisheries.[45]

For this to happen, there will need to be a significant increase in scientific research examining the relationship between biodiversity, on the one hand, and the relative intensity and nature of land use, on the other. We need a far deeper understanding of the service capacity of managed landscapes (depending on the scale, type and intensity of land use). This is starting to happen. The National Center for Ecological Analysis and Synthesis, for example, has created two relevant research groups — one examining how to incorporate ecosystem services into conservation planning and nongovernmental organizations work in general, and the second assessing how to restore the ecosystem service of pollination to degraded landscapes.[46]

Another exciting development has been the launch of a virtual ecosystem marketplace. It goes without saying that markets — and environmental markets in particular — do not run on will alone. They require sound policy, strong science, and most of all, timely and transparent information. For markets to work, people need to know they exist, and participants need to see, with clarity and ease, who is buying, who is selling, and at what price. There also needs to be a clear understanding of the policy changes that drive these markets, as well as the science that underpins them.

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[45] E-mail from Taylor Ricketts, Ph.D., Director of Conservation Science, World Wildlife Fund, (Nov. 13, 2005) (on file with author).

[46] National Center for Ecological Analysis and Synthesis, Research Projects (updated Feb. 16, 2006), http://www.nceas.ucsb.edu/nceas-web/projects/.

To date, this information gap has been a major barrier to ecosystem service market growth. Over the past year, however, an organization known as "The Katoomba Group" has stepped in to fill this information gap.[47]

The Katoomba Group is a unique organization. It has an intentionally broad-based membership including forest product companies, businesses, bankers, grassroots activists, and journalists, and has brought together experts from Australia, Mexico, Colombia, Sweden, Canada, U.K., Brazil, Indonesia, China, Japan, Uganda, the US, and dozens of other countries.[48] Over the past year, the Katoomba Group has been developing a website known as the Ecosystem Marketplace, with separate launch events at the IUCN Global Congress in Bangkok, London and New York City.[49]

The goal of the Marketplace is ambitious. It seeks to become the "one-stop shop" for basic and timely information on emerging markets and payment schemes for ecosystem services around the world. As noted above, anyone who wants to participate in a market needs basic information — prices, transactions, how the services are measured, packaged and sold, where the buyers and sellers are, et cetera. Lloyds of London is known to everyone today as an insurance giant, but it's worth remembering that it started as a popular coffee house where merchants came together to exchange information about shipping news.[50] The Marketplace wants to provide the same central source of information and networking to buyers and sellers today, facilitating transactions, catalyzing new thinking, and spurring the development of new ecosystem markets.

The website will provide this information, available with a mouse click to traders in environmental commodities, government regulators, businesses affected by environmental regulation, banks and financiers, scientists, environmental and community development organizations, as well as low-income producers interested in tapping into these markets. All these players need to be involved for environmental markets to reach their full potential. The website will also be providing policy analyses on how these markets operate on the ground, their impact on the ecosystems themselves, and on low-income producers and community groups in developing countries. Support has been provided by a wide range of institu-

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[47] In the interests of full disclosure, I am on the Katoomba Board.

[48] The Katoomba Group, Katoomba Members, http://www.katoombagroup.org/members.htm.

[49] *See* The Katoomba Group Home Page, http://www.katoombagroup.org.

[50] Chronology, http://www.lloyds.com/About_Us/History/Chronology.htm.

tions, from the World Bank and the U.S. Forest Service to Citigroup and ABN-AMRO.[51]

The last development that could really wake people up concerns the 2007 Farm Bill. Agricultural subsidies are, as everyone knows, significant in America and many other nations. While food security and ensuring the prosperity of farmers may well be laudable goals, the trade impacts of subsidies are powerful and often terribly damaging to developing country farmers who cannot compete with imported grains, fruits, et cetera.[52] Indeed, a number of noted authorities have argued that the most important single step to promote sustainable development would be to eliminate agricultural subsidies.[53] Easier said than done, though, because meaningful reduction of agricultural subsidies has traditionally been off the table at international trade talks.[54] Until recently, everyone thought the issues were too politically sensitive, domestic farm lobbies were too powerful, et cetera.[55]

In a series of cases brought against cotton subsidies in the United States and sugar subsidies in Europe, Brazil dramatically changed the status quo by persuading World Trade Organization dispute settlement panels that these subsidies violated international trade rules.[56] These decisions jump-started discussions already underway in the Doha Round for the next series of international trade rules. There is far more detail one could go into about the nature of the Brazil decisions, the "Peace Clause" and agricultural "boxes" of the Uruguay Round, and the current Doha negotiations.[57] For our purposes, however, it is enough to recognize

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[51] www.ecosystemmarketplace.com

[52] *See* Antonio LaViña et al., *Beyond the Doha Round and the Agricultural Subsidies Debate: Toward a Reform Agenda for Livelihoods and the Environment* 6 (World Resources Institute, Working Paper, 2005).

[53] *See, e.g.,* Carmen G. Gonzalez, *Institutionalizing Inequality: The WTO Agreement on Agriculture, Security, and Developing Countries*, 27 COLUM. J. ENVTL. L. 433, 463-465 (2002); James Gathii, *A Critical Appraisal of the NEPAD Agenda in Light of Africa's Place in the World Trade Regime in an Era of Market Centered Development,* 13 TRANSNAT'L L. & CONTEMP. PROBS. 179, 181 (2003); Nsongurua J. Udombana, *A Question of Justice: The WTO, Africa, and Countermeasures for Breaches of International Trade Obligations,* 38 J. MARSHALL L. REV. 1153, 1174 (Summer 2005); Raj Bhala, *World Agricultural Trade in Purgatory: The Uruguay Round Agriculture Agreement and Its Implications for the Doha Round*, 79 N.D. L. REV. 691, 698 (2003).

[54] William Petit, *The Free Trade Area of the Americas: Is It Setting the Stage for Significant Change in U.S. Agricultural Subsidy Use?,* 37 TEX. TECH. L. REV., 127, 147 (Winter 2004).

[55] *Id.* at 132-133.

[56] *See* Panel Report, *United States - Subsidies on Upland Cotton*, 350-51, WT/DS267/R (Sept. 8, 2004) (requiring the United States to "remove the adverse effects" of its support payments to domestic cotton producers).

[57] *See* World Trade Organization, Agriculture-gateway, http://www.wto.org/english/tratop_e/agric_e/agric_e.htm (describing the background and status of agriculture negotiations).

that commodity subsidy programs are now under threat as never before. Direct payment, export support, and supply control programs need to become World Trade Organization complaints. This will require a more transparent decoupling of subsidies and production than has been possible to date. Indeed just such a decoupling has been underway in the European Union.[58]

Why am I going into this seemingly irrelevant history during a discussion of ecosystem services? The farm lobby is not likely to give up its billions of dollars of subsidies without a fight, so it's worth considering the hydraulics of the situation. If these funds cannot go directly to production support subsidies, where might they go instead? A lot of people are talking about these funds going to ecosystem services. There is intense interest in expanding the current suite of United States Department of Agriculture (USDA) programs that support landscape management (with acronyms such as CRP, CSP, WRP, and EQIP).[59] This potential shift could not have been made clearer than in a speech given this past August by Mike Johanns, the Secretary of Agriculture. He declared that, "[t]oday, I am announcing that USDA will seek to broaden the use of markets for ecosystem services through voluntary market mechanisms. I see a future where credits for clean water, greenhouse gases, or wetlands can be traded as easily as corn or soybeans."[60]

It is a sign of the times when the most important government official for farm policy openly calls for a future premised upon the growth and flourishing of ecosystem service markets. It remains to be seen, of course, whether calls such as that by Secretary Johanns for greater reliance on service markets will lead to real reform. They say that lawmaking is as unappetizing as watching sausages being made, and agriculture bills can be even more gruesome. Nonetheless, his statement represents a sea of change in USDA policy and will have important repercussions in the coming months and years. We've indeed come a long way in a short time.

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[58] *See* EUROPA – Agriculture – CAP Reform – a long-term perspective for sustainable agriculture (adopted Sept. 2003), http://europa.eu.int/comm/agriculture/capreform/ index_ en.htm (describing the reform of its Common Agricultural Policy).

[59] *See* United States Department of Agriculture Natural Resources Conservation Service, NRCS Directives, Acronyms, http://policy.nrcs.usda.gov/scripts/lpsiis.dll/M/M_440_ 502_B_10.htm.

[60] The Hon. Mike Johanns, Sec'y, U.S. Dep't of Agric., Remarks at the White House Conference on Cooperative Conservation, *in* Press Release, U.S. Dep't of Agric., Press Release No. 0335.05 (Aug. 29, 2005), *available at* http://www.usda.gov (follow "Newsroom" hyperlink; then follow "Transcripts & Speeches" hyperlink; then select "August" and "2005" from the drop-down boxes; then follow "August 29, 2005" hyperlink).

This is an exciting time to be working in the field of ecosystem services. Major players, from conservation groups to multinational corporations, are waking up to the idea that a focus on services can enhance conservation and earn a competitive return on investment. Governments at the local, national and international levels are increasingly aware of the potential for an explicit focus on conserving ecosystem services and creating service markets. As never before, academic researchers face both the daunting responsibility and refreshing opportunity to examine how to move the theory of service market creation to practice.

REDUCING JUST COMPENSATION FOR ANTICIPATED CONDEMNATIONS

ALAN ROMERO*

I. INTRODUCTION

Governments, and those they represent, generally prefer to spend as little as possible on acquiring property interests. If they can get the desired property interest for free, even better. Regulation of land often may satisfy the public's need for an interest in property without requiring any condemnation. For example, if the government can prohibit coastal development by regulation without paying compensation, it can save the expense of buying a negative easement or fee simple title to the coastal land.[1]

But sometimes the public interest requires an easement or fee simple title by condemnation. In those cases, the government

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[1] *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1003 (1992) ("[T]he state legislature enacted the Beachfront Management Act, which barred Lucas from erecting any permanent habitable structures on his parcels.").

generally cannot hope to acquire the necessary property interest for free. Of course, sometimes the government can provide incentives that will induce some owners to voluntarily grant the needed property interests to the public.[2] But otherwise the government is going to have to pay.

Even then, the government would generally like to save as much money as it can. Sometimes political interests motivate the government to be more generous to landowners. But many cases evidence the government's desire to reduce the just compensation bill as much as possible.[3]

The government often tries to save money by arguing that the "just compensation" required by the Fifth Amendment does not require as much money as the landowner asserts. Payment of fair market value for the interest condemned is generally considered to be just compensation. So the government may argue that fair market value is less than the landowner believes.[4]

Another way that the government might save money, though, is to actively reduce the fair market value of properties it plans to condemn. If the government can plan what lands it may want to acquire in the future, it can also plan ways to reduce the costs of acquiring those lands.

This article discusses various ways in which governments may reduce the cost of condemning property interests by using their regulatory and police power to reduce property's market value in advance. It is not hard for the government to do. But regulating to reduce just compensation may sometimes unconstitutionally abuse the regulatory power. So besides describing and illustrating ways that government may reduce just compensation by regulation and other precondemnation activities, I discuss the constitutional boundaries to such strategies. The government's precondemnation activities may themselves take property or deny

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[2] *Cf.* United States v. Virginia Elec. & Power Co., 365 U.S. 624, 625, 626 n.1 (1961) (observing that a property owner gave the government a flowage easement over 1840 acres in exchange for only one dollar because the owner expected the rest of her property to be more valuable as a wild game preserve if the government created an artificial lake on the property).

[3] *See, e.g.*, Amen v. City of Dearborn, 363 F. Supp. 1267 (E.D. Mich. 1973) (recounting a city's various efforts to buy properties in a redevelopment area at the cheapest prices possible), *rev'd*, 532 F.2d 554 (6th Cir. 1976); Roth v. State Highway Comm'n, 688 S.W.2d 775, 776 (Mo. Ct. App. 1984) (noting that the State Highway Commission offered $465,000 for property that its own agent found would require $2,250,000 in just compensation).

[4] For example, the National Park Service (NPS) condemned hundreds of private tracts of land in assembling the land for Voyageurs National Park. The NPS indicated to landowners its intention to acquire land for 30% of market value. Condemnation suits evidenced the NPS strategy: the judicially determined fair market value on average exceeded NPS's offers of compensation by 785%. *See* Althaus v. United States, 7 Cl. Ct. 688, 691 (1985).

substantive due process if they deprive the owner of too much of the property's value or if they do not further a legitimate state interest — some interest other than saving money in eminent domain proceedings. And even if precondemnation activities do not take property or deny substantive due process, the Just Compensation Clause sometimes will require the government to pay for the resulting market value losses if the government does ultimately condemn the property.

II. DETERMINING JUST COMPENSATION

The Fifth Amendment prohibits governments from taking private property unless they pay owners "just compensation."[5] To be just, compensation ordinarily must at least equal the fair market value of the property taken by the government.[6] But fair market value is not constant, of course. Property values as a whole may fluctuate, but changes in a particular property or its neighborhood may also cause changes in market value. Such changes in market value can contribute to disagreements about what compensation the government must pay the owner of condemned property. The usual rule, however, is that the government must pay the market value at the moment it actually exercises its eminent domain power, the moment it actually takes the property from the owner.[7]

But before that moment, the market may already have anticipated the condemnation by the government. That anticipation sometimes may make the property worth less on the market than it was worth before the market had reason to anticipate condemnation. The government's preparation for condemnation may also lead to changes in permitted uses of the property or changes in the surrounding area that reduce the market value of the subject property.

Ordinarily, the property owner cannot complain. Changes in market value are one of the risks, as well as one of the rewards, of property ownership. But if the government has caused the loss in market value in preparing to condemn the land, the property owner may object that the government simply took part of her property in advance. Yet the law generally has been on the gov-

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[5] U.S. CONST. amend. V; s*ee also* Chicago, B. & Q. R. Co. v. Chicago, 166 U.S. 226, 241 (1897) (holding that the Fourteenth Amendment requires states to provide just compensation when taking private property for public use).

[6] *See, e.g.*, United States v. Miller, 317 U.S. 369, 374 (1943) (stating that just compensation usually equals market value).

[7] *See, e.g.*, First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 320 (1987); *Miller*, 317 U.S. at 374.

ernment's side: the government pays only the value on the day title changes from owner to government.

III. GOVERNMENT ACTIONS REDUCING MARKET VALUE TO BE COMPENSATED

Whether purposeful or not, there are many ways the government can cause the market value of future condemnation acquisitions to decline before actually beginning condemnation proceedings. This section categorizes the types of government actions that reduce the market value of properties that are ultimately condemned.

A. Planning

Merely planning to condemn a particular property may reduce the property's market value, or at least slow the property's appreciation in value.[8] For example, property designated as the possible site of a hazardous waste facility may have a reduced market value because it is no longer an attractive or feasible site for homes or for farming.[9] Therefore, when the time comes to actually condemn the property and use it for a hazardous waste facility, the government pays only the depressed market value, not the value it would have if the property were being used for say a mobile home park, or even if the market were still anticipating such a use.

One might reason that the mere possibility of condemnation should not depress the market value because the property owner who starts farming or builds a mobile home park will still be fully compensated for that value if the government does eventually con-

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[8] *See, e.g.*, Smith v. State, 123 Cal. Rptr. 745, 746 (Ct. App. 1975) (reciting allegations that a resolution concerning development of state highway substantially decreased the value of plaintiff's property); 4 JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN 12-415 (rev. 3d ed. 1985) ("If the projected public work will be injurious to the neighborhood through which it will pass, the fact that it is hanging like a sword of Damocles over the heads of the land owners in the vicinity cannot but fail to have a depressing effect upon values."); Joseph C. Rust, Note, *The Condemnor's Liability for Damages Arising Through Instituting, Litigating, or Abandoning Eminent Domain Proceedings*, 1967 UTAH L. REV. 548, 549 (listing ways in which government plans to condemn may cause decline in market value). Declarations of urban blight, prerequisite to urban renewal projects, can dramatically impair market value of properties long before property is condemned. *See, e.g.*, Washington Mkt. Enters. v. City of Trenton, 343 A.2d 408, 414-15 (N.J. 1975) ("From the time it becomes generally known that an area has been selected as the site of an urban renewal project . . . there ceases to be a ready market for premises within the area. It becomes difficult to find tenants and impossible to enter into long-term leases. Upkeep, maintenance and renovation cease; the value of the property tends constantly to diminish.").

[9] *See, e.g.,* Littman v. Gimello, 557 A.2d 314, 319 (N.J. 1989).

demn the property.[10] But the government only pays for the property it condemns. It does not pay the costs of relocating a business, lost goodwill, lost opportunity costs as time passes without the development proceeding, and so on. A developer who wants to build a mobile home park will undoubtedly sharply discount the value of a parcel that the government plans to condemn, even though the developer may still be willing to pay more than the value it would have if the government's intended use were the only possible use.[11]

In *Althaus v. United States*,[12] for example, the National Park Service frequently discussed in public meetings its intention to acquire all private lands within Voyageurs National Park.[13] The Park Service prepared land acquisition maps and otherwise planned to acquire those private lands for as little as possible.[14] As a result, there was virtually no market for buying those private lands, and even the Park Service argued that speculators might only offer twenty-five to fifty percent of their market value.[15]

Similarly, plans to condemn may impair market value by impairing access to credit for developing the property. In *Mesa Ranch Partnership v. United States*,[16] for example, certain property was included within a Department of Interior Land Acquisition Plan for Point Reyes National Seashore. But since the government had not yet initiated condemnation proceedings, the property owner tried to proceed with developing a residential subdivision. Lenders would not finance the development, however, because they anticipated the future condemnation, but could not be sure that the property would be condemned and that the government would pay sufficient compensation to pay off a development loan.[17]

B. Publicity

Besides formally planning to acquire certain property, government agencies and officials may publicly discuss the possibility.

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[10] *See id.* ("Plaintiffs' allegations concerning harm to potential farming operations are also comprised of nothing more than uncertainty caused by governmental planning and possible forgone economic opportunities. They can still use their land for farming and if it is eventually condemned, they will get a fair price for it. If it is not condemned, they can go on farming.").

[11] *See id.* at 320 ("Realistically no one will invest in their property while there is still a risk that it will be condemned.").

[12] 7 Cl. Ct. 688 (1985).

[13] *Id.* at 691.

[14] *Id.*

[15] *Id.* at 695.

[16] 2 Cl. Ct. 700 (1983).

[17] *Id.* at 705-06.

Regardless of how definite those plans may be, the result for the property owner may be the same: the property's value is depressed because the market anticipates the possible condemnation.[18]

C. Delay

The government may also save some condemnation expense by simply delaying regulatory action on property that it anticipates condemning. Delay can save money in two ways. First, if a building permit or zoning action would permit some development on the property, delaying such actions prevents the property from becoming more valuable as a result of the planned development.[19] Second, delaying regulatory action may actually reduce the value of the property. For example, in *Citino v. Redevelopment Agency*,[20] the plaintiff's land lost all market value during a nine-year period in which the redevelopment agency never implemented a redevelopment plan for the plaintiff's property and surrounding property.[21]

D. Zoning

On the other hand, timely regulatory action may decrease, rather than increase, market value. So sometimes the government may promptly take regulatory action on a property it plans to condemn. The simplest strategy is simply downzoning property that the government may desire to condemn. If the government wants to condemn land for an airport, for example, downzoning prospective acquisitions from industrial land to agricultural land would significantly reduce the property's market value. Then, when the time comes to exercise its eminent domain power, the government would save a substantial amount of money by paying less just compensation to the owners.[22] In *Grand Trunk Western Railroad*

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[18] *See, e.g.*, Commonwealth v. Levine, 281 A.2d 909, 910 (Pa. Commw. Ct. 1971) (finding sufficient plaintiff's allegations that public proclamations of a proposed highway route and imminent condemnation, among other things, caused loss of tenants and impaired market value of his property); Maxey v. Redev. Auth., 288 N.W.2d 794, 802 (Wis. 1980) (concluding that statements to press that property would be taken, among other things, constituted a taking even before property was legally restrained).

[19] *See, e.g.*, Amen v. City of Dearborn, 363 F. Supp. 1267, 1272 (E.D. Mich. 1973) (finding that a city had delayed building permits, occupancy permits, and repair permits in campaign to reduce the expense of acquiring desired properties), *rev'd*, 532 F.2d 554 (6th Cir. 1976).

[20] 721 A.2d 1197 (Conn. App. Ct. 1998).

[21] *See id.* at 1203-04, 1209.

[22] *See, e.g.*, Kissinger v. City of Los Angeles, 327 P.2d 10, 14 (Cal. Ct. App. 1958) (noting that the government had changed zoning of property in an airport area from multi-family

Co. v. City of Detroit,[23] the city apparently zoned blighted property along a railway to permit only multi-family residential buildings, knowing that it could not feasibly be used for such purposes, but anticipating that at some point the city would condemn the land for housing development.[24]

Rather than downzoning the anticipated acquisition, the government may instead establish buffer zones that can reduce the property's market value, or at least slow its increase in value. If neighboring property is zoned industrial rather than agricultural, for example, the market value of residential property will be less.

Finally, the government may target future acquisitions directly with zoning changes. The government could, for example, designate an airport zone that permits only lower value uses. Then, when the day comes to actually acquire the land and build an airport, the land will be worth less than if it had been developed industrially. A special zone like this may even prevent the land from being developed altogether. And the market value of land that may only be used for a governmental use will surely be less than the value of land that could be used for private development.

E. Building and Safety Regulations

Other regulatory actions can also depress or restrain market value. The government can use building or safety regulations to prevent or obstruct private development on land that the government plans or hopes to condemn.[25] For example, the district court in *Amen v. City of Dearborn*[26] found that the city had denied building permits, repair permits, and occupancy permits in an effort to acquire certain properties for less.[27] In *Roth v. State High-*

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residential to single-family residential, thus reducing market value from $114,000 to $48,000); State *ex rel.* Tingley v. Gurda, 243 N.W. 317, 320 (Wis. 1932) (considering the possibility that the city unlawfully zoned property residential to depress its value in anticipation of condemning it for a future road); Gideon Kanner, *What to Do Until the Bulldozers Come? Precondemnation Planning for Landowners*, 27 REAL ESTATE L.J. 47, 60 (1998) ("[Z]oning may be changed so as to lower property values in anticipation of condemnation.").

[23] 40 N.W.2d 195 (Mich. 1949).

[24] *See id.* at 198-99.

[25] *See* Cambria Spring Co. v. City of Pico Rivera, 217 Cal. Rptr. 772, 775 (Ct. App. 1985) (describing a city's plan to issue no permits for improvements inconsistent with its redevelopment plan for the project area); Sproul Homes v. State *ex rel.* Dep't of Highways, 611 P.2d 620, 621 (Nev. 1980) (reciting plaintiff's allegation that city denied building permits in an effort to coerce plaintiff to sell land for less than fair market value); Kanner, *supra* note 22, at 60 ("[I]t is common that building permits are withheld causing the targeted properties to fall into disrepair, so that cities can acquire them cheaply.").

[26] 363 F. Supp. 1267 (E.D. Mich. 1973), *rev'd*, 532 F.2d 554 (6th Cir. 1976).

[27] *See id.* at 1272 (holding that the city took plaintiffs' property as a result of various efforts to depress the value of properties in an acquisition area).

way Commission,[28] the court found that the State Highway Commission had asked several times that local governments not issue building permits for any property within an area planned for a highway, and the city consequently refused to issue a building permit to the plaintiff.[29]

F. Restricting Improvement and Rehabilitation

Another regulatory device to prevent future acquisitions from appreciating in value is to limit or prohibit improvement and rehabilitation of specified properties. If the government plans to condemn a blighted area, for example, preventing rehabilitation in the meantime would ensure that the market value of the land does not substantially increase. In fact, it almost ensures that the market value will decrease, because the property will likely continue to deteriorate.

For example, in *In re Elmwood Park Project Section 1, Group B*,[30] the city notified owners in an urban renewal area that it would be initiating condemnation proceedings. But during the next ten years, the plaintiff alleged, the city delayed the proceedings and deliberately caused the value of the properties to decline by, among other things, refusing to issue building permits to improve the properties.[31] Then, twelve years after beginning the process, the city discontinued the original proceedings and began new condemnation proceedings, using appraisals based on the now blighted, vandalized, and depressed market values of the properties.[32]

State law may permit cities to freeze development of property for a specified period of time while the city decides whether to acquire or condemn the land.[33] Governments also have commonly restricted improvement of properties while they make planning decisions about what regulatory restrictions are appropriate for the properties.[34] This sort of a moratorium on development, how-

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[28] 688 S.W.2d 775 (Mo. Ct. App. 1984).

[29] *See id*. at 776.

[30] 136 N.W.2d 896 (Mich. 1965).

[31] *See id.* at 900.

[32] *See id.*

[33] *See* Lomarch Corp. v. Mayor of Englewood, 237 A.2d 881, 882-83 (N.J. 1968) (upholding the Official Map Act that permitted a city ordinance prohibiting development of part of the plaintiff's property for one year while the city decided whether to purchase or condemn the land for parks, but holding that the city must pay just compensation for temporarily taken land).

[34] *See* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 337-38 (2002) ("[M]oratoria . . . are used widely among land-use planners to preserve the status quo while formulating a more permanent development strategy. In fact, the consen-

ever, is not overtly connected to a decision about whether to condemn properties, and therefore is less likely to reduce the compensation to be paid when property is condemned. Still, even this sort of a moratorium for regulatory decision-making will keep the property undeveloped or unimproved, and if the government ultimately decides to condemn some property subject to the moratorium rather than just regulate it, the property will be worth less when condemned.

Even if the government does not formally prohibit or restrain development, the government may still try to prevent improvement and rehabilitation informally. In one case, for example, the landowners alleged that the government told owners that they would not receive compensation for improvements and discouraged them in various ways from making improvements.[35] If these informal means work, they too will reduce the compensation the government will have to pay when it eventually condemns the property.

G. Government Improvements and Conduct Offsite

Finally, the government may depress or restrain the market value of land by developing government improvements nearby. Some improvements may increase the value of nearby land, like roads, parks and infrastructure, but other improvements may decrease the value of neighboring land. If the government intends to acquire land in an area for some government development, acquiring some of the land and beginning development thereon may reduce the cost of acquiring the rest of the land.

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sus in the planning community appears to be that moratoria, or 'interim development controls' as they are often called, are an essential tool of successful development." (footnotes omitted)); Elizabeth A. Garvin & Martin L. Leitner, *Drafting Interim Development Ordinances: Creating Time to Plan*, LAND USE L. & ZONING DIG., June 1996, at 3 ("With the planning so protected, there is no need for hasty adoption of permanent controls in order to avoid the establishment of nonconforming uses, or to respond in an ad hoc fashion to specific problems. Instead, the planning and implementation process may be permitted to run its full and natural course with widespread citizen input and involvement, public debate, and full consideration of all issues and points of view."). *See generally* Robert H. Freilich, *Interim Development Controls: Essential Tools for Implementing Flexible Planning and Zoning*, 49 J. URB. L. 65 (1971) (advocating use of interim development controls to aid good planning).

[35] *See* Foster v. City of Detroit, 254 F. Supp. 655, 662 & n.17 (E.D. Mich. 1966), *aff'd*, 405 F.2d 138 (6th Cir. 1968) (noting that a city advised a property owner only to "keep the roof on and the water running" and, as a condition to obtaining a building permit, required him to sign a waiver of any claim to the increased value of the property as a result of the proposed improvements).

For example, in *Merkur Steel Supply, Inc. v. City of Detroit*,[36] the City of Detroit planned to acquire plaintiff's land for an airport expansion. For years, however, the city did not actually condemn the land, but obstructed plaintiff's efforts to expand its business on its land. Plaintiff eventually sued in inverse condemnation, alleging among other things that the city tried to reduce the cost of acquiring plaintiff's land by condemning much of the surrounding property in order to prevent plaintiff's expansion.[37]

A related but different claim, also suggested in *Merkur Steel*, is that the government intentionally let neighboring properties deteriorate.[38] The result, of course, is that the subject property declines in value along with the neighboring properties.[39] Similarly, the government may not only allow neighboring properties to deteriorate, it may even demolish them in the process of redevelopment. When a building is surrounded by debris and vacant lots, it is much less valuable than when surrounded by other valuable uses.[40]

IV. CONSTITUTIONAL LIMITS

The government could acquire land for very little if it could use all of these strategies freely. If there were no limits, the government could simply prohibit use of a parcel for any purpose and make it useless, then condemn it and pay no compensation at all. But of course there are limits. This section discusses three constitutional limitations on reducing just compensation for anticipated condemnations. First, the government's precondemnation conduct may itself amount to a taking by depriving the owner of the use or value of her property. Second, the government may take property, or deny substantive due process, if the regulation does not serve a purpose other than reducing the compensation to be paid when the

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[36] 680 N.W.2d 485 (Mich. Ct. App. 2004).

[37] *See id*. at 493.

[38] *See id*. at 499 n.3 ("Some evidence in the record indicates that the city stopped services such as trash pickup around the area and also began dumping trash on property the city acquired. Further, plaintiff suggested that through condemnation, the city acquired some of the residential properties around the area, but let those properties become run down.").

[39] *See* Amen v. City of Dearborn, 363 F. Supp. 1267, 1273 (E.D. Mich. 1973) (finding that city's efforts to reduce cost of acquiring property included selling property in the area to polluting industries), *rev'd*, 532 F.2d 554 (6th Cir. 1976).

[40] *See, e.g.*, Thomas W. Garland, Inc. v. City of St. Louis, 596 F.2d 784, 786 (8th Cir. 1979) (recounting plaintiff's allegations that the city had acquired surrounding properties for redevelopment, demolished them, but abandoned the redevelopment, thereby taking plaintiff's property); Foster v. City of Detroit, 254 F. Supp. 655, 660 (E.D. Mich. 1966) (describing deterioration of a neighborhood planned for urban renewal, and effects on plaintiffs' property), *aff'd*, 405 F.2d 138 (6th Cir. 1968).

property is eventually condemned. Finally, even when the regulation does not take property or deny due process, if the government does ultimately condemn the property, the Fifth Amendment may require the government to pay the higher market value of the property before its regulatory activities depressed the value.

A. Regulatory Taking by Denying Economically Viable Use

If regulation goes too far, it will be treated as a taking of private property requiring just compensation, even though the government may not have intended to take the property.[41] The compensation-reducing strategies discussed in Part II may sometimes go too far.

Government land-use regulation that deprives the owner of economically viable use of her land is a taking of private property requiring just compensation.[42] In rare cases, the government may make a property useless for any purpose other than its own planned use. But even if the property is not useless, the restraint on use and the resulting loss of value may be so extreme that the government has effectively taken the owner's property. The court will consider "[t]he economic impact of the regulation on the claimant and . . . the extent to which the regulation has interfered with distinct investment-backed expectations" in deciding whether the regulation is constitutionally equivalent to a taking.[43] In this section, I consider possibilities that the precondemnation activities discussed in Part II will amount to a taking in this way by reducing the property's value so much that it is equivalent to taking the property away from the owner.

1. Planning and Publicity

Ordinarily, planning and publicity will not themselves impair the market value so severely that they effectively take the property from the owner. Planning a condemnation, or even passing legislation authorizing a condemnation, obviously does not ac-

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[41] *See* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) ("[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.").

[42] *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015-18 (1992) (stating that and explaining why government must pay just compensation when "regulation denies all economically beneficial or productive use of land"); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 485 (1987); Agins v. City of Tiburon, 447 U.S. 255, 260 (1980) ("The application of a general zoning law to particular property effects a taking if the ordinance . . . denies an owner economically viable use of his land.").

[43] Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978); s*ee also Lucas*, 505 U.S. at 1019 n.8 (observing that even if an owner is not deprived of all economically beneficial use, the owner may still establish a taking in particular cases).

tually take the property from the owner, nor does it make the property useless. Plans may change, of course, and the property may never actually be condemned by the government.[44] If courts grant just compensation for merely planned takings, inverse condemnation suits can subvert the legislative power to decide if and when to condemn.[45] In the meantime, the owner is still legally free to use or transfer her property as she wishes until the government actually condemns it. "[I]n the absence of an interference with an owner's legal right to dispose of his land, even a substantial reduction in the attractiveness of the property to potential purchasers does not entitle the owner to compensation under the Fifth Amendment."[46] Many cases have held that planning a condemnation therefore does not take the property until the condemnation actually occurs.[47]

But sometimes planning or publicity may actually deny an owner all economically viable use of her land, or nearly so.[48] For example, if the property's present use is not economically viable, planning and publicizing condemnation for the property may make it practically impossible to rehabilitate the land or sell it to another who would develop it in an economically useful way.[49] A

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[44] Danforth v. United States, 308 U.S. 271, 286 (1939) ("The mere enactment of legislation which authorizes condemnation of property cannot be a taking. Such legislation may be repealed or modified, or appropriations may fail.").

[45] *See* Howell Plaza, Inc. v. State Highway Comm'n, 226 N.W.2d 185, 189 (Wis. 1975) ("If this court countenances suits for inverse condemnation and permits the award of damages - - in effect by decree transfers property to a condemning authority before the project is finally decided on - - private citizens claiming they have been damaged by a threatened taking will in effect have preempted the legislative function.").

[46] Kirby Forest Indus. v. United States, 467 U.S. 1, 15 (1984); s*ee also Agins*, 447 U.S. at 263 n.9 ("Mere fluctuations in value during the process of governmental decisionmaking, absent extraordinary delay, are 'incidents of ownership.'" (quoting Danforth v. United States, 308 U.S. 271, 285 (1939))).

[47] *See, e.g.*, Santini v. Connecticut Hazardous Waste Mgmt. Serv., 342 F.3d 118, 131 (2d Cir. 2003) (reasoning that a siting declaration did not take property because property still had some use and value); Barthelemy v. Orange County Flood Control Dist., 76 Cal. Rptr. 2d 575, 579 (Ct. App. 1998) ("[M]ere designation of property for public acquisition, even though it may affect the marketability of the property, is not sufficient. 'The right of a governmental body to plan for the acquisition of property is unquestioned. In the absence of special circumstances it does not give rise to an action for inverse condemnation.'" (quoting City of Walnut Creek v. Leadership Hous. Sys., Inc., 140 Cal. Rptr. 690, 696 (Ct. App. 1977))); Far-Gold Constr. Co. v. Chatham, 357 A.2d 765, 768 (N.J. Super. Ct. App. Div. 1976) (holding that a municipality's resolution expressing desire to acquire property for a park did not take property); Westgate, Ltd. v. State, 843 S.W.2d 448, 452 (Tex. 1992) (holding that the government's proposal to condemn property was not a taking).

[48] *See* Washington Mkt. Enters., Inc. v. City of Trenton, 343 A.2d 408, 416 (N.J. 1975) (when "the threat of condemnation has had such a substantial effect as to destroy the beneficial use that a landowner has made of his property, then there has been a taking of property within the meaning of the Constitution.").

[49] *See* Drakes Bay Land Co. v. United States, 424 F.2d 574, 586 (Ct. Cl. 1970) (holding that the federal government took land never condemned for Point Reyes National Seashore

number of cases have held that urban blight declarations can destroy substantially all the value of property in the blighted area. If the property is not ultimately condemned, some courts have correctly held that the government has nonetheless taken the owner's property.[50]

2. Delay

When the government delays giving permission for property use or development, the delay may be a taking of this sort if, during the period of delay, the property cannot be used productively. Obviously, if the property is already developed and valuable, even a very long delay in permitting some more valuable use will not deprive the owner of all or nearly all value — just the extra increment of value that the owner sought, however substantial that may be. But if the property is undeveloped or otherwise useless in its present condition and the owner is unable to use or sell her property while the government delays decisions about permits, zoning or condemnation, the owner has been deprived of all value of her property during that period of delay.[51]

In *Ehrlander v. State Department of Transportation & Public Facilities*,[52] for example, the developer, Ehrlander, bought undeveloped land for residential development. Ehrlander sought subdivision plat approval, but the city denied approval for part of his property because the Department of Transportation (DOT) intended to acquire an unspecified part of the property for a highway.[53] Ehrlander alleged that DOT unreasonably delayed the condemnation of his land for three years, thus taking his property because he could not subdivide his property as long as the city was waiting for DOT to decide what land it was going to condemn for

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by officially declaring its intent to take the land and otherwise preventing subdivision and development of plaintiff's land).

[50] *See, e.g.*, Foster v. City of Detroit, 254 F. Supp. 655, 665-66 (E.D. Mich. 1966) (holding that abandoned condemnation proceedings in urban renewal zone took plaintiff's property because it substantially destroyed its value), *aff'd*, 405 F.2d 138 (6th Cir. 1968). *But see Washington Mkt. Enters.*, 343 A.2d at 411 ("One of the arguments advanced was that the very act of filing a declaration of blight was a 'taking of property' because it seriously impaired land values. We held that this was not a taking, saying: 'It is akin to the result which flows from municipal zoning. If some diminution in market value can be said to follow from a finding of blight inspired by the valid exercise of police power, it is Damnum absque injuria.'" (citation omitted)).

[51] *See* City of Los Angeles v. Tilem, 191 Cal. Rptr. 229, 235 (Ct. App. 1983) (holding that a city took land during a three-year period when pending condemnation for road widening "rendered the real estate virtually useless" and prevented sale).

[52] 797 P.2d 629 (Alaska 1990).

[53] *See id.* at 631.

the highway.[54] The Alaska Supreme Court held that Ehrlander had properly alleged a taking, because he was "deprived of the most important incidents of ownership, the rights to use and alienate property."[55] The owner was deprived of the right to use the property because it was unimproved and he could not improve it while the planned condemnation prevented subdivision approval. Additionally, his ability to market the property was allegedly "substantially impaired" by the planned, but uncertain, condemnation.[56]

But even if the owner is deprived of all value during a period of delay, the delay may not last forever. The government may eventually issue the permit or otherwise allow the property to be used again. The delay itself will only be a taking if, in light of all the circumstances, the burden on the owner is unfair and should be borne by the public.[57] As the Supreme Court put it in *Penn Central Transportation Co. v. City of New York*,[58] these are "essentially ad hoc, factual inquiries."[59] Of course, "the duration of the restriction is one of the important factors that a court must consider in the appraisal of a regulatory takings claim."[60] But in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, the Court said that "with respect to that factor as with respect to other factors, the 'temptation to adopt what amount to *per se* rules in either direction must be resisted.'"[61] Other considerations include the "landowners' investment-backed expectations, the actual impact of the regulation on any individual, the importance

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[54] *See id*. at 633.

[55] *Id*. at 635 (quoting Lange v. State, 547 P.2d 282, 288 (Wash. 1976)).

[56] *Id*. at 634 (quoting *Lange*, 547 P.2d at 288); s*ee also Lange*, 547 P.2d at 287-88 (explaining that a developer whose land is to be condemned loses all use of the property, because he can neither develop nor sell the land, and thus is in a different position than other property owners who may "continue to use the property, derive some income or benefit from it, and thus moderate the market decline").

[57] *See* Santini v. Connecticut Hazardous Waste Mgmt. Serv., 342 F.3d 118, 131 (2d Cir. 2003) (holding that a siting announcement was not a taking, in part because the declaration was temporary and the property recovered some of its value after the announcement was withdrawn).

[58] 438 U.S. 104 (1978).

[59] *Id*. at 124.

[60] Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 342 (2002); s*ee also* Steven J. Eagle, *Planning Moratoria and Regulatory Takings: The Supreme Court's Fairness Mandate Benefits Landowners*, 31 FLA. ST. U. L. REV. 429, 474 (2004) ("However, the fact that the duration of a moratorium significantly exceeds the duration customary under similar circumstances would greatly enhance the possibility that the moratorium was compensable under the *Tahoe-Sierra* fairness test.").

[61] *Tahoe-Sierra*, 535 U.S. at 342 (quoting Palazzolo v. Rhode Island, 533 U.S. 606, 636 (2001) (O'Connor, J., concurring)).

of the public interest served by the regulation, [and] the reasons for imposing the temporary restriction."[62]

So if the government's delay has a major economic impact on the owner's investment-backed expectations, as in *Ehrlander*, and the government does not have a good reason for the delay, it is likely to be a taking. But if the government does have a good reason for the delay, it is less likely to be a taking. In fact, while *Tahoe-Sierra Preservation Council* resists categorical rules, most other courts that have considered the issue have suggested that normal and reasonable delays can never be takings.[63] The Supreme Court in *First English Evangelical Lutheran Church v. County of Los Angeles*[64] stressed that it was not holding that the government must pay compensation for "normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like which are not before us."[65] Many cases have held that normal delays do not take property, even if the property is useless during the period of delay.[66] In *Agins v. City of Tiburon*,[67] for example, a pending condemnation limited the owners' ability to sell their property, but they were free to sell or develop when the proceeding ended. The Court stated that "[m]ere fluctuations in value during the process of governmental decisionmaking, absent extraordinary delay, are 'incidents of ownership. They cannot be considered as a 'taking' in the constitutional sense.'"[68]

The emphasis on ad hoc determinations in *Tahoe-Sierra Preservation Council* seems to leave open at least a hypothetical possibility that consideration of all the circumstances might find a temporary regulatory taking based on other factors, even though the delay was normal. And some courts have suggested that even normal delays may take property. The Alaska Supreme Court, for

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[62] *Id.* at 320; s*ee also Penn Central*, 438 U.S. at 124 ("The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action. A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." (citations omitted)).

[63] *See* Roth v. State Highway Comm'n, 688 S.W.2d 775, 777-78 (Mo. Ct. App. 1984) (holding that a jury had substantial evidence of "aggravated delay" of seven years and "untoward activity" in obstructing building permits and demanding that plaintiff settle another case before highway commission would file a condemnation petition).

[64] 482 U.S. 304 (1987).

[65] *Id.* at 321.

[66] *See, e.g.*, *Roth*, 688 S.W.2d at 777 ("It has been recognized that some delay prior to and during the pendency of condemnation proceedings is unavoidable and that, where it is a natural consequence of the proper exercise of the right of eminent domain, it does not give rise to a cause of action . . . .").

[67] 447 U.S. 255 (1980).

[68] *Id.* at 263 n.9 (quoting Danforth v. United States, 308 U.S. 271, 285 (1939).

one, reversed summary judgment for a condemning authority even though the plaintiff had not alleged that the authority's delay was extraordinary.[69] If the property is useless for a substantial period, and the government is depriving the owner of that value, it might seem that the public as a whole should bear the burden of lost property value resulting from public deliberations about condemnation and the like.[70] But that argument seems obviously to go too far, because it would require the government to pay compensation for delay incident to even normal permitting processes. As the Court observed in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*:

> [T]he extreme categorical rule that any deprivation of all economic use, no matter how brief, constitutes a compensable taking surely cannot be sustained. Petitioners' broad submission would apply to numerous "normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like," as well as to orders temporarily prohibiting access to crime scenes, businesses that violate health codes, fire-damaged buildings, or other areas that we cannot now foresee.[71]

The Court reasoned that a "rule that required compensation for every delay in the use of property would render routine government processes prohibitively expensive or encourage hasty decisionmaking."[72]

Besides this practical fear that the government would have to abandon or pay compensation for "numerous practices that have long been considered permissible exercises of the police power,"[73] there is a good theoretical reason to conclude that normal delays

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[69] *See* Ehrlander v. State Dep't of Transp. & Pub. Facilities, 797 P.2d 629, 635 (Alaska 1990).

[70] *See* Armstrong v. United States, 364 U.S. 40, 49 (1960) (reasoning that the Just Compensation Clause is "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.").

[71] 535 U.S. 302, 334-35 (2002) (citation omitted).

[72] *Id.* at 335. The Court further stated that:

> [S]uch a rule would undoubtedly require changes in numerous practices that have long been considered permissible exercises of the police power. As Justice Holmes warned in *Mahon*, "[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." *Id.* (omitted citation)

[73] *Id.*

do not take property. While even normal delays may very well deny the owner use of her property for a time, all properties are equally subject to such delays and enjoy the benefits of other properties being subject to such decision-making processes as well. This "average reciprocity of advantage"[74] means that the owner does not unfairly bear a burden to benefit the public in its efforts to regulate land uses because all other owners are likewise subject to the same burden, which benefits the owner in return.[75]

When delays are extraordinary, however, the owner is subjected to a burden to which others are not subject. Furthermore, that burden cannot even be justified by the importance of the government's activity because it is not important for the government to delay extraordinarily, beyond what the normal and reasonable process requires. Depriving the owner of all economically viable use because of extraordinary delay therefore should generally be considered a taking, although some such cases might still not be takings because the temporary burden on the owner is so small in relation to the value of the property as a whole over time.[76]

Delay may also constitute a taking when the property has some value to begin with, but during the period of delay it becomes useless. In such a case, the taking is not just temporary. The government has not just deprived the owner of the use of valuable property for a time, but has instead made the property worthless by its conduct. In *Citino v. Redevelopment Agency*,[77] for example, the redevelopment agency designated plaintiff's apartment building for condemnation and redevelopment, but agreed that plaintiff could redevelop the property himself on certain conditions. Plaintiff improved the property under the threat of fines from the Agency. But even though the Agency acquired the neighboring properties, for nine years the Agency did not follow through with its redevelopment plan and allowed the area to deteriorate so

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[74] Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) (justifying and distinguishing a land-use restriction that "secured an average reciprocity of advantage").

[75] *See* Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 836 n.4 (1987) ("If the Nollans were being singled out to bear the burden of California's attempt to remedy these problems, although they had not contributed to it more than other coastal landowners, the State's action, even if otherwise valid, might violate either the incorporated Takings Clause or the Equal Protection Clause. One of the principal purposes 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.'" (citation omitted)); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 491 (1987) ("While each of us is burdened somewhat by such restrictions, we, in turn, benefit greatly from the restrictions that are placed on others.").

[76] *See Tahoe-Sierra Preservation Council*, 535 U.S. at 303 ("A permanent deprivation of all use is a taking of the parcel as a whole, but a temporary restriction causing a diminution in value is not, for the property will recover value when the prohibition is lifted.").

[77] 721 A.2d 1197 (Conn. App. Ct. 1998).

much that plaintiff's building was practically useless.[78] The court therefore held "that the defendant's actions in failing to implement its redevelopment plan for the area in a reasonable amount of time, although not formally abandoning the plan, and in permitting the overall deterioration of the property within the area, amounts to a taking of the plaintiff's property without just compensation."[79]

If the delay is a taking under the circumstances, the government must pay just compensation for the taking period even if the government later permits development. In *First English*, the county's ordinance allegedly denied the property owner all use of its property for several years. The Supreme Court held that invalidating the ordinance in such a case, and thereby allowing the owner to use its property again, was "a constitutionally insufficient remedy" and that the county must pay just compensation for the period during which it deprived the owner of all use of its land.[80] The Court reasoned that "temporary use and occupation" takes property from an owner just as permanent occupation does.[81]

3. Zoning, Permits, and Other Regulatory Restraints on Use or Improvement

If the government downzones, denies building permits, or otherwise restrains the use and development of the land to keep it more affordable for eventual condemnation, this inverse condemnation theory will generally find the government's regulatory action to be a taking only if the property cannot practically be used for any permitted purpose.[82] The land-use regulation may be unconstitutional because of the government's illegitimate purpose, but that's a different theory discussed in the next section.[83] As far as this theory goes, the regulatory act will generally be a taking only if the property is undeveloped, or maybe if somehow its cur-

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[78] *See id*. at 1202-04, 1209.

[79] *Id*. at 1209-10; s*ee also* Howell Plaza, Inc. v. State Highway Comm'n, 226 N.W.2d 185, 189 (Wis. 1975) ("Long delays in actually acquiring property after the public improvements have been announced can result in substantial hardship to property owners, for which they ought in justice to receive compensation. We have no doubt that there can be a cause of action for inverse condemnation if . . . property owners so situated have been deprived of all, or substantially all, of the beneficial use of their property.").

[80] First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 322 (1987).

[81] *Id.* at 318-19 (quoting United States v. Dow, 357 U.S. 17, 26 (1958)).

[82] *See* HFH, Ltd. v. Superior Court, 542 P.2d 237, 244 (Cal. 1975) (en banc) ("[A] zoning action which merely decreases the market value of property does not violate the constitutional provisions . . . ."); cases cited *supra* note 42.

[83] *See infra* Part III.A.2.

rently permitted use has become completely unfeasible.[84] Even then, if the zoning action, development moratorium, or other regulatory action is only temporary while the government considers condemnation or appropriate land uses or whatever, and the period of deliberation is normal or reasonable, the regulatory act still will not be considered a taking under this theory.[85]

4. Government Development and Conduct Offsite

This kind of precondemnation activity will never be a taking solely because of its effect on an owner's property. If the government condemns other land in the area, or allows the surrounding area to deteriorate, or otherwise uses or affects neighboring land in a way that depresses the market value of property to be condemned, the government has not even restrained the owner's use and enjoyment of her property, let alone taken it from her. Government conduct offsite can certainly affect a property's value, but mere injury to market value does not amount to a taking.[86] Neighbors, public or private, can always affect a property's value by what they do with their own property. That is one of the risks of property ownership.

However, if the government's offsite conduct causes actual damage to the property, rather than merely making it worth less because of how it changes the surrounding area, the government may have to pay just compensation. "A property owner may be required to bear without compensation incidental damages which are suffered alike by the public in general, but he is entitled to compensation for special and peculiar damage inflicted upon him."[87]

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[84] *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015-18 (1992) (holding that government must pay just compensation when "regulation denies all economically beneficial or productive use of land").

[85] *See, e.g.*, Williams v. City of Central, 907 P.2d 701 (Colo. Ct. App. 1995) (holding that a ten-month moratorium did not take property even if the owner could not use the property for any purpose during those ten months); Woodbury Place Partners v. Woodbury, 492 N.W.2d 258, 263 (Minn. Ct. App. 1992) (holding that a two-year moratorium pending review of a plan for land adjacent to a interstate highway was not a taking because it did not deprive the owner of all economically beneficial use of the land).

[86] *See, e.g.*, Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 131 (1978) (stating that "diminution in property value, standing alone," cannot establish a taking); Hurst v. Starr, 607 N.E.2d 1155, 1158-59 (Ohio Ct. App. 1992) ("Properties located in the vicinity of the highway, even those where there is no actual take of the property, may suffer a loss of market value to some extent. However, if there has been no taking of a person's property, there is no right to compensation or damages. Under such circumstances, the loss suffered by the owner has been described as damnum absque injuria.").

[87] Aaron v. City of Los Angeles, 115 Cal. Rptr. 162, 170 (Ct. App. 1974) (affirming an inverse condemnation award in favor of landowners whose property was worth less because of jet noise from airport nearby); s*ee also* Richards v. Wash. Terminal Co., 233 U.S. 546, 557 (1914) (holding that special damage from smoke and gas, not common to other owners along the railroad, required payment of just compensation); Perron v. Telecable Assocs., 784 So.

This may be especially true under state constitutions that require compensation for property "taken or damaged."[88] So if the government builds an airport runway and the runway causes a nuisance on property not yet condemned, the government may have to pay just compensation for the lost market value of the uncondemned property.[89] But if the property is simply worth less because the government's conduct has made the area less desirable for development, changed traffic patterns, and so on, then the government does not have to pay just compensation.[90]

B. Illegitimate Purpose

Government regulation may also deny the owner substantive due process of law if the regulation does not further a legitimate public purpose. In *Village of Euclid v. Ambler Realty Co.*,[91] the Supreme Court held that a zoning ordinance does not violate the Due Process Clause unless it is "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."[92] Then, in *Nectow v. City of Cambridge*,[93] the Supreme Court held that the application of a zoning law to a particular property did violate the Due Process Clause because it did not "bear a substantial relation to the public health, safety, morals, or general welfare."[94] For twenty-five years, the Supreme Court also maintained that "[t]he application of a general zoning law to particular property" may similarly be a taking if it "does not substantially advance legitimate state interests."[95] But

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2d 852, 853 (La. Ct. App. 2001) ("[I]t must be determined 'whether that damage is not suffered by those in the general neighborhood—that is, whether the damage is peculiar to the individual who complains.' Therefore, this Court has concluded that damages such as the noise of traffic, a less pleasant view, and a circuitous or more inconvenient route to petitioner's property, even when these factors resulted in an actual diminution of market value of the property, were not in themselves special damages and were not recoverable." (citation omitted)).

[88] *See, e.g.*, CAL. CONST. art. I, § 19 ("Private property may be taken or damaged for public use only when just compensation . . . has first been paid to . . . the owner."); Albers v. County of Los Angeles, 398 P.2d 129, 137 (Cal. 1965) ("[A]ny actual physical injury to real property proximately caused by the improvement as deliberately designed and constructed is compensable . . . .").

[89] *See Aaron*, 115 Cal. Rptr. at 170.

[90] *See, e.g.*, Village of Round Lake v. Amann, 725 N.E.2d 35, 48 (Ill. App. Ct. 2000) ("A decreased market value is compensable only if it results from loss of access or other damage caused by the public improvement; otherwise, it is *damnum absque injuria*.").

[91] 272 U.S. 365 (1926).

[92] *Id.* at 395.

[93] 277 U.S. 183 (1928).

[94] *Id.* at 188.

[95] Agins v. City of Tiburon, 447 U.S. 255, 260 (1980); s*ee also* Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 834 (1987) ("We have long recognized that land-use regulation does

the Court recently decided in *Lingle v. Chevron*[96] that the purpose served by a regulation does not affect whether the regulation is a taking.[97] Still, the Court reaffirmed that a regulation may violate the Due Process Clause if it does not serve a legitimate governmental purpose.[98]

1. Takings

Despite the *Lingle* decision that failure to substantially advance a legitimate state interest does not make a regulation a taking, the regulation's purpose may still result in a taking in one way that *Lingle* acknowledges. That is, it may be a taking not because it doesn't serve a legitimate purpose, but because the purpose it serves is unfairly or uniquely accomplished at the expense of the individual property owner. The Court in *Lingle* emphasized again that the Takings Clause does not prevent any conduct by the government, but simply requires the government to pay compensation when it would otherwise "forc[e] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[99] The Court explained that the "substantially advances" test "cannot tell us when justice might require that the burden be spread among taxpayers through the payment of compensation."[100] The test ensures that the regulation is doing something legitimate and useful, but:

> [t]he owner of a property subject to a regulation that *effectively* serves a legitimate state interest may be just as singled out and just as burdened as the owner of a property subject to an *ineffective* regulation. It would make little sense to say that the second owner has suffered a taking while the first has

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not effect a taking if it 'substantially advance[s] legitimate state interests' . . . ."); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 127 (1978) ("[A] use restriction may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial government purpose.").

[96] 125 S. Ct. 2074 (2005).

[97] *See id.* at 2083-84 ("But such a test is not a valid method of discerning whether private property has been 'taken' for purposes of the Fifth Amendment.").

[98] *See id.* at 2083 ("An inquiry of this nature has some logic in the context of a due process challenge, for a regulation that fails to serve any legitimate governmental objective may be so arbitrary or irrational that it runs afoul of the Due Process Clause."); *id.* at 2087 (Kennedy, J., concurring) (noting that the Court's decision "does not foreclose the possibility that a regulation might be so arbitrary or irrational as to violate due process," but explaining that the property owner had voluntarily dismissed its due process claim).

[99] Armstrong v. United States, 364 U.S. 40, 49 (1960), *quoted in Lingle*, 125 S. Ct. at 2080.

[100] *Lingle*, 125 S. Ct. at 2084.

> not. Likewise, an ineffective regulation may not significantly burden property rights at all, and it may distribute any burden broadly and evenly among property owners. The notion that such a regulation nevertheless "takes" private property for public use merely by virtue of its ineffectiveness or foolishness is untenable.[101]

The Court thus seems to have indicated that a regulation may be a taking not because of the magnitude of the burden on the owner, but because of "how any regulatory burden is *distributed* among property owners."[102] Even if inequality alone cannot create a taking, the distribution of the burden is certainly relevant to the takings determination, at least.

A regulation, then, might be a taking because its purpose is by its nature achieved at the expense of individual property owners rather than being fairly distributed among property owners.[103] The typical regulatory purposes are naturally accomplished without unfairly unequal burdens on property owners. Zoning regulations are naturally reciprocal, in that all landowners are generally subject to such regulations and all, including the subject property owner, enjoy the benefit of the general regulatory approach.[104] And some regulations that burden smaller groups of landowners are still constitutional without compensation because of their gen-

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[101] *Id.*

[102] *Id.*

[103] I have argued elsewhere that this is how the Court's now-rejected "substantially advances" test should be understood in the takings context. *See* Alan Romero, *Two Constitutional Theories for Invalidating Extortionate Exactions*, 78 NEB. L. REV. 348, 365-68 (1999). In short, substantive due process sets outer limits to the government's power to act, while the Takings Clause divides all permissible government actions into two groups: those that require compensation and those that don't. The Takings Clause tries to avoid unfair burdens on individual property owners. So in the takings context, a regulation that does not advance "legitimate state interests" would be a taking not because the government does not have the power to take such an action, but because it is unfair to take such an action at the individual owner's expense, rather than the public's expense. But even though the Court has rejected the verbal formulation — that a regulation is a taking if it doesn't substantially advance a legitimate state interest — the Court clearly still recognizes the principle that a regulation may be a taking because of the inequality of the regulatory burden.

[104] *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 133-36 (1978) (declaring that landmark preservation law, like zoning laws generally, did not unfairly burden a landmark owner because the owner enjoyed reciprocal benefits along with the rest of the public, even though many owners were not subject to landmark restrictions); Landgate, Inc. v. Cal. Coastal Comm'n, 953 P.2d 1188, 1195 (Cal. 1998) ("[W]hereas 'the Fifth Amendment's just compensation provision is "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole,"' a rational permit regulation scheme is imposed on the public as a whole to ensure the orderly development of real property, benefiting as well as burdening property owners."(citation omitted)); Romero, *supra* note103, at 366-68.

eral public benefit. In some early takings cases, the Supreme Court held that even if regulation burdened only one or a few landowners, the government need not pay compensation when the regulation was prohibiting "harmful or noxious uses."[105] Such regulation is not unfair, despite its unequal burden, because it simply mitigates or prevents harms or burdens caused by the property owners themselves. But in *Penn Central*, the Supreme Court said that those earlier cases are "better understood as resting not on any supposed 'noxious' quality of the prohibited uses but rather on the ground that the restrictions were reasonably related to the implementation of a policy . . . expected to produce a widespread public benefit and applicable to all similarly situated property."[106] And in *Lucas v. South Carolina Coastal Council*,[107] the Court said that this principle "was . . . the progenitor of our more contemporary statements that 'land-use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests.'"[108] While the Court has now rejected the broader-sounding "substantially advances" test for takings, *Lingle* reaffirms this narrower understanding of the test — that a regulation may be a taking if it burdens a single landowner or a small group of landowners, but does not apply to all similarly situated property, or does not produce a widespread public benefit. That is, it may be a taking if the regulatory burden is unfairly distributed.

So if a regulation furthers a purpose that naturally requires unfairly unequal burdens, then the regulation could be a taking for that reason. Some courts have found takings, for example, when "land use restrictions . . . are clearly imposed to support or subsidize some distinct Government function or enterprise (such as the provision of public parks, schools, playgrounds, roads, airports, or flood control projects, etc.), where the burdens imposed are based largely on the accident of ownership of land at a particular location."[109] In such cases:

> [T]here is no approximation of equal sharing of cost or of sharing according to capacity to pay as there is where a public benefit is obtained by subsidy or expenditure of public funds. The accident of ownership

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[105] *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1022 (1992) ("[M]any of our prior opinions have suggested that 'harmful or noxious uses' of property may be proscribed by government regulation without the requirement of compensation.").

[106] *Penn Central*, 438 U.S. at 133 n.30.

[107] 505 U.S. 1003 (1992).

[108] *Id.* at 1023-24 (citation omitted).

[109] 1 RATHKOPF'S THE LAW OF ZONING AND PLANNING § 6:60 (4th ed. 2004) (citations omitted).

> of a particular location determines the persons in the community bearing the cost of increasing the general welfare.[110]

While the benefit of the government improvement may be widespread, the regulatory burden is not "applicable to all similarly situated property,"[111] but only those properties that happen to be in the location selected for the government's project.

Similarly, if the government restrains property development only because it anticipates condemning the property and wants to save money, the government imposes a unique burden on the property owner simply because of the accident that the owner has property the government wants. Property owners generally are not subject to such restraints. Even similar types of property are not subject to such restraints — only those properties that the government has happened to select for acquisition. So if the only reason for a precondemnation development restraint is to save money when the property is ultimately condemned, the restraint is by its nature unequal and takes property because, in fairness, the public as a whole should bear the burden of land acquisition for public projects.

Penn Central also says that one factor to consider in deciding whether a regulation is a taking is "the character of the governmental action."[112] The Federal Circuit has recently held that the government's bad faith is a relevant part of the character of the government's action. In *Cooley v. United States*,[113] the court considered a takings claim based on the Army Corps of Engineers' denial of a wetlands fill permit under the Clean Water Act. In discussing the issues on remand, the court said:

> Accordingly, those agencies receive appropriate deference in acquiring technical information. However, in the instant case the agency admits its requests for additional information were not necessary for issuing a permit. The trial court previously discounted the credibility of the Corps' argument that the permit denial letter requested additional information in an altruistic effort to issue a permit. In conducting a *Penn Central* analysis, the trial court may weigh

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[110] Allison Dunham, *A Legal and Economic Basis for City Planning*, 58 COLUM. L. REV. 650, 665 (1958).

[111] *Penn Central*, 438 U.S. at 133 n.30.

[112] *Id.* at 124.

[113] 324 F.3d 1297 (Fed. Cir. 2003).

> whether the Corps' conduct evinces elements of bad faith. A combination of extraordinary delay and intimated bad faith, under the third prong of the *Penn Central* analysis, influence the character of the governmental action.[114]

So in this way, too, the purpose of the government's precondemnation activity is relevant to deciding whether that activity amounts to a taking of property requiring just compensation.

Finally, regardless of how the Supreme Court construes the federal Takings Clause, state takings clauses may still be construed to require just compensation when government regulation restrains property use without a legitimate reason. In *Johnson v. City of Minneapolis*,[115] for example, the Minnesota Supreme Court recently declined to decide a federal takings claim under the *Penn Central* test and instead found a taking under the state constitution. The court said that, under the Minnesota constitution, "an abuse of the power of eminent domain may be tantamount to a regulatory control, constituting a de facto taking 'when that abuse is specifically directed against a particular parcel.'"[116] The city had misled the property owners into thinking that their properties would certainly be acquired for redevelopment and had acted in bad faith in causing the redevelopment deal to fail.[117] The court held that the city had thus taken some of the value of the properties that were designated for acquisition but never condemned.[118] The court ended with the caution that its decision does not mean "property owners are entitled to compensation for any diminishment in value or loss of income caused by the prospect that their property will be condemned at some future date," but *Johnson* certainly indicates the possibility that state constitutions will grant just compensation when the government restrains development of specific properties in bad faith and thereby impairs the properties' value.[119]

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[114] *Id.* at 1307 (citation omitted); s*ee also In re* Elmwood Park Project Section 1, Group B, 136 N.W.2d 896, 900 (Mich. 1965) ("The principle is firmly established in Michigan law . . . that a city may not by deliberate action reduce the value of private property and thereby deprive the owner of just compensation . . . . [M]any of the acts alleged by appellant, if so performed,—such as sending letters to tenants, filing lis pendens, intense building department inspection and citations against owners for any violations of the building code, and, finally, refusal to permit a long established business to continue in a building because it was going to be condemned—would . . . constitute a taking.").

[115] 667 N.W.2d 109 (Minn. 2003).

[116] *Id.* at 115 (quoting Orfield v. Hous. & Redev. Auth., 232 N.W.2d 923, 927 (Minn. 1975)).

[117] *See id.* at 116.

[118] *See id.*

[119] *Id.*

2. Substantive Due Process

Precondemnation activity that serves no purpose other than saving money on condemnation is also a deprivation of substantive due process. The Supreme Court "[has] not elaborated on the standards for determining what constitutes a 'legitimate state interest,'" but has said in the takings context that the term includes a "broad range of governmental purposes."[120] Ordinarily, of course, land-use regulations further state interests in planning communities, protecting health and safety, and harmonizing land uses, although they could certainly further other legitimate purposes as well. But if the government's precondemnation activity does not further a legitimate purpose, then it does not matter how much of the owner's property is taken. The government's action is invalid under the Due Process Clause.

Whatever the range of "legitimate" state interests, the Supreme Court has identified one illegitimate interest: obtaining a property interest without paying compensation. In *Nollan v. California Coastal Commission*, the Court held that conditioning a building permit on the surrender of a lateral easement across the beach was unconstitutional. The Court explained:

> Similarly here, the lack of nexus between the condition and the original purpose of the building restriction converts that purpose to something other than what it was. The purpose then becomes, quite simply, the obtaining of an easement to serve some valid governmental purpose, but without payment of compensation. Whatever may be the outer limits of "legitimate state interests" in the takings and land-use context, this is not one of them. In short, unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but "an out-and-out plan of extortion."[121]

As the Court noted, the government has a legitimate interest in obtaining property, like easements. The government likewise has a legitimate interest in saving money in acquiring property for public uses. But it is not legitimate to circumvent the Just Compensation Clause and try to obtain that property for free by

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[120] Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 834-35 (1987).
[121] *Id.* at 837 (quoting J.E.D. Assocs. v. Atkinson, 432 A.2d 12, 14 (N.H. 1981)).

using the regulatory power as leverage to extort the property from the owner. Similarly, it is not legitimate to try to obtain property for less by using the regulatory power to depress market values, rather than to further good-faith planning goals.[122] In the exactions situation, the government seeks to obtain a property interest for free, whereas in the precondemnation regulation situation, the government merely seeks to pay less for an interest it may eventually condemn. But that is a difference only of degree. In both cases, the government is not regulating to reduce public burdens or injuries resulting from a land use, to harmonize conflicting land uses, or to further any other such legitimate purpose. The government is regulating simply to save money in acquiring land.[123]

There is another, more significant difference between exactions and precondemnation regulation, however. When the government demands that the property owner convey some property interest in exchange for permission to develop her property, the government's own conduct objectively reveals the illegitimate reason for the property regulation. The government conditionally denies permission to develop the property, but tells the owner it will grant permission if the owner conveys the property interest. So the government will permit development if the owner conveys the interest, but will restrain development if the owner does not convey the interest. At that point, the only reason why the regulation

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[122] *See* Joint Ventures, Inc. v. Dep't of Transp., 563 So. 2d 622, 626 (Fla. 1990) ("We do not question the reasonableness of the state's goal to facilitate the general welfare. Rather we are concerned here with the means by which the legislature attempts to achieve that goal . . . . [T]he state may [not] deliberately restrict land use under its police power *before* the commencement of condemnation proceedings without the duty of compensation."); *cf.* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416 (1922) ("[A] strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.").

[123] The court described this sort of regulatory abuse in San Antonio River Auth. v. Garrett Bros., 528 S.W.2d 266, 273-74 (Tex. Ct. App. 1975):

> [I]n exercising the police power, the governmental agency is acting as an arbiter of disputes among groups and individuals for the purpose of resolving conflicts among competing interests. This is the role in which government acts when it adopts zoning ordinances, enacts health measures, adopts building codes, abates nuisances, or adopts a host of other regulations. . . . But where the purpose of the governmental action is the prevention of development of land that would increase the cost of a planned future acquisition of such land by government, the situation is patently different. Where government acts in this context, it can no longer pretend to be acting as a neutral arbiter. It is no longer an impartial weigher of the merits of competing interest among its citizens. Instead, it has placed a heavy governmental thumb on the scales to insure that in the forthcoming dispute between it and one, or more, of its citizens, the scales will tip in its own favor. . . . To permit government, as a prospective purchaser of land, to give itself such an advantage is clearly inconsistent with the doctrine that the cost of community benefits should be distributed impartially among members of the community.

is still restraining development is that the owner hasn't given the government some of her property. That is not a legitimate reason to restrain development.[124]

The objective reasons for precondemnation regulation, on the other hand, are less clear. Even if the regulation or other precondemnation activity does depress the property's value, thus reducing just compensation to be paid, the precondemnation activity may also have furthered other purposes that are legitimate. If the government could have rationally thought that its precondemnation activity would further some legitimate purpose — some purpose other than reducing the amount to be paid in just compensation later — then the government has not denied the property owner substantive due process.[125] So courts should be deferential and only find a substantive due process violation when there is clearly no possible purpose for precondemnation activity other than saving condemnation expenses in the future.[126]

This is true even if the government regulators did not actually intend to further any purpose other than saving money on later condemnations. As long as the precondemnation activity could have been thought to further some legitimate purpose, it should not matter that the regulators were primarily or even entirely motivated by the desire to save money on condemnation.[127] As the California Supreme Court observed in *Landgate, Inc. v. California Coastal Commission*:[128]

> The Court of Appeal erred in its attempt to divine . . . the "true," illegitimate, motive for the Commis-

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[124] *See* Romero, *supra* note 103, at 359.

[125] *See, e.g.*, Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 19 (1976) ("It is enough to say that the Act approaches the problem of cost spreading rationally; whether a broader cost-spreading scheme would have been wiser or more practical under the circumstances is not a question of constitutional dimension."); Williamson v. Lee Optical, 348 U.S. 483, 488 (1955) ("It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.").

[126] Courts continue to disagree about how egregious land use regulation must be to violate substantive due process. *See* Parna A. Mehrbani, Comment, *Substantive Due Process Claims in the Land-Use Context: The Need for a Simple and Intelligent Standard of Review*, 35 ENVTL. L. 209, 229-36 (Winter 2005). But regardless of the verbal standard, everyone agrees that the courts should be deferential and that a regulation will deny substantive due process if it does not serve any legitimate purpose.

[127] *See, e.g.*, Pinheiro v. County of Marin, 131 Cal. Rptr. 633, 636 (Ct. App. 1976) ("[T]he general rule is that 'the purpose or motive of the city officials in passing an ordinance is irrelevant to any inquiry concerning the reasonableness of the ordinance . . . . If the conditions justify the enactment of the ordinance, the motives prompting its enactment are of no consequence.'" (citation omitted)); Eagle, *supra* note 60, at 483 ("[T]he general rule is that the presence of bad faith does not, in itself, invalidate an otherwise reasonable land-use regulation.").

[128] 953 P.2d 1188 (Cal. 1998).

> sion's decision to deny Landgate's development permit. The proper inquiry is not into the subjective motive of the government agency, but whether there is, objectively, sufficient connection between the land use regulation in question and a legitimate governmental purpose so that the former may be said to substantially advance the latter. This type of objective inquiry is consistent with the principle that courts do not delve into the individual purposes of decisionmakers in a quasi-adjudicative proceeding, but rather look to the findings made by the government agency and determine whether these are based on substantial evidence. Thus, we must determine not whether a sinister purpose lurked behind the Commission's decision, but rather whether the development restrictions imposed on the subject property substantially advanced some legitimate state purposes so as to justify the denial of the development permit.[129]

However, some courts have relied upon evidence of actual illicit intent in deciding substantive due process challenges to land use regulation.[130] For example, in *Blanche Road Corp. v. Bensalem Township*,[131] the Third Circuit held that evidence of intentional delaying of permits to prevent a subdivision development would establish a substantive due process violation.[132] Considering such evidence makes more sense if a court is trying to decide if an executive official was acting so arbitrarily, or with such bad faith, that it "shocks the conscience," a substantive due process standard adopted by the Supreme Court in reviewing executive actions like police conduct in pursuing a motorcyclist.[133] The Third Circuit has held that this standard should apply to executive ac-

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[129] *Id.* at 1198 (citations omitted).

[130] *See, e.g.*, *In re* Elmwood Park Project Section1, Group B, 136 N.W.2d 896, 900 (Mich. 1965) ("The principle is firmly established in Michigan law . . . that a city may not by deliberate action reduce the value of private property and thereby deprive the owner of just compensation.").

[131] 57 F.3d 253 (3d Cir. 1995).

[132] *Id.* at 268-69; s*ee also* Woodwind Estates, Ltd. v. Gretkowski, 205 F.3d 118, 124-26 (3d Cir. 2000) (holding that evidence of intentional delaying of subdivision approval to prevent financing of subdivision would support finding a substantive due process violation).

[133] County of Sacramento v. Lewis, 523 U.S. 833, 847 (1998) ("[T]he substantive component of the Due Process Clause is violated by executive action only when it 'can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense.'" (quoting Collins v. Harker Heights, 503 U.S. 115, 128 (1992))).

tion concerning regulation of land as much as it applies to other executive action.[134]

But I don't need to get into the debate about whether land-use regulatory actions are legislative or executive, a debate which may have little practical significance in resolving substantive due process cases anyway.[135] The substantive due process theory of *Nollan* is clearly based on an objective fact about the purposes served by the government regulation, not an assessment of how egregiously the regulators acted.[136] Still, evidence of actual intent may not be entirely irrelevant to this particular inquiry. This substantive due process theory requires a court to examine the relationship between the means chosen by the government and the ends served thereby. Courts generally should defer to government decisionmakers, as long as there is any apparently rational purpose for their action. But if the evidence shows that the government was actually motivated by illegitimate purposes, a court does not have the same reason to defer to the government's judgment. There is not as much of a reason to assume the government was acting in good faith to achieve some legitimate purpose when the court can see what the government actually intended to achieve. The actual illegitimate motive itself may not thus make the action a due process violation, but it may justify the court in more closely scrutinizing whether the action did objectively advance some legitimate purpose despite the actual illegitimate purpose.[137]

Some courts have held that if property owners are not entitled to receive development permission, the Due Process Clause does not protect them at all because denying permission does not deprive them of any property right.[138] This "entitlement" require-

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[134] *See* United Artists Theatre Circuit, Inc. v. Township of Warrington, 316 F.3d 392, 401-02 (3d Cir. 2003).

[135] *See* Mehrbani, *supra* note 126, at 238.

[136] *Nollan* and the Court's subsequent decision in Dolan v. City of Tigard, 512 U.S. 374 (1994), do not say they are substantive due process cases, but I think that is the best way to understand them. *See* Romero, *supra* note 103, at 358-61, 370-73. In any event, they certainly discuss what interests are legitimate and illegitimate in the land-use context.

[137] I previously made a similar argument to justify the Supreme Court's requirement in *Dolan* that the city make an "individualized determination" showing a proportional relationship between a requested land-use permit and an exaction imposed by the permitting authority. *See* Romero, *supra* note 103, at 383-84.

[138] *See, e.g.*, Norton v. Village of Corrales, 103 F.3d 928, 932 (10th Cir. 1996) (stating that if the zoning commission's decision on plat approval was discretionary, the owner had no constitutional right to due process concerning that decision); Spence v. Zimmerman, 873 F.2d 256, 258 (11th Cir. 1989) (holding that property owners did not have a property interest in a temporary certificate of occupancy); RRI Realty Corp. v. Incorporated Village of Southampton, 870 F.2d 911, 917-19 (2d Cir. 1989) (holding that the property owner had no protected property right because the zoning board's decision was discretionary); Mehrbani, *supra* note 126, at 233.

ment comes from the Supreme Court's decision in *Board of Regents v. Roth*,[139] which involved neither land-use regulation nor substantive due process.[140] I have previously argued that this reasoning is inconsistent with the Supreme Court's original approval of zoning in *Euclid v. Ambler Realty Co.*[141] The ordinance in *Euclid* did not entitle the owners to develop their property, but the Court did not say that they therefore had no due process rights in developing their property. Instead, the Court reasoned that the public benefits of zoning outweighed the individual's right to use her property as she pleased.[142] Even while applying its "entitlement" precedents, the Second Circuit acknowledged that:

> It is not readily apparent why land regulation cases that involve applications to local regulators have applied the . . . entitlement test to inquire whether an entitlement exists in what has been applied for . . . instead of simply recognizing the owner's indisputable property interest in the land he owns and asking whether local government has exceeded the limits of substantive due process in regulating the plaintiff's use of his property by denying the application arbitrarily and capriciously.[143]

Regardless of whether an owner has a "right" to a certain sort of development approval, the owner clearly owns her property. She has the right to use her property any way she chooses within the boundaries of the common law, such as nuisance law. Any further restraint of her property use by the government takes away some of her property rights, and must be consistent with the limitations of the Due Process Clause as well as the Takings Clause.[144]

In summary, government's precondemnation activities may take property, and deny the owner substantive due process, if they deprive the owner of some part of her property rights with no objective purpose other than obtaining the property for less, because such property restraints are not fairly and equally distributed and do not further a legitimate public purpose. The rest of this section discusses the circumstances in which particular compensation-

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[139] 408 U.S. 564 (1972).

[140] *See id.* at 576-78.

[141] *See* Romero, *supra* note 103, at 372-73.

[142] *See* Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926).

[143] *RRI Realty Corp.*, 870 F.2d at 917.

[144] *See* Mehrbani, *supra* note 126, at 238-39 (arguing that courts should not apply the entitlement rule to land-use cases).

reducing practices may take property or deny substantive due process in this way.

3. Planning

The government certainly has good reasons to plan its acquisitions well in advance. Advance planning promotes deliberate consideration of government projects. Planning future acquisitions is also necessary so that the government can plan funding for those acquisitions, which often requires years of preparation. And planning future acquisitions helps prevent the economic waste that would result from incompatible development on or near the planned government development. Planning future condemnations therefore will consistently serve a legitimate state interest.

4. Publicity

Publicizing government plans also generally has a legitimate purpose. The public has an interest in such plans and should have an opportunity to discuss, comment, and object.[145] "[T]o allow recovery under all circumstances for decreases in the market value caused by precondemnation announcements might deter public agencies from announcing sufficiently in advance their intention to condemn."[146]

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[145] *See* Merced Irrigation Dist. v. Woolstenhulme, 483 P.2d 1, 13 n.9 (Cal. 1971) (en banc) (indicating the desirability of "afford[ing] the public some direct participation in the planning and placement of [government] projects"); Westgate Ltd. v. State, 843 S.W.2d 448, 453 (Tex. 1992) ("Construction of public-works projects would be severely impeded if the government could incur inverse-condemnation liability merely by announcing plans to condemn property in the future. Such a rule would encourage the government to maintain the secrecy of proposed projects as long as possible, hindering public debate and increasing waste and inefficiency. After announcing a project, the government would be under pressure to acquire the needed property as quickly as possible to avoid or minimize liability. This likewise would limit public input, and forestall any meaningful review of the project's environmental consequences. The government also would be reluctant to publicly suggest alternative locations, for fear that it might incur inverse condemnation liability to multiple landowners arising out of a single proposed project. Failing to consider available alternatives is not only inefficient, but is at odds with proper environmental review." (citation omitted)); Littman v. Gimello, 557 A.2d 314, 319 (N.J. 1989) (noting the public's interest in location of hazardous waste facilities).

[146] Klopping v. City of Whittier, 500 P.2d 1345, 1354 (Cal. 1972) (en banc); s*ee also* City of Buffalo v. J.W. Clement Co., 269 N.E.2d 895, 904 (N.Y. 1971) ("To hold the date of the Announcement of the impending condemnation, whether directly to the condemnee or by the news media, constitutes a De facto taking at that time, would be to impose an 'oppressive' and 'unwarranted' burden upon the condemning authority. At the very least, it would serve to penalize the condemnor for providing appropriate advance notice to a property owner. And to so impede the actions of the municipality in preparing and publicizing plans for the good of the community, would be to encourage a converse policy of secrecy which

Statutes may even require such an opportunity for the public to comment.[147]

But sometimes the government publicizes before it plans. That is, sometimes the government may indicate to the public that it may condemn certain land in the future, even though the government has not actually gone through the applicable planning process to arrive at that conclusion. In such cases, the government cannot justify publicity on the same grounds. Statutes and due process would not require the publicity. Still, the government might reason that public awareness and input, even before the planning process, will help ensure planning that is sensitive to public concerns and reduce the severity of potential citizen reaction. Sometimes, though, a plaintiff might establish a substantive due process violation if the only purpose of early publicity, without any procedural need to publicize, is to prevent land from being developed in the meantime in a way that would increase the ultimate cost to the condemning authority.

5. Delay

As discussed above, extraordinary delay may be a taking when it deprives the owner of all use and enjoyment of her property for a time.[148] But even if it deprives the owner of some, but not all use, or deprives the owner of all use for a period not long enough to amount to a taking, it should still be a substantive due process violation if it does not serve a legitimate state interest. Delay that results from good faith deliberation always serves a legitimate state interest, even if the government is doing a poor job of deliberating. But in some cases it seems the government's only reason for delay is not to deliberate further, but to stall while it considers condemning the property. If so, the government's reason is not legitimate.[149] Sure, the government wants time to consider a condemnation decision. But it is not a legitimate reason to prevent development that otherwise is consistent with land use regulations and policies. The only reason for the delay is that the government does not want the owner to develop the property, or receive build-

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'would but raise (greater) havoc with an owner's rights.'" (quoting City of Buffalo v. J.W. Clement Co., 311 N.Y.S.2d 98, 114 (App. Div. 1970) (Gabrielli, J., dissenting)).

[147] *See, e.g.*, R.I. GEN. LAWS § 23-19-10.2(b)(2) (2001) (requiring a Rhode Island resource recovery corporation to give public notice of condemnation plans and accept public comments in a public forum).

[148] *See supra* part III.A.

[149] *Cf.* Cooley v. United States, 324 F.3d 1297, 1306-07 (Fed. Cir. 2003) (stating that "extraordinary delay in decision-making may constitute a taking," but it is very rare for delay to be a taking "without a concomitant showing of bad faith").

ing or zoning permissions for the property, in a way that increases the cost of condemning the property. Saving money in this way is not a legitimate public purpose.

6. Zoning and Other General Regulation

If the government zones a property in order to assure compatibility with neighboring uses, to promote orderly development, or for other normal planning purposes, the zoning itself is not a substantive due process violation regardless of whether the zoning depresses market value, although it may still be a taking if it makes the property useless, of course.

But if the government downzones a particular area because it anticipates condemning the land, the downzoning should be treated as a substantive due process violation because the government's purpose is not legitimate. The government legitimately desires to reduce the costs of land acquisition, but it cannot legitimately restrain land use just to save itself money. [150]

Some courts have recognized this possible unconstitutional abuse of the zoning power. For example, in *State ex rel. Tingley v. Gurda*,[151] the Wisconsin Supreme Court found that:

> [T]he city planning commission contemplates some time in the future a boulevard along Mud creek, and, with that in view, a zoning regulation has been promulgated destroying the value of the property which will later have to be taken for that purpose, so that the city may be able to carry out the boulevarding project with less expense to itself.[152]

The court held that the city had exceeded the authority of the zoning law when it used the zoning power to zone "a block in the heart of an industrial section to residential purposes only" in order to reduce the cost of later condemnation.[153]

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[150] *See, e.g.*, San Diego Gas & Elec. Co. v. City of San Diego, 146 Cal. Rptr. 103,110 (Ct. App. 1978) ("[I]f the state downzones a property to decrease its value as a prelude to later acquiring the property, the zoning may be found to have been a condemnation."); Grand Trunk W. R. Co. v. City of Detroit, 40 N.W.2d 195, 200 (Mich. 1949) (holding a zoning ordinance "unreasonable and confiscatory" because it zoned property residential when the only way it could be developed residentially was if the government condemned the property).

[151] 243 N.W. 317 (Wis. 1932).

[152] *Id.* at 320.

[153] *Id.*

7. Restraints on Rehabilitation or Development Generally

On the other hand, the government may have a legitimate reason to directly prevent development of property that it is considering condemning. The government does not want the owner to develop the property wastefully. Even if the government fully compensates the owner for the increased market value, the owner's investment was still economically wasteful. The government ends up undoing valuable improvements that it does not need, and having to pay for the privilege. It may seem that the government is simply saving itself some money, but it is doing more than that. It is preventing waste. So a moratorium on development while condemnation is being considered should not be considered a taking for failure to advance a legitimate state interest.

But if the regulatory restraint is not preventing waste, then it seems to clearly be a taking. For example, in the unlikely case that a moratorium prevented rehabilitation of an improvement that the government would keep and use after condemnation, the moratorium would not prevent waste in the same way as when the improvements would not long be useful. The government's only other purpose is to keep the value of the property down, which is an illegitimate purpose.

8. Government Development and Conduct Offsite

The biggest problem for the landowner claiming a substantive due process violation based on this kind of precondemnation activity is that the government has not interfered with any recognized property right. A property owner may have an expectation, but not a property right, to a good or compatible neighborhood around her. If the government has not taken away any of the owner's property rights at all, it doesn't matter what purposes the government has advanced.[154] The property owner has no due process claim.

One way the government may try to reduce the market value of properties it plans to condemn is by acquiring other properties in the area first.[155] Although reducing compensation may be one purpose, government condemnation and development nearby will also surely serve a legitimate interest in advancing whatever

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[154] *See* cases cited *supra* note 138.

[155] *See, e.g.*, Merkur Steel Supply, Inc. v. City of Detroit, 680 N.W.2d 485, 493 (Mich. Ct. App. 2004) (noting plaintiff's allegation that the city tried to reduce the cost of acquiring plaintiff's land by condemning much of the surrounding property in order to prevent plaintiff's expansion).

project the government has in mind. But even if in an unusual case the evidence showed that the government really had no need of certain property condemned nearby and had no plans to make use of it, and also showed that the effect was to depress the market value of necessary properties, the owner of later-acquired property could not claim that the earlier condemnations denied her substantive due process, because she had no property interest in what happened on the neighboring land. As for those whose land was taken, they would have no reason to claim a taking or due process violation because the government in fact formally took their land and paid them just compensation for it.

In some cases the government allegedly neglected, demolished, or otherwise affected neighboring properties in order to reduce the value of property in the area before acquiring it.[156] Doing so might further a legitimate state interest in using public resources wisely by not maintaining or rehabilitating properties that the government intends to demolish anyway. And again, the affected property owner cannot really claim that the government has taken her property by allowing the area to deteriorate. However substantial the impact on her use and enjoyment of the property, the government has not taken away any recognized property right, regardless of the interests advanced by its actions.

C. Figuring Just Compensation

Most of the time the government's precondemnation activities will not themselves amount to a taking. If the government were to stop there and never condemn the property, it would need to pay no compensation to the owner at all, even though the owner may have suffered some actual loss during that anticipated condemnation period. That is simply one of many risks that come with ownership: the government and private owners alike may make decisions that affect the use and value of any particular

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[156] *See* Thomas W. Garland, Inc. v. City of St. Louis, 596 F.2d 784, 786 (8th Cir. 1979) (recounting plaintiff's allegations that the city had acquired surrounding properties for redevelopment, demolished them, but abandoned the redevelopment, thereby taking plaintiff's property); Amen v. City of Dearborn, 363 F. Supp. 1267, 1273 (E.D. Mich. 1973) (finding that the city's efforts to reduce the cost of acquiring property included selling property in the area to polluting industries), *rev'd*, 532 F.2d 554 (6th Cir. 1976); *Merkur Steel Supply*, 680 N.W.2d at 499 n.3 ("Some evidence in the record indicates that the city stopped services such as trash pickup around the area and also began dumping trash on property the city acquired. Further, plaintiff suggested that through condemnation, the city acquired some of the residential properties around the area, but let those properties become run down.").

property, and the value of the property will rise and fall because of those decisions, and in anticipation of those decisions.[157]

But when the government does ultimately take the property in formal condemnation proceedings, there is a second constitutional question: how much must the government pay for the condemned property? What compensation is "just"? The usual rule is that the government must pay the market value at the moment it actually takes title from the owner.[158] But a property's real market value might have been significantly higher if the government had not already started depressing the value by its regulatory or other precondemnation activities.

In general, the government should compensate owners for their full loss. "The owner is to be put in the same position monetarily as he would have occupied if his property had not been taken."[159] Taking property is not an instantaneous action. After making the decision to condemn, planning, funding, negotiating, and litigating a taking can take a long time. If the property declines in value because of that process, or because of other precondemnation activities, the owner has suffered a loss solely because of the taking, and the government should make her whole.[160]

Of course, we cannot determine actual market values very precisely to begin with.[161] And then isolating different causes of

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[157] *See* Danforth v. United States, 308 U.S. 271, 285 (1939) ("A reduction or increase in the value of property may occur by reason of legislation for or the beginning or completion of a project. Such changes in value are incidents of ownership. They cannot be considered as a 'taking' in the constitutional sense.").

[158] *See, e.g.*, First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 320 (1987); United States v. Miller, 317 U.S. 369, 374 (1943).

[159] United States v. Reynolds, 397 U.S. 14, 16 (1970); s*ee also* Olson v. United States, 292 U.S. 246, 255 (1934); Boston Chamber of Commerce v. Boston, 217 U.S. 189, 195 (1910) ("[T]he question is, What has the owner lost? not, What has the taker gained?").

[160] *See* H. Dixon Montague, *Market Value and All that Jazz: The Proof of the Pudding Is in the Eating*, 30 URB. LAW. 631, 650 (1998) ("[T]he government should not be permitted to artificially influence a market by various value depressing acts so that the property it must acquire in that market will come at a cheaper price. An owner whose property is the type traded in the marketplace is entitled to compensation in a condemnation case based on free market transactions uninfluenced by such governmental activity."); Christopher Serkin, *The Meaning of Value: Assessing Just Compensation for Regulatory Takings*, 99 NW. U. L. REV. 677, 696-97 (2005). Similarly, if the government's precondemnation conduct, or anticipation of the condemnation, makes the property worth more, the government is not required to pay the higher market value in compensation for the taken property. *See, e.g.*, United States. v. Cors, 337 U.S. 325, 333-34 (1949) (holding that the government need not pay higher market value for condemned tugs because the government's own war-time demand for tugs increased their market value); *Miller*, 317 U.S. at 376-77 ("If, however, the public project from the beginning included the taking of certain tracts but only one of them is taken in the first instance, the owner of the other tracts should not be allowed an increased value for his lands which are ultimately to be taken any more than the owner of the tract first condemned is entitled to be allowed an increased market value because adjacent lands not immediately taken increased in value due to the projected improvement.").

[161] *See* Serkin, *supra* note 160, at 683-84 (describing difficulties with determining "market value" as a measure of just compensation).

market value declines is even harder. So sometimes it may be too speculative to determine how much the property would be worth were it not for the government's precondemnation activities.[162] But the owner should be able to offer such proof and should be able to recover such value if she can sufficiently prove it.[163]

Proof of just compensation is even harder when there are multiple causes of market decline, or when market values generally increase, but the pending condemnation slows the increase in market value of the subject property. When the precondemnation activities themselves constitute a taking, as discussed above, the government must pay the entire market value at that earlier time. There is no need to isolate different effects on market value in such a case. But when the precondemnation activities themselves are not a taking, and the question is simply what compensation is required upon eventual condemnation, the government usually should not have to pay the owner for declines in value due to market changes generally, only those declines specifically due to the government's precondemnation activities.[164] Somehow the evidence must establish how much loss was due to the precondemnation activities and not other market influences.

In some cases, however, just compensation should include lost market value even if due to general market decline rather than anticipation of condemnation. If the government has indicated its intent to condemn or otherwise begun the condemnation process in some way, the market value may decline, but it also may be practically impossible to find a real buyer at all. If the owner is unable to sell the land because of the market's anticipa-

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[162] *See* Atchison, Topeka & Santa Fe Ry. Co. v. S. Pac. Co., 57 P.2d 575, 581 (Cal. Ct. App. 1936) ("[T]he trial court would have permitted an indulgence in unfathomable speculation had it opened the road to the examination of witnesses . . . to determine whether there was a slump in the market in this area, and, if so, what it was due to, during that period [between announcement and commencement of an eminent domain action].").

[163] *See, e.g.*, Klopping v. City of Whittier, 500 P.2d 1345, 1353 (Cal. 1972) (en banc) ("Since the condemnee has the burden of proving damages, requiring the condemnee to lay a proper foundation in these matters and properly instructing the jury should adequately circumscribe speculation and render unnecessary a rule of exclusion created from apprehension of speculation." (citations omitted)).

[164] *See id.* at 1351 ("In [a de facto taking claim], the owner claims his property has been Taken on the earlier date; thus all decline in value after that date is chargeable to the condemner. This would include damages wholly unrelated to the precondemnation activity of the public agency. For example, losses due to a general decline in market value in the area or to the adverse consequences of a natural disaster would be borne by the condemner since the Taking of the property is said to have occurred at the earlier date. In the instant case, however, plaintiffs do not contend that the subject properties should be treated as if they were actually condemned [earlier] . . . . Rather plaintiffs submit that any decrease in the market value caused by the precondemnation announcements should be disregarded and that the property should be valued without regard to the effect of the announcements on the property.").

tion of the condemnation, the owner not only loses the discounted market value because of the pending condemnation, but also may lose additional value as the market declines but she is unable to sell. The Supreme Court of Washington recognized this problem in *Lange v. State*, finding that:

> Once the State manifested its unequivocal intent to appropriate the Lange property, appellants were precluded from exercising their business judgment and selling the property before the market fell further. Moreover, appellants were precluded from taking any steps to counteract the market decline by making improvements on the land or otherwise changing its use. Thus, appellants were deprived of the most important incidents of ownership, the rights to use and alienate property. In addition, because the condemnation did in fact take place, appellants were prevented from holding their property, as other owners would be able to do, until economic conditions improved and market values rose again.[165]

The court therefore held that just compensation would require valuing the property at the time the highway location was first announced, even though the court had not found that the announcement itself constituted a taking.[166]

If an owner would not have sold the property but for the pending condemnation, however, the just compensation principle does not require compensating her for a general decline in market value during the time she was unable to sell. The government need only put the owner in the position she would have been in had there been no condemnation — and in such a case, had there been no condemnation, the owner would have suffered the same general decline in market value, as owners often do. In general, then, this additional compensation for general market declines while condemnation was looming should be paid only to owners who acquired the property for development and have demonstrated by at least some preliminary steps that they were going to develop the property when the precondemnation activities got in the way

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[165] Lange v. State, 547 P.2d 282, 288 (Wash. 1976) (en banc).

[166] *See id.* ("Under these circumstances the loss suffered is so closely connected to the condemnation itself that our constitutional concern for truly just compensation requires valuation in an eminent domain proceeding at a time earlier than the date of trial. This conclusion is necessary if the condemnee is to be placed in the same position monetarily as he would have occupied had his property not been taken.").

and practically prevented them from developing and selling the property.[167]

The rest of this section discusses the different types of pre-condemnation activities and how they can affect the measure of just compensation.

1. Planning and Publicity

The government certainly may have legitimate, important reasons to plan and publicize future land acquisitions. The government shouldn't pay more for the property as a result of such public planning. But the government shouldn't pay less either. If the planning and publicity also depressed the market value, that publicity is really just part of the condemnation process. The market has simply already discounted the property's value by some probability of eventual condemnation. The government shouldn't avoid paying a bill just because the market sees it coming.[168] Similarly, lenders will almost certainly refuse to finance development of property that is targeted for condemnation, even though the owner is free to proceed with such development until the government actually condemns the land, if it ever does.[169] Lack of avail-

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[167] *See id.* ("The special use of the land by the owner must be acquiring and holding the property for subsequent development and sale. Further, the owner must have taken active steps to accomplish this purpose. A property owner who purchased land or took steps to market it in contemplation of the condemnation could not insulate himself from a later general decline in market values and benefit from the holding in this case.").

[168] *See, e.g.*, Jersey City Redev. Agency v. Kugler, 277 A.2d 873, 875 (N.J. 1971) ("The rule supported by the weight of authority in the ordinary condemnation case is that the proper basis of compensation is the value of the property as it would be at the time of the taking (or at the time fixed by the statute, such as the date of commencement of the condemnation proceedings) disregarding either the depreciating threat of or the inflationary reaction to the proposed public project."); *Lange*, 547 P.2d at 286 ("It is similarly widely recognized that any decrease in property value attributable to the project for which the eminent domain proceeding is instituted is to be disregarded in computing just compensation. This rule also applies to situations in which the condemnation activities themselves have depreciated property prior to the institution of formal eminent domain proceedings." (citations omitted)); John Lewis, LAW OF EMINENT DOMAIN § 745 (3d ed. 1909) ("If the proposed improvement had depreciated the value of the property, it would be very unjust that the condemning party should get it at its depreciated value, . . . the correct rule would seem to be that the value should be estimated irrespective of any effect produced by the proposed work."). *But see* United States v. Va. Elec. & Power Co., 365 U.S. 624, 636 (1961) (stating that just compensation "must exclude any depreciation in value caused by the prospective taking once the Government 'was committed' to the project" (citation omitted)).

[169] *See, e.g.*, Madison Realty Co. v. City of Detroit, 315 F. Supp. 367, 370 (E.D. Mich. 1970) (noting that pending condemnation, and government condemnations in the surrounding area, prevented plaintiffs from borrowing money to improve property); Kanner, *supra* note 22, at 49 n.7 ("Needless to say, these decisions are unsound, indeed absurd, because they ignore the realities of a landowner having to secure the necessary permits and financing to create a substantial improvement, in the face of municipal plans to tear it down shortly after it is built, when the public project eventually materializes. No rational lender

able financing will likewise reduce the value of the land even before the government formally condemns the land, yet is the direct result of the condemnation decision.

The government therefore should pay the market value the land would have had if the government had never targeted the land for acquisition. Some condemnation statutes expressly direct that market value must be determined without depreciation resulting from the condemnation project itself.[170] But it can be especially difficult to determine how much the property would have been worth if the government had never begun to plan and publicize the condemnation. Sometimes particular events may logically provide a date on which to measure the market value of the ultimately condemned property. For example, a government declaration that an urban area is blighted will surely impair the market value of properties in that area. But it may be years before the government actually condemns the property. If so, the government should pay as just compensation at least the market value of the property on the date of the blight declaration.[171]

2. Delay

Condemnation takes time. Once the government begins planning a condemnation, passes a resolution to condemn, or oth-

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would lend money for such a venture. Still, if the courts insist that this is the law, no reason appears why the landowners should not be able to enjoy the benefit of that law when they are able to improve land slated for public acquisition.").

[170] *See, e.g.*, MD. CODE ANN., REAL PROP. §12-105 (2003) ("[F]air market value includes any amount by which the price reflects a diminution in value occurring between the effective date of legislative authority for the acquisition of the property and the date of actual taking if the trier of facts finds that the diminution in value was proximately caused by the public project for which the property condemned is needed, or by announcements or acts of the plaintiff or its officials concerning the public project, and was beyond the reasonable control of the property owner."); 26 PA. STAT. ANN. §1-604 (1997) ("Any change in the fair market value prior to the date of condemnation which . . . was substantially due to the general knowledge of the imminence of condemnation, other than that due to physical deterioration of the property within the reasonable control of the condemnee, shall be disregarded in determining fair market value."); WASH. REV. CODE § 8.26.180 (2004) ("Any decrease or increase in the fair market value of the real property to be acquired prior to the date of valuation caused by the public improvement for which such property is acquired or by the likelihood that the property would be acquired for such improvement . . . will be disregarded in determining the compensation for the property.").

[171] *See* Washington Mkt. Enters., Inc. v. City of Trenton, 343 A.2d 408, 411 (N.J. 1975) (citing a New Jersey statute and discussing just compensation for blighted property); City of Buffalo v. J. W. Clement Co., 269 N.E.2d 895, 903 (N.Y. 1971) (explaining that when "condemnation blight" reduces the value of later condemned property, "compensation shall be based on the value of the property at the time of the taking, as if it had not been subjected to the debilitating effect of a threatened condemnation"); City of Cleveland v. Carcione, 190 N.E.2d 52, 56-57 (Ohio Ct. App. 1963) (holding that just compensation had to be determined at a time before the renewal project caused neighborhood decline).

erwise begins the process of condemnation, the property may immediately become less valuable. The market recognizes that it will not be privately useable much longer, and many otherwise valuable uses are no longer feasible. If the government pays only the market value on the date of actual condemnation,[172] it will not actually "put [the owner] in the same position monetarily as he would have occupied if his property had not been taken."[173]

Some courts have recognized this problem, however, and held that "any decrease in property value attributable to the project for which the eminent domain proceeding is instituted is to be disregarded in computing just compensation."[174] So if the delay is in actually carrying out a planned condemnation, it doesn't matter whether the delay was reasonable or unreasonable. The market value is figured as if the condemnation proceeding never began, because that is how much the owner has lost.

On the other hand, some have reasoned that some delay is unavoidable, and the law should not discourage governments from announcing their intentions to condemn before formally commencing the condemnation. Therefore, the government will be required to pay market value lost during anticipation of condemnation only if the government "acted improperly either by unreasonably delaying eminent domain action following an announcement of intent to condemn or by other unreasonable conduct prior to condemnation."[175] But such a rule leaves open the possibility that the owner will have suffered some of the real loss from the condemnation, but not be compensated for it, simply because the government had a good reason for causing the loss. It doesn't matter how good the reason; if the government causes the loss in taking property for the benefit of the public, the government should compensate the owner for the loss.[176]

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[172] *See, e.g.*, Lange v. State, 547 P.2d 282, 285 (Wash. 1976) (en banc) (noting the usual rule and the potential unfairness of determining market value on date of trial).

[173] United States v. Reynolds, 397 U.S. 14, 16 (1970).

[174] *Lange*, 547 P.2d at 286.

[175] Klopping v. City of Whittier, 500 P.2d 1345, 1355 (Cal. 1972) (en banc); s*ee also* State *ex rel.* Dep't of Transp. v. Barsy, 941 P.2d 971, 976 (Nev. 1997) (following the rule from *Klopping*); Eric Kades, *Avoiding Takings "Accidents": A Tort Perspective on Takings Law*, 28 U. RICH. L. REV. 1235, 1274-77 (1994) (citing examples of courts using reasonableness tests to determine whether just compensation is required for precondemnation delay); Kanner, *supra* note 22, at 61 ("[T]o serve a broader public purpose, the prospective condemnees may have to suffer some minor incidental losses, as the public decision-making process progresses and knowledge of prospective public land acquisitions spreads, affecting market values at the targeted owners' expense.").

[176] *Cf.* Kanner, *supra* note 22, at 62 ("[T]he burdens of substantial delays in the implementation of public projects must fall somewhere, and given the constitutional doctrine that protects individual property owners from having to shoulder a disproportionate share of the cost of public improvements, it is only fair that it fall on the government that (1) is best

3. Zoning and Other General Regulation

As discussed in the previous section, the government may take property when it depresses the market value of targeted property by downzoning or denying permits and the like. If the loss is great enough to amount to a taking, or if the government does not have a legitimate reason for the regulatory action, then the government action will require compensation or be invalid under substantive due process. But if the loss is not substantial enough to amount to a taking, and the government has a legitimate reason for the regulatory action, then there is no reason that just compensation should be the greater market value the property would have had but for the permissible regulatory action. For example, if the government had a legitimate reason for downzoning a property from industrial to open space-agricultural, when it eventually condemned the property it should pay the property's market value as open space-agricultural land at that time, not the earlier industrial value. That's the general rule, and there is no reason to do differently if the government had a legitimate reason for the downzoning. On the other hand, if the government denied a permit necessary to properly maintain the property because it anticipated condemning the land, just compensation should be the market value the property would have had if the owner had been permitted to properly maintain it.[177] So the market value of condemned property should be determined based on the present condition and currently permitted uses, unless the owner can show that the government's regulatory decisions were themselves unconstitutional because they had no legitimate purpose.

4. Restraints on Rehabilitation or Development

Sometimes the government temporarily prohibits development while it decides whether to condemn particular properties. During the temporary prohibition, the property may decline in value because of market anticipation of the condemnation. Such

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situated to expedite the process, (2) is the effective cause of the loss, (3) has superior cost-spreading ability, (4) has superior resources that it can use until the cost of the project can be fairly spread on society that benefits from it.").

[177] *See id.* at 66-67 ("[I]f the local municipality refuses to issue the permits necessary to make repairs, that should be fully documented because if the poor condition of the property at the time of trial is attributable to the municipality's interference with proper maintenance, the negative impact of it will then be disregarded because the fair market value may not reflect any diminution caused by the imminence of the condemnation, or any preliminary acts taken in anticipation of it.").

losses in value should be compensated in the same way as any loss due to market anticipation of condemnation, as discussed above.

The property owner also loses some of the value of her property during the temporary prohibition if she can't use it as she wants to. The government has a legitimate reason for the temporary prohibition, however, and the owner will rarely be deprived of all beneficial use of the land, so that temporary loss itself will not be a taking. But if the government ultimately condemns the land, just compensation should be measured on the date that the owner was denied the right to use and enjoy her property. The Alaska condemnation statute, for example, recognizes this principle. The statute prohibits making improvements on land after a summons has been issued in a condemnation proceeding, and therefore requires the court to determine the market value of the property on the date the summons was issued.[178]

The government might temporarily prohibit development for other reasons, however, such as planning land uses for an area. In such cases the government has not prohibited development to avoid wasteful development of land the government is going to take anyway. Instead, the government has prohibited development because it is not yet sure whether any particular development will be consistent with other uses, the city's needs, and so on. Again, such a temporary prohibition for a reasonable purpose and time will not be a taking. If the government then at some point decides to condemn a particular property that is subject to the temporary prohibition, the government should pay the market value at the time of the taking, according to the general rule. Even if the temporary prohibition affected the property's market value, that lost value wasn't due to anticipation of condemnation.

5. Government Improvements and Conduct Offsite

If the government plans to condemn multiple properties for a project, later-acquired properties may be worth less than they were worth at the start of the project because of the market's reaction to the government project. Just compensation should be measured by the market value when the project first began. In *Becos v. Masheter*,[179] for example, the acquisition of properties for a highway caused the neighborhood to deteriorate and reduced the market value of a later-condemned parcel. The court held that valuation should be made on a date "reasonably related to events

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[178] ALASKA STAT. § 09.55.330 (2000).
[179] 238 N.E.2d 548 (Ohio 1968).

in the vicinity of the property taken whereby the appropriating authority's activity contributed to or caused substantial depreciation of the property taken."[180] Similarly, in *Uvodich v. Arizona Board of Regents*,[181] a university announced an expansion program and for ten years acquired residential properties in implementing that program. The court held that the university did not thereby take properties that were yet to be acquired, but did suggest that just compensation should be measured at a time that would compensate the owners for the depreciation they had already experienced due to the expansion program.[182]

On the other hand, if the government has caused a property's value to decline by letting neighboring areas deteriorate or be developed in certain ways, the loss in value is compensable only if the owner can show that the government conduct itself amounted to a taking. That is the only reason to grant compensation for such losses, whether the property is ever condemned or not. An owner whose property is condemned cannot demand compensation for market value her property would have had if the government had maintained the area better or the neighborhood had been developed in a different way. The owner has to show that those actions themselves were takings, or otherwise wrongful, in order to recover for such losses in value.[183]

V. CONCLUSION

Governments can easily be tempted to save money in eminent domain proceedings by doing what they can to depress the market value of properties they hope to condemn. They may even feel it is their duty to save money in this way, if the law allows it. And even if a government doesn't mean to depress market value, often its precondemnation activities will have that effect.

Those activities include planning possible condemnations well in advance, at least when the planned governmental use will

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[180] *Id.* at 551.

[181] 453 P.2d 229 (Ariz. Ct. App. 1969).

[182] *See id.* at 234 ("[P]roperty cannot be charged with a lesser value at the time of taking when the decrease in value is occasioned by reason of the taking itself."). The court also noted that "[o]ther jurisdictions which have had occasion to consider the question of depreciated value resulting from a general plan of condemnation do not permit depreciation in value caused by the condemnor to inure to its benefit." *Id.* at 235 (citations omitted).

[183] *See, e.g.*, Madison Realty Co. v. City of Detroit, 315 F. Supp. 367, 370-71 (E.D. Mich. 1970) (holding that city took property three years before formal condemnation because by then city had made the property "a complete financial loss" by, among other things, "failing to safeguard said property so as to prevent its deterioration, in making impractical almost impossible plaintiff's protection of the property, in removing from the vicinity all indicia of a residential area, [and] in preventing the continued use and enjoyment of the property as a residential building by making said property inaccessible . . . .").

cause the property to decline in value rather than increase in value; publicizing the intention to acquire land and thereby discouraging private investment in the land; zoning the land in a way that will keep its value down; denying building and other permits, whether expressly because of the possible condemnation or for other reasons; prohibiting development temporarily while the government decides whether to condemn property and what property to condemn; acquiring other properties in the area; allowing the neighboring area to decline in value by not maintaining it or by permitting lower value uses; and delaying at any stage of the process while the property declines in value.

These compensation-reducing activities generally will not impair so much of the property's value that they themselves are takings, independent of any eventual formal exercise of the eminent domain power. Their effects generally are temporary, so that even if the property is useless for a time, the property still retains substantial value once it becomes useable again — assuming the government does not ultimately condemn the land. But sometimes the government may actually destroy a property's entire value, such as by planning to condemn land for a project, changing the area around it, and making the land practically useless for any other purpose. If so, the government should pay compensation even if it does not ultimately condemn the land formally.

The government's precondemnation activities are more likely to deny substantive due process, or be a taking, for failure to substantially advance a legitimate state interest. The government has no legitimate purpose for taking a property interest from the owner if the only objective purpose is to reduce just compensation to be paid when the government might later condemn her land. Usually planning and publicizing condemnations will further legitimate interests in public decision-making, even if they also further the illegitimate purpose of reducing just compensation to be paid. Temporary development prohibitions or permit denials will generally serve a legitimate interest in avoiding waste. But the government denies substantive due process, or should pay just compensation for a taking, if it delays at any stage of the regulatory or condemnation process, and the delay is unreasonable and serves no purpose other than to cause the value of property to decline while the government considers condemnation.

Even if precondemnation activities do not themselves take property, they may still affect the amount of compensation the government should justly pay if it does eventually condemn the land. In principle, the government should pay the owner the value the property would have had at the time of taking if the govern-

ment had never begun the process of condemning the land, including planning and publicizing the condemnation. If the condemnation is part of a larger project, market value should be determined as if the government had not begun work on any of the project, even on land other than the subject property. And if, in anticipation of condemnation, the government previously prevented the owner from using and enjoying the land, the property should be valued on that earlier date rather than the date of actual taking.

As even this concluding summary demonstrates, these constitutional limitations on government's precondemnation activities do not prevent all compensation-reducing strategies. But any government conduct that is intended only to reduce compensation paid to owners of condemned property is inconsistent with the underlying principle of the Just Compensation Clause, that the government should not "forc[e] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[184] The true cost of the government's project includes the full market value of the necessary property, without any governmental intervention to alter that market value. The property owners have not done anything wrong to justify making them bear some of the costs of the public use on their own. Governments therefore should avoid and resist the temptation to hide some of the costs of public projects by making private owners bear such costs. And condemnation statutes should define the compensation to be paid in ways that help prevent government abuse of the regulatory power in a way that unfairly burdens private owners of land to be condemned.

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[184] Armstrong v. United States, 364 U.S. 40, 49 (1960).

PROTECTING THE COLUMBIA RIVER GORGE: A TWENTY-YEAR EXPERIMENT IN LAND-USE FEDERALISM

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I. INTRODUCTION

As the Columbia River approaches the Pacific Ocean, it flows between Oregon and Washington through a dramatic canyon known as the Columbia River Gorge. The Gorge is a spectacularly beautiful region, rich in diverse plant and animal life, sacred Native American sites, natural resources such as timber, and recrea-

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tional opportunities.[1] But the Gorge is not a pristine, undeveloped area. Highways and railroad tracks run along both sides of the Columbia River through the Gorge, and two large federal hydroelectric projects — which have decimated the Columbia River's salmon and permanently altered the flow of the river — lie within the canyon. Over 50,000 people live in the cities and unincorporated communities in the Gorge. The region is also politically fragmented, with two states, six counties, and thirteen cities and townships governing various parts of the Gorge; the U.S. Forest Service managing over 115,000 acres of land, roughly forty percent of the Gorge; and an interstate compact agency, the Columbia River Gorge Commission, with unprecedented regional land use powers under a federal statute.[2]

Prior to the establishment of the Gorge Commission in 1986, this collection of jurisdictions created conflicting policies that often threatened the Gorge's natural values. Although Washington and Oregon had considered various ways to protect the Gorge since 1937,[3] there was no comprehensive legislation was until 1986, when Congress passed the Columbia River Gorge National Scenic Area Act.[4] This statute represents an unusual experiment in federalism, attempting to marshal a complex array of federal, regional, and local authorities to protect a scenic area that, because of its preponderance of private lands, is not suitable for inclusion in the national park system, yet merits greater protection than the state or local governments can provide.[5]

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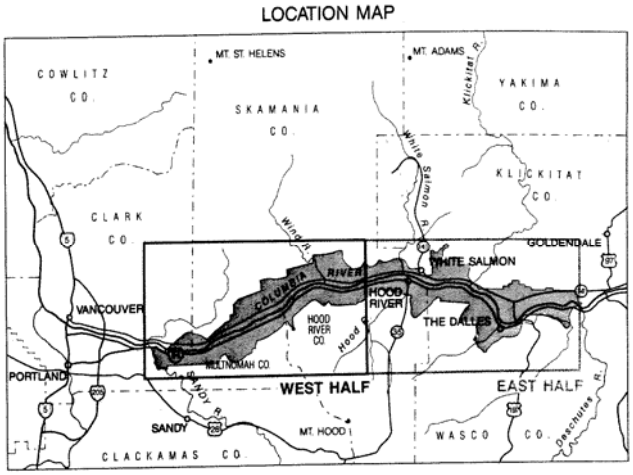
[1] *See* Bowen Blair, Jr., *The Columbia River Gorge National Scenic Area: The Act, Its Genesis and Legislative History*, 17 ENVTL. L. 863, 868 (1987).

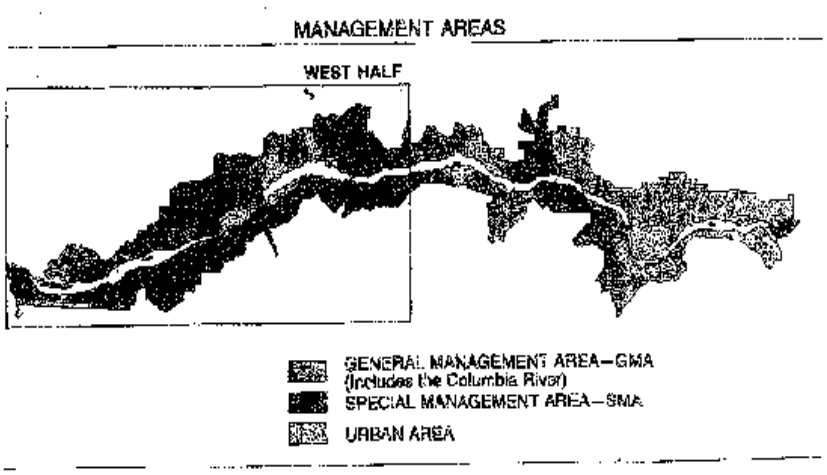
[2] *Id.* at 872-73. The Scenic Area encompasses the cities and towns of Cascade Locks, Hood River, Mosier, and The Dalles in Oregon; and Bingen, Carson, Dallesport, Home Valley, Lyle, North Bonneville, Stevenson, White Salmon, and Wishram in Washington. Columbia River Gorge National Scenic Area Act, 16 U.S.C. § 544b(e)(1) (2000). The federal government also is quite influential, due to its status as the largest landowner in the Gorge. The Scenic Area contains approximately 292,615 acres, of which approximately 115,100 acres (nearly forty percent) fall within special management areas (SMAs), which are managed by the U.S. Forest Service. Of that 115,100 acres, approximately 71,000 acres are national forest system lands within the Gifford Pinchot and the Mount Hood National Forests. The remaining 44,100 acres consist of county, state, tribal, private, and other federal lands. Columbia River Gorge Commission, Revisions to the Management Plan for the Columbia River Gorge National Scenic Area IV-2 (2004), *available at* http://www. gorgecommission.org/draft%20revised%20management%20plan.htm (last visited Feb. 19, 2006).

[3] Blair, *supra* note 1, at 878 (citing COLUMBIA GORGE COMMISSION, PACIFIC NORTHWEST REGIONAL PLANNING COMMISSION, REPORT ON THE PROBLEM OF CONSERVATION AND DEVELOPMENT OF SCENIC AND RECREATIONAL RESOURCES OF THE COLUMBIA GORGE IN WASHINGTON AND OREGON 2 (1937)).

[4] Columbia River Gorge National Scenic Area Act, 16 U.S.C. §§ 544-544p (2000).

[5] Blair, *supra* note 1, at 867.


LOCATION MAP
MT. ST. HELENS
MT. ADAMS
COWLITZ CO.
SKAMANIA CO.
YAKIMA CO.
KLICKITAT CO.
CLARK CO.
Klickitat R.
White Salmon R.
Wind R.
GOLDENDALE
WHITE SALMON
COLUMBIA RIVER
HOOD RIVER
VANCOUVER
HOOD RIVER CO.
THE DALLES
Hood R.
PORTLAND
MULTNOMAH CO.
WEST HALF
EAST HALF
Sandy R.
SANDY
MT. HOOD
WASCO CO.
CLACKAMAS CO.
Deschutes R.


MANAGEMENT AREAS
WEST HALF
GENERAL MANAGEMENT AREA—GMA
(Includes the Columbia River)
SPECIAL MANAGEMENT AREA—SMA
URBAN AREA
This map is a representation of the 1:24,000 scale official maps
Produced August 1992.

Adopting a regional approach to the Gorge's natural resources, the Act sought to establish relatively uniform land use controls on both the Washington and Oregon sides of the Gorge.[6] But the goal of the statute — to protect and enhance the scenic, cultural, recreational, and natural resources of the Columbia River Gorge while also encouraging growth in urban areas and allowing future economic development in the Gorge in a manner consistent with the Act's primary conservation purpose[7] — is quite vague. Thus, the implementing entities — which include the Gorge Commission authorized by the statute, the U.S. Forest Service, and local cities and counties — have considerable discretion in crafting management plans and zoning ordinances.[8]

Implementing the Gorge Act has proved to be difficult and often controversial. Although the statute survived a constitutional challenge,[9] one of the six county governments within the Scenic Area unsuccessfully challenged the Gorge Commission's initial 1992 Management Plan,[10] and thereafter refused to develop approvable implementing ordinance, requiring the Commission to remain the principal land use regulator for that county's Gorge Area lands.[11] There also have been widespread landowner allegations that various land use restrictions have worked unconstitutional takings, but those claims have yet to bear fruit.[12] More recently, the 2004 amendments to the Gorge Management Plan provoked environmentalist suits claiming that the amendments weaken scenic protections, inadequately address the cumulative

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[6] *See* Lawrence Watters, *The Columbia River Gorge National Scenic Area Act*, 23 ENVTL. L. 1127, 1128 (1993).

[7] 16 U.S.C. § 544a (2000).

[8] For example, in 2005, conservationists challenged a Gorge Commission decision, which expanded a federally defined "urban area" (exempt from the Act's regulatory controls, *see infra* note 16 and accompanying text) to accommodate urban growth. Although the Washington Court of Appeals noted the conservationists' claims that the urban expansion was inconsistent with the primary purpose of the Act — to protect and enhance the scenic, cultural, recreational, and natural resources of the Columbia River Gorge — the court concluded that the Commission's decision to expand the urban area was supported by the record, and the expansion would benefit the Skamania Lodge, the county's largest private sector employer. Friends of the Columbia Gorge, Inc., v. Columbia River Gorge Comm'n, 108 P.3d 134 (Wash. Ct. App. 2005). This decision reflects the deferential role that courts have assumed in determining whether challenged land uses are consistent with the Act's underlying purposes. Consequently, the statutory directive to "protect and enhance" the values of the Columbia Gorge has been criticized by the Gorge Commission's Executive Director as being too vague and difficult to measure. *See, e.g.*, Associated Press, *Air Pollution Worsens in Columbia Gorge, but Who's in Charge?*, THE DAILY NEWS, Aug. 26, 2005, *available at* http://www.tdn.com/articles/2005/08/27/area_news/news05.txt (last visited Feb. 19, 2006) (noting "when it comes down to the details, nobody knows what the standard really means").

[9] *See infra* notes 53-61 and accompanying text.

[10] *See infra* notes 62-65 and accompanying text.

[11] *See infra* note 65.

[12] *See infra* notes 66-84 and accompanying text.

effects of development, and fail to protect wildlife, water quality, and salmon habitat.[13]

This article provides a two-decade review of efforts to implement the Gorge Act, focusing especially on judicial interpretation. Parts II and III briefly outline the Act and the management plan it required. Part IV discusses the principal judicial interpretations of the statute and its implementation. These include constitutional and management plan challenges, takings cases, challenges to the implementation of the Act's innovative "opt-out" provision (under which some landowners may, under certain circumstances, evade the most stringent regulations under the Act by offering to sell their land to the federal government), and a controversial case in which the Washington Supreme Court limited the Gorge Commission's ability to invalidate county land use decisions after the period for appeals had passed. Part V surveys a series of problematic issues involving whether state agencies must implement the Gorge Act and its management plan. Part VI considers the 2004 revisions to the management plan and their pending challenges. The article concludes that, despite the contested nature of its implementation (perhaps because of it), the Gorge Act and its implementation are worthy of study by those seeking to protect other transboundary resources in other locations.

II. THE 1986 COLUMBIA RIVER GORGE NATIONAL SCENIC AREA ACT

The Gorge Act established a National Scenic Area extending along the Columbia River for some eighty-five miles, from just east of Portland, Oregon and Vancouver, Washington, upstream to the Deschutes River.[14] The statute divided the nearly 300,000 acres in the Scenic Area into three classifications: (1) Urban Areas (UAs); (2) Special Management Areas (SMAs); and (3) a General Management Area (GMA), comprised of land outside the UAs and SMAs;[15] subjecting each to a different type of regulation. Land within UAs — comprising ten percent of the total Scenic Area — is exempt from the Act's provisions.[16] SMAs — of which there are four, and which contain mostly federal lands and often the most

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[13] *See infra* notes 154-56 and accompanying text.

[14] 16 U.S.C. § 544b (2000).

[15] *Id.* The Gorge Act never actually mentions the GMA, a term coined by the implementing agencies.

[16] *Id.* § 544b(e)(1). The cities and towns included within UAs are Cascade Locks, Hood River, Mosier, and The Dalles in Oregon; and Bingen, Carson, Dallesport, Home Valley, Lyle, North Bonneville, Stevenson, White Salmon, and Wishram in Washington.

sensitive resources — are managed by the U.S. Forest Service.[17] The GMA — which is non-federal land outside UAs — is overseen by the Columbia River Gorge Commission, a nonfederal, interstate compact agency authorized by the Act.[18]

Although the Act authorized the Commission, the agency was actually created by Oregon and Washington through state legislation.[19] Of the twelve voting members of the Commission, half are appointed by the governors of Washington and Oregon (each appoints three), and half are appointed by the county commissioner of each of the six Gorge counties.[20] The Secretary of Agriculture appoints one non-voting member to represent the Forest Service.[21]

The Act's division of authority between the federal government and the bi-state commission was the product of a political compromise engineered by the drafters of the Act to alleviate concerns over the specter of federal zoning of private lands, which some conservative members of the U.S. Senate and the Reagan Administration claimed was unconstitutional.[22] In an effort to limit the federal regulatory controls, the Act created a complex structure which envisioned that the Forest Service, the Gorge Commission, and local governments would work together to address the protection and development of the Gorge.[23]

Although private property regulation by the Forest Service and other federal agencies in federal reserves is not a particularly novel development,[24] the Gorge Act contains a fairly unique allocation of power among federal, regional, and local authorities in its efforts to preserve a nationally significant landscape, spanning across two states, six counties, and thirteen cities and towns. The results have been decidedly mixed, with Gorge conservationists arguing that the multi-tiered structure of the Act can impede the achievement of the conservation goals of the Act,[25] while private

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[17] *Id.* § 544f. Approximately forty-five percent of the total land in the Scenic Area is contained in the SMAs.

[18] *Id.* § 544c(a)(1)(A). The establishment of the Commission was not without controversy. *See infra* notes 53-61 and accompanying text.

[19] Oregon and Washington approved the Commission by entering into the Columbia River Gorge Compact. OR. REV. STAT. § 196.150 (2003); WASH. REV. CODE ANN. § 43.97 (West 2005).

[20] 16 U.S.C. § 544c(a)(1)(C) (2000).

[21] *Id.*

[22] *See* Blair, *supra* note 1, at 920-22.

[23] *See id.* at 896-932 (throughly examining the Gorge Act's legislative history).

[24] *See id.* at 951-53 (describing the Sawtooth National Recreation Area and the Hell's Canyon National Recreation Area and noting that the 750, 000 Sawtooth NRA includes 25,200 acres of privately owned lands, while the 650,000 acre Hell's Canyon NRA includes approximately 41,000 acres of private property).

[25] *See e.g.*, CARL ABBOTT ET AL., PLANNING A NEW WEST: THE COLUMBIA RIVER GORGE NATIONAL SCENIC AREA 186-87 (William Lang ed., Oregon State University Press 1997)

property advocates decry the Commission's implementation of the Act as an impermissible governmental intrusion.[26]

Land uses within the Scenic Area must be consistent with a comprehensive management plan.[27] This plan consists of two components: a plan for the SMAs prepared by the Forest Service, and a plan for the GMA approved by the Commission. The Act prescribed three components of the plan: (1) an inventory of existing land uses and resources in the Scenic Area, including an economic study and a recreation assessment;[28] (2) land use designations for both the GMA and the SMAs establishing land suitable for agriculture, timber production, open space, and commercial and residential development;[29] and (3) a Scenic Area management plan based on the resource inventories and the land use designations,[30] which the Commission must incorporate into the SMA plan prepared by the Forest Service.[31]

(discussing the complexities involved in implementing the Act's "horizontal" or "state/state" intergovernmental relations and the Act's "vertical" coordination among federal, state, and local governments); *id*. at 188 ("Environmentalists have criticized the Management Plan for giving too much away . . . ."); *id*. at 189 ("The political legacy of the planning process is dissatisfaction among environmentalists *and* local residents . . . . [Environmentalists] wanted a powerful agency to take care of the gorge. Instead, they got a mixed management system that requires constant monitoring in county seats as well as Gorge Commission and Forest Service offices.").

[26] *See id.* at 155-56 ("Residents often take the Scenic Area Act itself as a slap in the face. They resent the implied message that they are unable to manage their own communities and protect what they also see as a valuable resource . . . . Opponents of the Scenic Area repeatedly claim that Management Plan regulations on open space and density constitute uncompensated takings of private property."); *id*. at 172 ("Many (but not all) residents of the Scenic Area remain convinced that the regulatory structure is basically illegitimate . . . ."); *see also* Steve Stuebner, *Counties Want to Develop Public Land*, HIGH COUNTRY NEWS, February 16, 1998, at 3 (quoting Al McKee of the Skamania County Commission, "The people from the city think everything outside of the urban areas should be saved and that we're not capable of managing growth . . . .We need more of a balanced perspective." According to Mckee, restrictions on property development in the gorge . . . have left Skamania County with a shrinking tax base for basic services. "We're really scrambling to keep our county running."); RaeLynn Gill, *Arrowheads Point to Property Dilemma,* HOOD RIVER NEWS, Feb. 6, 2002 (quoting Cherry Trautwein, whose property was declared undevelopable after archaeologists found native American artifacts on the property, "I would have never dreamed that I'd lose the total use of my property, I never knew regulations could do that to you.").

[27] 16 U.S.C. § 544e(a),(c) (2000).

[28] *Id*. § 544d(a). The statute required the resource inventory to be completed within one year of the establishment of the Commission. *Id*.

[29] *Id*. §§ 544d(b)(1), 544f(e). The Act's principal development controls are (1) a prohibition on all "major development actions" in SMAs, (2) a restriction on all residential development in SMAs and the GMA adversely affecting Gorge resources, and (3) strict limits on mining and industrial and commercial development. *Id*. § 544d(d)(5)-(8). The statute required the Gorge Commission to develop land use designations within two years. *Id*.

[30] *Id*. § 544d(c).

[31] *Id*. § 544d(c)(4); COLUMBIA RIVER GORGE COMM'N, MGMT. PLAN FOR THE COLUMBIA RIVER GORGE NAT'L SCENIC AREA (1992) [hereinafter 1992 MANAGEMENT PLAN]. The Secretary of Agriculture concurred in the plan's adoption on behalf of the Forest Service in February, 1992.

Although the Act required the U.S. Forest Service and the Commission to develop the management plan for SMAs and the GMA,[32] the statute authorized the six Gorge counties within the Scenic Area to implement the plan through county land use zoning ordinances, which in turn must be consistent with the management plan's requirements.[33] The Act directed the Forest Service and the Commission to determine whether a county ordinance is consistent with the management plan for the SMAs and GMA, respectively.[34] For counties not enacting ordinances consistent with the statute, the Commission must develop and implement zoning consistent with the management plan.[35] Only Klickitat County, Washington has failed to adopt an approved ordinance, so the Commission is the principal land use regulator for Gorge Area lands in that county.[36]

The Gorge Act also provided some protection for tributaries of the Columbia River that flow through the Scenic Area. All tributary rivers and streams flowing through SMAs — or those which have been designated as state wild, scenic, or recreation rivers — received federal Wild and Scenic Rivers Act protection from water resource projects unless (1) the project would have no "direct and adverse effect" on Scenic Area resources (for rivers flowing through SMAs), or (2) the project meets certain state-imposed conditions for state-designated rivers.[37] The Act also gave the Wind, Hood, and Little White Salmon Rivers federal Wild and Scenic Rivers Act protection for varying time periods.[38] In addition, the statute designated the White Salmon and Klickitat Rivers as fed-

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[32] 16 U.S.C. § 544d (2005).

[33] *Id.* §§ 544e, 544f.

[34] *Id.*

[35] *Id.* § 544f(f)(1).

[36] *See id.* § 544e(c). The Commission's ordinance governing land use in Klickitat County appears in Commission rule 350-81, *available at* http://www.gorgecommission.org/Commission %20Rules.html (last visited Feb. 19, 2006). The Forest Service concurred in the Commission's ordinance, as required by 16 U.S.C. § 544f(i)(2) (2000). Had the federal agency rejected the Commission's ordinance, the Commission could have overridden the objection by a vote of two-thirds of the Commission's members including a majority of the members appointed by each state, 16 U.S.C. § 544f(l)(5)(B) (2000), but the Forest Service would then have cut off certain federal funds available under the Act for a conference center, recreational facilities, and economic development. 16 U.S.C. §§ 544f(n), 544n(c).

[37] 16 U.S.C. § 544k(a) (2000).

[38] *Id.* Congress protected the Wind River "not less than three years" following the later of (1) final approval of the Gifford Pinchot National Forest Plan, or (2) the Secretary of Agriculture's determination of the suitability of the river for protection under the Wild and Scenic Rivers Act. *Id.* § 544k(a)(3). The statute protected the Hood River for a period not to exceed twenty years from November 1986, if water is diverted from that river by means other than a dam or diversion. *Id.* § 544k(a)(4). The segment of the Little White Salmon River between the Willard National Fishery Hatchery and the Columbia River was protected indefinitely. *Id.* § 544a(5).

eral wild and scenic rivers.[39] Consequently, certain water development projects are prohibited on these rivers, and the federal government may acquire lands within their protected corridors.[40]

III. THE 1992 MANAGEMENT PLAN

The Columbia River Gorge Commission devoted more than four years to preparing a management plan.[41] The planning process included a recreation assessment, a resource inventory, and an economic opportunity study, as well as a series of consultations with county, state, and federal officials and the four Indian tribal governments with treaty rights in the Scenic Area.[42] The Gorge Commission also conducted a major public involvement and comment process.[43] Perhaps not surprisingly, this attempt to accommodate a multitude of disparate interests, while also balancing the Act's apparently inconsistent goals of resource protection and economic development, proved to be an enormous challenge. The goals, objectives, policies, and guidelines contained in the final management plan often were vague and, in some cases, internally inconsistent.[44] As a result, some provisions in the ensuing management plan have proved to be difficult to enforce, and courts have been willing to afford wide latitude to the Gorge Commission

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[39] The Act designated the Klickitat and White Salmon Rivers as rivers under the protection of the Wild and Scenic Rivers Act, 16 U.S.C. § 1274(a)(60), (61) (2000).

[40] 16 U.S.C. §§ 1277, 1278(a) (2000).

[41] 1992 MANAGEMENT PLAN, *supra* note 31, at 4.

[42] *See id*. at 10-11.

[43] *Id*. at 11. The Gorge Commission received nearly 3,000 written comments from the public between 1988 and 1992 concerning the development of the management plan. *Id*. at 21.

[44] The 1992 Management Plan is replete with provisions that seem to anticipate considerable discretion in determining whether a proposed land use complies with the plan. *See e.g.*, 1992 MANAGEMENT PLAN, *supra* note 31, at I-4 ("New buildings and roads shall be . . . designed to . . . reduce grading to the maximum extent practicable….New buildings shall be generally consistent with the height and size of nearby development."); *id.* at I-9 ("New buildings or roads shall . . . minimize visibility from key viewing areas . . . to the maximum extent practicable."); *id*. at I-122 ("Protect and enhance natural resources . . . wetlands, ponds, lakes, riparians areas, old growth forests . . . sensitive wildlife and fishery habitats . . . shall be protected from adverse effects;" *id.* at II-15 (Agricultural lands shall be protected by minimizing adjacent land use conflicts."); *id*. at II-37 ("Forest landowners shall be encouraged to develop plans for long-term management of their property to protect and enhance the forest resource."). The plan also allowed new cultivation in SMA agriculture zones without review, unless there would be potential adverse effect on cultural or natural resources. *Id*. at II-16. However, the only way to find out if there is a potential adverse effect to cultural and natural resources is to review the proposed new cultivation. The plan prohibited residential development on parcels of land less than forty contiguous acres; *id*. at II-15; but allows boundary adjustments between two or more contiguous parcels that does not result in the creation of an additional parcel. *Id*. at II-89. Thus, through a lot line adjustment, a parcel that was previously ineligible for new residential development, can sidestep the prohibition.

and local government entities concerning their interpretation of the plan.[45]

When it completed the management plan in 1992, the Commission forwarded the plan to the six Gorge counties for implementation.[46] Each county was to prepare a land use ordinance consistent with the plan; the ordinances then had to be approved by the Commission.[47] The Act authorized the Commission to adopt and implement ordinances for counties not enacting approved ordinances.[48] During the interim (between the adoption of a final management plan and county adoption of local development ordinances), the Commission enforced the development restrictions in the management plan itself.[49]

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[45] For example, in 2005, the Washington Court of Appeals reversed a lower court decision and upheld a Washington Department of Natural Resources (DNR) interpretation of portions of the Gorge Management Plan that had been incorporated into state forest practices regulations administered by the DNR, the effect of which was to allow a landowner to convert forest land within an SMA to agricultural land by logging the land. Friends of the Columbia Gorge, Inc. v. Wash. State Forest Practices Appeals Bd., 118 P.3d 354, 366 (Wash. Ct. App. 2005) (deferring to the DNR decision, which effectively exempted the land conversion from scenic resources review).

[46] *See* 1992 MANAGEMENT PLAN, *supra* note 31.

[47] 16 U.S.C. §§ 544e(c) (GMAs), 544f(i) (SMAs). The Secretary of Agriculture must concur in the Commission's approval of ordinances for SMAs, but the Commission may override the Secretary's denial of concurrence with a two-thirds majority vote, including a majority of the members appointed from each state. 16 U.S.C. § 544f(k) (2000). Indian tribes must be notified of development proposals and may submit comments but have no veto authority. 16 U.S.C. § 544d(e) (2000).

[48] *Id*. §§ 544e(c), 544f(i)(3). Before the counties adopted a consistent land use ordinance (still the case with Klickitat County, *see infra* note 52), the Commission and the Forest Service shared management authority over the GMA and in SMAs. 16 U.S.C. § 544h(c) (2000). The Commission must review all proposals for "major development actions" and new residential development outside UAs in these counties, and may allow these developments only if they are consistent with the Act's purposes and development standards. *Id*. One court has held that "major development actions can occur and be subject to Commission review in all land classifications in the scenic area except urban areas," meaning that the Commission has regulatory authority in the GMA as well as in SMAs. Murray v. Columbia River Gorge Comm'n, 891 P.2d 1380, 1382 (Or. Ct. App. 1995). In *Murray*, a landowner challenged a Commission decision that he willfully violated the Act by removing aggregate and other resources without Commission approval. The landowner claimed that removal of mineral resources was only a "major development action" under the Act if it disturbed land within the SMAs; since his land was in the GMA, he claimed that his activity was not subject to Commission review. *Id*. at 1381. *See* 16 U.S.C. § 544(j)(3) (2000) ("major development actions means that . . . the exploration, development and production of mineral resources unless such exploration, development or production can be conducted without disturbing the surface of any land within the boundaries of a [SMA]"). The court disagreed, stating that the language of section 544(j)(3) "is not a limitation on regulation outside SMAs; it is an exception from a prohibition within SMAs." *Murray*, 891 P.2d at 1381-2.

[49] In Tucker v. Columbia River Gorge Comm'n, 867 P.2d 686, 690 (Wash. Ct. App. 1994), the court upheld the Commission's denial of an application by a landowner to subdivide his ten-acre parcel because the Commission could consider "cumulative environmental harm" in determining whether the development impermissibly "adversely affected" the resources of the Scenic Area, and therefore was prohibited by § 554(d)(8) of the Act (quoting Hayes v. Yount, 552 P.2d 1038, 1043 (Wa. 1976)).

The Act's apparently conflicting objectives — to protect and enhance the area's scenic, cultural, recreational, and natural resources while protecting and supporting the area's economy[50] — provided the Commission with sufficient discretion to approve over eighty percent of proposed developments during the interim period before the approval of most county ordinances in 1991, and ninety-one percent of residential applications.[51] Of the six Gorge counties, only Klickitat County, Washington, has failed to develop an approvable ordinance.[52]

IV. JUDICIAL INTERPRETATION OF THE MANAGEMENT PLAN AND THE GORGE ACT

The Scenic Area Act and the Gorge Management Plan have survived a number of challenges in both federal and state courts. Landowners tested the constitutionality of the statute and the alleged inflexibility of the management plan it produced. They have also filed numerous constitutional takings claims, seeking just compensation for alleged over-regulation, and have sued over the implementation of the statute's unique "opt out" provisions. None of these challenges have succeeded, but landowners did manage to curb the ability of the Commission to invalidate local land use decisions outside the normal appeals process. This section discusses each of these issues in turn.

A. Constitutional and Management Plan Challenges

The constitutionality of the Scenic Act was the subject of *Columbia River Gorge United-Protecting People and Property v.*

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[50] 16 U.S.C. § 544a.

[51] *See* ABBOTT, *supra* note 25, at 128.

[52] Multnomah, Hood, and Wasco Counties in Oregon and Skamania and Clark Counties in Washington all have adopted Scenic Area land use ordinances that the Gorge Commission approved, leaving Klickiat County as the only county for which the Commission continues to control land use within the Scenic Area under the authority of 16 U.S.C. § 544e(c). *See* Letter from Martha J. Bennett, Executive Director, Columbia River Gorge Commission, Annual Performance Report (Sept. 20, 2004) (on file with author) [hereinafter Bennett Letter]. Klickitat County refused to prepare an approvable ordinance because it claimed that Washington state planning and environmental regulations provided adequate protection of Gorge resources. ABBOTT, *supra* note 25, at 160. Even without a county ordinance, the vast majority of development proposals in Klickitat County have been approved by the Gorge Commission. For example, in 1996, the Commission approved one hundred percent of the development proposals in Klickitat County. That year the Commission and the Gorge counties approved a combined ninety-eight percent of all development proposals in the Scenic Area. 1996 COLUMBIA RIVER GORGE COMM'N, ANN REP. 5 (Feb. 1997). *See also* Nathan Baker & Michael Lang, *Gorge Commission Slides on Protecting Resources*, FRIENDS OF THE COLUMBIA GORGE NEWSLETTER, at 4 (Winter 2004) (noting that the Commission had not denied a single development application in over three years).

Yeutter, where the Ninth Circuit upheld the Act against a challenge brought by a group of Gorge property owners and an organization opposed to the legislation.[53] The plaintiffs claimed the Act violated the Tenth Amendment, the Commerce Clause, Property, and Compact Clauses of the Constitution.[54] The Ninth Circuit disposed of the Commerce Clause argument, holding that the Act was well within the "expansive power" of Congress under the commerce power because the Scenic Area in question "consists of portions of two states bisected by a navigable waterway . . . [and] virtually all activities affecting the land, the economy, the environment, or the resources have interstate ramifications."[55] The court observed that "Congress found this area to be one of critical national significance" and intended to regulate economic activities, including logging, fishing, and recreation in the Gorge.[56] Congress noted that the area was also a destination for travelers, attracting recreation enthusiasts from throughout the country, thus directly affecting interstate travel.[57]

The Ninth Circuit also rejected the plaintiffs' argument that the interstate agreement between Oregon and Washington violated the Constitution's Compact Clause, citing the need for innovative management solutions to "difficult interstate land preservation problem[s]."[58] Because the Act was a valid exercise of congressional power under the Commerce Clause, the court did not address whether the Act was within Congress's power under the Property Clause, although the Supreme Court has ruled many times that the congressional power under the Property Clause is "without limitations."[59] Finally, the court rejected the plaintiffs' Fifth Amendment claim that residents of the Scenic Area were

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[53] Columbia River Gorge United - Protecting People and Property v. Yeutter, 960 F.2d 110, 115 (9th Cir. 1992).

[54] *Id*. at 112.

[55] *Id*. at 113.

[56] *Id.*

[57] *See id*.

[58] *Id*. at 115. The Compact Clause requires any interstate agreement that increases the political power of the states to be approved by Congress. U.S. CONST., art. I, § 10, cl. 3. The *Yeutter* plaintiffs argued that advance congressional consent to the Gorge Compact was impermissible and maintained that the Gorge Act went too far in specifying the details of the compact. 960 F.2d at 114. The Ninth Circuit noted the difficulties in handling regional problems like environmental protection, pointed out that interstate compacts have been used in a wide variety of situations to promote both federal and state interests, and observed that the framers of the Constitution had the foresight to authorize inventive solutions to regional problems. *Id.* According to the court, the compact authorized in the Gorge Act was fully consistent with the need for "innovative solution[s]" to difficult "land preservation problem[s]." *Id.* at 115.

[59] *See, e.g.,* Kleppe v. New Mexico, 426 U.S. 529, 539 (1976) (determinations under the Property Clause are primarily left to Congress), citing United States v. San Francisco, 310 U.S. 16, 29-30 (1940); Light v. United States, 220 U.S. 523, 537 (1911); United States v. Gratiot, 39 U.S. 526, 537-38 (1840).

treated unconstitutionally differently than state residents outside of the area, ruling that different treatment of people in different areas "is permissible, provided there are reasons for such treatment that do not reflect unconstitutional motivations."[60] The court concluded, "preservation of the Columbia River Gorge Area is a permissible Congressional objective and a valid exercise of the power delegated to Congress under the Commerce Clause of the Constitution."[61]

The Commission's 1992 Management Plan drew a challenge from Klickitat County, which attempted to enjoin its adoption, contending that the plan was too inflexible in requiring counties to adopt conforming land use controls, thus impermissibly narrowing local discretion.[62] In 1991, even before the Commission approved the plan, the county filed suit, seeking to enjoin approval of the plan because the Commission failed to prepare an environmental impact statement (EIS) under either federal or state law.[63] Klickitat County argued that Washington law required an EIS, as did the Gorge Act's requirement of "disclosure of information."[64] But a federal district court held that the Commission need not prepare an EIS because the court thought it incongruous for Congress to explicitly exempt the Forest Service from the federal EIS requirement, as the Act did, and then "by implication require the Commission to follow the EIS requirements" of the state of Washington.[65]

B. Takings Claims and Fears of Takings Liability

A significant aspect of the Management Plan, and one that has been sharply criticized, concerns the restrictions the Act

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[60] *Yeutter*, 960 F.2d at 115.

[61] *Id.*

[62] *See* ABBOTT, *supra* note 25, at 140.

[63] Klickitat County v. Columbia River Gorge Comm'n, 770 F. Supp. 1419, 1422 (E.D. Wash. 1991).

[64] *Id.* at 1427. The Gorge Act states: "[T]he Commission shall adopt regulations relating to administrative procedure, the making of contracts, conflicts-of-interest, financial disclosure, open meetings of the Commission, advisory committees, and disclosure of information consistent with the more restrictive statutory provisions of either State." 16 U.S.C. § 544c(b) (2000).

[65] *Klickitat County,* 770 F. Supp. at 1428; 16 U.S.C. § 544o(f)(1) (2000). The court stated that the legislative history of the Act clearly indicated that Congress intended to direct the Commission to adopt the more restrictive state requirement regarding the release of public records, not to incorporate an environmental disclosure law by implication. *Klickitat County*, 770 F. Supp. at 1429. Klickitat County has continued to resist the Commission's development standards and is the only county of the six Gorge counties that has not adopted an ordinance for implementing the management plan. *See* Bennett Letter, *supra* note 52, at 1.

placed on federal land acquisitions.[66] The Scenic Act authorized the Forest Service to acquire "lands or interests . . . within the special management areas . . . ."[67] The Act permitted the agency to purchase lands in SMAs which the Secretary determines are necessary to achieve the dual purposes of the Act:[68] (1) protection and "enhancement of the scenic, cultural, recreational, and natural resources of the Columbia River Gorge;"[69] and (2) to provide protection and support for "the economy of the [Gorge] by encouraging growth . . . in existing urban areas."[70] But the Act made no provision for the purchase of lands in the GMA.[71] As a result, the approved counties, responsible for controlling development in the GMA, must rely heavily on regulatory controls and fear they will incur regulatory takings liability.[72]

Avoiding takings-related litigation appears to have influenced implementation of the Gorge Management Plan. For example, in 1996, the counties approved ninety-eight percent of all development proposals in the GMA.[73] Although most of those approvals included conditions to assure resource protection, this high percentage of approvals may cast some doubt on the efficacy of the management plan and its implementing ordinances to effectively

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[66] *See* 16 U.S.C. § 544g (2000).

[67] *Id.* § 544g(a)(1).

[68] *Id.*

[69] 16 U.S.C. § 544a(1) (2000).

[70] *Id.* § 544a(1).

[71] The Act does authorize the purchase of land in one particular area of the GMA: the Dodson/Warrendale Special Purchase Unit, an area susceptible to geologic hazards, where a major landslide occurred in 1996. *See* 16 U.S.C. §§ 544g(a)(1), 544b(d) (2000). But this limited authority should be compared to the general authority to acquire lands in the SMAs. *Id.* § 544g (authorizing the Secretary of Agriculture to acquire lands within special management areas by purchase as well as eminent domain and land exchange in certain circumstances). The Secretary may acquire land by eminent domain only when "reasonably necessary to accomplish the purposes" of the Act, and when all "reasonable efforts" to acquire the land with the consent of the owner have failed. *Id.* § 544g(b)(1). The Secretary may exchange federal forest land outside of SMAs for private lands within SMAs. *Id.* § 544g(d). The exchanged lands must be of "approximately equal value," and the exchange provision applies only to private "unimproved forest land at least forty acres in size within the boundaries of the special management areas . . . ." *Id.* § 544g(d)(1)-(2). Since the adoption of the Act, the Forest Service has acquired, through purchase, exchange, or donation, approximately 34,000 acres of new federal land in the Scenic Area. In addition, approximately 40,000 acres of the Gifford Pinchot National Forest and the Mount Hood National Forest are inside the boundary of the Scenic Area. COLUMBIA RIVER GORGE COMMISSION, 2004 REVISIONS TO THE MANAGEMENT PLAN FOR THE COLUMBIA RIVER GORGE NATIONAL SCENIC AREA IV-1 (May 2004), *available at* http://www.gorgecommission.org/Draft%20revised%20management%20plan.htm (last visited Feb. 19, 2006) [hereinafter cited as 2004 MANAGEMENT PLAN].

[72] *See* ABBOTT, *supra* note 25, at 110 (noting that the management plan imposes responsibility for regulating private property on the county governments, the governmental entities, least able, politically, technically, and financially, to bear the burden of takings-related claims).

[73] 1996 COLUMBIA RIVER GORGE COMM'N, ANN REP. 5 (Feb. 1997). *See* Baker & Lang, *supra* note 52 (no development denials during 2001-04).

balance development with protection and enhancement of the Scenic Area's resources.

Liability for regulatory takings-related claims has not materialized, however, and courts have not been particularly receptive to the relatively few takings-related claims that have been brought. In fact, several courts have avoided adjudicating such claims on the merits by disposing of them on procedural or justiciability grounds.[74] Of the claims that have been adjudicated on the merits, none have succeeded.[75] *Miller v. Columbia River Gorge*

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[74] *See, e.g.,* Broughton Lumber Co. v. Columbia River Gorge Comm'n, 975 F.2d 616, 622 (9th Cir. 1992) (holding "[b]ecause [plaintiff] did not demonstrate the inadequacy of the States' compensatory procedures and because it failed to seek compensation from Oregon or Washington prior to filing its suit in federal court, [plaintiff] has failed to satisfy the . . . ripeness requirement."); Schaefco, Inc. v. Columbia River Gorge Comm'n, 849 P.2d 1225 (Wash. 1993) (dismissing plaintiffs' appeal of the Commission's rejection of plaintiff's development proposal because plaintiffs failed to file a timely appeal); W. Birkenfeld Trust v. Bailey, 837 F. Supp. 1083, 1085 (E.D. Wash. 1993) (plaintiffs' claim of a taking without compensation for the closure of his quarry was not ripe because he failed to exhaust state compensation remedies).

[75] At the end of 2005, there were no reported cases in which a county or Gorge Commission land use decision had resulted in takings liability. In one case, the Wasco County Superior Court awarded a landowner $220,000 under an Oregon inverse condemnation statute, OR. REV. STAT. § 358.953 (2005)), as compensation for the Gorge Commission's denial of the landowner's application to conduct mining and quarry operations on property in the Scenic Area. In Decemeber 2005, however, the Oregon Court of Appeals vacated that award on ripeness grounds in Murray v. State, 124 P.3d 1261 (Or. Ct. App. 2005).

In *Murray*, within the span of three years, a landowner had filed five separate applications with the Gorge Commission seeking approval to build a single-family residence, conduct mining and quarry activities, and partition property within the Scenic Area. *Id.* at 1264-65. Citing the presence of Native American artifacts as well as evidence of a Native American burial site on the land, the Gorge Commission denied each of the applications on the ground that the landowner had failed to complete a cultural resources survey to determine the extent and significance of the archeological material found on the property, as required by the Scenic Area management plan. *Id.* at 1264-65. Although the Gorge Commission provided Murray with a list of potential archeological experts and indicated that the land use applications would be reconsidered upon the completion of the requisite cultural resources survey, Murray conducted various surface mining and quarry operations on the land without obtaining approval, prompting the Gorge Commission to seek a court order enjoining the mining activity. *Id.* at 1265-66. Despite a trial court's issuance of a preliminary injunction, Murray continued to conduct mining operations on his property, at one point deliberately using a tractor with ripper blades over the portion of the property where it was believed that Native American artifacts were present. *Id.* at 1265-66. The trial court eventually issued a permanent injunction prohibiting "[a]ll ground-disturbing and earth-moving activities, new development, and new land uses" on the property until Murray obtained the required approval under the Scenic Act for conducting such activities. *Id.* at 1266. In 1997, Murray filed suit against the State of Oregon, claiming that the Gorge Commission's denial of his quarry application and the court's subsequent injunction effected a taking for which just compensation was required. *Id.* at 1266-67. After concluding that the Gorge Commission was a state agency, the Wasco County Superior Court agreed with Murray and held that Murray had been deprived of all economically viable use of the property, and awarded him $220,000 under an Oregon inverse condemnation statute as compensation. *Id.* at 1267.

But in December 2005, the Oregon Court of Appeals vacated the Wasco County Superior Court award on ripeness grounds, noting there were available administrative procedures through which Murray could have pursued development of the property. *Id.* at 1269. Despite the Gorge Commission's representations that his application would be reconsidered

Commission is typical. There, the landowner claimed that the denial of an application to subdivide a parcel of land amounted to a taking of a scenic easement without just compensation. The court quickly dismissed the claim because the plaintiffs had not "been deprived of all economically viable or a substantial beneficial use of the property."[76]

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upon the completion of a cultural resources survey, and the commission's attempts to provide him with a list of consulting archeologists that could help complete the cultural resources survey, Murray refused to perform the requisite survey and deliberately destroyed Native American artifacts on the property. *Id.* In addition, Murray never sought review of the commission's decisions denying his permit applications, and because he failed to pursue all available administrative remedies to obtain approval for development, and there remained the possibility that a solution allowing some development could be obtained, his inverse condemnation claim was not ripe. *Id.*

The *Murray* court also rejected the landowner's claim that he did not need to wait until his claim became ripe because it would have been futile to do so. *Id.* at 1270-71. The court noted that the commission was willing to work with Murray to resolve the matter, and that the commission might have approved plaintiff's development plans if Murray had completed the required cultural resources survey. *Id.* at 1270-71. In addition, there was evidence that the property could be used for other activities, such as grazing. *Id.* at 1270-71. The court concluded that Murray failed to prove that his completion of the administrative process would be futile because it might have been possible for Murray to conduct such activities if he complied with the applicable administrative regulations. *Id.* at 1271.

[76] Miller v. Columbia River Gorge Comm'n, 848 P.2d 629, 630 (Or. Ct. App. 1993). The Oregon Court of Appeals rejected a similar takings claim in Murray v. Columbia River Gorge Comm'n, 865 P.2d 1319 (Or. Ct. App. 1993) (Gorge Commission's rejection of an application to subdivide a 37-acre parcel in the Scenic Area was not an uncompensated taking because nothing in the record suggested that the petitioner had lost all economically valuable or beneficial use of its property as a result of the denial).

In the November 2004 election, Oregon voters passed an initiative that would seemingly do away with the "all economically valuable or beneficial use of the property" standard for takings claims in Oregon. The initiative appears to be one of the most sweeping landowner compensation schemes ever enacted (Measure 37, to be codified at OR. REV. STAT. chap. 197, stating, "[i]f a public entity enacts or enforces a new land use regulation or enforces a land use regulation enacted prior to the effective date of this amendment that restricts the use of private real property or any interest therein and has the effect of reducing the fair market value of the property, or any interest therein, then the owner of the property shall be paid just compensation"). Text of Measure 37 *available at* http://www.sos.state.or.us/elections/nov22004/guide/meas/m37_text.html (last visited Feb. 19, 2006).

That measure, however, is unlikely to affect regulations under the Scenic Area's management plan because the Oregon initiative expressly exempted from compensation land use regulations, like the Scenic Act, that are required under federal law. *See* Measure 37 § (3)(C). Although the Commission is expressly not a federal agency, 16 U.S.C. § 544c(a)(1)(A), Congress can direct state compact agencies (or other state or local agencies) to carry out federal law, so the exemption in the initiative would seem to apply to the Commission. *See* Columbia River Gorge Comm'n v. Hood River Co., No. 050051 CC (Hood County Cir. Ct. Aug. 1, 2005), (enjoining Hood River County and two private plaintiffs from bringing Measure 37 claims against the Columbia River Gorge Commission because the Commission was carrying out federal law, and therefore exempt from the purview of Measure 37). However, land uses in urban areas, which are not subject to Commission controls, *see* 16 U.S.C. § 544d(c)(5)(B), and perhaps forest practices in the GMA, which are subject to state regulation, *see id.* § 544o(c), would seem to be subject to Measure 37 compensation requirements, while lands regulated by the Forest Service would seem clearly to be exempt.

After a lower court ruled that Measure 37 was inconsistent with several provisions of the Oregon and federal Constitutions, in February 2006, the Oregon Supreme Court unanimously upheld the measure on all counts. MacPherson v. Dept. of Admin. Serv., No. S52875, 2006 WL 433953 (Or. Feb. 21, 2006). For a variety of perspectives on Measure 37,

In another takings claim, a developer with a water right to appropriate thirty cubic feet per second of water from the Little White Salmon River sought compensation in the Court of Federal Claims after the Gorge Commission denied his requested approval for a small hydroelectric project for which he had obtained a federal preliminary permit.[77] The claims court rejected the takings claim because completion of the project, which required multiple state and federal agency approvals, was too speculative.[78] The court observed that even in the absence of the Columbia River Gorge Scenic Area Act, a federal preliminary permit was unlikely to survive the federal licensing process.[79]

The Washington Court of Appeals considered whether Gorge counties should pay compensation awards in *Klickitat County v. State* and concluded that the state of Washington would not be "liable for cost of paying and defending any inverse condemnation action brought by a landowner as a result of land use regulations adopted pursuant to . . . the Commission's land management plan."[80] Although the county had not adopted an approvable ordinance, it claimed that it needed "to assess the impact of implementing the Management Plan through the adoption of appropriate ordinances," and consequently sued both the Gorge Commission and the state, seeking insulation for any costs that the county "might incur in adopting, implementing, and administering" an approvable ordinance.[81]

Klickitat County also maintained that by ratifying the interstate compact creating the Gorge Commission, the Washington legislature "impose[d] [on the county] responsibility for new programs," thereby shifting responsibility for funding a state program to a local government in violation of Washington law.[82] The Washington Court of Appeals disagreed, noting that when two states enter into a compact with congressional approval, the compact is "considered an instrument of federal law" and does not "constitute a state program."[83] Because the Commission's land management plan was federally required, a county adopting an ordinance to conform to the plan was acting as an agent of the Commission, not

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see the symposium, *Ballot Measure 37: The Redrafting of Oregon's Landscape,* 36 ENVTL. L. no. 1 (2006).

[77] Broughton Lumber Co. v. United States, 30 Fed. Cl. 239, 240 (1994).

[78] *Id*. at 243.

[79] *Id*.

[80] Klickitat County v. State, 862 P.2d 629, 634 (Wash. Ct. App. 1993).

[81] *Id.* at 631.

[82] *See id.* at 631-33 (citing WASH. REV. CODE ANN. § 43.135.060 (West 2005) preventing the legislature from imposing responsibility for new programs or increased levels of service on local governments unless the state reimburses the local governments).

[83] *Id.* at 634.

an agent of the state, so the state could not be liable for any costs that the county incurred defending takings claims.[84]

C. Avoiding SMA Restrictions — the "Opt-out" Provision and Its Interpretation

Special Management Areas are those areas within the Scenic Area with the most significant scenic, natural, recreational, and cultural values.[85] These areas are largely federal land, regulated by the Forest Service.[86] The Gorge Act required the Forest Service to assure that both public and private land uses within the SMAs conform to both the purposes of the Act and the standards for management planning enumerated in the Act.[87] Although some of those standards are quite vague,[88] the Act specifically prohibits any "major development actions" in SMAs and requires that all residential, commercial, and mineral development "take place without adversely affecting the scenic, cultural, recreational, or natural resources of the scenic area."[89] The Act also prohibits industrial development in SMAs and the GMA.[90]

Although both public and private lands within the SMAs are subject to substantial restrictions, the statute (until the 2000 amendments to the Act)[91] allowed the private landowners in SMAs

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[84] *Id.* at 633-34 (noting that where Congress authorizes "the States to enter into a cooperative agreement, and where the subject matter . . . is an appropriate subject for congressional legislation, the consent of Congress transforms the States' agreement into federal law under the Compact Clause," citing Cuyler v. Adams, 449 U.S. 433, 440 (1981)). The *Klickitat County* court distinguished Orion Corp. v. State, 747 P.2d 1062 (1987), which had ruled that the state was responsible for compensating landowners burdened by local regulations imposed to carry out state mandates because the ordinance in that case — the Skagit County's Shoreline Management Master Plan — had been adopted at the direction and control of the state. The decision in *Klickitat County* is significant from the perspective of the Columbia River Gorge counties because it effectively precludes the counties from obtaining any relief for potential takings related liability from the state, and federal relief seems quite unlikely. Although the court's characterization of the Commission as a "creature of federal law" seems to suggest that counties, as agents of the Commission, could seek compensation from the federal government, in fact the Act expressly states that the Commission "shall not be considered an agency or instrumentality of the United States for the purpose of any federal law." 16 U.S.C. § 544c(a)(1)(A) (2000).

[85] *See* Blair, *supra* note 1, at 934.

[86] 16 U.S.C. § 544f(a) (2000).

[87] 16 U.S.C. §§ 544f(f), 544d(d)(1)-(9) (2000).

[88] For example, the Act requires the management plan for the Scenic Area, developed jointly by the Forest Service and the Gorge Commission, to include provisions that are designed to "protect and enhance" agricultural lands, forest lands, open spaces, and recreational uses. 16 U.S.C. § 544d(d)(1)-(4). The Act does not define the term "protect and enhance," however.

[89] 16 U.S.C. § 544d(d)(5) and (7)-(9) (2000).

[90] 16 U.S.C. § 544d(d)(5),(6) (2000).

[91] Dept't of Interior and Related Agencies Appropriations Act of 2001, Pub. L. No. 106-291, tit. 3, §346(b)(3), 114 Stat. 922, 999-1000 (2000) (codified at 16 U.S.C. § 544f(o)(2)) (prospectively ending the "opt out" provision described in this section and requiring all land-

to avoid SMA regulation under certain circumstances: the so-called "opt-out" provision. Under this provision, an owner of SMA property made a *bona fide* offer to sell her land to the Forest Service for fair market value enabling the agency to purchase the land.[92] If, however, the Forest Service failed to accept a landowner's *bona fide* offer within three years, the Act released that land from SMA status, rescinding applicable SMA regulations, effectively allowing the landowner to "opt-out" of SMA restrictions.[93] But an owner's offer would not be a *bona fide* offer if the landowner refused to accept the Secretary's fair market value bid, as determined by the Uniform Appraisal Standards for Federal Land Acquisitions, except that any restrictions imposed by the Gorge Act do alter fair market value.[94]

Although prospectively terminated by the 2000 congressional amendments, the amendments prompted a flood of claims before the filing deadline on April 1, 2001. Landowners made some 187 offers in the six months between the enactment of the amendments on October 11, 2000 and the filing deadline, totaling more than 6,700 acres.[95]

Courts have had to interpret a number of ambiguities in the "opt-out" provision. One federal court ruled that a Forest Service initial offer to buy private land within the SMA was not a final action subject to judicial review because the statute specifically provided for review of the landowner's offer after expiration of the three-year period.[96] The court noted that the purpose of the three-year period was to facilitate negotiation between the government and the landowner throughout that period, with the goal of con-

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owner offers to be made before April 1, 2001). The 2000 amendments, chiefly sponsored by former Senator Slade Gorton (R-Wash.), also required that appraised fair market value under the "opt out" provision not include any pre-April 2000 restrictions imposed by the Gorge Act. *Id.* §346(a)(3)(A).

[92] 16 U.S.C. §§ 544f(o)(1), 544g(a)(1).

[93] 16 U.S.C. § 544f(o) (2000). The Forest Service retains management authority over private land during this three-year period. If three years elapse, and the Secretary of Agriculture has not accepted a landowner's bona fide market value offer, the SMA ordinance will no longer apply to that property. But the landowner is still subject to the applicable county ordinance or, if that county has not adopted an ordinance, to the Commission's land use ordinance. 16 U.S.C. §§ 544f(o), 544e(c).

[94] *Id.* §544g(e)(3)(A). *See supra* note 91 on the effect of Gorge Act restrictions on fair market value prior to April 2000.

[95] E-mail from Nathan Baker, Attorney, Friends of the Columbia Gorge (Oct. 3, 2005) (on file with the author).

[96] Stevenson v. Rominger, 909 F. Supp. 779, 784-85 (E.D. Wash. 1995). In *Stevenson*, the landowner offered to sell her SMA property for $400,000, but the Forest Service countered with a one-year offer to purchase at $108,000; by limiting the counter-offer to one year, the landowner claimed the Forest Service effectively forced her to forfeit her ability to "opt-out" of the ordinance because if a court later determined that the $108,000 was fair market value, she could not accept the earlier, expired offer, and her land would remain subject to SMA regulation.

sensual federal acquisition of private lands within the SMA.[97] The decision seemed to give the Forest Service wide latitude to negotiate throughout the three-year period following the landowner's offer.[98]

What constitutes fair market value is obviously of critical importance in the SMA land acquisition program because a landowner's fair market offer to sell land to the Forest Service in the SMA begins the three-year statutory time limit, at the end of which, the Secretary must release the land from SMA restrictions unless the affected landowner agrees to an extension of time.[99] Another federal district court held that since the Gorge Act does not specify who exactly determines fair market value, the Forest Service's determination of that value is not entitled to any more deference than the landowner's appraisal.[100] According to that court, what amounts to a fair market bid is a question for *de novo* judicial determination.[101] Thus, the court rejected the Forest Service's assessment of value, ruling that the Gorge Act did not "authorize the agency to arbitrarily close its eyes to additional appraisals submitted by the owner, or categorically prohibit negotiation regarding the purchase price."[102] The court stated that Congress "intended to establish a [land acquisition] procedure that minimizes confrontation, and ensures that landowners are fairly. . . compensated"[103] and that the agency's method of calculation for fair market value seemed to frustrate congressional intent.[104] The court doubted that "Congress ever has or could give a federal agency the power to unilaterally determine the ultimate

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[97] *Id.* The court also ruled that the plaintiff was not adversely affected — a prerequisite for judicial review — by the low offer, since she merely had to make a choice whether to accept the offer or not. *Id.* at 785.

[98] The court concluded that it is the "plaintiff's offer that triggers the effect of [the 'opt-out' provision]; the government's offer or complete failure to make an offer has no effect on the operation of" the three-year period. *Id.* at 784. This means that a landowner rejecting an initial offer to purchase from the Forest Service must wait at least three years to obtain judicial review of that offer to ascertain whether it was a "fair market" offer under 16 U.S.C. § 544f(o). This may place the landowner in a precarious position where, as in *Stevenson*, the Forest Service makes a time-limited offer, since the landowner must decide whether to accept or reject it long before a court may review the offer. If it turns out that the landowner rejected what was a "fair market" offer, the land would remain subject to SMA regulation.

[99] 16 U.S.C. § 544f(o)(1).

[100] Stone v. United States Forest Service, 2004 W.L. 1631321, at *7 (D. Or. July 16, 2004), where the landowner thought the Forest Service's offer of $138,000 was too low and employed an independent appraiser, one the Forest Service thought habitually overstated land values. The Forest Service's policy in such a situation was to retain another appraiser, compare the two appraisals, and select the one having the "strongest support for value." *Id.* at *3.

[101] *Id.* at *7.

[102] *Id.* at *7.

[103] *Id.* at *5.

[104] *Id.* at *7.

price it must pay to acquire private property for public purposes."[105]

D. Curbing the Gorge Commission's Authority to Reverse Local Government Decisions

The tension between regional management and local control was quite evident in *Skamania County v. Columbia River Gorge Commission*, where the Washington Supreme Court held that the Gorge Commission lacked authority to invalidate land use decisions after the appeals period had expired.[106] The Commission asked the court to nullify a development approved by Skamania County, claiming that the county's decision to approve a residential development was inconsistent with its management plan and the house that was built was inconsistent with the county's permit.[107] More than a year after the expiration of the time for appeals — and after significant progress in the construction of the residence — the Commission sued to nullify the county's approval of the development.[108]

The Washington Supreme Court decided that, in order to promote finality and avoid injustice, the Gorge Act gave the Commission no authority to invalidate final county land use decisions. Thus, any Commission attempt to modify a county land use decision had to be made in a timely manner.[109] Observing that the Commission had ample opportunity to challenge the development within the statutory time for appeal, the court decided that the Commission could not overrule a county decision after that time because it would produce unnecessary uncertainty for all land developers in the Gorge.[110] Consequently, despite considerable evidence that the landowner failed to meet the conditions of project

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[105] *Id*. at *5.

[106] Skamania County v. Columbia River Gorge Comm'n, 26 P.3d 241, 254 (Wash. 2001).

[107] *Id.* at 245. In 1993, Skamania County's Commission-approved Scenic Area ordinance provided a public comment period on all development applications. Following that comment period, the county's Department of Planning and Community Development had to make a decision, which could be appealed to the county Board of Adjustment by any interested party within 20 days. Skamania County Code § 22.06.060. If there was an appeal within that 20-day period, the county board had to consider that decision *de novo*. *Id*. The county's decision, in turn, could be appealed to the Gorge Commission within thirty days. 16 U.S.C. § 544m(a)(2). In *Skamania County,* the county approved the landowner's application in 1996, but neither the Commission nor anyone else appealed the decision, and the landowner began to build the residence in 1997. *Skamania County*, 26 P.3d at 244-45.

[108] *Id.* at 245.

[109] *Id*. at 253.

[110] *Id.* at 250-51.

approval,[111] the court refused to allow the Commission to invalidate county decisions after the period of review had passed.[112]

The *Skamania County* court's observations emphasize the enormous importance of the Gorge Commission's oversight, review, and monitoring of development projects. But reviewing and monitoring county development approvals is no small task, requiring constant diligence on the part of the Commission. These challenges are daunting in light of recent budget constraints. For example, the Commission's budget for the 2003-05 biennium was around twenty percent less than the previous biennium. In dollars adjusted for inflation, the Commission's budget is now lower than at any time in its history.[113] At the same time, the number of development applications the Commission must review increased by twenty percent between 2002 and 2003 alone.[114] Moreover, the Commission must decide on an increasing number of development applications in Klickitat County, which has failed to adopt an approvable Scenic Act ordinance.[115] These budget cuts leave a small staff,[116] making the Commission's task to effectively review and monitor an increasingly large volume of land use applications increasingly infeasible.

The Commission's discretion to interpret management plan ambiguities has also been judicially limited to an extent. One Washington court ruled that although the Gorge Act and the interstate compact are federal laws, the Gorge Commission is required to apply state law when interpreting zoning issues which the man-

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[111] *Id.* at 245, 251.

[112] *Skamania County*, 26 P.3d at 254. The court also noted the numerous other opportunities the Commission had available to it under the Act: (1) it failed to file an appeal of the director's decision when it allegedly discovered the decision violated the Act; (2) it failed to file a civil action for injunctive relief as it is entitled to do under the Act; and (3) it failed to monitor and review county land use decisions. *Skamania County*, 26 P.3d at 253-54.

In 2003, the Commission promulgated Commission Rule 350-060-0240(3), creating "Special Rules for Filing Appeals After Expiration of Appeal Period" (authorizing "late appeals" where "the development constructed is materially different from the development allowed in the local government's decision to such a degree that a reasonable person could not have understood the decision to allow the actual development constructed"). OR. ADMIN. R 350-060-0240 (2006). Had this rule been in place prior to the *Skamania County* litigation, the provision likely would have authorized a challenge to the development, since the landowner constructed a house ten feet taller than the county authorized and built the house at a different location than the county approved.

[113] Bennett Letter, *supra* note 52, at 2. The budget for the 2005-2007 biennium improved relative to the 2003-05 biennium. Telephone conversation with Jeff Litwack, Counsel to the Gorge Commission (Feb. 21, 2006).

[114] Bennett Letter, *supra* note 52, at 2. Jeff Litwack noted, however, that as of early 2006, there were virtually no pending appeals of Commission decisions. Litwack, *supra* note 113.

[115] *See supra* note 65 and accompanying text.

[116] *See* ABBOTT, *supra* note 25, at 189.

agement plan does not squarely address.[117] This court noted that (1) Congress had specifically decided not to make the Commission a federal agency;[118] (2) Congress gave state courts almost exclusive jurisdiction over appeals from the Commission;[119] and (3) the legislative history of the Act evidenced serious congressional concern that the Act would amount to a "federal zoning" law, suggesting that Congress wanted the Commission to apply state law.[120] Since the court declared there was "no federal law of zoning," it was unclear what law would apply.[121] Thus, when neither the Gorge Act nor the management plan provides a resolution to a zoning dispute, the court concluded that the Commission must apply relevant state law.[122]

This decision suggests that the Commission must more clearly define Scenic Area objectives and policies in its management plan, because broadly worded language that is subject to conflicting interpretations will be difficult to effectively enforce. Any review of a county zoning or development decision will apply state law, rather than the Commission's interpretation. The Gorge Commission responded to the *Skamania County* decision by amending its management plan to attempt to preempt state laws concerning vested rights.[123] This judicial demand for specificity at a time of diminished budgets and increasing land development applications will pose formidable challenges for the Commission in the years ahead.

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[117] Skamania County v. Woodall, 16 P.3d 701, 705 (Wash. Ct. App. 2001) (concerning whether a mobile home park owner, who had been renovating the facility for more than a year, had discontinued its use on seven of the ten spaces in the park, and therefore it was no longer a pre-existing, non-conforming use under the Management Plan).

[118] 16 U.S.C. § 544c(a)(1)(A) (2000).

[119] 16 U.S.C. § 544m(b)(6) (2000).

[120] *Skamania County*, 16 P.3d at 705-06. Note that, according to the Washington Court of Appeals, although the statute expressly states that the Commission is not a federal agency under 16 U.S.C. § 544c(a)(1)(A), it is nevertheless apparently a "creature of the federal government." Klickitat County v. State, 862 P.2d. 629, 634 (Wash. Ct. App. 1993). The *Skamania County* court also pointed to the Scenic Act's legislative history and the absence of a congressional directive to apply federal law to zoning disputes as reflecting congressional intent that state common law would apply to issues left unresolved by the Act or the management plan. *Skamania County*, 16 P.3d at 706-07.

[121] *Skamania County*, 16 P.3d at 706.

[122] *Id.* at 709. Moreover, the Commission would not seem to be entitled to the same kind of deference in interpreting state law as it would its own management plan.

[123] 2004 MANAGEMENT PLAN, *supra* note 71, at II-102 (2004) (stating that "[t]he laws of the states of Oregon and Washington concerning vested rights shall not apply in the National Scenic Area").

V. THE UNCERTAIN RELATIONSHIP BETWEEN THE GORGE ACT AND STATE AGENCIES

The federalism conflict illustrated by the *Skamania County* decision is far from unusual. In fact, there are a number of unresolved tensions between the Gorge Act and local law. Although the Columbia River Gorge Compact expressly directs state agencies to carry out their functions in accordance with the Gorge Act,[124] three prominent areas of conflict concern air quality issues, forest practices within SMAs, and state wildlife introduction on federal lands. This section discusses each in turn.

A. Air Quality: Visibility Declines and the Rise of Acid Fog and Rain

The drafters of the Gorge Act were not primarily concerned about air pollution, but it would seem to be among those "natural resources" the statute aimed to protect and enhance.[125] Indeed, in 2000, an amendment to the Gorge Management Plan declared that "[a]ir quality shall be protected and enhanced, consistent with the purposes of the Scenic Area Act" and required the states to "develop and implement" a regional air quality strategy to fulfill the protection and enhancement purposes of the Gorge Act.[126] Yet, Gorge air quality concerns have become an increasing concern, as recent studies have indicated that the Scenic Area suffers from some of the worst air quality in the country, largely due to power plant emissions from a nearby coal plant, ammonia fumes from a

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[124] OR. REV. STAT. § 196.155 (2005); WASH. REV. CODE § 43.97.025 (2005) ("The governor, the Columbia River Gorge Commission and all state agencies and counties are hereby directed and provided authority to carry out their respective functions and responsibilities in accordance with the compact . . . [executed pursuant to] the Columbia River Gorge National Scenic Area Act . . . .") The 1992 Management Plan included a directive aimed at ensuring consistency of state and federal agency actions with the Management Plan: "[u]ses by state or federal agencies shall comply with the policies and guidelines in the Management Plan." 1992 MANAGEMENT PLAN, *supra* note 31, at II-96.

[125] The Gorge Act specifically aimed to "protect and provide for the enhancement of the scenic, cultural, recreational, and natural resources of the Columbia River Gorge." 16 U.S.C. § 544a(1). Although neither the term "scenic resources" nor "natural resources" are defined in the statute, common sense suggests that the term "natural resources" includes air quality. *See* 16 U.S.C. § 544a. Further, degraded air quality would certainly affect the "scenic resources" of the Columbia River Gorge. In addition, the Gorge Act also aimed to "protect and enhance open spaces." 16 U.S.C. § 544d(d)(3). The Act defines "open spaces" to include "outstanding scenic views and sites."16 U.S.C. § 544(l)(5). By seeking to protect the scenic views and resources of the Columbia Gorge, Congress likely intended to provide for the protection and enhancement of air quality as well.

[126] *See* 2004 MANAGEMENT PLAN, *supra* note 71, at I-82.

dairy complex, and vehicle exhausts largely from the Portland metropolitan area.[127]

All of these sources of pollution come from outside the Scenic Area, and consequently there are questions as to whether the Gorge Commission has the authority to restrict them. Environmentalists cited to the fact that Forest Service data shows that Scenic Area visibility is impaired at least ninety percent of the time and getting worse, including acid fog and rain ten to thirty times more acidic than normal Northwest rainfall, corroding petroglyphs and harming animals.[128] They therefore petitioned the Gorge Commission to issue a finding that the states are not in compliance with the Gorge Act's "protect and enhance" directive and its management plan.[129] But the Commission's executive director responded by claiming that Congress did not anticipate air quality problems and, unlike in the case of national parks, imposed no specific air quality safeguards.[130] She also maintained that the Commission lacked air quality expertise, and consequently was likely unwilling to direct the states to take action.[131] A state official opined that the kinds of regulatory controls necessary to restore Gorge air quality to 1986 levels would impose "draconian"

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[127] *See* Michael Milstein, *Beauty of the Gorge Slowly Choking Amid a Haze of Bureaucracy*, OREGONIAN, Aug. 26, 2005. The power plant and dairy emissions, emanating from east of the Gorge, are most serious in the winter, due to east winds; the vehicle emissions are most serious in the summer, due to west winds. *Id.*

[128] Letter from Nathan Baker, Staff Attorney, Friends of the Columbia River Gorge, to Columbia River Gorge Comm'n (Aug. 8, 2005) (noting that a recent Forest Service study shows that noticeable visibility impairment during the immediately preceding five years at its Wishram monitoring station was almost 100% and requesting the Gorge Commission to call upon the states to take action within six months) (on file with author).

[129] *Id.* The 1992 Management Plan had only the following declarations addressing air quality: "Existing levels of air visibility shall not be degraded. The Scenic Area shall be studied for designation as a Class I airshed." 1992 MANAGEMENT PLAN, *supra* note 31, at I-123. In May 2000, the Commission deleted this provision, replacing it with the following language:

> Air quality shall be protected and enhanced, consistent with the purposes of the Scenic Area Act. The States of Oregon and Washington shall: (1) continue to monitor air pollution and visibility levels in the Gorge; (2) conduct an analysis of monitoring and emissions data to identify all sources, both inside and outside the Scenic Area,that significantly contribute to air pollution. Based on this analysis, the States shall develop and implement a regional air quality strategy to carry out the purposes of the Scenic Area Act, with the U.S. Forest Service, the Southwest Air Pollution Control Authority [now the Southwest Clean Air Agency], and in consultation with affected stakeholders.

2004 MANAGEMENT PLAN, *supra* note 71, at I-82 (also requiring the states and the Forest Service to produce annual reports to the Commission of progress under this policy).

[130] *See* Milstein, *supra* note 127 (quoting Martha Bennett, Executive Director, Columbia River Gorge Commission).

[131] *See id.*

costs.[132] This issue appears almost certainly headed to the courts.[133]

B. Forest Practices and the Role of State Agencies in Implementing the Gorge Act

Whether state agencies can or must implement the Gorge Act or its management plan is an issue that has yet to be definitively resolved. The Act seemed to enlist state agencies in its implementation, requiring the states to provide "the Commission, State agencies, and the counties under State law [with] the authority to carry out their respective functions and responsibilities" under the Act.[134] The Compact implementing the Act stated that "[t]he governor, the Columbia River Gorge Commission, and all State agencies and counties are hereby directed and provided authority to carry out their respective functions and responsibilities" to implement the Act and the Compact.[135] These provisions were not sufficient to convince the Washington Forest Practices Appeals Board that the state Department of Natural Resources had to deny or condition its approval orders to satisfy the Gorge Act.

In its 1996 *Seeder Tree* decision, the board ruled that since there was no provision in the state Forest Practices Act or its implementing regulations requiring the Department of Natural Resources to satisfy the more restrictive requirements of the Gorge Act, the department had no authority to disapprove or condition the Seeder Tree Company's forest practices application to meet those requirements.[136] The board did not interpret the provisions quoted above to require the department to "administer" the Gorge Act, only to "not approve [forest practice] which purports to supervene" the Gorge Act.[137] According to the board, it was sufficient for the department merely to disclaim that its approval did not ensure compliance with other federal or state laws.[138]

The *Seeder Tree* decision prompted the Gorge Commission and others to convince the department to amend its regulations to incorporate the SMA forest practices provisions of the manage-

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[132] *See id.* (quoting Robert Elliott, Executive Director, Washington Southwest Clean Air Agency).

[133] *See id.* (quoting Brent Foster, an attorney with Columbia Riverkeeper, as promising that environmentalists will use "the hammer of litigation" if government agencies fail to act).

[134] 16 U.S.C. § 544c(a)(1)(B) (2000).

[135] *See* WASH. REV. CODE ANN. § 43.97.025(1) (West 2005).

[136] Columbia River Gorge Comm'n v. State of Wash. Dep't of Nat'l Res., Forest Practices Appeal Bd. No. 95-31 and 95-32 (Oct. 10, 1996).

[137] *Id.* at 7.

[138] *Id.*

ment plan. The amended regulations make the department ultimately responsible for implementing and enforcing the SMA provisions.[139] But the rules make no attempt to incorporate the provisions of the Gorge Act itself. A recent decision of the Washington Court of Appeals ducked the issue of whether the Gorge Act required the department to implement its provisions.[140] Consequently, the issue of whether state agencies must implement the Gorge Act and its management plan remains a live one.

C. Wildlife Introduction on Federal Lands

In April 2005, the Forest Service and the Oregon Fish and Wildlife Commission signed a memorandum of understanding aimed at introducing Rocky Mountain goats on federal lands within the Gorge with the goal of establishing a healthy, viable population of around 300 goats.[141] The plan was to trap up to forty goats from various locations in northeast Oregon and release them on federal lands in the Gorge. Environmentalists challenged the plan, claiming that there are serious questions about whether the goats are native to the Gorge, alleging that the introduction would harm sensitive plant species and increase erosion,[142] and noting that a similar goat introduction effort in Olympic National Park in the 1920s produced an overpopulation sixty years later.[143]

After the environmentalists filed suit (alleging violations of the Gorge Act, the management plan, and various other federal laws), the Forest Service withdrew from the memorandum of understanding.[144] But it is not quite clear that the state has aban-

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[139] WASH. ADMIN. CODE §§ 222-46-015, 222-20-040(5)(b), and 222-16-010 (2005) (definition of "Columbia River Gorge National Scenic Area special management area guidelines"). The rule changes were the product of a memorandum of understanding negotiated between the Commission, the Washington Department of Natural Resources, and the Forest Service in the wake of the *Seeder Tree* decision that called for a negotiated rulemaking by the state Forest Practices Board to implement the purposes of the Gorge Act and the management plan in SMAs. Memorandum of Understanding Between Washington State Dept. of Nat. Resources, U.S. Dept. of Agric. Forest Service, and Columbia River Gorge Comm'n (Feb. 24, 1998) (on file with author). The Gorge Act includes no provisions on logging in the GMA.

[140] *See* Friends of the Columbia Gorge, Inc. v. Wash. State Forest Practice Appeals Bd., 118 P.3d 354, 360 nn.9 & 11 (Wash. Ct. App. 2005) (declining to address whether Washington's Department of Natural Resources was required to use the Gorge Scenic Act as its decisional authority).

[141] *See* Memorandum of Understanding between Oregon Dept. of Fish and Wildlife and USDA—Forest Service, Columbia River Gorge National Scenic Area and Mount Hood National Forest (April 4, 2005) (on file with author).

[142] Memorandum in Support of Pl.'s Mot. Summ. J. at 6-18, Friends of the Columbia Gorge v. Ball, (D. Or. June 15, 2005) (No. 05-646 BR).

[143] *Id.* at 3-4.

[144] Letter from Daniel T. Harkendrider, Area Manager, Columbia River Gorge National Scenic Area, and Gary L. Larson, Forest Supervisor, Mount Hood National Forest to Kris

doned the plan. If, in fact, the state does not withdraw the plan, the environmentalists will likely seek to have the courts settle the question of whether the state must act consistently with the Gorge Act and the management plan.[145]

VI. THE 2004 REVISIONS TO THE MANAGEMENT PLAN

The Gorge Act requires the Commission and the Forest Service to review the management plan every ten years.[146] In 2004, the agencies responded to this directive by adopting revisions to the management plan which provided more specific directives for resource protection and management in the Gorge.[147] The process took three years, during which the Commission received over 1,600 comments on possible changes to the management plan.[148] The revisions produced more explicit resource protection policies, modified some land use designations, and clarified the Forest Service's role in the management plan.[149] The amendments authorized a number of new uses not previously permitted, including commercial events, road spoil disposal sites, and fish processing plants.[150] They also addressed some areas of the plan which engendered litigation or proved difficult to implement, such as Forest Service's land acquisition guidelines.[151] For example, one of

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Kautz, Deputy Director for Administration, Oregon Dept. of Fish & Wildlife (Sept. 30, 2005) (on file with author).

[145] Should the state proceed with the goat introduction, it would be seem to be in violation of the management plan, which directs state and federal agencies to "comply with" the plan. *See supra* note 124. Which court system would decide the issue is an interesting question, since the Forest Service has rescinded the MOU, *supra* note 144 and accompanying text; the only remaining defendant is the state. Environmentalists maintain that the federal suit is still proper, since the mountain goat plan involves federal land, and the state officials could be sued in federal court for violating federal law under the doctrine established by *Ex Parte* Young, 209 U.S. 123, 159-60 (1908) (holding that the Eleventh Amendment does not bar suits against state officers to enjoin violations of federal law).

[146] 16 U.S.C. § 544d(g) (2000).

[147] 2004 MANAGEMENT PLAN, *supra* note 71.

[148] *See* Nancy Lemons, *Gorge Panel Adopts 'Triage' Strategy*, THE DALLES CHRONICLE, Mar. 31, 2003, *available at* http://www.citizenreviewonline.org/april_2003/gorge.htm (last visited Feb. 18, 2006).

[149] *Id.*

[150] 2004 MANAGEMENT PLAN, *supra* note 71, at II-153 to II-154 (allowing for commercial events, such as weddings, small parties, and receptions on open space or forest use lands); *id.* at II-128 to II-131 (providing procedures for the disposal of spoil material associated with an emergency response action); *id.* at II-151 to II-153 (providing guidelines for the disposal of spoil material from public road maintenance); *id.* at II-148 to II-150 (allowing small-scale fishing support and processing facilities for the purpose of supporting small family-based commercial fishing businesses).

[151] Although the Forest Service retains ultimate authority to acquire land in the Scenic Area, the 2004 amendments to the management plan call for an acquisition philosophy based on the "willing seller, willing buyer" concept, emphasizing limited use of eminent domain powers and a policy of voluntary negotiation with landowners in SMAs. 2004 MANAGEMENT PLAN, *supra* note 71, at IV-3.

the most contentious aspects of the Act authorizes the Forest Service to purchase large tracks of land only in SMAs.[152] Short of congressional action amending the Gorge Act to authorize broader purchase authority, the revised management plan points out that "[i]n addition to the Scenic Area Act, there are other land adjustment authorities applicable to the Forest Service that allow acquisition of lands and interests outside of the [SMAs]."[153]

Environmentalists filed suit challenging the 2004 Management Plan, charging that the amendments weakened protection for scenic landscapes, failed to update wildlife and rare plant inventories, did not establish adequate buffer zones to protect water quality and salmon habitat from development, allowed new clear-cutting even within SMAs, and ignored requests to designate landslide and geo-hazard areas and protect them from development.[154] Among other things, the suit charged that the 2004 amendments failed to address the cumulative visual effects of over 600 new residences and thousands of new structures built in the Scenic Area since its designation in 1986.[155] The same plaintiffs have also challenged the Forest Service's concurrence on the plan amendments in federal court.[156]

A possible change to the Commission's administration of the management plan could come, not from amendments to the plan, but from the Oregon legislature. In 2003, an Oregon legislative subcommittee proposed to change the way that the state implements the Scenic Area Act by creating a standing committee to

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[152] 16 U.S.C. § 544g (2000). The Forest Service does have authority to purchase land in the Dodson/Warrendale Special Purchase Unit of the GMA. *Id.* § 544g(a).

[153] 2004 MANAGEMENT PLAN, *supra* note 71, at IV-3. The Commission urged the Forest Service to be creative in its land acquisition program and to "identify resource opportunities and needs that are important to fulfill the purposes of the Scenic Area Act." *Id.* Some groups are particularly concerned with extending the buyout program to non-SMA areas because the process could take land off of the property tax roles, adversely affecting already strained county budgets. *See* Nancy Lemons, *Committee Eyes Gorge Commission Changes*, THE DALLES CHRONICLE, Feb. 28, 2003, *available at* www.citizenreviewonline.orgapril_2003/gorge.htm (last visited Feb. 8, 2006).

[154] Press Release, Friends of the Columbia Gorge, (June 14, 2004) (on file with author) (noting that the amendments ignored the recommendations of an advisory committee of the American Society of Landscape Architects concerning scenic protection, rejected recommendations of the Washington Department of Fish and Wildlife on the size of no development buffer zones around streams, and rejected requests by Multnomah County, Oregon, to designate landslide and geohazard zones). A number of businesses have joined the Friends of the Gorge, Columbia Riverkeeper, and 1000 Friends of Oregon (a land-use watchdog group) in this lawsuit, including the Columbia Gorge Hotel and the owners of the Mt. Hood Railroad. At the time of this writing, the suit was pending before the Oregon Court of Appeals. Brief for Petitioners, Friends of the Columbia Gorge v. Columbia River Gorge Comm'n, CA No. A125031 (Or. Ct. App. Sept. 2005).

[155] Press Release, *supra* note 154.

[156] *See* Brief for Friends of the Columbia Gorge, Inc., et al. v. Johanns (D. Ct. Or. June 29, 2005) (No. 04-CV-1423-MO).

oversee Commission decisions within the state. Proponents claimed such oversight would ensure consistency in the application of land development controls and might help provide needed funding for economic and recreational development in the Gorge. Others criticized the planned oversight as adding another level of bureaucratic red tape to the process of Gorge protection.[157] Creation of such an oversight committee was at least delayed due to the results of the 2004 election, as the Democrats regained control of the Oregon Senate, thus ensuring a divided Oregon legislature, and consequently less appetite for deregulation.

VII. CONCLUSION

Twenty years after its enactment, the Columbia Gorge National Scenic Area Act remains a singular federal experiment in land use regulation. The Act aimed to protect scenic, ecological, and cultural resources while maintaining economic growth in a bi-state region of unparalleled beauty.[158] Because the Gorge is predominately comprised of non-federal lands, the statute created a complex web of federalism, enlisting federal, interstate, and local entities in its implementation. Without displacing local land use regulation, the Act aimed to reform local control through the planning and implementation efforts of a unique interstate compact agency.[159] This effort to infuse a regional perspective to preserve resources of greater-than-local significance has not been without controversy and a considerable amount of litigation.[160]

Regional-local tensions are not the only source of conflicts in the Gorge, however. An especially sensitive source of controversy concerns Forest Service regulation of private inholdings within SMAs. Aware of the potential problems federal regulation of private property could engender, for nearly fifteen years Congress authorized landowners to "opt-out" of the Gorge Act regulation by invoking a process leading to a federal buyout of their land or an exemption from regulation.[161] These provisions have not been free from controversy, as evidenced by their 2000 repeal, and there is considerable litigation pending over pre-existing claims.[162] There are also significant unresolved questions about the respon-

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[157] *See* Lemons, *supra* note 148. The 2003 legislature did enact one bill which requires the three Oregon counties to issue land-use decisions within 150 days of receiving a completed application. OR. REV. STAT. § 198.330 (2005).

[158] *See* 16 U.S.C. § 544a.

[159] *See supra* notes 23, 33-36, 46-49 and accompanying text.

[160] *See, e.g., supra* Part V.

[161] *See supra* notes 91-98 and accompanying text.

[162] *See supra* notes 99-105 and accompanying text.

sibility of state agencies to enforce the Gorge Act and the 2004 Management Plan, which have produced court decisions in the past and will continue to produce more in the future.[163]

More controversy is on the horizon concerning the pending challenges to the 2004 amendments to the management plan. Environmentalists charge that the amendments roll back scenic protections, overlook cumulative environmental effects, and fail to adequately protect water quality and wildlife habitat.[164] This litigation will keep the Gorge Act in the headlines, as will the question of whether implementation of the statute by the Gorge Commission and Oregon local governments is subject to Measure 37 compensation requirements.[165]

The Gorge Act's regional, multi-jurisdictional approach to protecting an area of national significance comprised primarily of private lands is a noteworthy and perhaps the preeminent ongoing experiment in federal land use planning.[166] Although this unusual intergovernmental structure has engendered its share of controversies, its approach should serve as a model for protecting other

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[163] *See supra* § VI.

[164] *See supra* notes 154-56 and accompanying text.

[165] *See supra* note 75 and accompanying text. The Gorge Commission bears a resemblance to the Tahoe Regional Planning Agency, another interstate compact agency, which may be its closest analogue. *See* Act of Dec. 18, 1969, Pub. L. No. 91-148, 83 Stat. 360 (1969) (this special act of Congress is not codified in U.S.C.). For an in-depth comparison between the Lake Tahoe Bi-state Compact and a draft of Columbia River Gorge Scenic Area Act, which was similar in many respects to the Gorge Act Congress ultimately enacted, see Gary D. Meyers & Jean Meschke, *Proposed Federal Land Use Management of the Columbia River Gorge*, 15 ENVTL. L. 71, 89—92 (1984).

[166] Other well-known examples of federal land use controls include wetlands regulation under § 404 of the Clean Water Act, 33 U.S.C. § 1344 (2000), and the species take prohibition under § 9 of the Endangered Species Act, 16 U.S.C. § 1538 (2000). However those programs are not as institutionally complex as the Gorge Act. More similar models may be found in the California approach to implementing the Coastal Zone Management Act of 1972, 16 U.S.C. §§ 1451-1464 (2000), which involves a regional approach to preserving coastal resources. That approach was a state innovation; it was not a federal idea. The Hells Canyon Recreation Area, 16 U.S.C. § 460gg (2000), was also a predecessor of the Gorge Act, but that initiative relied on federal land managers to implement an area with a much larger proportion of federal lands than the Gorge. *See* Meyers & Meschke, *supra* note 165, at 84-92 (analyzing both the Tahoe and Hells Canyon legislation through the lens of the then-proposed Gorge Act).

Another predecessor of the Gorge Act was the 1980 Northwest Power Act, 16 U.S.C. § 839b (2000), which created an interstate compact agency that might have been the model for the Gorge Commission (authorized six years later). But that agency, the Northwest Power Planning and Conservation Council, has virtually no role beyond supplying advice in state law, and its role in influencing federal agencies is questionable. On the Council and its authority, *see e.g,* Roy Hemmingway, *The Northwest Power Planning Council: Its Origins and Future Role*, 13 ENVTL. L. 673, 683—87 (1983); *Symposium on* Seattle Masters Builders *and Creative Cooperative Federalism,* 17 ENVTL. L. no. 4 (1987); Michael C. Blumm, *The Appointments Clause, Innovative Federalism, and the Constitutionality of the Northwest Power Planning Council,* 8 J. ENERGY L. & POL'Y 1 (1987); MICHAEL C. BLUMM, SACRIFICING THE SALMON: A LEGAL AND POLICY HISTORY OF THE DECLINE OF COLUMBIA BASIN SALMON 132, 134-36 (Bookworld Publications 2002).

important transboundary natural resources in other parts of the country.

NO POLITICAL SPEECH ALLOWED: COMMON INTEREST DEVELOPMENTS, HOMEOWNERS ASSOCIATIONS, AND RESTRICTIONS ON FREE SPEECH

LISA J. CHADDERDON*

I. INTRODUCTION

Nearly fifty-five million Americans currently live in homes that are part of some type of common interest development — including condominiums, planned developments, and gated communities.[1] All of these common interest developments (CIDs) have two things in common. First, they are all governed by an overseeing board or association (such as a condominium association or a

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[1] *See* Community Associations Institute, Data on U.S. Community Associations, http://www.caionline.org/about/facts.cfm (last visited Mar. 15, 2006). *See also* American Homeowners Resource Center, http://www.ahrc.com/new/index.php/src/home (last visited Mar. 15, 2006).

homeowners association). Second, they all have various forms of restrictive covenants (CC&Rs) to which homeowners must agree before purchasing and occupying the property. One restriction imposed by a "vast number" of CIDs is a prohibition on the display of signs and flags.[2] Frequently, the prohibition is not a restriction that allows for reasonable time, place, and manner of display of signs and flags; rather, the sign and flag covenants entail a complete ban.[3] Such bans can, and often do, include a prohibition on all campaign signs, political banners and fliers, and even on displaying the American flag.[4]

The restrictions imposed by CID governing organizations (hereinafter "HOAs") vary greatly, and are certainly not limited to political speech. That said, the discussion in this paper will address only restrictions on political speech, since political speech is afforded the highest degree of protection in the Supreme Court's First Amendment jurisprudence.

One essential legal aspect of community associations like HOAs is that they operate entirely outside of federal constitutional restrictions, since the law generally views HOAs and other such CID governing boards as private business entities, instead of as governments. This is the case notwithstanding the fact that many commentators and residents of CIDs frequently refer to HOAs as "quasi-governments" or "mini-governments." One article described HOAs and other governing associations as "privately owned and operated 'shadow governments' that 'can rigidly control immense residential areas.'"[5] Even courts have used the "quasi-government" and "mini-government" terminology.[6] These factors raise the

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[2] Wayne S. Hyatt & JoAnne P. Stubblefield, *The Identity Crisis of Community Associations: In Search of the Appropriate Analogy*, 27 REAL PROP. PROB. & TR. J. 589, 686 (1993).

[3] *See id.* at 686-87.

[4] *See id.*

[5] Harvey Rishikov & Alexander Wohl, *Private Communities or Public Governments: "The State Will Make the Call"*, 30 VAL. U. L. REV. 509, 527 (1996) (quoting JOEL GARREAU, EDGE CITY - LIFE ON THE NEW FRONTIER (Doubleday 1991)).

[6] *See, e.g.,* Cohen v. Kite Hill Cmty. Ass'n, 191 Cal. Rptr. 209, 214 (Cal. Ct. App. 1983). This terminology has been used in more recent cases as well. *See, e.g.,* Chesus v. Watts, 967 S.W.2d 97, 108 (Mo. Ct. App. 1998) ("The association 'provides a vehicle for individual owners to work together' to serve their new community or neighborhood, and it also operates as a sort of 'quasi-governmental entity' to provide members utility service, road maintenance, and refuse removal."); Terre Du Lac Ass'n v. Terre Du Lac, Inc., 737 S.W.2d 206, 215 (Mo. Ct. App. 1987) ("There are two distinct roles of the association: managerial or service-oriented functions, and quasi-governmental or regulatory functions . . . . [O]ne clearly sees the association as a quasi-government entity paralleling in almost every case the powers, duties, and responsibilities of a municipal government. As a 'mini-government,' the association provides to its members, in almost every case, utility services, road maintenance, street and common area lighting, and refuse removal. In many cases, it also provides security services and various forms of communication within the community. There is, moreover, a clear analogy to the municipal police and public safety functions. All of these functions are financed through assessments or taxes levied upon the members of the community with

question of whether the current legal and judicial approach to HOAs — the approach that regards them as private entities whose actions are not subject to constitutional protections — is appropriate, particularly given the rapid growth of, and increasing power of, these associations over millions of homeowners' lives in the United States.

II. COMMON INTEREST DEVELOPMENTS: HISTORY AND CURRENT STATE OF AFFAIRS

Prior to 1960, there were fewer than 500 CIDs in America.[7] Today, there are an estimated 250,000 CIDs, and that number continues to grow at a rapid pace.[8] CIDs are, in fact, the fastest-growing segment of the residential housing industry.[9] Between 6000 and 8000 new CIDs are built each year, including condominiums, cooperatives, and planned communities.[10] The Community Associations Institute estimates that more than four out of five housing starts in the past five to eight years were built in communities governed by an HOA or other similar association.[11] Since 1970, one out of three new residential units has been built in a community governed by an association.[12] In large metropolitan areas, more than 50% of home sales in 2000 involved houses subject to HOA regulations and restrictions.[13]

In 2003, the population of the United States was approximately 293 million, and the 2003 homeownership rate was ap-

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powers vested in the board of directors, council of co-owners, board of managers, or other similar body clearly analogous to the governing body of a municipality.").

[7] Mary Steven Siegel, *The Constitution and Private Government: Toward the Recognition of Constitutional Rights in Private Residential Communities Fifty Years After Marsh v. Alabama*, 6 WM. & MARY BILL RTS. J. 461 (1998).

[8] Evan McKenzie, Gated Communities and Homeowners Associations, http://tigger.uic.edu/ ~mckenzie/hoa.html (last visited Mar. 15, 2006).

[9] *Id. See also* Barbie L. Anderson, *Common Interest Developments: A Historical Overview of California Case Law* (Public Law Research Institute, U.C. Hastings College of the Law, PLRI Working Paper Series, Fall 1996-03), *available at* http://w3.uchastings.edu/ plri/96-97tex/california.htm (last visited Mar. 15, 2006).

[10] Evan McKenzie, Fannie Mae Foundation, *Common-Interest Housing in the Communities of Tomorrow*, 14 HOUSING POLICY DEBATE 1-2 (2003), *available at* http://www.fanniemaefoundation.org/programs/hpd/pdf/hpd_1401_McKenzie.pdf (citing ERIN FULLER & CHRISTOPHER DURSO, A SENSE OF PLACE AND HARMONY: OUTCOMES FROM THE COMMUNITIES OF TOMORROW SUMMIT: A NATIONAL DIALOGUE ON EXCELLENCE IN COMMUNITY DESIGN, GOVERNANCE, AND MANAGEMENT 2 (2000)).

[11] Common Interest Development Statistics, http://davis-stirling.com/ds/pages/stats.html (last visited Apr. 9, 2006) (referencing data from the Community Associations Institute, http://www.caionline.org (last visited Apr. 9, 2006)).

[12] McKenzie, *supra* note 10, at 203.

[13] *Id.*

proximately 68%.[14] Thus, approximately 202 million Americans were homeowners. With fifty-five million people living in associations, that means that nearly one in four Americans who own a home live in a CID of some type. Running a different kind of calculation, these numbers also bear out if we compare the number of owner-occupied housing units in 2003 with the number of housing units that existed in association-governed communities. According to the U.S. Census Bureau, just over seventy-two million housing units were owner-occupied in 2003,[15] and the Community Associations Institute estimates that there were twenty million housing units in associations in 2003.[16] Thus, more than one in four owner-occupied housing units in the United States are located in developments governed by HOAs or similar associations.

The growth of HOAs over the past several decades has been, by any account, rather astounding. In 1970, there were 701,000 housing units in CIDs, comprising less than 1% of American homes.[17] Today, there are twenty million housing units located in CIDs, comprising a full 16.5% of America's housing stock.[18] This fast-growing phenomenon has dramatically affected the nature of residential living in America and is a trend that does not appear likely to slow down. If history is any guide, the percentage of American homes located in developments governed by a private association will continue to rise at a rapid pace for the foreseeable future.

In general, new CIDs tend to sprout up in regions experiencing significant growth and development. Indeed, in some areas of the country, it has already become difficult, if not impossible, for homebuyers to purchase homes in anything *other* than a CID. For example, 80% of all new housing built in Orange County, California between 1980 and 1995 were in CIDs.[19] Most new homes being built in the Orlando, Florida region are in planned communities.[20]

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[14] *See* InfoPlease Population by State, http://www.infoplease.com/ipa/A0004986.html (last visited Apr. 9, 2006); U.S. Census Bureau, Housing Vacancies and Homeownership, Annual Statistics 2003, Table 12, *available at* http://www.census.gov/hhes/www/housing/hvs/annual03/ann03t12.html.

[15] U.S. Census Bureau, Housing Vacancies and Homeownership, Annual Statistics 2003, Table 9, *available at* http://www.census.gov/hhes/www/housing/hvs/annual03/ann03t9.html.

[16] *See* Community Associations Institute, Data on U.S. Community Associations, http://www.caionline.org/about/facts.cfm (last visited Mar. 15, 2006).

[17] McKenzie, *supra* note 10, at 206.

[18] *See* Community Associations Institute, Data on U.S. Community Associations, http://www.caionline.org/about/facts.cfm (last visited Mar. 15, 2006). According to the U.S. Census Bureau, in 2003 there were 120,834 total housing units in the United States. U.S. Census Bureau, Housing Vacancies and Homeownership, Annual Statistics 2003, Table 9, *available at* http://www.census.gov/hhes/www/housing/hvs/annual03/ann03t9.html.

[19] Karen E. Klein, *Owners Complain of Double Tax*, L.A. TIMES, Mar. 5, 1995, at Part K.

[20] Matthew Benjamin, *Hi, Neighbor, Want to Get Together? Let's Meet in Court!*, U.S. NEWS & WORLD REP., Aug. 21, 2000, at 56.

In early 2001, 5,400 new homes were being built in San Clemente, California, all of which were in CIDs.[21] In addition to Florida and California, other fertile areas of growth for CIDs include the Sunbelt, northern Virginia, southern Maryland, Las Vegas, and the outer suburban ring of most large metropolitan areas.[22] The result is that homebuyers in many areas of the country often have little choice but to accept the often rigid restrictions placed on them by CID covenants into which they must buy.

In addition to the sheer preponderance of this type of housing in many areas of the country, and arguably more important to this analysis, are local zoning regulations related to the development of CIDs. Gilbert, Arizona, for example, is a fast-growing town of 107,000 that has zoning laws that "all but require new homes to be built in associations."[23] The result has been that 90% of homes in Gilbert are in HOAs.[24] According to another report, Glendale, Arizona has zoning regulations that effectively restrict new development to houses built in a community governed by an association:

> '[T]he mandate is for HOAs in all new subdivisions WITH common areas. The catch is that ALL new subdivisions have common areas. All new subdivisions have at least [one] water-retention area to collect rainwater run-off' . . . . 'This may be the only common area for the community. (For this, an HOA is mandated.)'[25]

Las Vegas is another example of a region that has implemented zoning regulations that effectively require that all new housing developments be governed by private associations. Evan McKenzie, who has studied the HOA phenomenon for many years, explains that "[t]he City of Las Vegas [has] virtually mandate[d] that new development be done with homeowner associations" by

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[21] The American Homeowners Resource Center, The American Home — A Thing of the Past, Feb.18, 2001, http://ahrc.com/old/HOAorg/Media/ma_180201_AHRC_AHome.html.

[22] *Id.*

[23] Benjamin, *supra* note 20. *See also* The American Homeowners Resource Center, *supra* note 21.

[24] *Nasty Neighbors: Are HOA Boards Abusing Power?*, THE SCOTTSDALE TIMES, July 7, 2004, *available at* http://www.ccfj.net/HOAAZnastyneighbors.html.

[25] Bob Lewin, *Issues Homeowners Have with Common Interest Developments*, The American Homeowners Resource Center (1998), http://ahrc.com/old/HOAorg/News/keyreports/ kr_lewinCIDs.html.

implementing a two-step process.[26] First, the city's zoning and development codes require that all new developments contain specific features, such as open spaces, landscaping plans, and even security walls.[27] Second, other parts of the zoning and development codes require that 'if" these features are included in a new development (the codes, in fact, *require* that those features be included), then there must be a homeowners' association to maintain them.[28] Nearby suburbs have similar requirements.[29] In response to complaints from Las Vegas builders and homeowners that these kinds of zoning and development ordinances, which have been on the books since 1997, mandated that all new subdivisions be built as part of homeowner associations, Las Vegas Mayor Oscar Goodman responded that "[w]e can see if we can make some adjustments."[30] But, as McKenzie suggests, any such adjustments are not likely to be made anytime soon, if at all.[31]

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[26] Evan McKenzie, Private Gated Communities in the American Urban Fabric: Emerging Trends in their Production, Practices, and Regulation. Keynote address at the University of Glasgow, Scotland, Conference: Gated Communities: Building Social Division or Safer Communities? 5 (Sept. 18-19, 2003), *available at* http://www.bristol.ac.uk/sps/cnr papersword/gated/mckenzie.pdf.

[27] *Id.*

[28] *Id.* For example, in the following excerpt from Title 18 of the Las Vegas Zoning Code Section 18.12.5600, the word "shall" was recently substituted for the word "may" to provide as follows:

> 18.12.5600 Landscaping Plan: *A landscaping plan shall be provided by the subdivider as an integral part of subdivision design.* Such a plan shall be prepared and submitted with each final map application addressing the landscape design of the subdivision with respect to such features as wall or fence design; land forms or berms; rocks and boulders; trees and plant materials; sculpture, art, paving materials, street furniture; and subdivision entrance statement; common area landscaping and other open space areas . . . . *Where common lots are shown for landscaping, the applicant shall cause the creation of a homeowners association for purposes of owning the common lot and maintaining the landscaping.*

The code further provides that:

> All walls, setback areas and landscaping created to accommodate these regulations shall be located on private property. *If in common ownership, the property shall be owned and maintained by a Homeowner's Association.*' (Las Vegas Zoning Code, Section 18.12.570, subsection C. And Chapter 19 of the Zoning Code requiers [sic] that in Residential Planned Development Districts, 'All development with 12 or more dwelling units shall provide 15 percent useable open space for passive and active recreational uses.'

Id. at 5-6 (emphasis added).

[29] *Id.* at 7.

[30] *Id.*

[31] *Id.*

In addition to effectively mandating that HOAs govern all new housing units built in the area, the City of Las Vegas "also encourages existing neighborhoods that [are] not [governed by] homeowner associations to *form* them."[32] Through its "Neighborhood Services Department," Las Vegas has successfully urged more than 150 new neighborhood homeowners' associations to form.[33]

Thus, through the use of a variety of land use and zoning laws, local governments (like Las Vegas) can effectively force all new developments in a given region to be built within CIDs, subject to the governing structure of HOAs and other associations. This is no accident: local governments can derive significant benefits from encouraging this kind of development in the form of an increased tax base and lower expenses. This is because in many CIDs, services typically provided by the city (using taxpayer revenue) are instead performed by HOAs (using the fees paid by homeowners living in each CID). These services can range from plowing snow, to replacing light bulbs in street lights, to landscaping, to removing leaves in autumn, to maintaining parks and other community common areas, to collecting garbage. At the same time, building new communities within carefully planned and zoned CIDs allows for more people to live in a smaller area. The land use control process is thus turned into "a fiscal instrument, enabling cities to acquire new property tax payers without having to extend the city's governmentally funded infrastructure to them."[34] McKenzie has called this broad-ranging privatization of municipal services "'the most significant privatization of local government responsibilities in recent times.'"[35]

Assuming that the trend seen over the past few decades continues, more CIDs are likely to be built in more areas across the country. Additionally, more local governments are likely to jump on the HOA zoning bandwagon, passing regulations that encourage — and even force — new developments to be built under HOA governing structures. If this is the case, then a series of related circumstances may put pressure on the traditional view of HOAs as purely private groups. First, homebuyers in many areas

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[32] *Id.*

[33] *Id.* (citing MARK GOTTDIENER, ET AL., LAS VEGAS: THE SOCIAL PRODUCTION OF AN ALL-AMERICAN CITY 182 (1999)).

[34] McKenzie, *supra* note 10, at 221.

[35] EVAN MCKENZIE, PRIVATOPIA: HOMEOWNER ASSOCIATIONS AND THE RISE OF RESIDENTIAL PRIVATE GOVERNMENT 178 (Yale University Press 1994) (quoting Advisory Comm'n on Intergovernmental Relations, Residential Community Associations 18).

will have no choice but to buy a home in a community other than one in an HOA. Second, many local governments will have implemented zoning regulations that effectively mandate new homes be built in CIDs. And third, many, if not most, of those HOAs will have covenants that restrict political speech in the form of signage and/or flags. The question posed by this paper is this: assuming that these three factors are present, would adequate "state action" then exist such that restrictions on political speech in HOAs constitute an infringement of First Amendment free speech rights?

III. THE FIRST AMENDMENT, FREE SPEECH, AND THE REQUIREMENT OF STATE ACTION

The threshold question in the analysis of whether or not prohibitions on political signs and other speech in CIDs are constitutional is whether any state action is involved. If the associations that govern CIDs are considered state actors, then restrictions or bans on political signs would be subject to First Amendment scrutiny and protection. Purely private conduct, absent state action, is not subject to the First Amendment's protections. "[T]he principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful."[36]

There are no Supreme Court cases directly on point regarding HOAs as state actors and HOA restrictions on political signs. But one recent Supreme Court case did deal with the issue of city ordinances against the posting of political signs on residential property. In *City of Ladue v. Gilleo*,[37] a homeowner (who did not live in a CID) filed suit against the city of Ladue, Missouri, challenging a local ordinance that banned the display of most signs on residential property.[38] After noting that prior decisions had voiced special concern for regulations that banned an entire medium of expression,[39] the Court found that, in this case, it was "not persuaded that adequate substitutes exist for the important medium

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[36] Shelley v. Kraemer, 334 U.S. 1, 13 (1948).

[37] 512 U.S. 43 (1994).

[38] *Id.* at 45 (1994). The restriction at issue prohibited all homeowners from displaying signs on their property, except for "'residence identification' signs, 'for sale' signs, and signs warning of safety hazards." *Id.* Gilleo had placed a sign protesting the Gulf War in her front yard, and later, after being told such a sign was illegal, put an 8.5" x 11" sign in a second story window. *Id.* at 45-46.

[39] *Id.* at 48-51.

of speech that Ladue has closed off."[40] The Court further noted that:

> Residential signs are an unusually cheap and convenient form of communication. Especially for persons of modest means or limited mobility, a yard or window sign may have no practical substitute. Even for the affluent, the added costs in money or time of taking out a newspaper advertisement, handing out leaflets on the street, or standing in front of one's house with a handheld sign may make the difference between participating and not participating in some public debate. Furthermore, a person who puts up a sign at her residence often intends to reach *neighbors*, an audience that could not be reached nearly as well by other means.[41]

The Court ultimately held that the Ladue ordinance was an unconstitutional restriction on freedom of speech as guaranteed by the First Amendment.[42] In so holding, it stated that, although reasonable time, place, and manner restrictions on signs might pass muster, "[a] special respect for individual liberty in the home has long been part of our culture and our law . . . . Most Americans would be understandably dismayed, given that tradition, to learn that it was illegal to display from their window an 8 by 11-inch sign expressing their political views."[43]

Despite the fairly strong language used by the Court in striking down the Ladue city ordinance restricting homeowners' ability to display political signs, a similar restriction on political speech would not be struck down in CIDs, unless the CID's governing association was considered a state actor. Although state action was unquestionably involved in *Ladue*, since Ladue was a municipality, the Court's analysis nonetheless helps shed light on its view of free speech — and especially of political speech — when it comes to the display of political signs in homeowners' front yards or windows. Given the language used in *Ladue*, and in other cases that have struck down restrictions on political expression, it is quite

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[40] *Id.* at 56.
[41] *Id.* at 57.
[42] *Id.* at 58.
[43] City of Ladue v. Gilleo, 512 U.S. 43, 58 (1994) (citations omitted).

likely that the Court would find similar restrictions on expression in CIDs unconstitutional, *provided that* it could reasonably find state action. It has even been suggested that a trend in this direction could occur in the absence of a clear finding of state action: "*Ladue* does not, in its own right, affect the legality or enforceability of community association covenants; [but] it could . . . be the beginning of a line of cases leading to such a result."[44] While there seems to be no evidence of such a trend on the federal level, there has been some movement in this direction on the state level, as will be discussed below. For the time being, though, it seems safe to say that, according to Supreme Court jurisprudence, a finding of state action would be a necessary condition to striking down restrictions on political speech in HOAs.

There are four primary ways in which state action has historically been analyzed by the Supreme Court: (1) *Shelley v. Kraemer*[45] and the "judicial enforcement" theory of state action; (2) *Marsh v. Alabama*[46] and the "company town" approach to state action; (3) *Jackson v. Metropolitan Edison*[47] and the "sufficiently close nexus" test for state action; and (4) *Brentwood Academy v. Tennessee Secondary School Athletic Association*[48] and the "entwinement" theory of state action. Each of the tests advanced by the above four cases is different, and none has been consistently or regularly applied so as to have become the defining test for state action. As such, there is no single, clear state action doctrine. As one commentator noted, "[l]ack of predictability is [a] troubling hallmark in state action law. Essentially, because the courts have . . . flexible tests that they shape around the facts on a case-by-case basis, the state action area of the law is quite unpredictable and confusing."[49]

In addition to the four approaches used by the Supreme Court in analyzing state action for the purposes of First Amendment law, a number of states have also used state constitutions to find violations of the right to free expression even where state action for federal First Amendment purposes might not have been found.

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[44] Monique C. M. Leahy, *Homeowners' Association Defense: Free Speech*, 93 AM. JURIS. TRIALS 293, § 8 (updated 2006) (alteration in original) (citing *Common Ground*, Cmty. Ass'ns Inst., Sept./Oct. 1994).

[45] 334 U.S. 1 (1948).

[46] 326 U.S. 501 (1946).

[47] 419 U.S. 345 (1974).

[48] 531 U.S. 288 (2001).

[49] Josiah N. Drew, *The Sixth Circuit Dropped the Ball: An Analysis of* Brentwood Acad. v. Tennessee Secondary School Athletic Ass'n *in Light of the Supreme Court's Recent Trends in State Action Jurisprudence*, B.Y.U. L. REV. 1313, 1340 (2001).

Below, each of the four state action approaches is broken down and analyzed in terms of how each might apply, or not apply, to HOAs. The analysis will proceed based on a hypothetical situation which includes the three assumptions described above: first, that CIDs have become so widespread that homebuyers wishing to live in many locations have no choice but to accept the restrictive covenants of such CIDs; second, that in many of these locations, local zoning regulations have been enacted so as to mandate the development of all homes under the umbrella of a homeowners' association, since such developments both reduce costs for the municipality and increase the tax base; and third, that the vast majority of these CIDs enforce covenants that restrict or prohibit political speech by homeowners. Although these three assumptions do present a hypothetical scenario, the scenario is, in fact, not far afield from the situation which exists today in a number of regions, and which is likely to exist in more and more communities over time.

A. Shelley v. Kraemer: Racially Discriminatory Covenants and the Judicial-Enforcement Theory of State Action

One way that state action can be found is through the "judicial enforcement" theory of state action. This theory was first proffered by the Supreme Court in *Shelley v. Kraemer*, a case in which the Court held that judicial enforcement of a racially discriminatory covenant constituted "state action."[50] In that case, an African-American bought property subject to a racially restrictive covenant stating that ownership of the property in question was limited to Caucasians.[51] The same restrictive covenant bound the owners of nearly fifty neighboring properties.[52] One of the other owners subject to the same covenant brought suit, seeking to enforce the covenant.[53] The Supreme Court of Missouri held that the covenant could be enforced,[54] but the U.S. Supreme Court reversed, holding that the covenant was not enforceable because enforcement of the covenant violated the Equal Protection Clause.[55] The Court reasoned that judicial enforcement of the covenant by Missouri courts

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[51] Shelley v. Kraemer, 334 U.S. 1, 21 (1948).
[52] *Id.* at 4.
[53] *Id.* at 5.
[54] *Id.* at 6.
[55] Kraemer v. Shelley, 198 S.W.2d 679, 683 (Mo. 1947).
[56] Shelley v. Kraemer, 334 U.S. 1, 20 (1948).

amounted to state action, since the courts were an instrument of the state.[56] Therefore, the covenant was subject to constitutional review.[57]

The holding of *Shelley* was, and continues to be, fairly controversial. The idea that judicial enforcement of the provisions of a private agreement or covenant can, in and of itself, amount to state action and thus subject a private agreement to federal constitutional restraints is a sweeping notion. It certainly raises the problematic issue of distinguishing what is private from what is public for constitutional purposes. Read broadly, if any judicial enforcement can constitute state action, then *nothing* is truly private — every private action or agreement becomes potentially subject to a claim of state action and thus to a claim of federal constitutional protection. This problem was aggravated by the Court's failure to state a clear set of rules for lower courts to apply the *Shelley* state action theory. As one commentator summarized:

> In the absence of [such] guidance, the *Shelley* decision, taken literally, can be understood as subjecting to constitutional constraints the entire sphere of private agreements whenever these agreements are subject to judicial enforcement. It is doubtful that the Court ever intended this result in *Shelley*, because such a result effectively would reduce the Fourteenth Amendment state-action requirements to a 'meaningless formality.'[58]

To prevent a reduction of state action requirements to a "meaningless formality," the holding of *Shelley* has frequently been read and applied quite narrowly by courts. But the ultimate scope of *Shelley*'s judicial enforcement theory of state action, even today, remains uncertain. During the past several decades, for example, many lower courts have limited the application of *Shelley* exclusively to racially discriminatory covenants.[59] But others have read

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[57] *Id.*

[58] *Id.*

[59] Siegel, *supra* note 7, at 492-93.

[60] *See, e.g.,* Davis v. Prudential Secs., Inc., 59 F.3d 1186, 1191 (11th Cir. 1995) (holding that *Shelley* "has not been extended beyond the context of race discrimination"); Parks v. "Mr. Ford," 556 F.2d 132, 136 n.6a (3d. Cir. 1977) (noting that the doctrine propounded in *Shelley* "has been limited to cases involving racial discrimination"); Midlake on Big Boulder Lake, Condo. Ass'n v. Cappuccio, 673 A.2d 340,342 (Pa. Super. Ct. 1996) (quoting Wilco Elec. Sys., Inc. v. Davis, 543 A.2d 1202, 1205 (Pa. Super. Ct. 1988)) (stating that "there is no state action for constitutional purposes absent a finding that racial discrimination is involved as existed in the *Shelley* case").

it considerably more broadly. Take, for example, *Gerber v. Longboat Harbour North Condominium, Inc.*[60] In that 1991 case, a Florida district court suggested that *Shelley* might apply to HOAs in the context of regulations on speech and expression:

> [B]y applying the principles enumerated in *Shelley v. Kraemer* [citation omitted], this Court found and continues to find that judicial enforcement of private agreements contained in a declaration of condominium constitutes state action and brings the heretofore private conduct within the scope of the Fourteenth Amendment, through which the First Amendment guarantee of free speech is made applicable to the states. [61]

Two years earlier, a Florida district court of appeal held precisely the opposite, finding a lack of "state action" that would warrant a finding that an HOA's restrictive covenants regarding signs on homeowners' property were unconstitutional.[62] The court held that, "neither the recording of the protective covenant in the public records, *nor the possible enforcement of the covenant in the courts of the state,* constitutes sufficient 'state action' to render the parties' purely private contracts relating to the ownership of real property unconstitutional."[63] Thus, although *Shelley* as a whole appears to have been interpreted and applied quite narrowly by many subsequent court decisions, its continuing influence is apparent.

In one interesting 1969 case, *West Hill Baptist Church v. Abbate*[64], the Ohio Court of Common Pleas held that a covenant that restricted privately owned land to residential and agricultural uses was unconstitutional.[65] The case was brought after two religious organizations were denied permission to build churches and a synagogue on the property in question.[66] Applying *Shelley*, the

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[61] 757 F. Supp. 1339 (M.D. Fla. 1991).

[62] *Id.* at 1341 (M.D. Fla. 1991). In Gerber, the owner of a condominium unit challenged a regulation of the condominium association that banned the flying of flags (including the American flag) except on specified holidays. The court held that judicial enforcement of covenants restricting homeowner's ability to fly the flag would constitute state action. *Id.*

[63] Quail Creek Property Owners Ass'n, Inc. v. Hunter, 538 So. 2d 1288, 1289 (Fla. Dist. Ct. App. 1989).

[64] *Id.* (emphasis added).

[65] 261 N.E.2d 196 (Ohio Com. Pl. 1969).

[66] *Id.* at 202.

court stated that, "if this Court were to enforce (by declaratory judgment) the restrictive covenants here we would be engaging in state action."[67] In finding the covenant unconstitutional, the court's stated rationale was that, "covenants such as these here in issue, which seek to limit an area to residential use only, thereby barring churches, would be unconstitutional as to houses of worship if they were in the form of zoning ordinances or resolutions rather than covenants."[68] Given that this is a state case from the 1960s, its precedential value is clearly limited. However, it does provide another example of how *Shelley* can be, and has been, extended, in a limited way, to cover land-use restrictions created and applied by private owners.

One possible solution has been proposed by Mary Steven Siegel, who suggests that courts apply a "land-use reading" of *Shelley*.[69] Such a reading would limit *Shelley* to the enforcement of covenants that restrict the use or occupation of land in ways that would be deemed unconstitutional had the restriction been the product of a state instrumentality.[70] This may be a workable, and perhaps desirable, solution, particularly as applied to CIDs, since CIDs effectively privatize land-use decisions and functions that would otherwise be the domain of the state or local municipality. Such a solution would certainly reduce the risk of completely blurring the distinction between public and private, since it would be limited to the enforcement of land-use covenants that restrict the use or occupation of land. This solution also seems to remain true to the original intent of *Shelley*, which was aimed specifically at a covenant restricting ownership of private land.

But Siegel's solution is not without problems. If such a solution were implemented, individuals would no longer be able to *choose* to develop or live in any communities that restricted political speech or other kinds of activities and speech — even if they so desired. This raises an important question: do we want to tell all people, in every state, that they simply cannot choose to live in a place that restricts political speech? Perhaps not; but Steven Siegel's approach would do exactly that. This does seem potentially problematic and may pose too significant an encroachment on individuals' rights to choose how they want to live. Nonetheless, the Supreme Court did decide in *Shelley* that racially restrictive covenants were something that, as a society, we should not allow people to opt into, since racial discrimination is such an in-

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[67] *Id.* at 196-98.
[68] *Id.* at 200.
[69] *Id.* at 200-01.
[70] Siegel, *supra* note 7, at 502-508.

sidious harm. There is certainly an argument to be made that since political speech is so essential to our society — precisely because it is so highly-valued and protected — covenants restricting political speech should similarly not be something that people are allowed to opt into.

Alternately, there appears to be a middle ground. If we do not think that individuals' choices should be limited, and if we fear judicial encroachment on private decisions and agreements, then we should limit *Shelley* to racially discriminatory covenants, but create a second, very narrow judicial enforcement exception. This new exception would be for political speech in HOAs that exist in areas where consumer choice in non-CID housing is extremely limited. This compromise solution would give individuals the continued ability to choose to build or live in communities that restrict political speech and would also leave room in the doctrine for other, future narrow exceptions for important rights and values, as facts and society require.

As *Shelley* stands today, though, the extent to which the judicial enforcement theory of state action may apply to HOAs is still an undecided and live issue. As the two Florida federal court cases mentioned above demonstrate, it is certainly not outside the realm of possibility that the ghost of *Shelley* may be resurrected in the future, perhaps successfully, by homeowners in the context of state action and HOAs.

B. Marsh v. Alabama: Company-Owned Towns and State Action

In *Marsh v. Alabama*, the Supreme Court held that privately-owned streets in a "company town" were subject to the protections of the First Amendment.[71] In that case, a Jehovah's Witness was arrested and convicted of handing out religious literature on a street in Chickasaw, a town owned by the Gulf Shipbuilding Company, after being warned not to do so.[72] The Supreme Court overturned her conviction, finding that her rights under the First and Fourteenth Amendments had been violated.[73]

Chickasaw was, for all intents and purposes, identical to any other town, save for the fact that it was owned by a company. As the Court described:

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[71] Marsh v. Alabama, 326 U.S. 501, 509-10 (1946).
[72] *Id.* at 501.
[73] *Id.* at 509-10.

> [I]t has all the characteristics of any other American town. The property consists of residential buildings, streets, a system of sewers, a sewage disposal plant and a 'business block' on which business places are situated. A deputy of the Mobile County Sheriff, paid by the company, serves as the town's policeman. Merchants and service establishments have rented the stores and business places on the business block and the United States uses one of the places as a post office from which six carriers deliver mail to the people of Chickasaw and the adjacent area. The town and the surrounding neighborhood, which can not be distinguished from the Gulf property by anyone not familiar with the property lines, are thickly settled, and according to all indications the residents use the business block as their regular shopping center.[74]

Except for private ownership, the town of Chickasaw does not function differently from any other town.[75] As a consequence, citizens' rights under the federal Constitution were protected as if the town were, in fact, any other municipally-owned and operated town; the Court found no more reason to curtail the liberties and freedoms of citizens in Chickasaw any more than citizens in other towns:[76]

> Whether a corporation or a municipality owns or possesses the town the public in either case has *an identical interest in the functioning of the community in such manner that the channels of communication remain free* . . . . The managers appointed by the corporation cannot curtail the liberty of press and religion of these people consistently with the purposes of the Constitutional guarantees, and *a state statute, as the one here involved, which enforces such action by criminally punishing those who attempt to distribute religious literature clearly violates the First and Fourteenth Amendments to the Constitution.* Many people in the United States live in company-owned towns . . . . There is no more reason for depriving these people of the liberties guaranteed by the First and Four-

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[74] *Id.* at 502-03.
[75] *Id.* at 502-03, 508.
[76] Marsh v. Alabama, 326 U.S. 501, 508-09 (1946).

> teenth Amendments than there is for curtailing these freedoms with respect to any other citizen.[77]

In short, the Court held that, because Chickasaw looked and acted just like a traditional municipality, it was a state actor and was therefore subject to federal constitutional restrictions on government action, including the First Amendment. Therefore, despite the fact that the streets were privately-owned, people like the Jehovah's Witness in *Marsh* had a First Amendment right of access in order to speak to or communicate with the citizens of the company-owned town.

More than thirty years later, at a time when many fewer company towns existed, the Court in *Amalgamated Food v. Logan Valley Plaza*[78] extended the logic of *Marsh* to privately-owned shopping centers that served a community's business block and that were freely accessible and open to the public.[79] *Logan Valley*, in fact, expanded the reasoning of *Marsh* quite extensively, since a private shopping center performs few of the functions of a traditional municipality and cannot generally be considered to look, and act, like a traditional town. Nonetheless, the Court found that, "[t]he shopping center here is clearly the functional equivalent of the business district of Chickasaw . . . ."[80] As a result, the owners of the shopping center could not prohibit citizens from exercising their First Amendment rights under the Constitution; private ownership of the property did not bar the application of First Amendment protections. As the Court explained, "[o]wnership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it."[81]

This significant extension of the company-town analysis promulgated in *Marsh* did not last long. Only eight years later, in *Hudgens v. NLRB*,[82] the Supreme Court overturned *Logan Valley* and instead adopted a much narrower reading of *Marsh*.[83] In overturning *Logan Valley*, the *Hudgens* majority relied heavily on, and quoted extensively from, Justice Black's *Logan Valley* dissent:

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[77] *Id.* at 507-509 (emphasis added).
[78] 391 U.S. 308 (1968), *vacated by* 424 U.S. 507 (1976).
[79] *Id.* at 325.
[80] *Id.* at 318.
[81] *Id.* at 325 (quoting *Marsh*, 326 U.S. at 506).
[82] 424 U.S. 507 (1976).
[83] *See id.* at 516-20.

> 'Marsh dealt with the very special situation of a company-owned town, complete with streets, alleys, sewers, stores, residences, and everything else that goes to make a town . . . . I can find very little resemblance between the shopping center involved in this case and Chickasaw, Alabama. There are no homes, there is no sewage disposal plant, there is not even a post office on this private property which the Court now considers the equivalent of a 'town.' . . . The question is, *Under what circumstances can private property be treated as though it were public? The answer that Marsh gives is when that property has taken on All the attributes of a town*, I. e., 'residential buildings, streets, a system of sewers, a sewage disposal plant and a "business block" on which business places are situated.' 326 U.S., at 502. . . . *I can find nothing in Marsh which indicates that if one of these features is present, e. g., a business district, this is sufficient for the Court to confiscate a part of an owner's private property* and give its use to people who want to picket on it.'[84]

Under *Hudgens*, the mere fact that privately-owned property has one, or even some, of the characteristics of a traditional municipally does *not* mean that the full protections of the Constitution apply. Simply having a "business district," for example, would no longer be sufficient to find state action adequate to trigger the protections of the First Amendment. Instead, in order to be the functional equivalent of a traditional town, the private property in question would have to take on most, or even all, of the attributes of a typical municipality. This concept echoed the language of a case that preceded *Hudgens* by four years. In *Lloyd Corp. v. Tanner*,[85] the Court held that protesters did not have a right to exercise their free speech rights on the grounds of a privately-owned shopping mall.[86] In its opinion, the majority noted that in *Marsh*, "the owner of the company town was performing the *full spectrum of municipal powers* and *stood in the shoes of the State*."[87]

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[84] *Id.* at 516-17 (quoting *Logan Valley Plaza*, 391 U.S. at 330-32) (emphasis added).
[85] 407 U.S. 551 (1972).
[86] *Id.* at 570.
[87] *Id.* at 569 (emphasis added).

One commentator noted that *Hudgens* was more than just a mere narrowing of the interpretation of *Marsh*. "[T]he Court in *Hudgens* not only replaced the broad reading of *Marsh* with the narrow reading; in a sense, the Court memorialized *Marsh's* Chickasaw as the paradigmatic town for constitutional purposes."[88] This rather stringent test, based on the framework established by *Marsh*, is the test that still technically applies today.

Since *Hudgens* was decided, many claims of state action based on *Marsh* have been rejected.[89] Given this history, and the strictness of the *Hudgens* test, it is likely that most courts would find that CIDs are not state actors. This is because most CIDs do not have business districts, nor post offices, sewage disposal plants, police departments, or many of the other services and functions commonly associated with government municipalities.[90] To the contrary, many, if not most, CIDs explicitly prohibit commercial activity and business districts from forming within their boundaries.

That said, it may nonetheless be time for courts to reconsider how they view CIDs and their governing associations with regard to the *Hudgens* and *Marsh* precedents. It is no accident that many commentators have referred to HOAs as "private governments," "mini-governments," or "quasi-governments."[91] Some of those commentators have suggested that HOAs be recognized as a new form of local government based on their special characteristics, power, and similarity to local municipalities.[92] The result of this approach would be that HOAs would then ostensibly be subject to the restrictions of the federal Constitution.

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[88] Siegel, *supra* note 7, at 474.

[89] For a partial listing of these cases, see LAURA COON, SIGN RESTRICTIONS IN RESIDENTIAL COMMUNITIES: DOES THE FIRST AMENDMENT STOP AT THE GATE? 19 A.B.A. F. COMM. L. 24, 27 n.21 (2001), http://www.abanet.org/forums/communication/comlawyer/summer01/coon.pdf.

[90] There are a few very large CIDs, sometimes called "mixed-use developments," that would probably qualify under the *Hudgens* test for state action. In these large, mixed-use developments, there exists a combination of residences and businesses. Reston, Virginia is one such example; Sun City, Arizona is another. Reston has a population of 35,000 and contains 12,500 residential units, 500 businesses, 21 churches, 8 public schools, 1 sewage treatment plant, 4 shopping centers, and its streets and businesses are open to the public at large. Siegel, *supra* note 7, at 479. I would argue that this kind of large, mixed-use development looks, acts, and feels like a regular municipality so as to qualify under the *Hudgens* test.

[91] *See supra* notes 5-6.

[92] *See, e.g.,* Lara Womack & Douglas Timmons, *Homeowner Associations: Are They Private Governments?*, 29 REAL EST. L.J. 322 (Spring 2001).

There is something to be said for this argument. First, the reality is that many CIDs do, indeed, perform many of the services and functions typically provided by municipal governments. Siegel, for example, notes the striking functional similarity of CIDs to municipalities:

> Territorial [CIDs] exercise authority over a network of streets, parking lots, open space, and recreational facilities. Like municipalities, territorial [CIDs] typically provide services such as street cleaning, trash collection, snow removal, and maintenance of open space. Territorial [CIDs] also exercise powers traditionally associated with the municipal zoning authority, such as review of proposed home alterations and enforcement of rules governing home occupancy. All purchasers of property within [a CID] community automatically become members of the [CID], and are required to obey its rules and pay its fees and special assessments. A failure to pay [a CID] fee, like the failure to pay a municipal real estate tax, can result in a lien on a homeowner's residence, and, ultimately, in the forced sale of the property through the enforcement of the lien. Finally, [a CID] community, like a municipality, is governed by officers who are elected by community residents.[93]

Second, these kinds of services and activities "are financed through assessments" that resemble taxes.[94] Homeowners in CIDs are effectively double-taxed: they pay property taxes to the local municipal government and also pay an HOA fee to help pay for many of the same services that the municipal government would normally supply. Third, some states (including Maryland, Virginia, California, and Arizona) have passed statutes that suggest that even some legislatures regard HOAs as quasi-governmental organizations, as opposed to private corporations.[95]

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[93] Siegel, *supra* note 7, at 476-77. *See also* Womack & Timmons, *supra* note 92 at 322 ("Homeowner associations have taken on many of the characteristics of governmental entities. They regulate the use of privately owned property, own common property, and provide services such as utilities, roads, lighting, refuse removal, and security.").

[94] Siegel, *supra* note 7, at 535 (quoting Wayne S. Hyatt & James B. Rhoads, *Concepts of Liberty in the Development and Administration of Condominium and Home Owner Associations*, 12 WAKE FOREST L. REV. 915, 918 (1976)).

[95] Siegel, *supra* note 7, at 535.

Thus, many modern CIDs appear to be quite similar to the company town that the Supreme Court reviewed in *Marsh*. Undoubtedly, CIDs are much more akin to company towns than they are to shopping malls. But, as Siegel persuasively argues, modern CIDs may, in fact, have *more* in common with municipalities than did company towns, specifically because a CID is a "comprehensive system of service delivery, quasi-taxation, and community governance." [96] In *Marsh*, the company town was considered to have "all the characteristics of any other American town" — an analysis which led to the "functional equivalent of a municipality standard."[97] But precisely because this standard was based on a company town, it does not consider other municipal characteristics found in some private communities, but not found in company towns, and thus is not entirely consistent with modern-day patterns of residential and community development.[98] Siegel concludes that if the *Marsh* "town" paradigm were to be "updated and made consistent with contemporary forms of community development, which typically exclude commercial uses from residential areas," then many modern CIDs would, in fact, be considered the functional equivalent of municipalities.[99]

As persuasive as that argument may be, it seems to take the analogy a little too far. It is hard to disagree with the assertion that the nature of a "typical" municipality has changed significantly since the *Marsh* era of company towns. Zoning and development ordinances today are such that, in many municipalities, commercial districts are carefully regulated or even practically prohibited. But one key problem remains: in addition to the fact that most CIDs do not contain a business district, few contain their own post office, sewage treatment plant, or police departments. As much as typical municipalities and development patterns have changed since the 1940s, these factors are still a standard in most municipalities. Thus, absent a perhaps-desirable shift in its understanding of the *Hudgens* "functional equivalent of a municipality" standard, the current Supreme Court would still probably find that most CIDs do not meet the *Hudgens* test. Alternately, if we assume the existence of the three hypothetical factors detailed in

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[96] *Id.* at 478.

[97] *Id.* at 477-78.

[98] *Id.* at 477, 480. "The Thornton Wilder version of a small town exemplified in *Marsh* has been replaced by suburban sprawl, regional shopping centers far removed from residential areas, and zoning ordinances that separate commercial uses from residential uses — or even entirely prohibit commercial uses within a municipality." *Id.* at 480-81.

[99] *Id.* at 481.

Section II (above), it is fathomable that the Supreme Court might find some large HOAs to be the "functional equivalent of a municipality" under the *Hudgens* and *Marsh* doctrines, and thus subject to the same constitutional restraints as any other state actor.

C. Jackson v. Metropolitan Edison and the "Sufficiently Close Nexus" Test

Another test that has been used to determine whether or not a private organization is engaged in state action is the "sufficiently close nexus" test. The defining case for this test is *Jackson v. Metropolitan Edison Company*.[100] In *Jackson*, a woman brought suit against a privately-owned utility company after the utility terminated her electric service.[101] She claimed that, since the utility company had failed to provide adequate notice or any hearing with regard to the termination of her electricity, her due process rights had been violated.[102] She based the suit on a state action theory, since the state licensed the private utility as, effectively, a statewide monopoly.[103] The Supreme Court rejected the extension of state action to licensed monopolies, holding that even though the utility was heavily regulated by the state, there was no sufficient connection between the utility and the state as to establish that state action existed.[104]

> The mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment. Nor does the fact that the regulation is extensive and detailed, as in the case of most public utilities, do so. It may well be that acts of a heavily regulated utility with at least something of a governmentally protected monopoly will more readily be found to be 'state' acts than will the acts of an entity lacking these characteristics. *But the inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the lat-*

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[100] 419 U.S. 345 (1974).

[101] *Id.*

[102] *Id.* at 347-48.

[103] *Id.* at 351. There was a state statute that required utilities to provide and maintain service to customers in a way that was "reasonably continuous and without unreasonable interruptions or delay." *Id.* at 348.

[104] *Id.* at 345, 350-52.

> *ter may be fairly treated as that of the State itself.*[105]

Thus, the essential line of inquiry required by *Jackson* is whether there is a "sufficiently close nexus" between the challenged conduct of the private company (e.g., the HOA), and the involvement of the state to find that state action is present in the actions of the private company.

Unquestionably, there is state involvement in the creation of CIDs. For example, the development of CIDs is commonly controlled by state statutes; local zoning laws almost always impact the creation of CIDs; sometimes there are state regulations related to how and when HOA Covenants, Conditions, and Restrictions documents are provided to potential and current homeowners; and state agencies often must get involved when common property within CIDs is developed (e.g., if a swimming pool is put into a common area, the local water board and health and safety agencies may need to be involved). But, under *Jackson*, this kind of involvement is clearly not enough to amount to state action. This is likely the case, even though HOAs are "often forced upon reluctant private developers by local governments exercising regulatory powers,"[106] because under *Jackson's* sufficient connection test, the simple pervasiveness of state or local regulation is not enough to create state action. The utility in *Jackson* was more involved with the state than most HOAs (arguably including even those whose existence is mandated by local zoning laws), and yet the Supreme Court found no state action.[107]

Thus, as a whole, it seems quite unlikely that the Supreme Court would find that an HOA was a state actor based on the sufficiently close nexus test promulgated by *Jackson*. CIDs and HOAs are certainly "regulated," in the sense that there are zoning ordinances that the HOAs must adhere to, and other development ordinances with which they must comply; but *Jackson* ultimately seems to require much more. If *Jackson*'s sufficiently close nexus test was the sole test used in determining the existence of state action, or lack thereof, CIDs would be able to continue enforcing

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[105] Jackson v. Metro. Edison Co., 419 U.S. 345, 350-51 (1974) (citations omitted) (emphasis added).

[106] Siegel, *supra* note 7, at 550 (quoting STEPHEN E. BARTON & CAROL J. SILVERMAN eds., COMMON INTEREST COMMUNITIES: PRIVATE GOVERNMENT AND THE PUBLIC INTEREST xi (1994)).

[107] *Jackson*, 419 U.S. at 350-52.

substantial limitations on freedom of expression and speech without fear of any claim of state action or violation of homeowners' First Amendment rights.

D. Brentwood Academy v. Tennessee Secondary School Athletic Association: The "Entwinement" Theory of State Action

A relatively new test for state action, the "entwinement" test, was used in *Brentwood Academy v. Tennessee Secondary School Athletic Association* ("TSSAA").[108] In that case, Brentwood Academy was a member of the non-profit corporation, TSSAA.[109] TSSAA was created to regulate interscholastic athletics in Tennessee high schools.[110] Although high schools were not forced to join the Association, member schools (84% of which were public) were not allowed to play against non-member schools unless they had special permission.[111] After the TSSAA claimed Brentwood had violated the Association's football recruiting policies, Brentwood sued the TSSAA, claiming that it was a state actor and had violated the First and Fourteenth Amendments.[112]

The Supreme Court held that TSSAA was a state actor.[113] It based this holding on a finding of excessive "entwinement" between state school officials and the actions and structure of the ostensibly private non-profit organization.[114] The decision was based on the fact that a large majority of TSSAA members were public school officials, that employees of TSSAA were treated like state employees in terms of their eligibility for the state's retirement program, and that public school officials "overwhelmingly perform[ed] all but the purely ministerial acts by which the Association exists and functions."[115] In short, the non-profit athletic association was held to have to comply with federal constitutional standards based on its excessive entwinement with state employees and programs.

In some ways, the *Brentwood Academy* state action test seems similar to the *Jackson* state action test. *Jackson* required a "sufficiently close nexus" between the actions of the private company and the state. By definition, this seems very similar to the

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[108] 531 U.S. 288 (2001).
[109] *Id.* at 291.
[110] *Id.*
[111] *Id.*
[112] *Id.* at 293.
[113] Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n., 531 U.S. 288, 291 (2001).
[114] *Id.*
[115] *Id.* at 298-302.

question of whether a private entity and the state are so closely "entwined" with each other as to find state action. Both tests require a case-by-case inquiry into the extent to which the actions of the state are connected to or involved in the actions of a private entity. There are subtle differences between the two tests, of course, but to some degree, *Brentwood Academy* may be considered an updated version of the *Jackson* sufficient connection test. *Brentwood Academy* also seems more on-point to the inquiry at hand, since it dealt specifically with a First Amendment violation.

Applying the entwinement test to HOAs, it seems unlikely that most HOAs would be considered state actors based on excessive entwinement with local government officials. In most HOAs, there simply is not the kind of connection or entanglement with the state that existed in *Brentwood Academy*. For example, most of the people sitting on HOA boards are not state officials, unlike in *Brentwood Academy*. But if we consider the actual *development* of HOAs, and apply our three hypothetical factors, the answer is not as clear. Might the entwinement test be met, for example, by a community like Las Vegas? There, excessive entwinement arguably could be found between state programs and private entities based on zoning ordinances that effectively mandate the creation of CIDs. The strong incentives that municipalities have to create such laws, the enactment of such ordinances, and the fact that developers and builders are forced to build CIDs rather than any other type of building or development might together add up to "entwinement" that constitutes state action under *Brentwood Academy*.

IV. STATE RESPONSES TO THE PROBLEM OF RESTRICTIONS ON POLITICAL SPEECH IN HOAS

Courts in several states have addressed the problems posed by covenants imposed by HOAs. Many courts have used a "reasonableness test" in determining whether a particular restriction or covenant can stand.[116] Others have relied on state constitutions

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[116] *See, e.g.*, Nahrstedt v. Lakeside Vill. Condo. Assn., 878 P.2d 1275 (Cal. 1994) (applying a reasonableness standard to condominium covenants, and holding that when a condominium use restriction is contained in declaration of a common interest development, there is a rebuttable presumption that the restriction is reasonable); Hidden Harbour Estates, Inc. v. Basso, 393 So.2d 637, 639 (Fl. Dist. Ct. App. 1981) ("[T]he 'rule of reasonableness' [is] the touchstone by which the validity of a condominium association's actions should be measured."); Riley v. Stoves, 526 P.2d 747, 752 (Ariz. Ct. App. 1973) ("[W]e should ascertain

to find greater protection of free speech rights than the federal Constitution provides. This is not surprising given that the constitutions of thirty-five states have free speech clauses that are framed in the affirmative.[117] In those states, freedom of expression is affirmatively granted to citizens, as opposed to the First Amendment, which prohibits restrictions on free speech. This distinction may prove important, as the granting of such affirmative rights may be a valid way for courts to invalidate HOA restrictions on speech.

Among those states that provide more protection than the U.S. Constitution with regard to freedom of expression is California. In one of the seminal cases in this area, *Pruneyard Shopping Center v. Robins*,[118] the U.S. Supreme Court upheld a California Supreme Court decision determining that the California Constitution protects free speech in privately-owned shopping centers.[119] (In effect, it upheld freedom of expression in shopping centers, similar to the Supreme Court's holding in *Logan Valley*.) The Supreme Court majority held that states can, through state constitutional provisions, provide broader protections of individual liberties than the federal Constitution would provide under the same facts or circumstances. This was precisely the case in *Pruneyard*. There, although the speech at issue would not have been protected under the First Amendment (as per *Hudgens*), California's constitution did protect free speech in the shopping mall context.[120] Thus, one way that states may be able to reach into CIDs to protect political speech (or other types of speech) is by applying their own state constitutional provisions.

In *Pruneyard*, the California Supreme Court implicitly applied a balancing test of sorts to weigh the rights of private property owners against the free speech rights of protesters.[121] Other states have also solved the problem posed by overly-restrictive CID covenants by applying similar combinations of state statutes, state constitutions, and balancing tests. For example, in *Gutenberg Taxpayers v. Galaxy Towers Condominium Association*[122], a New Jersey case, the court applied a three-part test (derived from the earlier New Jersey case of *State v. Schmid*[123]) in order to "deter-

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the extent to which the restriction is a reasonable means to accomplish the private objective when considered in light of its effect upon defendants.").

[117] James C. Harrington, *Homeowners Associations: Creating Deconstitutionalized Zones*, TEX. LAW., Oct. 18, 2004, at 34.

[118] 447 U.S. 74 (1980).

[119] *Id.* at 88.

[120] *Id.* at 78.

[121] Robins v. Pruneyard Shopping Ctr., 592 P.2d 341 (Cal. 1979).

[122] 688 A.2d 156 (N.J. 1996).

[123] 423 A.2d 615 (N.J. 1980).

mine the parameters of the right to free speech upon privately-owned property and the extent to which access to private property can be restricted and still accommodate this right."[124] In *Galaxy,* the court held that determining whether a "constitutional obligation to permit public access on the part of the private property owner exists" depends on the three *Schmid* factors as well as on "a balancing of the right to free expression and the right to private property."[125]

The current legal situation on the federal level with regard to state action involves multiple possible tests for determining the presence or absence of state action, and has been highly criticized in legal scholarship. A number of commentators have encouraged the use of a balancing test for all state action cases.[126] With the exception of a few state courts, though, the balancing test approach has generally not been implemented with regard to HOAs and land-use covenants that restrict freedom of expression. Nonetheless, such a balancing test may prove to be a positive and practical solution to the problem. This is because the careful application of a balancing test on a case by case basis would take into consideration the continuing conflict between private property rights and constitutional liberties and would allow courts to make fact-based determinations as to which of the two tipped the scale in any given case. Josiah Drew explains the balancing test this way:

> If judges were to implement a balancing test, they would weigh two items — rights against practices. If the value of a legitimate right (e.g., First Amendment, Due Process, etc.) outweighs the value of the private entity's challenged practice (e.g., athletic rule making, Medicaid implementing, etc.) then the practice violates the constitutional amendment at issue, and the state

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[124] *Galaxy*, 688 A.2d at 158. This three-part test was established in an earlier decision by the New Jersey Supreme Court. State v. Schmid, 423 A.2d 615 (N.J. 1980). First, the court considered the "nature, purposes, and primary use of such private property: generally, its 'normal' use;" second, the "extent and nature of the public's invitation to use that property;" and third, the "purpose of the expressional activity undertaken upon such property in relation to both the private and public use of the property." *Gutenberg*, 688 A.2d at 158. In Galaxy, the court found that a condominium group's regulation prohibiting the distribution of political campaign literature by non-members of the condominium violated free speech rights under New Jersey's state constitution. *Id*. at 159.

[125] *Gutenberg*, 688 A.2d at 158 (citing New Jersey Coal Against War v. J.M.B. Realty Corp., 138 N.J. 326, 356 (N.J. 1994)).

[126] *See, e.g.*, Rishkof & Wohl, *supra* note 5; Drew, *supra* note 49, at 1342.

> (either covertly or overtly) is allowing the practice to limit this right when it should not. Conversely, if the value of a right is not clearly greater that the challenged practice's value, then the practice does not violate the amendment at issue, and the state is not allowing a practice to continue that it should not.[127]

Although the implementation of such a test would, undoubtedly, increase the risk of blurring the lines between public and private, the simple fact of the matter is that courts already do this to a significant extent. *Shelley* is a perfect example of how the Supreme Court is willing to stretch existing doctrine quite thin in order to achieve what it considers a "right" or "just" result in a particular case. In *Shelley* and similar cases where the Court feels that a fundamental liberty has been violated, it has been known to go out of its way to achieve the right result, even if it means developing an entirely new doctrine of "state action." Although the balancing test does run the risk of blurring the public-private line too much, it may, in fact, not do so any more than current state action doctrines already allow. The balancing test would simply allow courts to come to the right decision in a particular case without having to resort to tortured contortions of existing state action tests or trying to create entirely new state action doctrines.

V. HOMEOWNERS' VOTING RIGHTS IN HOAS — AN ADEQUATE POLITICAL REMEDY?

One argument that can be made against applying state action doctrine to HOAs is that HOA members do have the ability to change the covenants of the HOA through a vote of the members. Thus, there appears to be a political remedy built into the HOA structure: if enough homeowners want to make a change, they can vote to make that change.

The problem with this voting-remedy argument is that it is an extremely limited remedy. This is primarily because the notion that homeowners can makes changes to CC&Rs once becoming home-owning members of HOAs is largely illusory. In most HOAs, there is a process by which, through a vote of homeowners (but not renters), the covenants and restrictions can be changed or amended. But in order to change the CC&Rs in most HOAs, a vote

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[127] Drew, *supra* note 49, at 1342.

of a *supermajority* of *all* HOA members is required.[128] McKenzie puts it this way:

> Amendments are . . . difficult to enact, especially because most CIDs have a number of absentee owners who rent their units and are not present to vote, even if they are interested in the issue. So *the developer's idea of how people should live is, to a large extent, cast in concrete*.[129]

Thus, except in highly unusual cases, it is effectively impossible to enact such change as a "voting" member of an HOA.

Another interesting freedom of expression argument is one that circumscribes the issue of consent entirely: the impact of HOAs on non-members. Although not specifically tied to the issue of signs on lawns or in windows, the free speech rights of non-members of HOAs can nonetheless be significantly affected by HOA regulations. HOAs commonly prohibit all solicitation, including door-to-door political campaigning, and gated communities are able to effectuate this goal even more easily. Unquestionably, non-members of these communities do not consent to the HOA restrictions as homeowners do. Yet they are restricted nonetheless — and these restrictions may be significant, especially in communities where the majority of residences, and even some businesses, are located within HOAs and gated communities. Although there appears to be no persuasive authority on the issue as of yet, it is an issue which will probably continue to create litigation as CIDs continue to spread in size and influence.

VI. CONCLUSION

Given the current, confusing state of state action doctrine, if the Supreme Court were to hear a case regarding HOAs and restrictions on political speech, it would not be likely to find state action unless a specific series of facts were in evidence. First, there would need to be zoning laws in place that explicitly or effectively mandated all new development be built within CIDs. Second, CIDs in the area in question would have to be so pervasive that homebuyers effectively had no choice but to submit to the re-

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[128] MCKENZIE, *supra* note 35, at 127.
[129] *Id.* (emphasis added).

strictive covenants connected to those developments. And third, the majority of HOAs within such an area would have to have covenants restricting speech. It is not unlikely that, in the future, we may see such a confluence of facts in CIDs across the country. Taken individually, none of these factors alone seems to rise to the level of "state action" under any of the tests formally accepted to date by the Supreme Court; but the combination of factors, when taken together, does seem to strongly smack of state action, and may be considered as such by the Court.

Courts understandably are protective of private property rights and will be hesitant to make a major change unless circumstances truly merit it. But as one commentator noted, "[b]y any standard, these associations clearly strain the distinction between public and private."[130] It is also important to note that "much about [CIDs] is decidedly not private, including the policy choices made by municipal officials that induced, even compelled, real estate developers in many areas of the country to establish [CIDs] as a means of securing building permits."[131] If enough CIDs develop, limiting homeowner choice significantly and also significantly decreasing the ability of those homeowners to exercise fundamental rights, the Court may find that a line has been impermissibly crossed.

Going forward, it may make sense for courts to take a second look at the extent to which HOAs really do perform the same functions as municipalities, and the extent to which these associations act as mini-governments. Although the Supreme Court in particular has seemed reluctant to expand government control over privately-owned property, as demonstrated by the strict test promulgated in *Hudgens*, the growth of CIDs, and the increasing lack of choice that homebuyers have in terms of whether or not to buy into a CID, may eventually demand a change of course.

If a solution is not found through litigation, an alternative solution may present itself in the form of state legislation. Already, Arizona and Maryland have passed laws that prevent HOAs from banning homeowners from posting political signs.[132] California and Texas are considering a similar law.[133] Florida, California, and Arizona legislatures have passed laws forbidding HOAs from enforcing covenants against flying the American flag.[134] While

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[130] Rishkof & Wohl, *supra* note 5, at 525.

[131] Siegel, *supra* note 7, at 548.

[132] *See* MD. CODE ANN., REAL PROP. § 11B-111.2 (West 1999); H.R. 2478, 46th Leg., 2d Reg. Sess. (Ariz. 2004).

[133] Harrington, *supra* note 117, at 34.

[134] *Id. See also* Jeff Kunerth, *The Political Divide Among Neighbors*, ORLANDO SENTINEL, Aug. 28, 2004, at B1.

these laws may not reach all homeowners, they suggest a trend toward legislative recognition of the problematic nature of many such restrictions and recognition of the violation that such covenants do to private property owners' fundamental rights and liberties.

One thing is clear: the jury is still out on the extent to which any of the four primary state action doctrines might apply to HOAs. Any finding of state action on the part of an HOA is likely to be narrowly applied to the facts of the specific case and to the specific situation of the HOA and the region in question.

Justice Marshall was uncannily prescient in his dissent in *Lloyd Corp. v. Tanner* — a dissent written more than thirty years ago.

> It would not be surprising in the future to see cities rely more and more on private businesses to perform functions once performed by governmental agencies. The advantage of reduced expenses and an increased tax base cannot be overstated. As governments rely on private enterprise, public property decreases in favor of privately owned property. It becomes harder and harder for citizens to find means to communicate with other citizens. Only the wealthy may find effective communication possible unless we adhere to *Marsh* v. *Alabama* and continue to hold that '(t)he more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it.' When there are no effective means of communication, free speech is a mere shibboleth. I believe that the First Amendment requires it to be a reality.[135]

What Justice Marshall discussed in hypothetical terms in 1972 has today become a reality. CIDs in many communities are undeniably taking over many of the functions that used to be served by the government. Zoning laws create incentives — or even de facto mandates — to build new developments under the auspices of an

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[135] Lloyd Corp. v. Tanner, 407 U.S. 551, 586 (1972) (citations omitted).

HOA or other association. This is no accident — cities are well aware of the advantages that such associations can create in terms of reducing expenses and increasing the tax base, as Marshall foresaw. And, as Marshall also suggested, the restrictions imposed by quasi-governmental bodies like HOAs do, indeed, today make it harder for millions of citizens to communicate and express themselves to their neighbors. Unless the courts or state legislatures step in to prevent further erosion of these rights by powerful and purportedly private HOAs, the First Amendment will, indeed, become but a "mere shibboleth" for millions of Americans.

BOOK REVIEW

KEITH A. HALPERN*

RUTHERFORD H. PLATT, *Land Use and Society: Geography, Law, and Public Policy,* Revised Edition (Island Press 2004).

I. INTRODUCTION

"*The American system is one of complete decentralization, the primary and vital ideal of which is, that local affairs shall be managed by local authorities."*[1]

Oliver Wendell Holmes in *Pennsylvania Coal Co. v. Mahon*[2] edifies us that "[t]he general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking."[3] Among the realm of advancing private property rights, weighty public interests will gradually convert substantial of those precious private rights into the public concerns. Holmes instructs that land use regulation succeeds when private property rights are properly balanced with important public interests. As we'll see, Professor Platt adopts Holmes' message as a recurring focal point throughout *Land Use and Society*.

Professor Platt brings us from feudal land barons to just eighty years ago in *Ambler Realty Co. v. Village of Euclid*[4]. He advances to *Golden v. Township of Ramapo*[5] and drives beyond into "Smart Growth" and "New Urbanism." Platt takes us on a chronological odyssey of land use regulation, geography, and pressing social issues. Professor Platt broadcasts new hopes for successes in legal maneuvers to eradicate harmful land use externalities.

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* B.S. Finance and Management Information Systems, The University of Virginia, McIntire School of Commerce (1987); J.D. Candidate, The Florida State University, College of Law (2006). Thank you Mr. McKernan & Mr. Ross.

[1] RUTHERFORD H. PLATT, LAND USE AND SOCIETY; GEOGRAPHY, LAW, AND PUBLIC POLICY, REVISED EDITION 236 (Kathleen Lafferty, Ed., Island Press 2004) (quoting Justice Thomas McIntyre Cooley, 1868).

[2] 260 U.S. 393 (1922).

[3] PLATT, *supra* note 1, at 291 (quoting Justice Oliver Wendel Holmes in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922)).

[4] 272 U.S. 365 (1926).

[5] 409 U.S. 1003 (1972).

Platt's text includes much more than the traditional anthologies of land use case law. Platt explains that effectiveness "depend[s] upon understanding of the geographical context in which such [legal] effects arise. *Law based on sound geography yields beneficial land use policy.*"[6]

II. ORGANIZATION

Professor Platt delivers a bird's-eye view of *Land Use and Society* as he narrates an introduction of an airline flight from San Francisco to Boston. This "high-altitude" entrée to a complex topic provides a vivid topographical contrast while illustrating how land use is geographically interpretive. Along the flight, Platt identifies often-seen, key geographic features while carefully pointing out that the "geographer seeks to discern order, process, and coherency in the seemingly haphazard sequence of images."[7] *Land Use and Society* is a thoughtfully organized tapestry of the world and how we share it. This book rediscovers the land use body of law on several human and scientific planes.

Professor Platt opens this unique, twelve-chapter journey with broad global resource queries. Such queries may answer how we can sustain a world population that appears to double every 50 years. Platt's refined tact is fresh and unique. *Land Use and Society* not only compiles physical, economic, and other spatial factors, but points to law as the overriding factor in how people settle and use resources. Platt connects law to nontraditional human factors with unexpected geographical linkage. Professor Platt argues that the rules we live under might address one problem, but simultaneously compound others, while such rules often lack solutions to underlying issues. What's more, a rule lacking solutions may linger long after it is rendered useless. Professor Platt offers this text as a *geographer's observation* of how law influences human land use.[8]

Professor Platt presents key lessons from fifty-six cases steeped in the land use, policy, constitutional, and social battlefronts. This updated edition reflects the 2000 Census and the interactions between law, sociology, geography, history, and human culture. *Land Use and Society* accurately portrays the chronology of land use development through a delightfully clear, four-part exposition.

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[6] *Id.* at 419.
[7] PLATT, *supra* note 1, at xi-xvi.
[8] *Id.* at xvi.

Part I, entitled "Preliminaries: Land, Geography, and Law,"[9] offers land use definitions and exposes the intersection of geography and the law. Part II, "From Feudalism to Federalism: The Social Organization of Land Use,"[10] traverses old English land use origins into European urban evolution with summaries of nineteenth and twentieth century U.S. land use and urban experiences. This edition addresses racial issues and social injustice as a driving factor in urban sprawl, exclusionary zoning, and central city neglect.[11] Part III, entitled "Discordant Voices: Property Ownership, Local Government, and the Courts,"[12] initiates the reader into basic, practical land use decisions while summarizing geographical and legal property ownership. Part IV reaches "Beyond Localism: The Search for Broader Land Use Politics"[13] and uproots traditional models. These later chapters deliver insights into reactive federal public land management and major environmental initiatives during the last thirty years. Professor Platt makes the salient point that regional land use cooperation can catalyze political factions. This explains the critical role that regional techniques play in open space preservation.[14] Highlighted here are the leadership of "Smart Growth", environmental impact assessments, tax-increment financing, coastal management, wetland protection, and hazardous waste issues.[15]

Each chapter begins with a unique *head's-up display* that shows Platt's land use roadmap. Each chapters ends with a unique conclusion based on meticulous research. Professor Platt notably includes scholarship from E.M. Bassett, Banta, Blackstone, Bosselman, Callies, Daniels, Dukeminier, Gillham, Godschalk, Haar, Juergensmeyer, J.H. Kinstler, Maitland, Mayer, Powell, Prosser, J. Rothchild, S. Toll, W. H. Whyte, and S.R. Woodbury. Platt delivers almost every conceivable statistic on demographics, geographic boundary depictions, "greenpoint" programs, federal land ownership, landscape protection, and natural disasters.

The Book's conclusion is cautiously optimistic. Although Platt concedes that the land use legal framework surrounding us is good, the "effectiveness and validity of legal measures to control harmful externalities depend[s] upon understanding [or maybe

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[9] *Id.* at 3-62.
[10] *Id.* at 65-206.
[11] *Id.* at xvii.
[12] *Id.* at 209-332.
[13] *Id.* at 335-431.
[14] *Id.* at 336.
[15] *Id.* at 336-83.

balancing] of the geographical context in which such effects arise; [because,] *law based on sound geography yields beneficial land use policy."*[16] Thus, our involvement must balance private benefit while protecting the public from inherent harms. Platt shares the harmful reality of working class commuters excessively traveling because they are financially ill equipped to afford to live where they labor.[17] Finally, Platt returns to the solution of fundamentals of fostering health, safety, and public welfare — a well-advised destination.[18]

III. DISCUSSION AND ANALYSIS

Land Use and Society: Geography, Law, and Public Policy is an effective presentation of the interlaced mosaic of land use benefits, issues, exigencies, history, and related tools. This book is an enjoyable, informative, and relevant document that concisely presents the coterminous intersection of land use law and geography. Clear social and economic "realities" are properly posted throughout the text. Professor Platt has carefully timed the presentation of dozens of technical aids depicting water supply plans, subdivisions, urban statistics, traffic congestion, downtown skylines, and, of course, the house built on the infamous site of *Lucas v. South Carolina Coastal Council.*[19] The careful presentation marshals land use tools and legislation while giving balanced time to the overwhelming demand for private rights and open space.

A geographer, lawyer, and professor at the University of Massachusetts in Amherst, Professor Platt captures the more flexible solution to land use issues. Here, one can synthesize diverse phenomena and freely form theories based on the interplay of related factors. Platt sees a parallel theoretical world that guides an overall land use policy. For example, in the 1920's the theory of "environmental determinism" focused on regional climate. Later, a "central place theory" focused on 1960's economic motivations. In the 1990's, the "political landscape" gave land use further direction. As pointed out above, Platt's depth of analysis and research should be nothing short of reassuring to the reader.

We also learn that Platt is an advocate for social justice, but not in an overbearing manner. Here, we are reminded of negative externalities such as "urban sprawl." Such phenomena affects residents in Atlanta, for example, who must spend an average of

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[16] *Id.* at 419.
[17] *Id.* at 423.
[18] *Id.* at 427.
[19] Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992).

sixty-eight hours per year caged in gridlock.[20] Platt makes fast work of fresh concepts to "guide" growth rather than halting it. Understanding the monumental problems caused by the destruction of water and air resources, limited affordable housing, and crumbling infrastructure, Rutherford Platt focuses on how metropolitan growth can serve the environment.

Introduced in Chapter Two, Platt's *Land Use and Society* model tends to encourage a compact, pedestrian-friendly community linked by easy transit while nested within a larger regional plan. This "New Urbanist" view is found in Celebration, Florida where one can enjoy alternatives to conventional subdivisions. And yet, Platt reveals his own sense of balance by showing the reader that the "clever, and in some respects desirable, marketing vision" leaves the *new urbanist* short-changed.[21] Professor Platt safely grounds us by revealing that places like Celebration might not address all employment or housing needs with starting homestead prices between $120,000 to $1 million (circa 1995).[22] *Land Use and Society* again drives us back to the fundamental concepts: new urbanism revitalizes the components of today's life — access to housing, workplace, shopping, education, and recreation.

Rutherford Platt illustrates that although strong, bipartisan environmental legislation was a driving force in land use policy, many initiatives are "themselves 'endangered species.'"[23] Although overwhelming distractions often shroud environmental or land use initiatives, Americans support federal environmental intervention. Thus, part of reaching beyond localism means locals reaching to Congress to continue innovation through legislation.

Land Use and Society summarily concludes its twelve chapters with a concise, all-encompassing master-conclusion. Platt focuses his review on the "Status and Prospects" of how we are limiting negative land use externalities and how we promote land use positives. Here, Platt carefully recaps his guidance from earlier in the book — and with the depth of research displayed, such a conclusion solidifies many of Platt's novel viewpoints. Professor Platt leaves us with accessible downtowns, yet seventy years of housing programs only yielded about 1 million family houses plus 375,000 "elderly homes." This outcome horrifically contrasts the 31 million persons in 6.7 million families federally classified below poverty levels.[24]

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[20] *Id.* at 287.
[21] *Id.* at 289.
[22] *Id.*
[23] *Id.* at 414.
[24] *Id.* at 421 (providing elements of the 2000 U.S. Census).

In his conclusion, Professor Platt spotlights the proliferation of private SUVs advancing 100% faster than the population. Platt carefully concludes his positions and suggestions for cities, suburbia, and environmental injustice. He underscores energy recovery from waste management.[25] Moreover, his summary includes natural hazard areas, smart growth, and an "ecological cities" continuum. Professor Platt opines that "urban re-greening" of open spaces is a mechanism for land use planning. Together with various partnerships, visioning, and persistence, these mechanisms provide much hope for today's land use challenges."[26]

[25] *Id.* at 424 (providing elements of the 1984 Hazardous and Solid Waste Amendments and components of the Resource Conservation and Recovery Act. This highlights that leaking underground storage tanks were estimated at 400,000 of the approximately 6 million tanks in existence).

[26] *Id.* at 428-29. Here, Platt provides his view of the Central City to Urban Fringe Continuum including his ten key elements of the "Ecological Cities" program. *Id.*