COMMENT

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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.[1]

Current takings law is largely based on 20th century Fifth Amendment case law, which has never examined the intended meaning of the federal ta085

state constitutional muster if the test is framed in terms of 19th century conceptions of property rights?[2]

I. INTRODUCTION

The Oregon Constitution, in common with the Federal Constitution and the state constitutions of the other forty-nine states,[3] prohibits the government from taking private property for public use without providing just compensation.[4] 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."[5] However, this treatment is inaccurate and inappropriate.

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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*

text of Article I, section 18,[13] it is time to take a fresh look at what limits, if any, the provision places upon the power of the State, or in-

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.