

**ORIGINALISM AS A SHOT IN THE ARM FOR LAND-USE  
REGULATION: REGULATORY “TAKINGS” ARE NOT  
COMPENSABLE UNDER A TRADITIONAL ORIGINALIST  
VIEW OF ARTICLE I, SECTION 18 OF THE OREGON  
CONSTITUTION**

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Natural resource management legislation cannot be immunized from challenge under article I, section 18 of the Oregon constitution.<sup>1</sup>

Current takings law is largely based on 20th century Fifth Amendment case law, which has never examined the intended meaning of the federal takings clause. Will current land use restrictions pass

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1. Richard Benner, Comment, *The Taking Issue: Potential Obstacle to Natural Resource Management Legislation*, 54 OR. L. REV. 67, 79 (1975).

state constitutional muster if the test is framed in terms of 19th century conceptions of property rights?<sup>2</sup>

## I. INTRODUCTION

The Oregon Constitution, in common with the Federal Constitution and the state constitutions of the other forty-nine states,<sup>3</sup> prohibits the government from taking private property for public use without providing just compensation.<sup>4</sup> With the advent of the regulatory state, this seemingly simple prohibition has spawned one of the great jurisprudential debates of modern times: Whether the mere regulation of land use rises to the level of a taking requiring just compensation.

The Oregon Supreme Court long has treated the takings clauses of the state and federal constitutions as “identical in language and meaning.”<sup>5</sup> However, this treatment is inaccurate and inappropriate.

2. Jack L. Landau, *The Unfinished Revolution: Interpreting the Oregon Constitution*, OR. ST. B. BULL., Nov. 2001, at 19 [hereinafter *The Unfinished Revolution*].

3. Richard L. Settle, *Regulatory Taking Doctrine in Washington: Now You See It, Now You Don't*, 12 U. PUGET SOUND L. REV. 339, 343 (1989).

4. OR. CONST. art. I, § 18. Specifically, today Article I, section 18 provides:

Private property shall not be taken for public use, nor the particular services of any man be demanded, without just compensation; nor except in the case of the state, without such compensation first assessed and tendered; provided, that the use of all roads, ways and waterways necessary to promote the transportation of the raw products of mine or farm or forest or water for beneficial use or drainage is necessary to the development and welfare of the state and is declared a public use.

*Id.*

5. *Cereghino v. State Highway Comm'n*, 370 P.2d 694, 697 (Or. 1962). *See also* *GTE Northwest, Inc. v. Public Utility Comm'n*, 900 P.2d 495, 501 n.6 (Or. 1995) (“GTE offers no separate analysis under the state constitution. Accordingly, we assume, without deciding, that the analysis is the same under Article I, section 18, of the Oregon Constitution, and the Takings Clause of the Fifth Amendment to the Constitution of the United States.”); *Stevens v. City of Cannon Beach*, 854 P.2d 449, 451 n.5 (Or. 1993) (“Because plaintiffs have not made a separate argument under the state constitution, we will assume for purposes of this case, without deciding, that the analysis would be the same under the Oregon Constitution.”); *Dep't of Transp. v. Lundberg*, 825 P.2d 641, 644 n.4 (Or. 1992) (“Defendants, however, do not suggest any different analysis under the Oregon Constitution than under the United States Constitution. Therefore, we assume for purposes of this case, without deciding, that the analysis would be the same under the Oregon Constitution.”). *But see* *Suess Builders Co. v. City of Beaverton*, 656 P.2d 306, 309 n.5 (Or. 1982) (“[T]he criteria of compensable ‘taking for public use’ under [Article I, section 18], are not necessarily identical to those pronounced from time to time by the United States Supreme Court under the fifth amendment.”). Judge Jack Landau summarizes the above cases and criticizes those that equate the two clauses. Jack L. Landau, *Hurrah for Revolution: A Critical Assessment of State Constitutional Interpretation*, 79 OR. L. REV. 793, 869-70 (2000) [hereinafter Landau]. Not surprisingly—though he did not author the opinion—when Judge Landau’s panel of the Oregon Court of Appeals addressed an alleged taking by Washington County pled only under the Federal Takings Clause, it *did not* equate the federal and state clauses. *See* *Rogers Mach., Inc. v. Washington County*, 45 P.3d 966, 967

In terms of language, while similar, the two clauses are not identical. The federal clause provides “nor shall private property be taken for public use, without just compensation.”<sup>6</sup> However, the Oregon clause provides, “[p]rivate property shall not be taken for public use, nor the particular services of any man be demanded, without just compensation; nor except in the case of the state, without such compensation first assessed and tendered.”<sup>7</sup>

Further, the two clauses should not be interpreted in the same way. The Oregon Supreme Court has embraced originalism as the official brand of constitutional interpretation for the Oregon Constitution.<sup>8</sup> In contrast, the United States Supreme Court has strayed from original intent in its interpretation of the Fifth Amendment.<sup>9</sup> The resolution to the divisive debate over regulatory takings in Oregon turns on the original intent of the framers of the Oregon Constitution in 1857. Therefore, the Oregon Supreme Court should sever the link between the federal clause and the Oregon clause, and declare—true to the original intent of the framers—that regulatory “takings” are not compensable under the Oregon Constitution. This bold statement would serve to strengthen Oregon’s progressive land-use system.

As revealed by the intense debate over Measure 7,<sup>10</sup> land-use regulation is still a hot-button issue in Oregon nearly thirty years after the passage of the comprehensive land-use planning statute in 1973.<sup>11</sup> Property rights activists continue to challenge the power of the State to regulate land use.<sup>12</sup> Now that Measure 7 has been purged from the

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n.2 (Or. Ct. App. 2002) (stating only that “[p]etitioner does not raise a challenge under the parallel provisions of Article I, section 18 of the Oregon Constitution”).

6. U.S. CONST. amend. V.

7. OR. CONST. art. I, § 18.

8. See *infra* note **Error! Bookmark not defined.** and accompanying text.

9. See *infra* notes **Error! Bookmark not defined.**-20 and accompanying text.

10. Measure 7 on the November 2002 ballot in Oregon was a voter initiative to amend Article I, section 18 of the Oregon Constitution to require compensation to property owners for any diminution of the market value of their property resulting from a land-use regulation. ELECTIONS DIV., OR. SEC’Y OF STATE, ONLINE VOTERS’ GUIDE: STATE OF OREGON GENERAL ELECTION (Nov. 7, 2000), at <http://www.sos.state.or.us/elections/nov72000/guide/mea/m7/m7.htm> (last visited Feb. 6, 2004). Voters approved the measure, but the Oregon Supreme Court subsequently struck it down as violative of “the separate-vote requirement set out in Article XVII, section 1” of the Oregon Constitution. *League of Or. Cities v. State*, 56 P.3d 892, 896 (Or. 2002).

11. 1973 Or. Laws ch. 1, § 80 (codified at OR. REV. STAT. §§ 197.015-.860 (2001)).

12. Press Release, Oregonians in Action, Oregon Supreme Court Invalidates Measure 7 and Overturns Will of People (Oct. 2002), <http://oia.org/Measure7UpdateOct2002.htm> (last visited Feb. 6, 2004) (on file with author).

text of Article I, section 18,<sup>13</sup> it is time to take a fresh look at what limits, if any, the provision places upon the power of the State, or incorporated municipalities, to regulate land use. In fact, in September 2003, the Oregon Court of Appeals for the first time held that Article I, section 18 of the Oregon Constitution provides *more* protection for property rights than does the Fifth Amendment of the United States Constitution.<sup>14</sup>

This Comment proposes that an originalist interpretation of the provision reveals that it is not an obstacle to land-use regulation, even if a regulation deprives a property owner of all economically viable use of property. In the grand scheme of things, the Federal Takings Clause will still prove to limit such power, but that does not diminish the need for Oregon to make the statement that its own constitution does not limit the State's power to regulate land use. This interpretation is likely to draw criticism, but it is nonetheless supported by the text, case law, and history of Article I, section 18.<sup>15</sup>

Part II of this Comment sets out the current approach the Oregon Supreme Court purports to take when interpreting original clauses of

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13. *League of Or. Cities*, 56 P.3d at 896.

14. In *Coast Range Conifers, LLC v. State*, 76 P.3d 1148, 1158 (Or. Ct. App. 2003), the Oregon Court of Appeals held that the "whole parcel rule" does not apply to analysis of regulatory takings claims under Article I, section 18. The whole parcel rule, which applies under Fifth Amendment jurisprudence, requires a reviewing court to consider whether a land-use regulation deprives a landowner of all economically viable use of an entire parcel of property. See *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 327 (2002) (holding that in regulatory takings cases, the court "must focus on 'the parcel as a whole.'" (quoting *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 131 (1978))). The Oregon Court of Appeals, purportedly relying on Oregon Supreme Court precedent, rejected this rule and held that Article I, section 18 demands compensation for property owners when a land-use regulation deprives a landowner of all economically viable use of only a portion of the property. See *Coast Range Conifers*, 76 P.3d at 1158 (holding that the circuit court erred in dismissing the landowner's Article I, section 18 claim for taking a nine-acre section of its forty-acre parcel). Thus, for the first time, the Oregon Constitution places greater limits on the power of state and local governments to regulate land use for the public good than does the Federal Constitution. In light of this holding, the relevance of this Comment becomes more than academic. Prior to *Coast Range Conifers*, a holding that Article I, section 18 does not contemplate compensation for regulatory takings would have merely forced regulated property owners to plead their claims under the Federal Constitution only, with no underlying change in the amount of protection they receive or the power of government to regulate land use. Now, such a holding would alter the landscape, and empower state and local governments to continue land-use regulation without concern for having to compensate landowners for "partial" takings.

15. Admittedly, the critics of this interpretation are not powerless to change the situation. As Professor Shuster puts it, "We are likely to see an effort once again to amend Article I, section 18 with the 'Son of Seven,' either in the legislature or as another ballot measure." Professor Philip Schuster, Lecture at Lewis and Clark Law School (Oct. 7, 2002).

the Oregon Constitution. Part III applies this approach to Article I, section 18. The application begins with an analysis of the text of the provision, proceeds to examine the case law interpreting it, and is completed with a review of the provision's history. The Comment concludes that Article I, section 18 of the Oregon Constitution provides just compensation only for physical appropriations of property and does not contemplate compensation for lost value resulting from land-use regulations.