

**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 Con-

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

(3) the historical circumstances that led to its creation.<sup>4</sup>

A court will look first to the text and context of the words; second, to cases decided prior to or contemporaneously with the adoption

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.<sup>9</sup> Unfortunately, our constitution was written in 1857 and became operative in 1859, on the eve of the Civil War.<sup>10</sup> 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*<sup>11</sup> 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.<sup>12</sup> 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.<sup>13</sup> 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

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9. Historians too can be advocates, a fact courts and lawyers must consider.

curb social limitations on development. Early Oregon was, however, somewhat less influenced by corporate interests, and more inclined to protect agrarian property interests.<sup>14</sup> 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.<sup>15</sup>

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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.