ORIGINALISM SUPPORTS COMPENSATION FOR "REGULATORY TAKINGS": THAT 'SHOT IN THE ARM' MAY BE A LETHAL INJECTION

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A new interpretation of Article I, section 18 of the Oregon Constitution has been proposed recently.[1] The intention of this revisionist interpretation appears to be an effort to eliminate any compensation for "regulatory takings," especially land use regulations. The gist of this new argument is that only denial of possession of property is compensable under Article I, section 18, Oregon's "just compensation for takings" provision. Teaney proposes that no compensation is ever due for "regulatory takings" as that term has been defined in twentieth century case law. The argument has a good deal of superficial appeal. This author tentatively reached the same conclusion several years ago following a first glance at the issue. If Teaney's proposal were correct, two results would be inevitable. First, land use proponents would feel free (even compelled) to add more restrictions on the use of private property, in order to achieve desirable social goals. But the second, opposite reaction would inexorably follow: property rights advocates and opponents of regulation would commence or renew their efforts with a variety of parries, including initiative ballot measures to require just compensation in more instances. Some observers suggest that property rights advocates, and groups with broader agendas would seek to limit judicial review or to change the composition of the judicial branch.[2]

However, analysis of the text and context, historical purposes,

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1. Derek O. Teaney, *Originalism as a Shot in the Arm for Land-Use Regulation*, 40 WILLAMETTE L. REV. 529 (2004). Under the interpretation of the present Article, that "shot in the arm" may prove to be a lethal injection, at least for uncompensated takings.

2. Ashbel S. Green, *Rulings May Put Oregon Courts On Trial Next Year*, THE OREGONIAN, Nov. 26, 2001, at A1.

and case law surrounding the power of eminent domain, the legislative power, and the requirement for just compensation leads to a far different conclusion; the Oregon Constitution contemplates that compensation be paid for interference with some nonpossessory interests in property, in addition to interference with some uses of property. Not all interferences with the use of property require compensation. But, some land use regulations may be affected, just as they are under the federal constitution. The current state interpretation, identical to the current federal test, is not too different in its results from early cases that appear to state the intention of the framers, but may not be identical to their intended analytical method.

This paper has several purposes. First, it responds to and rebuts the proposition that regulatory takings are not compensable under an originalist interpretation of Oregon's constitution. Second, it reviews Oregon's constitutional takings provisions under the original (and current) interpretive methodology and restates the tests that Oregon's Supreme Court applied to takings litigation during the first sixty years of the state's existence. Third, it briefly discusses the concept clarified by Justice Linde that the state legislative power includes the so-called "police power", the "regulatory power" as well as the eminent domain power, rendering them subject to equivalent treatment, and the same tests for takings. It does not address, but suggests future discussion topics concerning damages computations for regulatory takings. For example, how can a court measure the value of the benefit of a regulation—the "regulatory giving" that the older Oregon test required? Under the rule reiterated in this paper, damages are unlikely to be as great as some property rights advocates would want, nor as little as some advocates of land use regulation find appropriate.

I. INTRODUCTION

Under the Oregon Supreme Court's current methodology, the Oregon Constitution is not a living document subject to changing interpretation over time like the federal Constitution, but is interpreted according to intent of the drafters:; in 1857 for the original text, and at the time of adoption of later amendments.[3] The intention of the drafters is determined by reference to (1) the text of the Constitution together with the context of the words, (2) the case law interpreting both the sources from which the text is drawn and the text itself, and

3. *See* Priest v. Pearce, 840 P.2d 65, 67 (Or. 1992). *Priest* is the modern seminal case in which the court returned to the original intention of the drafters.

(3) the historical circumstances that led to its creation.[4]

A court will look first to the text and context of the words; second, to cases decided prior to or contemporaneously with the adoption of the Constitution; and third, to the historical context to determine the currents of thought and policy that the drafters sought to address.[5] This has been referred to as an originalist interpretation.[6] An unchanging interpretation is what was intended for constitutional interpretation before the civil war, according to constitutional commentators such as Theodore Sedgwick and Thomas Cooley.[7] Because an originalist interpretation appears to define and perhaps limit the judicial authority granted by the people, any changes in the rules of interpretation that expand judicial authority may require a constitutional amendment.[8]

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4. *Id.* The Oregon Supreme Court has recently relied on another source, reports of the debates of the Indiana Constitution from which much of Oregon's may have been drawn. Armatta v. Kitzhaber, 959 P.2d 49, 57 (Or. 1998). The most direct method to determine what was meant by a constitutional section adopted from another state is to look at what the Oregon convention had before it, the text, and the cases interpreting the other state's section before it was added to the Oregon Constitution. Cases, even those not debated at the convention, are more reliable than debates of another state's constitutional convention because no one from Oregon was present at those debates to know what was said and because most published debates were not widely distributed. In addition, in debates by representative bodies, important purposes of legislation are often not discussed in favor of other purposes that may be obscure in order to solve immediate problems such as gaining the votes of waffling party members. Debates of other states are helpful to the extent that they demonstrate the collective wisdom or beliefs of the general population. Court decisions, in contrast, were published and discussed by lawyers and judges, many of whom were present at the convention. Ordinary citizens took note of many cases that were discussed and debated in the highly partisan newspapers of the day, as well as in barbershops and taverns. For example, the *Dred Scott* decision was well known to the Oregon constitutional convention, even though it was only five months old, and travel was very slow.

5. *See Priest*, 840 P.2d at 67-69.

6. Jack L. Landau, *Hurrah for Revolution: A Critical Assessment of State Constitutional Interpretation*, 79 OR. L. REV. 793, 795 (2000).

7. *See* THEODORE SEDGWICK, THE INTERPRETATION AND CONSTRUCTION OF STATUTORY AND CONSTITUTIONAL LAW 179 (2d ed. 1874) ("It is the office of the courts to administer the law as the Legislature [or constitution] has declared it, not to alter the law by means of construction . . . ."). The text of the 1874 edition is identical to the 1857 first edition, but the pagination differs because updates were added as footnotes. The 1874 edition was cited in Dalles Lumbering Co. v. Urquhart, 19 P. 78, 79 (Or. 1888); THOMAS COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 54 (The Law Book Exchange 1999) (1868) ("A constitution is not to mean one thing at one time, and another at some subsequent time."). Judge Cooley was not cited as frequently as Sedgwick by the early Oregon Supreme Court.

8. It is possible that the amended Article VII, § 2 carried out this change, but the topic has not been explored. OR. CONST. art. VII, § 2 (amended 1910).

The biggest problem with the originalist interpretation is that modern lawyers have not been taught it. Most lawyers are familiar only with federal constitutional interpretation as practiced in the twentieth and twenty-first centuries. Lawyers are not taught how to research the public purposes and context of constitutional provisions. In addition, lawyers are advocates, and are prone to picking and choosing among facts and public policy statements, to quote only those that suit their needs. We need historians and political scientists to consider, and dispassionately write about *all* the influences that went into constitutional drafting.[9] Unfortunately, our constitution was written in 1857 and became operative in 1859, on the eve of the Civil War.[10] Most historians focus on that war, and its causes and outcomes, rather than on more mundane issues that are addressed in constitutions.

However, there are enough source materials and scholarly studies to demonstrate clearly that in the decades leading up to the Civil War, private property rights were in their ascendancy. 1857 was the year of the *Dred Scott*[11] decision, in which the federal Supreme Court helped bring about the Civil War by determining that property rights in human slaves triumphed over the personal liberties of those people. After the beginning of the Civil War, the Republican Party, which increasingly represented the interests of railroads and other business enterprises, dominated political discourse by "waving the bloody shirt," labeling the Democratic Party as the party that caused the war.[12] The Republicans used their authority to change public policy, to reduce the circumstances under which railroads and other developers must pay compensation either for interfering with the property of others, or for exercise of the eminent domain power that was delegated to them.[13] Therefore, constitutions written by Democrats in the 1850s stand somewhat apart from their predecessors and those that followed in the nineteenth century. They appear to have been intended to protect the development of property for private uses, and to

9. Historians too can be advocates, a fact courts and lawyers must consider. *See, e.g.*, KOHL, *infra* note 15, at vii-ix; Cachan, *infra* note **Error! Bookmark not defined.**.

10. ROY MEREDITH, STORM OVER SUMTER, THE OPENING OF THE CIVIL WAR 162, 166 (1951).

11. Scott v. Sandford, 60 U.S. 393 (1856) (holding that human slaves remained chattel property and did not become free persons merely by living in a free state for a time).

12. HENRY W. ELSON, 5 THE HISTORY OF THE UNITED STATES 35 (1905) (citing THE NATION, Vol. XXIII at 227).

13. *See* discussion *infra* Part III.B.

curb social limitations on development. Early Oregon was, however, somewhat less influenced by corporate interests, and more inclined to protect agrarian property interests.[14] It is difficult to pin down precisely what the individual members of the 1857 convention thought or intended, but the tendencies of free soil and states rights Democrats (who made up the majority of Oregon's residents and convention members) are not difficult to discern.[15]

14. DAVID JOHNSON, FOUNDING THE FAR WEST 41-70, 139-87, 142 n.10, 182-87 (1992).

15. *See*, *e.g.*, *id.*; ERIC FONER, FREE SOIL, FREE LABOR, FREE MEN, THE IDEOLOGY OF THE REPUBLICAN PARTY ON THE EVE OF THE CIVIL WAR (1995); LAWRENCE KOHL, THE POLITICS OF INDIVIDUALISM: PARTIES AND THE AMERICAN CHARACTER IN THE JACKSONIAN ERA (1989). All Democrats believed that public improvements such as roads and canals were a sometimes necessary evil, to be developed only as required to permit farmers and individually owned businesses to prosper. Whigs and Republicans promoted great public works, in the belief that they would bring about the public good. Free-soil and free-labor adherents believed that free labor should flourish without slavery in the new states based on natural law, while some states' rights adherents went so far as to deny natural law, in order to defend slavery.