

# MEASURE 37'S FEDERAL LAW EXCEPTION: A CRITICAL PROTECTION FOR OREGON'S FEDERALLY APPROVED LAND USE LAWS

**Abstract:** Ballot Measure 37, a property rights initiative passed by Oregon voters in November 2004, requires Oregon's state and local governments to compensate landowners for any reduction in the value of real property due to land use regulation or else to waive the offending regulations. This Note addresses the scope of an important exception to Measure 37: the law does not apply "to the extent that the land use regulation is required to comply with federal law." The ambit of this exception is questionable because many federal environmental laws, some with significant land use implications, involve a partnership approach called cooperative federalism where federal agencies set broad goals and states are responsible for on-the-ground implementation. This Note surveys Measure 37's federal law exception in its textual, regulatory, and constitutional contexts and concludes that the most tenable interpretation is a broad one: Measure 37 does not apply to land use regulations in federally approved plans and programs that represent Oregon's efforts to comply with federal law. This interpretation is reinforced by a clarifying definition of "federal law" in Ballot Measure 49, an initiative subject to a November 2007 special election vote.

## INTRODUCTION

In November 2004, Oregon voters passed ballot Measure 37, a law demanding that "government must pay landowners when certain land use regulations reduce land values."<sup>1</sup> In sum, Measure 37 requires payment for lost value of real property due to land use regulations enacted after the owner or a family member acquired the property.<sup>2</sup> In lieu of payment, state and local governments may waive the regulations at issue.<sup>3</sup> Measure 37 represents a dramatic departure from both state and

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<sup>1</sup> Compensation for Loss of Value Due to Land Use Regulation, OR. REV. STAT. § 197.352 (2005) (commonly referred to as Measure 37); BILL BRADBURY, OR. SEC'Y OF STATE, OFFICIAL 2004 GENERAL ELECTION VOTERS' PAMPHLET 103 (2004).

<sup>2</sup> See OR. REV. STAT. § 197.352(1), (3)(E).

<sup>3</sup> *Id.* § 197.352(8).

federal regulatory takings law.<sup>4</sup> Rather than focusing on the remaining value of regulated property as courts have done for decades, Measure 37 grants relief based on the value lost due to regulation.<sup>5</sup> Notably, Measure 37's impact extends beyond Oregon's borders.<sup>6</sup> Encouraged by Measure 37's success at the ballot box, property rights advocates have recently proposed similar initiatives in nine other states.<sup>7</sup> Although many of these efforts have failed, in November 2006 Arizona voters passed a law virtually identical to Oregon's Measure 37.<sup>8</sup>

Measure 37 has generated thousands of claims worth billions of dollars.<sup>9</sup> The Measure does not provide a source of funding to compensate successful claimants and thus state and local governments have been forced to waive many of Oregon's land use laws.<sup>10</sup> Measure 37 proponents assert that these waivers represent much-needed relief from the state's restrictive land use planning system.<sup>11</sup> On the other hand, the law weakens the state's ability to enforce land use regulations that promote important public values and stymies future land use planning efforts.<sup>12</sup>

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<sup>4</sup> See *id.* § 197.352; *Palazzolo v. Rhode Island*, 533 U.S. 606, 631 (2001); *Penn. Cent. Transp. Co. v. New York City*, 438 U.S. 104, 130-31 (1978); *Dodd v. Hood River County*, 855 P.2d 608, 613 (Or. 1993).

<sup>5</sup> See OR. REV. STAT. § 197.352; *Palazzolo*, 533 U.S. at 631; *Penn. Cent.*, 438 U.S. at 130-31; *Dodd*, 855 P.2d at 613.

<sup>6</sup> See *Regulatory Takings Ballot Measures Across America: Attack of the Measure 37 Clones*, AM. PLANNING ASS'N, Dec. 6, 2006, <http://www.planning.org/legislation/measure37/> [hereinafter *Ballot Measures Across America*]. See generally Patricia E. Salkin & Amy Lavine, *Measure 37 and a Spoonful of Kelo: A Recipe for Property Rights Activists at the Ballot Box*, 38 URB. LAW. 1065 (2006).

<sup>7</sup> *Ballot Measures Across America*, *supra* note 6.

<sup>8</sup> JANICE K. BREWER, ARIZ. SEC'Y OF STATE, *BALLOT PROPOSITIONS & JUDICIAL PERFORMANCE REVIEW* 177-92 (2006) [hereinafter *BREWER, BALLOT PROPOSITIONS*]; JANICE K. BREWER, ARIZ. SEC'Y OF STATE, *STATE OF ARIZONA OFFICIAL CANVAS* 16 (2006) [hereinafter *BREWER, OFFICIAL CANVAS*]; *Ballot Measures Across America*, *supra* note 6.

<sup>9</sup> See OR. DEP'T OF LAND CONSERVATION AND DEV., *SUMMARIES OF CLAIMS FILED IN THE STATE* (2007), [http://www.lcd.state.or.us/LCD/MEASURE37/summaries\\_of\\_claims.shtml#Summaries\\_of\\_Claims\\_Filed\\_in\\_the\\_State](http://www.lcd.state.or.us/LCD/MEASURE37/summaries_of_claims.shtml#Summaries_of_Claims_Filed_in_the_State) [hereinafter *DLCD SUMMARIES OF CLAIMS FILED*].

<sup>10</sup> See OR. REV. STAT. § 197.352 (2005); OR. DEP'T OF ADMIN. SERVS., *MEASURE 37 CLAIMS REGISTRY* (2007) [hereinafter *DAS CLAIMS REGISTRY*], available at <http://www.oregon.gov/DAS/SSD/Risk/M37Registry.shtml>.

<sup>11</sup> See Steven G. Gieseler et al., *Measure 37: Paying People for What We Take*, 36 ENVTL. L. 79, 90 (2006); David J. Hunnicutt, *Oregon Land-Use Regulation and Ballot Measure 37: Newton's Third Law at Work*, 36 ENVTL. L. 25, 26-27 (2006).

<sup>12</sup> See Margaret H. Clune, *Government Hardly Could Go On: Oregon's Measure 37, Implications for Land Use Planning and a More Rational Means of Compensation*, 38 URB. LAW. 275, 286 (2006); Edward J. Sullivan, *Year Zero: The Aftermath of Measure 37*, 36 ENVTL. L. 131, 156 (2006).

Measure 37 has been incredibly controversial and many Oregonians who voted for its passage in 2004 have since realized that its effects go substantially beyond what they intended.<sup>13</sup> Numerous rural landowners have been confronted with neighbors' attempts to build subdivisions in the midst of formerly protected farmland or forestland.<sup>14</sup> Many more Oregonians, regardless of where they call home, are disturbed by the dramatic change in the state's landscape threatened by Measure 37 waivers.<sup>15</sup> In a November 2007 special election, Oregon citizens will have an opportunity to refine Measure 37.<sup>16</sup> Ballot Measure 49, referred to the Oregon voters by the state legislature, limits the extent of Measure 37 waivers and protects high-value farmland, forestland, and places with limited water supplies.<sup>17</sup>

Importantly, Measure 37 contains several exceptions that render certain types of land use regulations beyond the reach of would-be claimants.<sup>18</sup> One critical exception—the focus of this Note's analysis—declares that Measure 37 does not apply “to the extent that the land use regulation is required to comply with federal law.”<sup>19</sup> The scope of this federal law exception is potentially subject to extremely narrow, or relatively broad, interpretations.<sup>20</sup> More specifically, most federal laws with land use implications, including many major environmental

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<sup>13</sup> Memorandum from David Metz, Fairbank, Maslin, Maullin & Associates, to Opportunity PAC II (Mar. 16, 2007) [hereinafter Metz Memorandum], available at <http://governor.oregon.gov/Gov/docs/KeyFindingsOregonStatewideVoterSurvey.pdf>; Yes on 49, Oregon Stories, [http://www.yeson49.com/2007/07/oregon\\_stories.html](http://www.yeson49.com/2007/07/oregon_stories.html) (last visited July 29, 2007).

<sup>14</sup> See Yes on 49, *supra* note 13.

<sup>15</sup> See Metz Memorandum, *supra* note 13 (voter survey concluding that “more than two-thirds of voters either want to fix what they see as significant flaws in Measure 37 or believe that it should be repealed entirely”); Yes on 49, Measure 49: Our one chance to protect what's special about Oregon, [http://www.yeson49.com/2007/07/a\\_special\\_messa.html](http://www.yeson49.com/2007/07/a_special_messa.html) (last visited Sept. 20, 2007) (online letter signed by nine prominent Oregonians including current Governor Ted Kulongoski and three former Governors).

<sup>16</sup> BILL BRADBURY, OR. SEC'Y OF STATE, NOVEMBER 6, 2007, SPECIAL ELECTION, MEASURE 49, EXPLANATORY STATEMENT [hereinafter MEASURE 49 EXPLANATORY STATEMENT], available at <http://www.sos.state.or.us/elections/nov62007> (last visited Sept. 21, 2007); BILL BRADBURY, OR. SEC'Y OF STATE, NOVEMBER 6, 2007, SPECIAL ELECTION, MEASURE 49, BALLOT TITLE [hereinafter MEASURE 49 BALLOT TITLE], available at <http://www.sos.state.or.us/elections/nov62007> (last visited Sept. 21, 2007).

<sup>17</sup> MEASURE 49 EXPLANATORY STATEMENT, *supra* note 16. This is a much-simplified summary of Measure 49. See *infra* notes 75–78 and accompanying text for a more detailed explanation.

<sup>18</sup> OR. REV. STAT. § 197.352(3) (2005).

<sup>19</sup> *Id.* § 197.352(3)(C).

<sup>20</sup> See *id.*; Columbia River Gorge Comm'n v. Hood River County, 152 P.3d 997, 1004 (Or. Ct. App. 2007), review denied, 160 P.3d 992 (Or. 2007); Hunnicutt, *supra* note 11, at 43; Caroline E.K. MacLaren, *Oregon at a Crossroads: Where Do We Go from Here?*, 36 ENVTL. L. 53, 65–66 (2006); Sullivan, *supra* note 12, at 145.

statutes, operate by delegating regulatory authority to state and local governments—a model called cooperative federalism.<sup>21</sup> It is unclear whether Measure 37 applies to those state and local land use regulations that form part of federal frameworks.<sup>22</sup>

This Note explores the scope of Measure 37's federal law exception in its textual, regulatory, and constitutional contexts.<sup>23</sup> It argues that a broad interpretation of Measure 37's federal law exception is more tenable than a narrow one.<sup>24</sup> The federal law exception exempts not only state and local regulations explicitly mandated by federal law but also regulations necessary to achieve the benchmarks of more flexible cooperative federalism statutes.<sup>25</sup> This conclusion is explicitly reinforced by the text of Ballot Measure 49, which defines "federal law" to include land use regulations passed under authority delegated from the federal government.<sup>26</sup>

Part I of this Note provides a brief history of Measure 37 and describes some of the divergent views about its effects.<sup>27</sup> It then explains that Measure 37 is a statute in flux and may be tempered by Ballot Measure 49.<sup>28</sup> Among many improvements intended to reflect the sentiment of Oregonians concerned both about their property rights and the long-term livability of their state, Ballot Measure 49 clarifies the federal law issue in a way that could be an important determinant of Measure 37's ultimate impact.<sup>29</sup> Part II reviews the methods Congress has used to require compliance with federal law and considers their constitutional limits.<sup>30</sup> Next, it describes cooperative federalism as a pervasive approach in modern environmental law and introduces two cooperative federalism statutes that have significant land use implica-

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<sup>21</sup> See *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 289 (1981); ZYG-MUNT J.B. PLATER ET AL., *ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY* 305 (2004); Robert L. Fischman, *Cooperative Federalism and Natural Resources Law*, 14 N.Y.U. ENVTL. L.J. 179, 183–84 (2005).

<sup>22</sup> See OR. REV. STAT. § 197.352(3)(C); see, e.g., Clean Water Act, 33 U.S.C.A. §§ 1251–1387 (West 2001 & Supp. 2007). But see *Columbia*, 152 P.3d at 1004 (holding that Measure 37 does not apply to land use regulations passed to comply with the Columbia River Gorge National Scenic Area Act); see *infra* notes 178–191 and accompanying text.

<sup>23</sup> See *infra* notes 35–314 and accompanying text.

<sup>24</sup> See *infra* notes 191–313 and accompanying text.

<sup>25</sup> See *id.*

<sup>26</sup> BILL BRADBURY, NOVEMBER 6, 2007, SPECIAL ELECTION, MEASURE 49, TEXT OF MEASURE, [hereinafter MEASURE 49 TEXT], available at <http://www.sos.state.or.us/elections/nov62007> (last visited Sept. 21, 2007); see *infra* notes 89–90, 192–314 and accompanying text.

<sup>27</sup> See *infra* notes 38–68 and accompanying text.

<sup>28</sup> See *infra* notes 69–78 and accompanying text.

<sup>29</sup> See *infra* notes 79–90 and accompanying text.

<sup>30</sup> See *infra* notes 94–123 and accompanying text.

tions: the Clean Water Act and the Columbia River Gorge National Scenic Area Act.<sup>31</sup> Lastly, it reviews the February 2006 decision by the Oregon Court of Appeals, *Columbia River Gorge Commission v. Hood River County*, which holds that Measure 37 does not apply to county land use regulations adopted pursuant to the Scenic Area Act.<sup>32</sup> Part III argues for a broad interpretation of Measure 37's federal law exception that would extend the *Columbia* holding to include all land use regulations in federally approved plans and programs that represent Oregon's efforts to comply with federal law.<sup>33</sup> Such a broad interpretation is supported by the text of the exception itself, constitutional principles of federalism, key elements of federal statutes, and the practical consequences of an alternative narrow interpretation.<sup>34</sup>

### I. A BRIEF HISTORY OF MEASURE 37

This Part provides a brief background on Measure 37 and presents some of the conflicting views about the law's potential impacts.<sup>35</sup> It then describes the dynamic context in which Measure 37 is currently being interpreted, including the proposal of Ballot Measure 49.<sup>36</sup> This information serves as a backdrop for analyzing the scope of Measure 37's federal law exception, a provision that could have significant implications for Oregon's landscape.<sup>37</sup>

#### A. Measure 37: Reprieve from Oregon's Regulatory Nightmare or Land Use Sclerosis?<sup>38</sup>

The poster child of the Measure 37 campaign was Dorothy English, a ninety-four year old widow and the owner of a large tract of for-

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<sup>31</sup> See *infra* notes 124–177 and accompanying text.

<sup>32</sup> See *infra* notes 178–191 and accompanying text.

<sup>33</sup> See *infra* notes 192–314 and accompanying text.

<sup>34</sup> See *infra* notes 192–314 and accompanying text.

<sup>35</sup> See *infra* notes 38–68 and accompanying text.

<sup>36</sup> See *infra* notes 69–78 and accompanying text.

<sup>37</sup> See *infra* notes 80–90 and accompanying text.

<sup>38</sup> This subtitle reflects the opposing views of two authors who have weighed in on the Measure 37 debate. See Gieseler et al., *supra* note 11, at 91; Sullivan, *supra* note 12, at 131, 156. In their article, *Measure 37: Paying People for What We Take*, Steven G. Gieseler, Staff Attorney at the Pacific Legal Foundation, and his coauthors labeled Oregon's land use planning system prior to Measure 37 a "regulatory nightmare." Gieseler et al., *supra* note 11, at 91. On the other hand, in his article, *Year Zero: The Aftermath of Measure 37*, Edward J. Sullivan predicted that Measure 37 would cause a "sclerosis of the state's land use planning system." Sullivan, *supra* note 12, at 131, 156.

est land in Multnomah County, outside the city of Portland.<sup>39</sup> When Mrs. English purchased her property in 1953, she intended to someday divide the land, selling a portion to provide retirement income and giving the remainder to her children.<sup>40</sup> As the television ads leading up to the November 2004 elections complained, land use regulations prohibiting subdivision, imposed by the County starting in the early 1970s to meet visionary state goals such as forest protection and the containment of urbanization, now stood between Mrs. English and her desire to distribute her property near the end of her life.<sup>41</sup>

Largely in response to such concerns about the perceived unfairness of Oregon's land use laws, voters passed Ballot Measure 37 in November 2004 with sixty-one percent of the electorate voting in favor of the new law.<sup>42</sup> Measure 37 requires state and local governments to either pay landowners for lost value due to the regulation of their property or to waive the contested regulations.<sup>43</sup> Under the Measure, land-

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<sup>39</sup> Gieseler et al., *supra* note 11, at 94.

<sup>40</sup> *Id.*

<sup>41</sup> Clune, *supra* note 12, at 295; Gieseler et al., *supra* note 11, at 93-94. The campaign to adopt Measure 37 was spearheaded by Oregonians in Action, the nation's largest property rights group, and financed in large part by natural resource extraction interests and developers. See Clune, *supra* note 12, at 292; Randi Bjornstad, *Campaign Donors File Big Claims Under Law*, REG.-GUARD (Eugene, Or.), Sept. 3, 2006, at A1. Portraying Mrs. English as a victim of government regulation to generate support for Measure 37 is a strategy employed frequently by the modern property rights movement. See Christine A. Klein, *The New Nuisance: An Antidote to Wetland Loss, Sprawl, and Global Warming*, 48 B.C. L. REV. 1155, 1163-65 (2007). Planning advocates and conservation groups lined up in opposition to the Measure, resulting in a highly publicized and well-financed campaign on both sides. See Hunnicutt, *supra* note 11, at 41.

<sup>42</sup> Or. Dep't of Land Conservation and Dev., Measure 37 Legal Information About the Election, [http://www.oregon.gov/LCD/MEASURE37/legal\\_information.shtml](http://www.oregon.gov/LCD/MEASURE37/legal_information.shtml) (last visited Sept. 21, 2007) [hereinafter DCLD Information About the Election]; see Clune, *supra* note 12, at 284.

<sup>43</sup> OR. REV. STAT. § 197.352 (2005). The text of Measure 37 provides:

If 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 statute] 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.

*Id.* § 197.352(1). Measure 37's waiver provision reads:

[I]n lieu of payment of just compensation under this section, the governing body responsible for enacting the land use regulation may modify, remove, or not apply the land use regulation or land use regulations to allow the owner to use the property for a use permitted at the time the owner acquired the property.

*Id.* § 197.352(8).

owners have a valid claim for "just compensation" or waiver if they can show that: 1) a land use regulation was enacted or changed after the owner or a family member acquired the land, 2) the regulation restricts use of the land, and 3) the regulation reduces the value of the property.<sup>44</sup> After December 4, 2006, claimants seeking to contest existing regulations must also provide evidence that they have filed a land use application and that the application has been denied or conditioned as a result of the contested land use regulation.<sup>45</sup> Government bodies receiving Measure 37 claims have 180 days to award payment or issue a waiver; if no action is taken, the landowner has a cause of action in a state trial court and can recover damages as well as attorney's fees and other costs.<sup>46</sup>

One view is that Measure 37 addresses inequities created by Oregon's statewide land use planning system.<sup>47</sup> Proponents claim that Measure 37 is an improvement upon fuzzy and unforgiving regulatory takings law and provides a much needed remedy for the many rural landowners who feel disenfranchised because their properties have been devalued by restrictive land use regulations.<sup>48</sup>

Measure 37 provides a direct answer to concerns about the restrictiveness of Oregon's land use laws and a strict standard for awarding compensation, but what are its costs?<sup>49</sup> Oregon voters have begun to realize that Measure 37 not only provides relief for landowners

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<sup>44</sup> *Id.* § 197.352(1), (3)(E).

<sup>45</sup> *Id.* § 197.352(5); Or. Dep't of Admin. Servs., Risk Management, Measure 37, <http://www.das.state.or.us/DAS/SSD/Risk/M37Claims.shtml> (last visited Sept 21, 2007).

<sup>46</sup> OR. REV. STAT. § 197.352(4), (6).

<sup>47</sup> See Hunnicutt, *supra* note 11, at 27. Oregon's statewide land use planning system requires every city and county to adopt a comprehensive land use plan consistent with nineteen Statewide Planning Goals. OR. ADMIN. R. 660-015-0000(1) to -0010(4) (2007), available at <http://www.lcd.state.or.us/LCD/goals.shtml>; Sullivan, *supra* note 12, at 135. The Statewide Planning Goals and their companion regulations emphasize forest and farmland protection; management of coastal resources; and controlling urban development, in particular through the use of urban growth boundaries. See OR. ADMIN. R. 660-015-0000(1) to -0010(4). Oregon's system has been heralded as the country's leading land use program and until recent years, it has also enjoyed consistent support from Oregon citizens at the ballot box. See Clune, *supra* note 12, at 293; Sullivan, *supra* note 12, at 134.

<sup>48</sup> See Hunnicutt, *supra* note 11, at 34-37; Gieseler et al., *supra* note 11, at 88-90. Steven Gieseler, Staff Attorney at the Pacific Legal Foundation writes: "[v]ague standards, subjective balancing of interests, and an almost perfect record of judgments denying compensation suggest that *Penn Central* does not offer meaningful or reliable constitutional protection for property owners." Gieseler et al., *supra* note 11, at 88. He further suggests that with Measure 37 and similar proposals in other states, "American citizens are . . . putting an end to a regulatory takings regime that has gone too far." *Id.* at 104.

<sup>49</sup> See OR. REV. STAT. § 197.352; *supra* notes 47-48 and accompanying text; *infra* notes 50-68 and accompanying text.

such as Dorothy English, but that it is likely to have a dramatic effect on land use across the state.<sup>50</sup> As of May 25, 2007, the state had received over 6749 Measure 37 claims totaling over \$19 billion (not to mention the many claims Oregon's counties and local governments received).<sup>51</sup> Many Measure 37 claims have come not from individual landowners but from developers and extractive industries seeking to maximize their profits.<sup>52</sup> One extreme example is a \$203 million demand that James R. Miller filed in Dechutes County.<sup>53</sup> In 2000 Mr. Miller's 157 acre property became part of the Newberry National Volcanic Monument, an area in Central Oregon covering more than fifty thousand acres and comprised of lakes, lava flows, and spectacular geologic features.<sup>54</sup> Mr. Miller—who has owned the land since 1969—sought the right to develop a large pumice mine, geothermal power plant, and 100 vacation homes near one of the two lakes within the Monument.<sup>55</sup> Claims with such “monumental” implications were not something most Oregonians expected when they voted for Measure 37.<sup>56</sup> In fact, recent surveys show that the majority of Oregon voters either want to fix what they see as significant flaws in Measure 37 or believe that it should be repealed entirely.<sup>57</sup>

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<sup>50</sup> See MacLaren, *supra* note 20, at 58; Sullivan, *supra* note 12, at 162.

<sup>51</sup> DLCD SUMMARIES OF CLAIMS FILED, *supra* note 9.

<sup>52</sup> See Bjornstad, *supra* note 41.

<sup>53</sup> Editorial, *Judge's Ruling Limits the Bonanza from Measure 37*, OREGONIAN, Aug. 14, 2006, at B6 [hereinafter OREGONIAN Editorial].

<sup>54</sup> *Id.*; USDA Forest Serv., Newberry Crater National Volcanic Monument, <http://www.fs.fed.us/r6/centraloregon/newberrynvm/index.shtml> (last visited Sept. 21, 2007).

<sup>55</sup> OREGONIAN Editorial, *supra* note 53.

<sup>56</sup> See Clune, *supra* note 12, at 292, 296; OREGONIAN Editorial, *supra* note 53. Proponents assert that Measure 37 captured voter opposition to the restrictiveness of the state land use planning system. Hunnicutt, *supra* note 11, at 37, 39. Others have suggested that there was a certain degree of “special interest capture” involved; the Measure's success was attributable to the ability of Oregonians in Action and other property rights advocates to dominate media attention and political debate. Clune, *supra* note 12, at 296.

<sup>57</sup> Metz Memorandum, *supra* note 13 (voter survey concluding that “more than two-thirds of voters either want to fix what they see as significant flaws in Measure 37 or believe that it should be repealed entirely”). Many Oregonians who voted for the Measure may not have viewed it as a challenge to the land use planning system, and “smart growth” principles they had long upheld. Clune, *supra* note 12, at 292, 296. An April 2005, poll captures the complexity of voter sentiment. See *id.* at 292; Laura Oppenheimer & James Mayer, *Poll: Balance Rights, Land Use*, OREGONIAN, Apr. 21, 2005, at C1 (“On one hand, respondents valued protecting private property rights more than protecting farmland, the environment, or wildlife habitat . . . . On the other hand, more than two thirds said growth management makes Oregon a more desirable place to live.”).



Another concern is Measure 37's frustration of land use regulations already in place and its chilling effect on future regulation.<sup>58</sup> State and local governments faced with a flood of claims and without budgets to finance compensation have invariably exercised their option to waive land use regulations rather than pay compensation.<sup>59</sup> While Mr. Miller's claim ultimately proved unsuccessful, many more claims with similarly ambitious development plans—often located in hitherto protected farm and forestland—have received Measure 37 waivers.<sup>60</sup> The result is a patchwork of regulation where successful claimants can ignore rules that still apply to their neighbors.<sup>61</sup> Longer-lasting damage may result from the unwillingness of state or local governments to adopt regulations that provide important public benefits because they might be the target of future Measure 37 claims.<sup>62</sup> As U.S. Supreme Court Justice Oliver Wendell Holmes warned in the 1922 landmark case *Pennsylvania Coal v. Mahon*, "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."<sup>63</sup> Finally, Measure 37 has created an environment of uncertainty with respect to property interests that has affected individual property owners as well as the real estate, banking, and legal industries.<sup>64</sup>

It appears that the unraveling of Oregon's much-celebrated land use planning system has served as a warning to some states contemplating initiatives styled after Measure 37, yet the pressure from property rights advocates to adopt similar laws elsewhere continues.<sup>65</sup> Voters in

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<sup>58</sup> See Clune, *supra* note 12, at 286–88; MacLaren, *supra* note 20, at 68–69; Sullivan, *supra* note 12, at 156–57.

<sup>59</sup> See DAS CLAIMS REGISTRY, *supra* note 10.

<sup>60</sup> In re Claim for Compensation Under ORS 197.352, Final Order Claim No. M129449 (2006), available at [http://www.oregon.gov/LCD/MEASURE37/docs/finals2006/M129449\\_Miller\\_Deschutes.pdf](http://www.oregon.gov/LCD/MEASURE37/docs/finals2006/M129449_Miller_Deschutes.pdf) (denying Miller's claim); DAS CLAIMS REGISTRY, *supra* note 10. Portland State University has produced maps that provide a striking visual of Measure 37 claims across the state. See Portland State Univ., Mapping Measure 37 Claims, <http://www.pdx.edu/ims/maps.html> (last visited Sept. 21, 2007).

<sup>61</sup> See Clune, *supra* note 12, at 286.

<sup>62</sup> See *id.*; Sullivan, *supra* note 12, at 156.

<sup>63</sup> 260 U.S. 393, 413 (1922).

<sup>64</sup> See MacLaren, *supra* note 20, at 67.

<sup>65</sup> See *Ballot Measures Across America*, *supra* note 6. Many "regulatory takings" initiatives proposed after Measure 37 have taken advantage of the backlash against the U.S. Supreme Court's 2005 decision *Kelo v. City of New London*, holding that an eminent domain taking of private homes for economic redevelopment where private entities would benefit met the "public use" requirement of the Fifth Amendment. See 545 U.S. 469, 489–90 (2005); Salkin & Lavine, *supra* note 6, at 1069–70. Provisions similar to Measure 37 have been packaged together with state constitutional amendments or new state statutes that restrict the types

Washington, Idaho, and California rejected comparable ballot initiatives in the November 2006 elections.<sup>66</sup> Arizona voters, however, passed Proposition 207, labeled the "Private Property Rights Protection Act," a statute that includes "just compensation" provisions almost identical to Measure 37.<sup>67</sup> Regulatory takings initiatives are likely to resurface in future elections in at least five other states where Measure 37-type proposals were removed from the November 2006 ballot before election day, in most cases due to drafting or procedural errors.<sup>68</sup>

### B. A Statute in Flux

Measure 37 went into effect on December 2, 2004, but was challenged immediately on constitutional grounds.<sup>69</sup> The lead petitioner was former State Senator Hector MacPherson, a dairy farmer and long-time advocate for comprehensive land use planning in Oregon.<sup>70</sup> In a decisive February 2006 opinion, the Supreme Court of Oregon held that Measure 37 does not violate either the Oregon or the U.S. Constitution.<sup>71</sup> Following that decision, Measure 37 claims that had been

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of public uses for which eminent domain can be exercised. Salkin & Lavine, *supra* note 6, at 1069–70; *Ballot Measures Across America*, *supra* note 6.

<sup>66</sup> See *Ballot Measures Across America*, *supra* note 6.

<sup>67</sup> See BREWER, *BALLOT PROPOSITIONS*, *supra* note 8, at 177–92; BREWER, *OFFICIAL CANVAS*, *supra* note 8, at 16; *Ballot Measures Across America*, *supra* note 6.

<sup>68</sup> See *Ballot Measures Across America*, *supra* note 6. Initiatives similar to Measure 37 were removed from the ballot prior to the November 2006 elections in the following states: Colorado (withdrawn by the initiative sponsor as part of a political compromise), Missouri (stricken from the ballot by the Missouri Secretary of State for technical reasons), Montana (removed from the ballot after the Montana Supreme Court upheld a lower court ruling that the signature gathering effort was fraudulent), Nevada (regulatory takings provisions of the ballot measure removed after the Nevada Supreme Court ruled that the originally submitted ballot language did not comply with state requirements that ballot measures address only a single issue), and Oklahoma (removed from the ballot after the Oklahoma Supreme Court ruled that the proposed initiative was unconstitutional because it addressed more than one public policy issue). *Id.*

<sup>69</sup> *MacPherson v. Dep't of Admin. Servs.*, 130 P.3d 308, 312 (Or. 2006); DCLD Information About the Election, *supra* note 42.

<sup>70</sup> *MacPherson*, 130 P.3d at 308; Clune, *supra* note 12, at 288. The lawsuit was joined by a number of county farm bureaus; other affected individuals; and 1000 Friends of Oregon, a prominent state advocacy organization focused on land use issues. *MacPherson*, 130 P.3d at 308; Clune, *supra* note 12, at 289.

<sup>71</sup> *MacPherson*, 130 P.3d at 322. Notably, the court held that Measure 37 does not violate separation of powers nor does it impede the plenary power of the state's legislative bodies to enact land use regulations. *Id.* at 315, 318. Rather, the court explained, Measure 37 represents an exercise of legislative power by the people of Oregon through a ballot initiative rather than a limit on legislative power. *Id.* at 315. The court also explained that Measure 37 does not violate substantive due process because it advances the rational policy objective of compensating or otherwise relieving landowners for a diminution in property

temporarily put on hold once again flooded state and local government offices.<sup>72</sup>

The Oregon Department of Land Conservation and Development has promulgated administrative rules to govern the process of filing and reviewing Measure 37 claims, as have many cities and counties.<sup>73</sup> The state Attorney General and the Governor have issued memoranda providing clarifications on a number of legal issues, and Oregon's courts have begun to interpret various provisions of the statute.<sup>74</sup>

Most recently, the Oregon state legislature developed a proposal to amend Measure 37, which has been referred to the voters for a special election on November 6, 2007.<sup>75</sup> In short, Ballot Measure 49 clarifies private landowners' rights to build a limited number of homes on properties that they owned before land use restrictions were imposed; it also extends those rights to surviving spouses (this transferability is unclear under Measure 37).<sup>76</sup> At the same time, Measure 49 disallows subdivi-

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value resulting from certain land use regulations. *Id.* at 322. The court concluded: "Whether Measure 37 as a policy choice is wise or foolish, farsighted or blind, is beyond this court's purview." *Id.*

<sup>72</sup> See DAS CLAIMS REGISTRY, *supra* note 10; Or. Dep't of Land Conservation and Dev., Measure 37 Legal Information, Supreme Court Reinstates Measure 37 (Mar. 9, 2006), [http://www.oregon.gov/LCD/MEASURE37/legal\\_information.shtml](http://www.oregon.gov/LCD/MEASURE37/legal_information.shtml).

<sup>73</sup> OR. ADMIN. R. 125-145-0010 to -0105 (2007); e.g., COOS COUNTY, OR., CODE § 11.040.010-.080 (2005); LANE COUNTY, OR., CODE § 2.700-.770 (2004); MULTNOMAH COUNTY, OR., CODE § 27.500-.565 (2005). Note, however, that in January 2007, the Oregon Court of Appeals in *Corey v. Department of Land Conservation & Development*, held that the state's administrative rules, which provide only for written comment, do not satisfy constitutional due process requirements. 152 P.3d 933, 937-38 (Or. Ct. App. 2007), *amended by* 159 P.3d 327 (Or. Ct. App. 2007). One of the objectives of a newly established Committee on Land Use Fairness in the Oregon senate is to establish uniform procedures for dealing with Measure 37 claims. Randi Bjornstad, *Lawmaker Aims to Solve the Dilemma of Measure 37*, REG.-GUARD, Jan. 2, 2007, at A1. These procedures may be further revised under Measure 49. See MEASURE 49 EXPLANATORY STATEMENT, *supra* note 16; MEASURE 49 TEXT, *supra* note 26.

<sup>74</sup> See, e.g., Memorandum from Theodore R. Kulongoski, Governor of Or., Initial Questions & Answers About Ballot Measure 37 (Feb. 28, 2005), *available at* <http://governor.oregon.gov/Gov/pdf/m37qa.pdf>; Letter from Stephanie Striffler, Special Counsel to the Attorney Gen. of Or., to Lane Shetterly, Dir., Or. Dep't of Land Conservation and Dev. (Feb. 24, 2005) [hereinafter Striffler Letter], *available at* <http://www.oregon.gov/LCD/docs/measure37/m37dojadvice.pdf>; Or. Dep't of Justice, Pending Measure 37 Litigation, [http://www.doj.state.or.us/hot\\_topics/measure37litigation.shtml](http://www.doj.state.or.us/hot_topics/measure37litigation.shtml) (last visited Oct. 1, 2007) [hereinafter Pending Measure 37 Litigation].

<sup>75</sup> See MEASURE 49 TEXT, *supra* note 26; Or. Sec'y of State Elections Div., November 6, 2007, Special Election, <http://www.sos.state.or.us/elections/nov62007/> (last visited Sept. 7, 2007).

<sup>76</sup> Jackson County v. All Electors, No. 05-2993-E-3(2), slip op. at 9 (Or. Cir. Ct. Jackson Co. Jan. 19, 2007) (finding that Measure 37 claims are not transferable); MEASURE 49 Ex-

sions on high-value farmland, forestland and groundwater-restricted land and bars claims for strip malls, mines and other commercial and industrial development.<sup>77</sup> The primary goal of these changes is to make the law more consistent with the true intent of Oregon voters who passed Measure 37 in 2004.<sup>78</sup>

### C. Measure 37's Federal Law Exception and Measure 49's Fix

One of the many open legal questions presented by Measure 37 is the full scope of the statute's federal law exception.<sup>79</sup> The federal law exception provides that Measure 37 does not apply "to the extent that the land use regulation is required to comply with federal law."<sup>80</sup>

Property rights advocates have advanced the view that the federal law exception should include only those state and local land use laws explicitly mandated by federal law.<sup>81</sup> Such an interpretation would exempt very few, if any, land use regulations from Measure 37 because most federal laws implicating land use employ a more flexible federal-state partnership approach, which the U.S. Supreme Court has described as cooperative federalism.<sup>82</sup>

For example, under the Clean Water Act (the "CWA"), Oregon has established specific water pollution standards called Total Maximum

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PLANATORY STATEMENT, *supra* note 16; MEASURE 49 TEXT, *supra* note 26. See generally Jona Maukonen, *Transferring Measure 37 Waivers*, 36 ENV'T. L. 177 (2007).

<sup>77</sup> MEASURE 49 EXPLANATORY STATEMENT, *supra* note 16; MEASURE 49 TEXT, *supra* note 26.

<sup>78</sup> Bjornstad, *supra* note 73; Yes on 49, <http://yeson49.com> (last visited July, 29, 2007).

<sup>79</sup> See OR. REV. STAT. § 197.352(3)(C) (2005); *Columbia River Gorge Comm'n v. Hood River County*, 152 P.3d 997, 1004 (Or. Ct. App. 2007) (holding that Measure 37 does not apply to land use regulations adopted to comply with the Columbia River Gorge National Scenic Area Act), *review denied*, 160 P.3d 992 (Or. 2007).

<sup>80</sup> OR. REV. STAT. § 197.352(3)(C). Measure 37 has other important exceptions. *Id.* § 197.352(3). The law does not apply to regulations that restrict activities historically recognized as public nuisances, regulations for the protection of public health and safety such as fire and building codes, or regulations restricting the use of a property for the purpose of pornography or performing nude dancing (an exception that may have been inserted to avoid constitutional challenges). See *id.*; Sullivan, *supra* note 12, at 145. From a theoretical perspective, Measure 37's federal law exception seems to alter the baseline from which takings are measured in Oregon. See OR. REV. STAT. § 197.352(3)(C); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 (1992). As compared to Supreme Court jurisprudence, which suggests that "background principles of the State's law of property and nuisance" serve as a baseline, Measure 37 also exempts federal law from its definition of a regulatory taking. See OR. REV. STAT. § 197.352(3)(C); *Lucas*, 505 U.S. at 1029.

<sup>81</sup> Oregonians in Action, Ballot Measure 37 Frequently Asked Questions No. 6, <http://www.measure37.com/measure%2037/faq.htm> (last visited Jan. 25, 2007).

<sup>82</sup> *New York v. United States*, 505 U.S. 144, 167 (1992); *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 289 (1981); PLATER ET AL., *supra* note 21, at 305.

Daily Loads ("TMDLs") and has developed related plans to achieve these water quality goals.<sup>83</sup> The state's TMDLs and corresponding implementation plans are subject to the approval of the U.S. Environmental Protection Agency (the "EPA").<sup>84</sup> Because agriculture, forestry, and other land use activities are responsible for a large percentage of total water pollution, Oregon has included a number of land use controls in its implementation plans.<sup>85</sup> If these state land use rules, approved by the EPA pursuant to the CWA, were contested via a Measure 37 claim, could they be waived by the state of Oregon or are they "required to comply with federal law"?<sup>86</sup>

A similar question can be asked about land use regulations adopted by the state and local governments to comply with a number of other federal laws that employ a cooperative federalism approach, for example the Coastal Zone Management Act and the Safe Drinking Water Act.<sup>87</sup> Accordingly, whether Measure 37's federal law exception is interpreted broadly or narrowly may have significant implications for Oregon's landscape.<sup>88</sup>

Measure 49—on the ballot for a November 2007 special election vote—could clear up this issue because it defines "federal law" as:

A statute, regulation, order, decree or policy enacted by a federal entity or by a state entity acting under authority delegated by the federal government; [a] requirement contained in a plan or rule enacted by a compact entity; or [a] requirement contained in a permit issued by a federal or state agency pursuant to a federal or state regulation.<sup>89</sup>

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<sup>83</sup> See 33 U.S.C. § 1313(d)(1)(C), (d)(3), (e) (2000); Or. Dep't of Envtl. Quality, Total Maximum Daily Loads Program, <http://www.deq.state.or.us/wq/TMDLs/willamette.htm> (last visited Feb. 28, 2007) [hereinafter Oregon TMDL Program]; see, e.g., OR. DEP'T OF ENVTL. QUALITY, WILLAMETTE BASIN TMDL, CHAPTER 14: WATER QUALITY MANAGEMENT PLAN 4-5 (2006) [hereinafter WILLAMETTE BASIN PLAN], available at <http://www.deq.state.or.us/wq/TMDLs/willamette.htm>.

<sup>84</sup> 33 U.S.C. § 1313(d)(2), (e)(2).

<sup>85</sup> See, e.g., WILLAMETTE BASIN PLAN, *supra* note 83; U.S. ENVTL. PROT. AGENCY, INTRODUCTION TO THE CLEAN WATER ACT 57, <http://www.epa.gov/watertrain/cwa> (last visited Sept. 21, 2007) [hereinafter EPA CWA INTRODUCTION].

<sup>86</sup> See 33 U.S.C. § 1313(e)(2); OR. REV. STAT. § 197.352(3)(C); see, e.g., WILLAMETTE BASIN PLAN, *supra* note 83.

<sup>87</sup> See Coastal Zone Management Act of 1972, 16 U.S.C.A. §§ 1451-1465 (West 2000 & Supp. 2007); Safe Drinking Water Act, 42 U.S.C.A. §§ 300f-300j-26 (West 2003 & Supp. 2007); MacLaren, *supra* note 20, at 66; Sullivan, *supra* note 12, at 145.

<sup>88</sup> See *Columbia*, 152 P.3d at 1004; MacLaren, *supra* note 20, at 66; Sullivan, *supra* note 12, at 145.

<sup>89</sup> MEASURE 49 TEXT, *supra* note 26, § 2(6).

The remainder of this Note explains the context and importance of this definition and argues for a broad interpretation of Measure 37's federal law exception that is consistent with Measure 49.<sup>90</sup>

## II. LAND USE REGULATION AS PART OF A FEDERAL FRAMEWORK

This Part reviews U.S. Supreme Court precedent that explains the methods that Congress uses to require compliance with federal law, and the constitutional limits of these methods.<sup>91</sup> It then describes cooperative federalism as a pervasive approach in modern environmental law and introduces two cooperative federalism statutes that have significant land use implications: the Clean Water Act and the Columbia River Gorge National Scenic Area Act.<sup>92</sup> Finally, it highlights the Oregon Court of Appeals February 2007 decision in *Columbia River Gorge Commission v. Hood River County*, holding that county land use ordinances adopted pursuant to the Scenic Area Act are exempt from Measure 37 under the federal law exception.<sup>93</sup>

### A. Federal Regulation and Its Constitutional Limits

What options does Congress have to require compliance with a federal law?<sup>94</sup> Where Congress has established authority to exercise legislative power under Article I, Section 8 of the U.S. Constitution, it has two choices.<sup>95</sup> First, Congress can regulate individual activity directly.<sup>96</sup> The U.S. Supreme Court has held that Congress may do so even in areas of traditional state function such as land use.<sup>97</sup> Second, Congress can provide states with incentives to administer regulatory programs that address federal goals.<sup>98</sup> However, Congress cannot regulate the "States as States" by commanding state legislatures to adopt specific laws or regulations or by directing state executive officials to enforce federal laws.<sup>99</sup>

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<sup>90</sup> See *infra* notes 91–314 and accompanying text.

<sup>91</sup> See *infra* notes 94–123 and accompanying text.

<sup>92</sup> See *infra* notes 124–177 and accompanying text.

<sup>93</sup> 152 P.3d 997, 1004 (Or. Ct. App. 2007), *review denied*, 160 P.3d 992 (Or. 2007); see *infra* notes 178–191 and accompanying text.

<sup>94</sup> See OR. REV. STAT. § 197.352(3) (C) (2005); *New York v. United States*, 505 U.S. 144, 167 (1992).

<sup>95</sup> See U.S. CONST. art. I, § 8; see *infra* notes 96–98 and accompanying text.

<sup>96</sup> See U.S. CONST. art. I, § 8.

<sup>97</sup> See *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 291 (1981).

<sup>98</sup> See *New York*, 505 U.S. at 166.

<sup>99</sup> *Printz v. United States*, 521 U.S. 898, 935 (1997); *New York*, 505 U.S. at 175–76; *Hodel*, 452 U.S. at 286–87.

# 1. *Hodel v. Virginia Surface Mining & Reclamation Ass'n*: An Endorsement of Cooperative Federalism

In 1981 in *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, the U.S. Supreme Court held that the Surface Mining Control and Reclamation Act of 1977 does not violate the Tenth Amendment.<sup>100</sup> The Act's interim program mandated immediate promulgation and federal enforcement of environmental protection performance standards, which could be complemented by ongoing state regulation.<sup>101</sup> Under the permanent program, states had the option to develop and enforce their own regulatory program so long as it met the Act's standards and was approved by the Secretary of the Interior.<sup>102</sup> If states did not submit a satisfactory program, or failed to submit a program at all, the Secretary would develop and enforce a federal permanent program.<sup>103</sup>

The plaintiffs, an association of coal mining companies and several individual landowners, argued that the performance standards for surface mining on steep slopes under the interim program impermissibly interfered with the traditional state and local power to regulate land use and thus violated the Tenth Amendment.<sup>104</sup> The Court disagreed, holding that Congress's authority to regulate private activity was limited only by the extent of its Commerce Power and that the standards were valid even though they displaced the states' exercise of traditional police powers.<sup>105</sup>

Despite upholding such direct regulation of private activity, Justice Marshall, writing for the majority, noted a "sharp distinction between congressional regulation of private persons and businesses" and the regulation of "States as States."<sup>106</sup> The Court instructed that Congress could not "commandeer" the "legislative process of states by directly compelling them to enact and enforce a federal regulatory program."<sup>107</sup> Nevertheless, the Court found no such problem with the Surface Mining Act because, under the permanent program, states could choose

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<sup>100</sup> *Hodel*, 452 U.S. at 291.

<sup>101</sup> *Id.* at 269.

<sup>102</sup> *Id.* at 271.

<sup>103</sup> *Id.* at 272.

<sup>104</sup> *Id.* at 273.

<sup>105</sup> *Hodel*, 452 U.S. at 291-92.

<sup>106</sup> *Id.* at 286.

<sup>107</sup> *Id.* at 288.

whether or not to bear the regulatory burden.<sup>108</sup> The Court endorsed the statute as a model of cooperative federalism.<sup>109</sup>

2. *New York v. United States* and *Printz v. United States*: The Anticommandeering Principle

In 1992, in *New York v. United States*, the U.S. Supreme Court struck down the take title provision of the Low-Level Radioactive Waste Policy Act of 1985, holding that the provision unconstitutionally commandeered state legislatures into serving federal purposes.<sup>110</sup> The State of New York and two of its counties argued that the Waste Policy Act was inconsistent with the Tenth Amendment.<sup>111</sup> The Court upheld two key provisions of the Act that provided monetary and access incentives for states to develop waste storage facilities within their borders.<sup>112</sup> The Court also determined, however, that the Act's take title provision was problematic.<sup>113</sup> The take title provision offered states a choice between regulating radioactive waste according to Congress's instructions or taking the title to (and associated liability for) the waste.<sup>114</sup> Justice O'Connor, writing for the majority, noted that the first option, "a simple command to state governments to implement legislation enacted by Congress," is beyond Congress's powers.<sup>115</sup> The Court further reasoned that the alternative—requiring states to accept ownership of the waste—would unconstitutionally "commandeer" state governments into the service of federal regulatory purposes.<sup>116</sup> The Court concluded that "[a] choice between two unconstitutionally coercive regulatory tech-

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

<sup>109</sup> *Id.* at 289. Justice Marshall, writing for the majority, explained:

The most that can be said is that the Surface Mining Act establishes a program of cooperative federalism that allows the States, within limits established by federal minimum standards, to enact and administer their own regulatory programs, structured to meet their own particular needs. In this respect, the Act resembles a number of other federal statutes that have survived Tenth Amendment challenges in the lower federal courts.

*Id.*

<sup>110</sup> *New York*, 505 U.S. at 176.

<sup>111</sup> *Id.* at 155.

<sup>112</sup> *Id.* at 173, 174.

<sup>113</sup> *Id.* at 175-76.

<sup>114</sup> *Id.* at 153-54, 175-76.

<sup>115</sup> *New York*, 505 U.S. at 176.

<sup>116</sup> *Id.* at 175.



niques is no choice at all," and held the entire provision unconstitutional.<sup>117</sup>

In 1997, in *Printz v. United States*, the U.S. Supreme Court extended the anticommandeering principle from *New York* to executive functions.<sup>118</sup> There, two county chief law enforcement officers challenged the constitutionality of interim provisions of the Brady Handgun Violence Prevention Act that required them to conduct background checks on prospective handgun purchasers.<sup>119</sup> The Court held that the Act violated the Tenth Amendment, reasoning that the federal government may not conscript state officers to administer or enforce a federal regulatory program.<sup>120</sup>

Although the holding in *New York* clearly prohibits federal directives to states to promulgate and enforce specific laws or regulations, the Court identified at least two methods that Congress can use to influence state regulatory choices.<sup>121</sup> First, Congress may attach conditions to federal funding in order to induce state or local action.<sup>122</sup> Second, Congress may employ a cooperative federalism approach by offering states the "choice of regulating that [private] activity according to federal standards or having state law preempted by federal regulation."<sup>123</sup>

### B. Cooperative Federalism: A Pervasive Model in Federal Environmental Law

Given the constitutional options available to the federal government—to regulate individual activity directly or to provide states with incentives to administer regulatory programs that address federal goals—most federal statutes in the areas of environmental and land use law adopt the latter approach.<sup>124</sup> Only a very limited number of federal environmental laws (for example, pesticide labeling rules and regulations concerning defense generated nuclear waste) are imple-

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<sup>117</sup> *Id.* at 176.

<sup>118</sup> *Printz*, 521 U.S. at 935.

<sup>119</sup> *Id.* at 902-04.

<sup>120</sup> *Id.* at 935.

<sup>121</sup> *New York*, 505 U.S. at 167, 176.

<sup>122</sup> *Id.* at 167.

<sup>123</sup> *Id.* The Court summarized the distinction between these permissible means of encouraging state action and the unconstitutional take title provision as follows: "[W]hile Congress has substantial power under the Constitution to encourage the States to provide for the disposal of the radioactive waste generated within their borders, the Constitution does not confer upon Congress the ability simply to compel the States to do so." *Id.* at 149.

<sup>124</sup> See PLATER ET AL., *supra* note 21, at 305; Fischman, *supra* note 21, at 183-84.

mented exclusively by the federal government.<sup>125</sup> Instead, the vast majority of federal environmental laws involve some sort of federal-state cooperation.<sup>126</sup> Many statutes employ a cooperative federalism approach to induce state action much like the permanent program of the Surface Mining and Control and Reclamation Act in *Hodel*.<sup>127</sup>

Under a cooperative federalism model, environmental standards are set at the federal level and legal authority is delegated to states that consent to take on planning, implementation, and/or enforcement responsibilities to achieve those standards.<sup>128</sup> Essentially, cooperative federalism statutes offer states the choice of regulating according to federal standards or having state law preempted by federal regulation.<sup>129</sup> Faced with this choice, many states have chosen to administer federal environmental programs: approximately seventy-five to eighty percent of the pollution control permits authorized by federal law are actually issued by state agencies<sup>130</sup> and as much as ninety-six percent of total environmental enforcement actions are carried out by state authorities.<sup>131</sup>

Cooperative federalism is often referred to as a "carrot-and-stick approach."<sup>132</sup> Federal funding is a significant carrot, used to induce states to accept responsibility for implementing federal programs.<sup>133</sup> States are also encouraged by the opportunity to tailor substantive standards, control permitting, and choose environmental management strategies in a way that is responsive to local environmental concerns

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<sup>125</sup> Fischman, *supra* note 21, at 183.

<sup>126</sup> PLATER ET AL., *supra* note 21, at 305; Fischman, *supra* note 21, at 183-84.

<sup>127</sup> *Hodel*, 452 U.S. at 271-72; PLATER ET AL., *supra* note 21, at 305. Cooperative federalism rose with the New Deal as the national government became more involved in the operation of state programs. Fischman, *supra* note 21, at 184-85. The approach took hold and became an organizing concept in the environmental arena with the explosion of environmental legislation in the 1970s. *Id.* at 187.

<sup>128</sup> PLATER ET AL., *supra* note 21, at 305.

<sup>129</sup> See *New York*, 505 U.S. at 167; see also Robert L. Glicksman, *From Cooperative to Inoperative Federalism: The Perverse Mutation of Environmental Law and Policy*, 41 WAKE FOREST L. REV. 719, 737 (2006) ("One terse definition of cooperative federalism is 'shared governmental responsibilities for regulating private activity.'").

<sup>130</sup> PLATER ET AL., *supra* note 21, at 306.

<sup>131</sup> MARY E. BLAKESLEE & FANG RONG, STATE ENVIRONMENTAL AGENCY CONTRIBUTIONS TO ENFORCEMENT AND COMPLIANCE 1-5 (2006). This figure includes enforcement of federal programs delegated to states as well as some state-only programs. *Id.*

<sup>132</sup> Fischman, *supra* note 21, at 189.

<sup>133</sup> *Id.* at 190; Glicksman, *supra* note 129, at 738-39; see, e.g., 33 U.S.C. §§ 1256, 1329(h) (2000 & Supp. III 2003).

and economic interests.<sup>134</sup> If states elect not to take on the responsibility of administering federal programs, most cooperative federalism statutes provide for direct federal regulation—a preemption stick.<sup>135</sup>

Although the cooperative federalism model gives states flexibility to create regulatory programs tailored to their needs, state-administered programs remain subject to federal oversight.<sup>136</sup> State programs must be approved at the outset by the relevant federal agency and, under most cooperative federalism statutes, states must report regularly thereafter on the status of implementation.<sup>137</sup> If state programs do not meet federal standards, the federal agency may withhold federal funds or even pull the program, revoking the state's authority to substitute for direct federal control.<sup>138</sup> In addition to program oversight, some statutes give federal agencies the authority to veto individual state permitting decisions or override state enforcement actions.<sup>139</sup>

A case that emphasizes the importance of such federal oversight is the 1992 U.S. Supreme Court decision *Arkansas v. Oklahoma*, which held that a federally approved state water quality standard under the CWA is part of federal water pollution law.<sup>140</sup> The State of Oklahoma challenged a permit the EPA granted to a sewage treatment plant in Arkansas that discharged into the Illinois River less than forty miles upstream from the Arkansas—Oklahoma border.<sup>141</sup> Oklahoma argued that the EPA had to take greater account of the permit's effect on the downstream state's ability to achieve its water quality standards.<sup>142</sup> The Court held that Oklahoma's water quality standards "promulgated by the State with substantial guidance from the EPA and approved by the

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<sup>134</sup> See *Hodel*, 452 U.S. at 289; Fischman, *supra* note 21, at 192–93. In *Hodel*, Justice Marshall, writing for the majority, described cooperative federalism as an approach that "allows the States, within limits established by federal minimum standards, to enact and administer their own regulatory programs, structured to meet their own particular needs." *Hodel*, 452 U.S. at 289.

<sup>135</sup> See *New York*, 505 U.S. at 167–68; see, e.g., 16 U.S.C. §§ 544e(c), 544f(l)(1) (2000); 33 U.S.C. § 1313(b)(1), (d)(2) (2000).

<sup>136</sup> Fischman, *supra* note 21, at 190, 192; see, e.g., 16 U.S.C. §§ 544d(f), 544e(b)(3), 544f(i), (j); 33 U.S.C. § 1313(c)(1), (d)(2), (e).

<sup>137</sup> See, e.g., 16 U.S.C. §§ 544d(f), 544e(b)(3), 544f(i), (j); 33 U.S.C. § 1313(c)(1), (d)(2), (e).

<sup>138</sup> Fischman, *supra* note 21, at 192.

<sup>139</sup> Glucksman, *supra* note 129, at 742.

<sup>140</sup> *Arkansas v. Oklahoma*, 503 U.S. 91, 110 (1992).

<sup>141</sup> *Id.* at 95.

<sup>142</sup> *Id.* In this case, Arkansas had not yet been authorized to issue point source permits, and thus the EPA issued the permit to the sewage treatment plant directly. *Id.* at 103. Oklahoma, on the other hand, had developed its own water quality standards, which had been approved by the EPA. See *id.* at 95 n.2, 101.

Agency . . . are part of the federal law of water pollution control" and could legitimately be applied to a permit decision across state lines.<sup>143</sup> Thus, the oversight required by the CWA federalized the state water quality standards.<sup>144</sup>

Two federal statutes that employ a cooperative federalism approach—the Clean Water Act and the Columbia River Gorge National Scenic Area Act—are described briefly below.<sup>145</sup> The descriptions are intended to illustrate the basic structure of federal-state cooperation and demonstrate how state and local land use laws are included in such federal frameworks.<sup>146</sup>

### 1. The Clean Water Act

The Federal Water Pollution Control Act, commonly known as the Clean Water Act, is a quintessential cooperative federalism statute.<sup>147</sup> The CWA calls on states to establish water quality standards for all intrastate waters and to submit them to the U.S. Environmental Protection Agency for approval.<sup>148</sup> The CWA induces such action in part through federal funding that is made available to those states that create a regulatory scheme at least as stringent as the statute requires.<sup>149</sup> If a state fails to submit water quality standards to the EPA or

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<sup>143</sup> *Id.* at 110. Although the Court held that the EPA had the authority to take into account Oklahoma's water quality standards in its Arkansas permitting decision, it upheld the EPA's decision to grant the permit in Arkansas based on a finding that the new discharges would cause no detectable violation of Oklahoma's water quality standards. *Id.* at 110–11.

<sup>144</sup> *Id.* at 110. The U.S. Courts of Appeals have extended the *Arkansas* rule to the Clean Air Act, another cooperative federalism statute. See *Safe Air for Everyone v. EPA*, 475 F.3d 1096, 1105 (9th Cir. 2007) (holding that once a State Implementation Plan is approved by the EPA it has "the force and effect of federal law" and cannot be unilaterally changed by the state); *Sierra Club v. Leavitt*, 368 F.3d 1300, 1305 n.9 (11th Cir. 2004) (reasoning in dicta that a state permitting requirement is "sufficiently intertwined with the administration of the CAA that it can be considered part of the federal law of air pollution control"). They have not extended the rule, however, to the Surface Mining Control and Reclamation Act. See *Pa. Fed'n of Sportsmen's Clubs, Inc. v. Hess*, 297 F.3d 310, 326–27 (3d Cir. 2002) (distinguishing the "state-specific" nature of mining standards from the interstate nature of the CWA where a federal role is integral); *Bragg v. W. Va. Coal Ass'n*, 248 F.3d 275, 294 (4th Cir. 2001) (holding that the Surface Mining Act is a scheme of mutually exclusive regulation by either the U.S. Secretary of the Interior or the state regulatory authority, unlike the CWA's "unitary federal enforcement scheme" that incorporates state law in certain circumstances).

<sup>145</sup> See *infra* notes 147–177 and accompanying text.

<sup>146</sup> See *infra* notes 147–177 and accompanying text.

<sup>147</sup> See Clean Water Act, 33 U.S.C.A. §§ 1251–1387 (West 2001 & Supp. 2007).

<sup>148</sup> See *id.* § 1313(a).

<sup>149</sup> See *id.* §§ 1256, 1329(h).

submits standards that do not meet CWA requirements, the EPA will promulgate standards binding on that state.<sup>150</sup>

The CWA recognizes that in many cases two kinds of pollution management will be necessary to achieve water quality standards: 1) point source or "end of pipe" controls that limit the amount of effluent allowed from facilities such as sewage treatment plants, and 2) non-point source controls.<sup>151</sup> Under the CWA, all point sources require a permit from the National Pollutant Discharge and Elimination System to ensure that the source meets federal technology-based standards.<sup>152</sup> Point source permitting may be delegated to the states and Oregon is one of many states that have taken on this responsibility.<sup>153</sup>

The CWA also calls on states to develop a list of impaired waterbodies: rivers, lakes, and streams that are failing to achieve water quality standards despite point source controls.<sup>154</sup> Such waters are often polluted mostly by nonpoint sources such as agriculture, forestry, and other land use practices.<sup>155</sup> For each impaired waterbody, the CWA requires states to develop TMDLs, quantitative pollution budgets for pollutants such as mercury, *E. coli*, and heat.<sup>156</sup> As with water quality standards, the EPA must approve state TMDLs and will step in and establish TMDLs for relevant waterbodies if state standards do not meet CWA requirements.<sup>157</sup>

Oregon has accepted the responsibility for developing TMDLs for its impaired waterbodies.<sup>158</sup> The state sets pollution budgets that

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<sup>150</sup> See *id.* § 1313(b)(1).

<sup>151</sup> See *id.* §§ 1311(a), 1313(d), (e), 1329, 1342.

<sup>152</sup> See 33 U.S.C. §§ 1311(a), 1342(a)(1).

<sup>153</sup> See *id.* § 1342(a)(5); U.S. Envtl. Prot. Agency, National Pollutant Discharge Elimination System: State Program Status, [http://cfpub.epa.gov/npdes/statestats.cfm?program\\_id=12](http://cfpub.epa.gov/npdes/statestats.cfm?program_id=12) (last visited Sept. 21, 2007).

<sup>154</sup> See 33 U.S.C. § 1313(d)(1)(A). States must also identify waters for which controls on thermal discharges "are not stringent enough to assure the protection and propagation of a balanced indigenous population of shellfish, fish and wildlife." See *id.* § 1313(d)(1)(B).

<sup>155</sup> See EPA CWA INTRODUCTION, *supra* note 85, at 57. As the EPA explains:

According to states' 305(b) and 303(d) reports, more miles of rivers and acres of lakes are impaired by overland runoff from rowcrop farming, livestock pasturing, and other types of nonpoint sources than by industrial facilities, municipal sewage plants, and point source runoff from municipal storm sewer systems and storm water associated with industrial activity.

*Id.*

<sup>156</sup> 33 U.S.C. § 1313(d)(1)(C), (D).

<sup>157</sup> 33 U.S.C. § 1313(d)(2); EPA CWA INTRODUCTION, *supra* note 85, at 31 ("If EPA ultimately decides that it cannot approve a TMDL that has been submitted, the Agency would need to develop and promulgate what it considers to be an acceptable TMDL.").

<sup>158</sup> See Oregon TMDL Program, *supra* note 83.

are consistent with the CWA requirement that "[s]uch load[s] shall be established at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality."<sup>159</sup> Although the state's TMDLs must meet this federal requirement, the state has significant leeway in terms of how it allocates the quantitative pollution budgets among pollution sources.<sup>160</sup> Oregon makes the allocations as part of a planning process required by the CWA and on a regular basis submits its plans for achieving water quality standards to the EPA for approval in the form of basin-wide Water Quality Management Plans.<sup>161</sup> These plans set out a framework of management strategies and identify specific state and local agencies responsible for carrying out those strategies.<sup>162</sup> For example, the Willamette Basin Water Quality Management Plan, approved recently by the EPA, incorporates Management Plans and Rules developed by the Oregon Department of Agriculture, the Oregon Forestry Practices Act administered by the state Department of Forestry, the Oregon Department of Environmental Quality Non-point Source Control Program Plan, and various city and county TMDL implementation plans.<sup>163</sup>

A significant number of land use regulations (as well as nonregulatory programs addressing land use) are included in Oregon's EPA-approved plans to achieve water quality standards.<sup>164</sup> For example, the following land use regulations are implicated by the state's plans to

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<sup>159</sup> 33 U.S.C. § 1313(d)(1)(C). The standard for thermal TMDLs is as follows:

[T]o assure protection and propagation of a balanced, indigenous population of shellfish, fish and wildlife. Such estimates shall take into account the normal water temperatures, flow rates, seasonal variations, existing sources of heat input, and the dissipative capacity of the identified waters or parts thereof. Such estimates shall include a calculation of the maximum heat input that can be made into each such part and shall include a margin of safety which takes into account any lack of knowledge concerning the development of thermal water quality criteria for such protection and propagation in the identified waters or parts thereof.

*Id.* § 1313(d)(1)(D).

<sup>160</sup> EPA CWA INTRODUCTION, *supra* note 85, at 34 ("States, territories and tribes are free to allocate among sources in any way they see fit, so long as the sum of all the allocations is no greater than the overall loading cap.").

<sup>161</sup> 33 U.S.C. § 1313(e); 40 C.F.R. § 130.5-.6 (2006); Oregon TMDL Program, *supra* note 83. See generally WILLAMETTE BASIN PLAN, *supra* note 83.

<sup>162</sup> See 40 C.F.R. § 130.6; see, e.g., WILLAMETTE BASIN PLAN, *supra* note 83, at 4, 7.

<sup>163</sup> See WILLAMETTE BASIN PLAN, *supra* note 83, at 7-9.

<sup>164</sup> See *id.*; *infra* notes 165-167 and accompanying text.

achieve its heat TMDLs in the Willamette Basin: Oregon Department of Agriculture rules prohibiting landowners from restricting the growth of streamside vegetation that provides shade and keeps water cool,<sup>165</sup> riparian management provisions under the Oregon Forest Practices Act,<sup>166</sup> and urban land use controls such as riparian protection overlays that are included in municipal TMDL implementation plans.<sup>167</sup>

## 2. The Columbia River Gorge National Scenic Area Act

The Columbia River Gorge National Scenic Area Act (the "Scenic Area Act") also employs a cooperative federalism approach.<sup>168</sup> The Act establishes a national scenic area to protect and enhance the picturesque Columbia River Gorge, an eighty-mile long sea-level passage through the Cascade Mountain Range dividing Oregon from Washington State.<sup>169</sup> The Act authorizes Oregon and Washington to enter into an interstate compact to create a new bistate Columbia River Gorge Commission.<sup>170</sup> Among other things, the Commission is tasked with developing a Scenic Area Management Plan together with the U.S. Forest Service.<sup>171</sup> By the terms of the Act, the Management Plan must be developed according to a specified process and it must include specific land use designations and development standards that are consistent with nine statutory standards.<sup>172</sup>

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<sup>165</sup> See WILLAMETTE BASIN PLAN, *supra* note 83, at 7–8, 12; see also Middle Willamette Agricultural Water Quality Management Program, OR. ADMIN. R. 603-095-2340(1)(b) (2002) ("By January 1, 2003, agricultural activities shall allow the growth and establishment of vegetation along perennial streams consistent with site capability to promote infiltration of overland flow, streambank stability and provide moderation of solar heating. Minimal breaks in shade vegetation for essential management activities are considered appropriate.").

<sup>166</sup> See WILLAMETTE BASIN PLAN, *supra* note 83, at 8, 12; see also Oregon Department of Forestry, Water Protection Rules, Vegetation Retention Along Streams, OR. ADMIN. R. 629-640-0000 to -0400 (2006).

<sup>167</sup> See WILLAMETTE BASIN PLAN, *supra* note 83, at 9, 13.

<sup>168</sup> See Columbia River Gorge National Scenic Area Act, 16 U.S.C. §§ 544–544p (2000); *Columbia*, 152 P.3d at 1000–03.

<sup>169</sup> 16 U.S.C. § 544a (2000); Brief and Supplemental Excerpt of Record of Plaintiff-Respondent Columbia River Gorge Commission at 5–6, *Columbia River Gorge Comm'n v. Hood River Co.*, 152 P.3d 997 (Or. Ct. App. 2007) (CA No. A129652) [hereinafter *Commission's Brief*]; USDA Forest Serv., Columbia River Gorge National Scenic Area, <http://www.fs.fed.us/r6/columbia/forest> (last visited Sept. 21, 2007). The Scenic Area encompasses 292,000 acre area of private, state, county, tribal, and federal land on both sides of the river. *Commission's Brief*, *supra*, at 6.

<sup>170</sup> 16 U.S.C. § 544c(a).

<sup>171</sup> *Id.* § 544d.

<sup>172</sup> *Id.*

The land use regulations set out in the Management Plan are administered through land use ordinances adopted by the six Gorge counties (three in Oregon and three in Washington).<sup>173</sup> Although implementation occurs at the county level, the federal government retains an oversight role.<sup>174</sup> The U.S. Secretary of Agriculture must concur with the Management Plan and supervise the Commission's approval of the counties' land use ordinances.<sup>175</sup> The Act also contains an important preemption provision: if any Gorge county does not adopt land use ordinances consistent with the Management Plan, the Commission must adopt and administer land use ordinances in that county.<sup>176</sup> All three Oregon counties and two of the Washington counties have adopted land use ordinances pursuant to the Management Plan and the Commission administers a land use ordinance in Klickitat County, Washington.<sup>177</sup>

C. Columbia River Gorge Commission v. Hood River County:  
*Cooperative Federalism Fits the Federal Law Exception*

The scenic area ordinances on the Oregon side of the Gorge were recently the subject of a Measure 37 lawsuit.<sup>178</sup> In *Columbia River Gorge Commission v. Hood River County*, decided in February 2007, the Oregon Court of Appeals held that Measure 37 does not apply to county land use ordinances adopted pursuant to the Management Plan because they are required to comply with the Scenic Area Act.<sup>179</sup>

The case began when two private landowners filed Measure 37 claims seeking compensation or a waiver of minimum lot size requirements that restricted their ability to subdivide and develop their properties.<sup>180</sup> The contested land use regulations were imposed by Hood

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<sup>173</sup> *Id.* §§ 544e(b), 544f(h). The three Oregon counties are Hood River, Multnomah, and Wasco; the three Washington counties are Clark, Klickitat, and Skamania. *Id.* § 544(d).

<sup>174</sup> *Id.* §§ 544d(f); 544f(j).

<sup>175</sup> 16 U.S.C. §§ 544d(f); 544f(j).

<sup>176</sup> *Id.* §§ 544e(c); 544f(l)(1).

<sup>177</sup> Columbia River Gorge Commission, Land Use Ordinance § 350-81 (Aug. 1, 2006); CLARK COUNTY, WA., CODE § 40.240 (2006); HOOD RIVER COUNTY, OR., CODE art. 75 (2005); MULTNOMAH COUNTY, OR., CODE ch. 38 (2006); SKAMANIA COUNTY, WA., CODE title 22 (2005); Wasco County, Or., National Scenic Area Land Use & Development Ordinance (Jan. 10, 2006).

<sup>178</sup> See generally *Columbia*, 152 P.3d 997.

<sup>179</sup> *Id.* at 1004.

<sup>180</sup> *Id.* at 999. One landowner contested a two acre minimum lot size requirement that applies to his property, and the other landowner contested a forty acre minimum lot size requirement that applies to his land, which is located in a different part of the scenic area. Commission's Brief, *supra* note 169, at 10.



River County pursuant to the Scenic Area Management Plan.<sup>181</sup> Hood River County was prepared to approve the claims because of the threat of attorney's fees imposed by Measure 37.<sup>182</sup> However, the Commission, in cooperation with the three Oregon counties affected by the Scenic Area Act, sought a declaratory judgment as to whether the counties' land use ordinances fell within Measure 37's federal law exception.<sup>183</sup> The landowners were included as necessary parties; the State of Oregon and Friends of the Columbia Gorge, a nonprofit organization, intervened on the side of the Commission.<sup>184</sup> The trial court issued a declaratory judgment in favor of the Commission on August 1, 2006, and the landowners appealed the decision to the Oregon Court of Appeals.<sup>185</sup>

In February 2007, the Oregon Court of Appeals affirmed the trial court decision, holding that the county land use ordinances enacted in accordance with and to implement the Scenic Area Management Plan are within the scope of Measure 37's federal law exception.<sup>186</sup> The court reasoned that the nine "goal-like" statutory standards in the Scenic Area Act are insufficient to satisfy the requirements of the federal law; rather, the Scenic Area Act explicitly requires land use ordinances such as the minimum lot size requirements at issue in the case.<sup>187</sup> In reaching its conclusion, the court relied on the Commission's power to disapprove county ordinances that do not meet the Act's requirements and to enact ordinances consistent with the Act should the counties fail to do so themselves.<sup>188</sup> The court also emphasized the degree of federal oversight provided by the Scenic Area Act, noting the Secretary of Agriculture's responsibility for approving the Management Plan and county ordinances.<sup>189</sup>

The Supreme Court of Oregon denied the landowners' petition for review on May 22, 2007, thus securing the precedential value of the

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<sup>181</sup> *Columbia*, 152 P.3d at 999.

<sup>182</sup> Telephone Interview with Jeffrey B. Litwak, Counsel, Columbia River Gorge Commission (Nov. 4, 2006) [hereinafter Litwak Interview].

<sup>183</sup> OR. REV. STAT. § 28.020 (2005); *Columbia*, 152 P.3d at 999; Litwak Interview, *supra* note 182.

<sup>184</sup> *Columbia*, 152 P.3d at 999; Litwak Interview, *supra* note 182.

<sup>185</sup> *Columbia*, 152 P.3d at 999–1000. Oregonians in Action, the lead organization behind the Measure 37 campaign, represented the landowners. Appellant's Brief and Excerpt of the Record at 24, *Columbia River Gorge Comm'n v. Hood River Co.*, 152 P.3d 997 (Or. Ct. App. 2007) (CA No. A129652) [hereinafter Appellant's Brief].

<sup>186</sup> *Columbia*, 152 P.3d at 1004.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.* at 1002–03.

<sup>189</sup> *Id.* at 1004.

Court of Appeals' decision.<sup>190</sup> Significantly, *Columbia* highlights three aspects of the Scenic Area Act that are common to other cooperative federalism statutes: 1) "goal-like" statutory standards that require further development and implementation at the state or local level, 2) an agency with the authority to preempt state and local regulations, and 3) federal approval of locally administered regulatory programs.<sup>191</sup>

### III. THE CASE FOR A BROAD INTERPRETATION OF MEASURE 37'S FEDERAL LAW EXCEPTION

Cooperative federalism statutes are complex, each with a unique purpose and construction, and each with a different combination of carrots and sticks that set up federal-state relationships.<sup>192</sup> Although every federal statute is distinct, some of their common elements suggest that many of the land use regulations that form part of federally approved state programs should be exempt from Measure 37.<sup>193</sup> Drawing on the reasoning in the Oregon Court of Appeals February 2007, decision in *Columbia River Gorge Commission v. Hood River County*, and using the CWA as an example, this Part argues for an expansive interpretation of Measure 37's federal law exception.<sup>194</sup> First, this Part suggests that while several interpretations are possible, the federal law exception's text best supports a broad interpretation of the provision.<sup>195</sup> Second, this Part explains that constitutional principles of federalism preclude a narrow interpretation of the federal law exception.<sup>196</sup> Next, this Part analyzes elements common to many cooperative federalism statutes—including preemption provisions and federal approval requirements—and argues that these elements support a broad interpretation of the federal law exception.<sup>197</sup> In view of these legal rationales, as well as the practical consequences of a narrow interpretation, this Part concludes that Measure 37's federal law exception should be interpreted broadly to include all land use regulations contained in federally approved plans and programs that represent Oregon's efforts to com-

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<sup>190</sup> *Colombia River Gorge Comm'n v. Hood River County*, 160 P.3d 992, 992 (Or. 2007).

<sup>191</sup> *Columbia*, 152 P.3d at 1002-04.

<sup>192</sup> See *supra* notes 124-177 and accompanying text.

<sup>193</sup> See *infra* notes 229-314 and accompanying text.

<sup>194</sup> See *infra* notes 201-314 and accompanying text.

<sup>195</sup> See *infra* notes 201-218 and accompanying text.

<sup>196</sup> See *infra* notes 219-228 and accompanying text.

<sup>197</sup> See *infra* notes 229-314 and accompanying text.

ply with federal law.<sup>198</sup> This view is reinforced by Measure 49's explicitly broad definition of federal law.<sup>199</sup> Thus, these arguments demonstrate one key reason to support Measure 49's passage.<sup>200</sup>

*A. The Text of Measure 37's Federal Law Exception Best Supports a Broad Interpretation of the Provision*

The text of Measure 37's federal law exception states that the Measure does not apply to a given land use regulation "to the extent the land use regulation is required to comply with federal law."<sup>201</sup> One potential interpretation of this text is that the exception covers only those federal laws that directly regulate the land use activities of individual citizens.<sup>202</sup> Although such laws are clearly exempt from Measure 37, there are several compelling reasons why the exception must be broader in scope.<sup>203</sup> First, even without the federal law exception, Measure 37 would be preempted in cases where its operation conflicts with federal laws directly regulating the land use practices of individuals, so the exception must mean something more.<sup>204</sup> Second, state and local governments receiving Measure 37 claims have no authority to waive federal laws that apply directly to individual properties, even if the claims otherwise meet the requirements of Measure 37.<sup>205</sup> Third, Measure 37 concerns state and local land use regulations; it follows that

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<sup>198</sup> See *infra* notes 201–314 and accompanying text.

<sup>199</sup> See *supra* notes 89–90 and accompanying text; *infra* notes 210–314 and accompanying text.

<sup>200</sup> See *supra* notes 89–90 and accompanying text; *infra* notes 210–314 and accompanying text.

<sup>201</sup> OR. REV. STAT. § 197.352(3)(C) (2005). The Oregon courts apply the same methodology to interpreting statutory provisions adopted through the initiative process as they do to the construction of any other statute. *Stranahan v. Fred Meyer, Inc.*, 11 P.3d 228, 239 (Or. 2000). The text of the statutory provision is the starting point for interpretation and is considered the best evidence of the voters' intent. *Portland Gen. Elec. Co. v. Bureau of Labor and Indus.*, 859 P.2d 1143, 1146 (Or. 1993); *Roseburg Sch. Dist. v. City of Roseburg*, 851 P.2d 595, 597 (Or. 1993).

<sup>202</sup> See OR. REV. STAT. § 197.352(3)(C).

<sup>203</sup> See *infra* notes 204–206 and accompanying text.

<sup>204</sup> See *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963) (holding that "[t]he test of whether both federal and state regulations may operate, or the state regulation must give way, is whether both regulations can be enforced without impairing the federal superintendence of the field"); *City of Astoria v. Kozier*, 264 P. 445, 446 (Or. 1928) (stating that the court must ascertain the legislative intention from the language used and adopt such construction of the Act as to give effect, if possible, to all provisions thereof).

<sup>205</sup> See U.S. CONST. art. VI, cl. 2.

the exceptions to the rule are about state and local regulations as well.<sup>206</sup>

Seeking a more workable, but still narrow interpretation of the federal law exception, property rights advocates have suggested that the provision applies only when a federal law truly mandates the adoption of a state or local land use regulation.<sup>207</sup> This interpretation relies on the plain meaning of the word "required"; activity that is demanded or compulsory.<sup>208</sup> Under this view, state and local governments can deny Measure 37 claims based on the federal law exception only when the regulation at issue is absolutely required by federal law.<sup>209</sup> This interpretation is discussed in greater detail below and is referred to throughout the remainder of this Note as the "narrow interpretation."<sup>210</sup>

Despite the high degree of compulsion suggested by the term "required," the text of the federal law exception better supports a significantly broader interpretation.<sup>211</sup> The phrase "to comply with" expands the meaning of the exception to include activity that may not be absolutely required but is nonetheless necessary to conform with federal law.<sup>212</sup> Further textual support for a broad interpretation of the provision comes from its context.<sup>213</sup> A parallel exception regarding public

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<sup>206</sup> See OR. REV. STAT. § 197.352(11)(B). Measure 37's definitions section provides:

Land use regulation" shall include: (i) Any statute regulating the use of land or any interest therein; (ii) Administrative rules and goals of the Land Conservation and Development Commission; (iii) Local government comprehensive plans, zoning ordinances, land division ordinances, and transportation ordinances; (iv) Metropolitan service district regional framework plans, functional plans, planning goals and objectives; and (v) Statutes and administrative rules regulating farming and forest practices.

*Id.*

<sup>207</sup> See Appellant's Brief, *supra* note 185, at 4; Oregonians in Action, *supra* note 81 (stating that the federal law exception applies only "when federal law truly mandates the adoption of a state or local land use law").

<sup>208</sup> See Appellant's Brief, *supra* note 185, at 4; MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 995 (10th ed. 1994); Oregonians in Action, *supra* note 81. The relevant dictionary definitions of "require" are: "1 a: to claim or ask for by right and authority . . . 2 a: to call for as suitable or appropriate . . . b: to demand as necessary or essential: to have a compelling need for . . . 3: to impose a compulsion or command on: COMPEL . . . *syn* see DEMAND." MERRIAM WEBSTER'S COLLEGIATE DICTIONARY, *supra*, at 995.

<sup>209</sup> See Appellant's Brief, *supra* note 185, at 4; Oregonians in Action, *supra* note 81.

<sup>210</sup> See *infra* notes 219-314 and accompanying text.

<sup>211</sup> See OR. REV. STAT. § 197.352(3)(C); see *infra* notes 212-218 and accompanying text.

<sup>212</sup> See OR. REV. STAT. § 197.352(3)(C); MERRIAM WEBSTER'S COLLEGIATE DICTIONARY, *supra* note 208, at 236. The relevant dictionary definition of comply is: "2: to conform or adapt one's actions to another's wishes, to a rule, or to necessity." MERRIAM WEBSTER'S COLLEGIATE DICTIONARY, *supra* note 208, at 236.

<sup>213</sup> See OR. REV. STAT. § 197.532(3)(A).

nuisances includes the phrase: "[t]his subsection shall be construed narrowly in favor of a finding of compensation under this section."<sup>214</sup> This admonition to read the nuisance exception narrowly is omitted from the federal law exception, which follows two lines down in the statute's text.<sup>215</sup> Rules of construction provide that this difference favors a broader interpretation of the federal law exception, or at least disfavors a narrow one.<sup>216</sup>

Importantly, a broad interpretation of the federal law exception could encompass a wide array of state and local land use regulations necessary to comply with federal laws that employ a cooperative federalism approach.<sup>217</sup> This "broad interpretation" and its implications are discussed below.<sup>218</sup>

### B. Constitutional Principles of Federalism Preclude a Narrow Interpretation of Measure 37's Federal Law Exception

Although Measure 37's text does not make it entirely clear what degree of compulsion is intended by the federal law exception, the U.S. Supreme Court has clearly established an upper limit.<sup>219</sup> Measure 37 was passed in 2004 and therefore must be interpreted in light of *New York v. United States* and *Printz v. United States*, decided in 1992 and 1997, respectively.<sup>220</sup> These cases provide that it is unconstitutional for Con-

<sup>214</sup> *Id.*

<sup>215</sup> See *id.* § 197.532(3)(A), (C).

<sup>216</sup> See *id.*; *In re Marriage of Perlenfein*, 848 P.2d 604, 607-08 (Or. 1993) (stating that use of a term in one section and not in another section of the same statute indicates a purposeful omission). If the voters' intent remains unclear after an interpretation of a statute's text, the Oregon courts proceed to a second level of analysis, which is to consider the history of the provision. *Portland Gen. Elec.*, 859 P.2d at 1146. The focus of this inquiry is on information available to voters at the time the measure was adopted that discloses the public's understanding of the measure, for example the ballot title and information in the Voter's pamphlet. *Ecumenical Ministries v. Or. State Lottery Comm'n*, 871 P.2d 106, 111 n.8 (Or. 1994); see also Striffler Letter, *supra* note 74, at 5 (referring to the Voter's pamphlet as the "primary source of Measure 37's history"). Measure 37's ballot title, "Governments must pay owners, or forgo enforcement, when *certain* land use restrictions reduce property value," indicates that voters understood that the scope of regulations covered by the Measure was to be limited in some way; however the Voter's pamphlet contains no explicit discussion of the federal law exception. See BRADBURY, *supra* note 1, at 103-32 (emphasis added).

<sup>217</sup> See Clean Water Act, 33 U.S.C.A. §§ 1251-1387 (West 2001 & Supp. 2007); OR. REV. STAT. § 197.532(3)(C).

<sup>218</sup> See *infra* notes 219-314 and accompanying text.

<sup>219</sup> See OR. REV. STAT. § 197.532(3)(C); *Printz v. United States*, 521 U.S. 898, 935 (1997); *New York v. United States*, 505 U.S. 144, 176 (1992).

<sup>220</sup> See OR. REV. STAT. § 197.352; *Printz*, 521 U.S. at 935; *New York*, 505 U.S. at 176.

gress to commandeer state legislatures or executive officials into serving federal purposes.<sup>221</sup> Therefore, Measure 37's federal law exception cannot possibly be limited to land use regulations adopted under federal mandates directing Oregon to enact specific rules or to administer federal regulatory programs.<sup>222</sup> Just as Congress could not compel the State of New York to adopt a particular regulatory program to deal with radioactive waste in *New York*, Congress cannot prescribe specific land use regulations to be adopted by the Oregon legislature.<sup>223</sup> And just as Congress could not require county law enforcement officers to conduct background checks in *Printz*, Congress cannot compel Oregon's Department of Environmental Quality or other agencies to enforce federal environmental programs.<sup>224</sup>

Instead, the federal law exception must encompass the normal and constitutional "carrot-and-stick" approach used by the federal government to induce state action.<sup>225</sup> As Justice O'Connor explained in *New York*, Congress may condition federal funding upon state action.<sup>226</sup> Congress may also give states a choice between regulating up to federal standards or being preempted by federal regulation.<sup>227</sup> Indeed, cooperative federalism has become a dominant approach to federal environmental regulation during the last four decades and a number of federal laws with significant land use implications employ this structure.<sup>228</sup>

### C. Preemption Provisions in Cooperative Federalism Statutes Suggest That Substitute State Action is "Required to Comply with Federal Law"

Most cooperative federalism statutes induce state action in part through the threat of preemption: if states do not take on the responsibility for implementing the federal mandate, or if state programs do

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<sup>221</sup> *Printz*, 521 U.S. at 935; *New York*, 505 U.S. at 176.

<sup>222</sup> See OR. REV. STAT. § 197.352(3)(C); *Printz*, 521 U.S. at 935; *New York*, 505 U.S. at 176.

<sup>223</sup> See OR. REV. STAT. § 197.352(3)(C); *New York*, 505 U.S. at 176.

<sup>224</sup> See OR. REV. STAT. § 197.352(3)(C); *Printz*, 521 U.S. at 935.

<sup>225</sup> See OR. REV. STAT. § 197.352(3)(C); *New York*, 505 U.S. at 167; *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 289 (1981).

<sup>226</sup> *New York*, 505 U.S. at 167.

<sup>227</sup> *Id.*; *Hodel*, 452 U.S. at 289.

<sup>228</sup> See Columbia River Gorge National Scenic Area Act, 16 U.S.C. §§ 544-544p (2000); Coastal Zone Management Act of 1972, 16 U.S.C.A. §§ 1451-1465 (West 2000 & Supp. 2007); Clean Water Act, 33 U.S.C.A. §§ 1251-1387 (West 2001 & Supp. 2007); Safe Drinking Water Act, 42 U.S.C.A. §§ 300f-300j-26 (West 2003 & Supp. 2007); Fischman, *supra* note 21, at 187.

not meet federal standards, the relevant federal agency will step in and regulate directly.<sup>229</sup> In *Columbia*, the court relied in part on the preemption features of the Scenic Area Act to conclude that the county land use ordinances at issue were "required to comply with federal law."<sup>230</sup> Under the Scenic Area Act, if the Gorge counties did not adopt land use ordinances consistent with the Management Plan, the scenic area would be regulated by the Columbia River Gorge Commission.<sup>231</sup> Similarly, under the CWA, if Oregon failed to adopt water quality standards or TMDLs, the U.S. EPA would step in and set pollution budgets for the state.<sup>232</sup> Such preemption provisions suggest that when Oregon accepts the responsibility for administering a federal program, the state acts as an assignee for the federal government and the state's regulations serve as a substitute for direct federal regulation.<sup>233</sup> If Measure 37 does not apply to direct federal regulation, it seems only logical that state laws that take the place of direct federal regulation are also "required to comply with federal law."<sup>234</sup>

On the other hand, property rights advocates have argued that preemption provisions give Oregon a choice of whether to develop its own regulatory approach or to accept direct federal regulation.<sup>235</sup> The state's ability to make this choice is critical, they contend, because it means that state activity under the auspices of cooperative federalism statutes is voluntary and not "required to comply with federal law."<sup>236</sup>

The question presented by the federal law exception, however, is not whether the initial assumption of authority by a state to administer

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<sup>229</sup> See, e.g., 16 U.S.C. §§ 544e(c), 544f(l)(1); 33 U.S.C. § 1313(b)(1), (d)(2).

<sup>230</sup> See *Columbia River Gorge Comm'n v. Hood River County*, 152 P.3d 997, 1002, 1003 (Or. Ct. App. 2007), *review denied*, 160 P.3d 992 (Or. 2007).

<sup>231</sup> See 16 U.S.C. §§ 544e(c), 544f(l)(1); *Columbia*, 152 P.3d at 1002, 1003.

<sup>232</sup> See 33 U.S.C. § 1313(b)(1), (d)(2). It is less clear how the EPA would respond if Oregon failed to develop and administer the more specific Water Quality Management Plans aimed at achieving TMDLs and water quality standards. See *Sierra Club v. Meiburg*, 296 F.3d 1021, 1034 (11th Cir. 2002) (holding that after Georgia failed to establish TMDLs in a timely fashion, the EPA was responsible for developing TMDLs for the state's impaired waters but only had a supervisory role with regard to their implementation).

<sup>233</sup> See, e.g., 16 U.S.C. §§ 544e(c), 544f(l)(1); 33 U.S.C. § 1313(b)(1), (d)(2).

<sup>234</sup> See OR. REV. STAT. § 197.352(3)(C) (2005); *Columbia*, 152 P.3d at 1002, 1003; see, e.g., 16 U.S.C. §§ 544e(c), 544f(l)(1); 33 U.S.C. § 1313(b)(1), (d)(2).

<sup>235</sup> Appellant's Brief, *supra* note 185, at 4.

<sup>236</sup> *Id.* In *Columbia*, the landowners argued that because the Oregon Gorge counties had the option of adopting land use ordinances consistent with the Management Plan and could have instead allowed the Columbia River Gorge Commission to directly regulate their portion of the scenic area, the county ordinances were not required to comply with federal law. *Id.*

a federal program is required or voluntary.<sup>237</sup> As discussed above, constitutional principles dictate that Oregon cannot be absolutely required to adopt specific laws or administer federal programs; the state must be given a choice.<sup>238</sup> The real question presented by Measure 37's federal law exception is: once a state accepts responsibility for a delegated program, what specific land use regulations are "required to comply with federal law"?<sup>239</sup>

#### D. What Amounts to Compliance?

Admittedly, answering the question of what constitutes compliance under many cooperative federalism statutes is not easy.<sup>240</sup> In *Columbia*, the court was able to readily determine that the county ordinances are required to comply with the Scenic Area Act because the minimum lot size regulations at issue are derived directly from the Scenic Area Management Plan.<sup>241</sup> However, most cooperative federalism statutes do not have something equivalent to the Management Plan, an interim step between the broad policies and goals of the Scenic Area Act and the on-the-ground application of the law by the Gorge counties.<sup>242</sup> Instead, under most cooperative federalism statutes, states must adhere to some level of agency guidance but have more liberty to elect what specific

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<sup>237</sup> See OR. REV. STAT. § 197.352(3)(C); *Printz*, 521 U.S. at 935; *New York*, 505 U.S. at 176.

<sup>238</sup> See *Printz*, 521 U.S. at 935; *New York*, 505 U.S. at 176. Because Measure 37 must be interpreted in light of these anticommandeering principles, a narrow interpretation would be a nullity, and only a somewhat broader interpretation makes sense. See OR. REV. STAT. § 197.352(3)(C); *Printz*, 521 U.S. at 935; *New York*, 505 U.S. at 176. Notably, the choice presented to states in many cooperative federalism statutes appears mandatory. See, e.g., 33 U.S.C. § 1313(a)(2), (a)(3)(A). For example, the text of the CWA demands that each state "shall" submit water quality standards to the EPA. *Id.* However, in view of the statute as a whole, such language has been interpreted as a quid pro quo between the states and the federal government: states that do not submit water quality standards that meet CWA requirements must accept federal standards and forgo funding for their water quality programs. See 33 U.S.C. §§ 1256, 1329(h) (2000 & Supp. III 2003); *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992).

<sup>239</sup> See OR. REV. STAT. § 197.352(3)(C); *Printz*, 521 U.S. at 935; *New York*, 505 U.S. at 176.

<sup>240</sup> See *infra* notes 241–249 and accompanying text.

<sup>241</sup> See HOOD RIVER COUNTY, OR., CODE art. 75 (2005); *Columbia*, 152 P.3d at 999, 1004; U.S. FOREST SERV. & COLUMBIA RIVER GORGE COMM'N, MANAGEMENT PLAN FOR THE COLUMBIA RIVER GORGE NATIONAL SCENIC AREA [hereinafter SCENIC AREA MANAGEMENT PLAN]; Commission's Brief, *supra* note 169, at 10.

<sup>242</sup> See 16 U.S.C. § 544d (2000); SCENIC AREA MANAGEMENT PLAN, *supra* note 241; see, e.g., Coastal Zone Management Act of 1972, 16 U.S.C.A. §§ 1451–1465 (West 2000 & Supp. 2007); Clean Water Act, 33 U.S.C.A. §§ 1251–1387 (West 2001 & Supp. 2007); Safe Drinking Water Act, 42 U.S.C.A. §§ 300f–300j-26 (West 2003 & Supp. 2007).



tools they will use to achieve federal goals.<sup>243</sup> Indeed, this flexibility is why many states choose to administer federal programs in the first place.<sup>244</sup>

For example, the Water Quality Management Plans that Oregon submits to the EPA represent a package of regulatory and nonregulatory initiatives that the state considers to be the most effective way to achieve water quality standards under the CWA.<sup>245</sup> Thus, there is some merit to the argument that because other regulatory (or nonregulatory) approaches are available to the state, the individual land use regulations contained in Water Quality Management Plans are not "required to comply with federal law."<sup>246</sup> Furthermore, some of the regulations described in the Plans were developed specifically in response to the CWA whereas others may not have been initiated for the express purpose of achieving federal water quality standards.<sup>247</sup> Are land use regulations that were selected by the state when other options were available, some not even enacted in direct response to the CWA, "required to comply with federal law?"<sup>248</sup> The overall structure of cooperative federalism statutes, their federal approval requirements, and the practical consequences of a narrower interpretation suggest that the best answer to this question is yes.<sup>249</sup>

### 1. Compliance Requires Specific Land Use Regulations That Go Beyond Statutory Goals

In *Columbia*, the landowners addressed the difficult question of what constitutes compliance by arguing that only the nine standards listed in the Scenic Area Act, among them goals like "protect and enhance open spaces"—and not the more specific regulations contained in the Management Plan and the county ordinances—are "required to comply with federal law."<sup>250</sup> This argument was rejected by the Oregon Court of Appeals and fails in several respects.<sup>251</sup>

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<sup>243</sup> See *Hodel*, 452 U.S. at 289; Fischman, *supra* note 21, at 192–93.

<sup>244</sup> See *Hodel*, 452 U.S. at 289; Fischman, *supra* note 21, at 192–93.

<sup>245</sup> See generally WILLAMETTE BASIN PLAN, *supra* note 83.

<sup>246</sup> See OR. REV. STAT. § 197.352(3) (C) (2005). See generally WILLAMETTE BASIN PLAN, *supra* note 83.

<sup>247</sup> See, e.g., WILLAMETTE BASIN PLAN, *supra* note 83, at 11–13.

<sup>248</sup> See OR. REV. STAT. § 197.352(3) (C); see, e.g., WILLAMETTE BASIN PLAN, *supra* note 83, at 11–13.

<sup>249</sup> See *infra* notes 250–314 and accompanying text.

<sup>250</sup> See *Columbia*, 152 P.3d at 1002–04; Appellant's Brief, *supra* note 185, at 4, 8–9. As a further illustration, the first three standards listed in the Scenic Area Act are:

The landowners' argument implied that statutory standards are directly implementable.<sup>252</sup> As the court concluded, however, this proposition defies the very text of the Scenic Area Act and the concept of "standards" therein.<sup>253</sup> Notably, the Act specifies that the Management Plan should be based on the results of a resource inventory carried out pursuant to the Act and should include "land use designations."<sup>254</sup> The Act also spells out that the Management Plan and all ordinances adopted pursuant to the Act "shall include provisions to" achieve the nine standards listed in the Act.<sup>255</sup> The court concluded that read as a whole, the Act "requires a degree of detail and rigor in the management plan and implementing ordinances far transcending" the nine "goal-like" standards set out in the Act.<sup>256</sup>

As in the Scenic Area Act, the explicit standards or requirements in most cooperative federalism statutes are broad, "goal-like" policies or criteria used to evaluate more specific state action and do not represent a prescription for direct implementation.<sup>257</sup> In other words, the policies set forth in most cooperative federalism statutes will have no on-the-ground effect unless the states develop regulatory schemes to achieve them.<sup>258</sup> For example, the CWA calls on states to set TMDL pollution budgets and describes what acceptable TMDLs must take into account.<sup>259</sup> Thus, the statutory requirement serves as a measuring

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- (1) protect and enhance agricultural lands for agricultural uses and to allow, but not require, conversion of agricultural lands to open space, recreation development or forest lands; (2) protect and enhance forest lands for forest uses and to allow, but not require, conversion of forest lands to agricultural lands, recreation development or open spaces; (3) protect and enhance open spaces.

16 U.S.C. § 544d(d) (2000). The more specific regulations in the Management Plan and county ordinances include, for example, minimum lot size requirements such as those challenged in the case, recreation area designations, and compatibility requirements for land use in rural areas. See SCENIC AREA MANAGEMENT PLAN, *supra* note 241.

<sup>251</sup> See *Columbia*, 152 P.3d at 1004; *infra* notes 252-256 and accompanying text.

<sup>252</sup> See *Columbia*, 152 P.3d at 1003-04.

<sup>253</sup> See *id.* at 1004.

<sup>254</sup> See 16 U.S.C. § 544d(c) (1), (2); *Columbia*, 152 P.3d at 1004.

<sup>255</sup> See 16 U.S.C. § 544d(d); *Columbia*, 152 P.3d at 1001.

<sup>256</sup> See *Columbia*, 152 P.3d at 1004. The court noted that "Defendant's view of what the Scenic Area Act 'requires' with respect to promulgation of the management plan is artificially and implausibly crabbed; that view cannot be reconciled with the federal Act's comprehensive design and operation." *Id.*

<sup>257</sup> See *Columbia*, 152 P.3d at 1004; see, e.g., Clean Water Act, 33 U.S.C. § 1313(d) (1) (C), (D) (2000).

<sup>258</sup> See *Columbia*, 152 P.3d at 1004; see, e.g., 33 U.S.C. § 1313(d) (1) (C), (D).

<sup>259</sup> 33 U.S.C. § 1313(d) (1) (C) The CWA declares:

stick for state action.<sup>260</sup> Oregon still must set quantitative pollution limits and develop plans to achieve its TMDLs in order to make any real progress toward achieving federal water quality goals.<sup>261</sup>

In the case of the CWA, property rights advocates might argue that even if the Act requires states to set TMDLs, it does not require related implementation plans because the text of the CWA refers only to a "continuing planning process."<sup>262</sup> When the statute is considered as a whole, however, it becomes clear that the required planning process must include specific management activities beyond the quantitative pollution budgets.<sup>263</sup> TMDLs by definition are established only when a waterbody is impaired, which means that point source controls alone have not proven sufficient to achieve water quality standards.<sup>264</sup> Oregon must therefore address nonpoint sources.<sup>265</sup> To this end, the state has developed a package of management activities, including land use controls, in the form of Water Quality Management Plans.<sup>266</sup> This package of controls is reviewed periodically by the EPA and approved only if certain requirements are met.<sup>267</sup> Thus, Oregon's responsibility to comply with the CWA does not end with setting TMDLs but requires adequate

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Each state shall establish [for impaired waterbodies] and in accordance with the priority ranking, the total maximum daily load, for those pollutants which the Administrator identifies under section 304(a)(2) as suitable for calculation. Such load shall be established at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality.

*Id.*

<sup>260</sup> See *id.*

<sup>261</sup> See *id.*; *Columbia*, 152 P.3d at 1004. See generally WILLAMETTE BASIN PLAN, *supra* note 83.

<sup>262</sup> See 33 U.S.C. § 1313(e) ("Each state shall have a continuing planning process approved . . . which is consistent with this chapter."); Appellant's Brief, *supra* note 185, at 4, 8-9; see also *Pronsolino v. Nastri*, 291 F.3d 1123, 1140 (9th Cir. 2002) (holding that although the CWA requires a continuing planning process informed by TMDLs, "[s]tates must implement TMDLs only to the extent that they seek to avoid losing federal grant money; there is no pertinent statutory provision otherwise requiring the implementation of § 303 plans or providing for their enforcement").

<sup>263</sup> See 33 U.S.C. §§ 1311, 1313, 1342.

<sup>264</sup> See *id.* §§ 1311(b)(1)(A)-(B), 1313(d)(1)(A)-(D), 1342.

<sup>265</sup> See *id.*

<sup>266</sup> See *id.* § 1313(e). See generally WILLAMETTE BASIN PLAN, *supra* note 83.

<sup>267</sup> See 33 U.S.C. § 1313(e); 40 C.F.R. § 130.5-.6 (2006). Minimum requirements of the continuing planning process include a description of "[t]he process for establishing and assuring adequate implementation of new or revised water quality standards, including schedules of compliance." 40 C.F.R. § 130.5.

implementation of its chosen package of federally approved management activities.<sup>268</sup>

## 2. Land Use Regulations Contained in Federally Approved Plans and Programs Should Be Considered Exempt from Measure 37

States must do more than merely adopt federal statutory goals to comply with most cooperative federalism statutes, but what specific regulations are "required"?<sup>269</sup> Measure 37's federal law exception should be interpreted to include all land use regulations in federally approved plans and programs that represent the state's efforts to comply with federal law.<sup>270</sup>

Such an encompassing interpretation of the federal law exception is justified because the federal approval requirements in cooperative federalism statutes make federal agencies responsible for deciding what constitutes compliance.<sup>271</sup> In *Columbia*, the Oregon Court of Appeals relied in part on the oversight role of the Secretary of Agriculture—responsible for approving the Scenic Area Management Plan and county land use ordinances—to conclude that Measure 37 does not apply to the county ordinances.<sup>272</sup> The court implied that because the Secretary of Agriculture must sign off on the Management Plan and county ordinances, it is ultimately the federal agency that defines compliance and Oregon cannot pick and choose which land use regulations within its federally approved program are "required to comply with federal law."<sup>273</sup>

The importance of this federal approval element has also been recognized in the context of the CWA.<sup>274</sup> In its 1992 decision, *Arkansas v. Oklahoma*, the U.S. Supreme Court held that state programmatic activity was federalized where the CWA required federal review and approval.<sup>275</sup> This rule may be extended to other components of the CWA.<sup>276</sup> For example, much like the water quality standards in *Arkan-*

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<sup>268</sup> See 33 U.S.C. § 1313(d)(1)(A)–(D), (e). See generally WILLAMETTE BASIN PLAN, *supra* note 83.

<sup>269</sup> See OR. REV. STAT. § 197.352(3)(C) (2005).

<sup>270</sup> See *infra* notes 271–314 and accompanying text.

<sup>271</sup> See OR. REV. STAT. § 197.352(3)(C); *Arkansas*, 503 U.S. at 110; see, e.g., *Columbia River Gorge National Scenic Area Act*, 16 U.S.C. §§ 544d(f), 544f(j) (2000); 33 U.S.C. § 1313(d)(2), (e)(2).

<sup>272</sup> See *Columbia*, 152 P.3d at 1004.

<sup>273</sup> See *id.*

<sup>274</sup> See *Arkansas*, 503 U.S. at 110.

<sup>275</sup> See *id.*

<sup>276</sup> See *id.*; see, e.g., 33 U.S.C. § 1313(d), (e).

sas, Oregon's TMDLs and Water Quality Management Plans are EPA-approved and are based on substantial guidance from the agency.<sup>277</sup> The U.S. Courts of Appeals have extended the *Arkansas* rule to the Clean Air Act and it may well apply to other cooperative federalism statutes, particularly those statutes that address environmental problems with interstate effects.<sup>278</sup> Thus, many of Oregon's federally approved plans, and programs developed under cooperative federalism statutes, although not directly implemented by the federal government, might be considered incorporated into federal law.<sup>279</sup> If this is the case, such plans and programs are certainly "required to comply with federal law," and the land use regulations they contain should be exempt from Measure 37.<sup>280</sup>

A broad interpretation of the federal law exception is further supported by the fundamental goals and policies of cooperative federalism statutes.<sup>281</sup> The objective of the CWA is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."<sup>282</sup> In order to achieve this objective, the CWA declares that "it is the national policy that programs for the control of nonpoint sources of pollution be developed *and implemented in an expeditious manner* so as to enable the goals of this Act to be met through the control of both point and nonpoint sources of pollution."<sup>283</sup> A broad interpretation of the federal law exception that protects the land use regulations in Oregon's federally approved Water Quality Management Plans is consistent with this important mandate.<sup>284</sup> On the other

<sup>277</sup> See 33 U.S.C. § 1313(d)(2), (e)(2); *Arkansas*, 503 U.S. at 110; 40 C.F.R. § 130.5-.6 (2006); Oregon TMDL Program, *supra* note 83; see, e.g., Memorandum from Benjamin H. Grumbles, EPA Assistant Administrator on Establishing TMDL "Daily" Loads (Nov. 16, 2006) [hereinafter Grumbles Memorandum], available at <http://www.epa.gov/owow/tmdl/daily-loadsguidance.html>.

<sup>278</sup> See *Safe Air for Everyone v. EPA*, 475 F.3d 1096, 1105 (9th Cir. 2007); *Sierra Club v. Leavitt*, 368 F.3d 1300, 1304 (11th Cir. 2004); see, e.g., Coastal Zone Management Act of 1972, 16 U.S.C.A. §§ 1451-1465 (West 2000 & Supp. 2007); Safe Drinking Water Act, 42 U.S.C.A. §§ 300f-300j-26 (West 2003 & Supp. 2007).

<sup>279</sup> See *Arkansas*, 503 U.S. at 110; *Safe Air for Everyone*, 475 F.3d at 1105; *Leavitt*, 368 F.3d at 1304.

<sup>280</sup> See *Arkansas*, 503 U.S. at 110; *Safe Air for Everyone*, 475 F.3d at 1105; *Leavitt*, 368 F.3d at 1304. The logical extension of this argument is that as federal law, these federally approved plans and programs would preempt Measure 37 even without the federal law exception in cases where there was a direct conflict between the laws. See OR. REV. STAT. § 197.352(3)(C) (2005); *Arkansas*, 503 U.S. at 110; *Fla. Lime*, 373 U.S. at 142.

<sup>281</sup> See OR. REV. STAT. § 197.352(3)(C); see, e.g., 33 U.S.C. § 1251(a).

<sup>282</sup> 33 U.S.C. § 1251(a).

<sup>283</sup> *Id.* § 1251(a)(7) (emphasis added).

<sup>284</sup> See *id.* § 1251(a), (a)(7); OR. REV. STAT. § 197.352(3)(C).

hand, a narrow interpretation that would subject those same regulations to Measure 37 waivers would not allow Oregon to expeditiously implement its nonpoint source programs nor would it serve the ultimate goal of restoring and maintaining the nation's waters.<sup>285</sup>

In addition to the above legal rationales, several important policy concerns justify a broad interpretation of the federal law exception that includes land use regulations in state plans and programs subject to federal approval.<sup>286</sup> First, as a practical matter, the strategies Oregon presents to federal agencies are often, for all intents and purposes, "required."<sup>287</sup> For example, Oregon is free to allocate its TMDL pollution budgets among pollution sources as it sees fit so long as the sum of the allocations does not exceed the total pollution cap.<sup>288</sup> Nevertheless, the state is much more likely to impose controls on pollution sources in close proximity to impaired waterbodies because such controls will make a much greater contribution to achieving the pollution goal than restrictions on sources many river miles away.<sup>289</sup> In this way, the regulatory techniques chosen by Oregon's state and local governments are often, in a practical sense, "required to comply with federal law."<sup>290</sup> In the case of the CWA, interpreting Measure 37's federal law exception narrowly would strip away the state's ability to enforce the specific land use regulations that it now uses to achieve water quality goals.<sup>291</sup> Oregon's nonpoint source control program would almost certainly become more costly and less efficient because the state would no longer be able to employ some of the most practical and direct solutions to resolving federally defined problems.<sup>292</sup>

Second, whereas a broad interpretation of Measure 37's federal law exception that includes land use regulations in federally approved plans and programs would secure important benefits for the state, a narrow interpretation would mean risking that the relevant federal agencies will use the "sticks" at their disposal.<sup>293</sup> For example, under the CWA, the EPA assesses Oregon's strategy for achieving water quality standards every time it reviews a Water Quality Management

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<sup>285</sup> See 33 U.S.C. § 1251(a), (a) (7); OR. REV. STAT. § 197.352(3) (C).

<sup>286</sup> See *infra* notes 287–300 and accompanying text.

<sup>287</sup> See OR. REV. STAT. § 197.352(3) (C); EPA CWA INTRODUCTION, *supra* note 85, at 34.

<sup>288</sup> See EPA CWA INTRODUCTION, *supra* note 85, at 34.

<sup>289</sup> See *id.*

<sup>290</sup> See OR. REV. STAT. § 197.352(3) (C); EPA CWA INTRODUCTION, *supra* note 85, at 34.

<sup>291</sup> See generally WILLAMETTE BASIN PLAN, *supra* note 83.

<sup>292</sup> See *Hodel*, 452 U.S. at 289; Fischman, *supra* note 21, at 192–93.

<sup>293</sup> See OR. REV. STAT. § 197.352(3) (C); see, e.g., Clean Water Act, 33 U.S.C. §§ 1313(e) (2), 1329(h) (2000 & Supp. III 2003).

Plan.<sup>294</sup> State plans are approved only if they represent "adequate implementation, including schedules of compliance" to achieve water quality standards.<sup>295</sup> If the land use regulations that are included in Oregon's Water Quality Management Plans were not exempt from Measure 37 and became the subject of Measure 37 claims, the most likely result would be the waiver of these regulations on a number of individual properties.<sup>296</sup> Such patchy enforcement would hardly constitute "adequate implementation" and, by the terms of the CWA, the EPA could revoke Oregon's point source permitting authority and withhold federal funds.<sup>297</sup>

Such federal overrides rarely occur in practice; however, Measure 37 presents a novel scenario and it is important to consider the possible consequences of a potentially extensive failure to enforce.<sup>298</sup> Oregon could lose critical water pollution funding, and at least with respect to point source permitting, the ability to employ its own expertise and more sophisticated understanding of local conditions.<sup>299</sup> Ironically, a narrow interpretation of the federal law exception could lead to more regulation—precisely what property rights advocates sought to curtail with Measure 37 in the first place.<sup>300</sup>

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<sup>294</sup> See 33 U.S.C. § 1313(e) (2); 40 C.F.R. § 130.5-.6 (2006).

<sup>295</sup> See 33 U.S.C. § 1313(e) (3) (F).

<sup>296</sup> See OR. REV. STAT. § 197.352(8); DAS CLAIMS REGISTRY, *supra* note 10.

<sup>297</sup> See 33 U.S.C. § 1313(e) (2), (3) (F) ("The Administrator shall not approve any state permit program under title IV of this Act for any State which does not have any approved continuing planning process under this section."); *id.* § 1329(h) (1), (5) (stating that "the Administrator shall make grants [for nonpoint source control programs], subject to such terms and conditions as the Administrator considers appropriate" including giving "priority for effective mechanisms").

<sup>298</sup> See *id.* §§ 1329(h), 1313(e) (2); PLATER ET AL., *supra* note 21, at 311; Kenneth M. Murchison, *Learning from More than Five-and-a-Half Decades of Federal Water Pollution Control Legislation: Twenty Lessons for the Future*, 32 B.C. ENVTL. AFF. L. REV. 527, 594-95 (2005). The actual threat of revoking the state's funding and/or NPDES permitting authority may be significantly weaker than the statute suggests. See PLATER ET AL., *supra* note 21, at 311 (noting the high fiscal and political costs of de-delegation); Murchison, *supra*, at 594-95 (noting that due to inadequate staffing and funding "EPA never has revoked a state's authority to administer the [NPDES] program when a state has failed to perform its obligations").

<sup>299</sup> See 33 U.S.C. §§ 1313(e) (2), 1329(h); *Hodel*, 452 U.S. at 289; Fischman, *supra* note 21, at 192-93.

<sup>300</sup> See 33 U.S.C. § 1313(e) (2); BRADBURY, *supra* note 1, at 105-18.

### 3. The Federal Law Exception Does Not Exempt State and Local Laws That Exceed the Federal Floor

Perhaps the greatest difficulty with an interpretation of Measure 37's federal law exception that relies on federal approval is that Oregon could in theory bootstrap any number of land use regulations into its federally approved plans and programs.<sup>301</sup> Most cooperative federalism statutes require state programs at least as stringent as federal standards but leave the door open for states to exceed federal goals.<sup>302</sup> Thus, it is possible that Oregon's current plans and programs under the CWA go beyond what is required to comply with federal law.<sup>303</sup> Property rights advocates might further contend that in the future, a broad interpretation of the federal law exception would allow the state to package additional regulations that are only tangentially related to water quality into its Water Quality Management Plans.<sup>304</sup> So long as the Plans met the CWA's minimum standards, the EPA would presumably approve them.<sup>305</sup>

This concern is mitigated at least to some degree by the language of the federal law exception itself: a land use regulation is exempt from Measure 37 "to the extent the land use regulation is required to comply with federal law."<sup>306</sup> Thus, the exception includes state regulations necessary to meet the federal floor established by cooperative federalism statutes, but not the state's efforts to reach for the ceiling.<sup>307</sup>

In *Columbia*, the required federal baseline was easy to determine because the minimum lot size regulations at issue were adopted by

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<sup>301</sup> See OR. REV. STAT. § 197.352(3)(C); *Oregonians in Action*, *supra* note 81.

<sup>302</sup> See Fischman, *supra* note 21, at 191; *see, e.g.*, 33 U.S.C. § 1370(a)(1) (providing that the CWA does not preclude states from adopting or enforcing any standard or limitation with respect to water pollution unless such standard or limitation is less stringent than the CWA).

<sup>303</sup> See 33 U.S.C. § 1370(a)(1); OR. REV. STAT. § 197.352(3)(C).

<sup>304</sup> *Oregonians in Action*, *supra* note 81. The *Oregonians in Action* website contends:

Measure 37 does not apply to state and local land use regulations that are required to be adopted in order to comply with federal law. Some state and local government officials may try to extend the reach of this exemption by claiming that they are adopting land use regulations because 'the feds made them do it.' But in most instances, the federal government leaves land use planning and regulation to state and local governments, such that the times when federal law truly mandates the adoption of a state or local land use law are not common.

*Id.*

<sup>305</sup> See 33 U.S.C. § 1313(e)(2); 40 C.F.R. §§ 130.5–6 (2006).

<sup>306</sup> See OR. REV. STAT. § 197.352(3)(C) (emphasis added).

<sup>307</sup> See *id.*



Hood River County directly from the Scenic Area Management Plan, which was drafted by the Gorge Commission and the U.S. Forest Service and approved by the U.S. Secretary of Agriculture.<sup>308</sup> Likewise, it would have been easy to determine if Hood River County had gone beyond what was required by the Scenic Area Act, for example, if the county had applied a two-acre minimum lot size requirement to a landowner's property where the Management Plan prescribed a one-acre minimum.<sup>309</sup>

Under the CWA, there is no Management Plan against which to measure state activity.<sup>310</sup> The EPA, however, provides substantial guidance for state programs that might suggest what specific land use regulations are "required."<sup>311</sup> The agency may also condition the approval of programmatic plans on certain modifications or on the presence of certain elements, thereby indicating required management strategies.<sup>312</sup>

Still, there may be cases where it is unclear whether specific land use regulations are necessary for compliance or whether they exceed the federal floor, especially given the EPA's (and the state's) comprehensive, basin-wide approach to addressing water quality issues.<sup>313</sup> In such cases, Oregon may have to request a determination from the agency regarding what specific aspects of its CWA plans and programs are "required to comply with federal law."<sup>314</sup>

### CONCLUSION

Measure 37's federal law exception should be interpreted to include all land use regulations in federally approved plans and programs that represent Oregon's efforts to comply with federal law. Admittedly, this is an expansive proposition. It is supported, however, by the text of the federal law exception and by constitutional princi-

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<sup>308</sup> See HOOD RIVER COUNTY, OR., CODE art. 75 (2005); *Columbia*, 152 P.3d at 999, 1004; SCENIC AREA MANAGEMENT PLAN, *supra* note 241; Commission's Brief, *supra* note 169, at 10.

<sup>309</sup> See OR. REV. STAT. § 197.352(3)(C); HOOD RIVER COUNTY, OR., CODE art. 75; SCENIC AREA MANAGEMENT PLAN, *supra* note 241.

<sup>310</sup> See 33 U.S.C.A. §§ 1251-1387 (West 2001 & Supp. 2007).

<sup>311</sup> See 40 C.F.R. § 130 (2006); see, e.g., Grumbles Memorandum, *supra* note 277.

<sup>312</sup> See 33 U.S.C. § 1329(d)(2); 40 C.F.R. § 130.5-.6.

<sup>313</sup> See EPA CWA INTRODUCTION, *supra* note 85, at 31 ("EPA is encouraging states, tribes and territories to do TMDLs on a 'watershed basis' . . . . Ideally TMDLs would be incorporated into comprehensive watershed strategies. . . . They would also address the full array of activities affecting the waterbody."). See generally WILLAMETTE BASIN PLAN, *supra* note 83.

<sup>314</sup> See OR. REV. STAT. § 197.352(3)(C). See generally WILLAMETTE BASIN PLAN, *supra* note 83.

ples that govern how Congress can and cannot compel state action. A broad interpretation of the federal law exception is also buttressed by key elements of cooperative federalism statutes that treat state programs as substitutes for federal regulation and rest the ultimate determination regarding what constitutes compliance with federal agencies. Perhaps most importantly, a broad interpretation of the federal law exception makes sense. Such an interpretation allows Oregon to maintain control over critical environmental programs and to implement cost-effective solutions that are tailored to the state's unique local needs. These arguments are reinforced by Ballot Measure 49's definition of federal law.

Evaluating the scope of Measure 37's federal law exception also serves as a reminder that most environmental law, much of it implicating land use, is ultimately federal. This means that property rights initiatives such as Oregon's Measure 37 and Arizona's Proposition 207 cannot undermine state and local laws that are integral components of a federal framework. Rather, these land use regulations should be subject only to the long-established test of federal regulatory takings law that considers both the fairness of land use regulations to individual property owners and the broader interests of the public.

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