# REVIEWS

## *THE TAKING ISSUE: AN ANALYSIS OF THE CONSTITUTIONAL LIMITS OF LAND USE CONTROL.* By Fred Bosselman, David Callies and John Banta. Washington, D.C.: Council on Environmental Quality, 1973. Pp. xxiii, 329. $2.35

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No aspect of American folkways is so deeply engrained into our lives as is that of limitation of public regulation of private land. No issue has been so clouded by as many received truths. No area of the law needs greater clarification.

The authors of this book are aware of the tremendous task to be undertaken and the impact of the popular mind upon the law relating to taking by governmental regulation.[1] Nevertheless, *The Taking Issue*, the result of a grant for this study by the Council on Environmental Quality, is equal to the task.

The special regard in which the law has viewed real property as an object of police power regulation, separate and apart from other such objects, has always been one of the mysteries of American law. With the demise of "substantive due process" as an effective standard of review of economic legislation,[2] regulation of land use has preserved this anachronism.[3]

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1. In the opening paragraphs of their introduction the authors state:

> "Many people seriously believe that the Constitution gives every man the right to do whatever he wants with his land. Foreign concepts like 'environmental protection' and 'zoning' were probably sneaked through by the Warren Court.
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> "Many more people recognize the validity of land use regulation in general, but believe that it may never be used to reduce the value of man's land to the point where he can not make a profit on it. After all, what good is land if you can not make a profit on it."

At 1-2.

2. *Compare* Allgeyer v. Louisiana, 165 U.S. 578 (1897) and Lochner v. New York, 198 U.S. 45 (1905) *with* Nebbia v. New York, 291 U.S. 502 (1934).

3. *See, e.g.*, Nectow v. Cambridge, 277 U.S. 183 (1928); Selby Realty Co. v. City of San Buenaventura, 10 Cal. 3d 110, 514 P.2d 111, 109 Cal. Rptr. 799 (1973); Arverne Bay Constr. Co. v. Thatcher, 278 N.Y. 222, 15 N.E.2d 587 (1938).

Perhaps the survival of the taking issue with regard to regulation of land use is, as the authors suggest, an historical accident, the re-evaluation of which has been avoided or ignored by the United States Supreme Court since 1922, the heyday of substantive due process.[4] It is just as likely that the courts, while entrusting control of commerce, and hence the economy, to governmental hands, have, in the field of land use regulation, declined to allow such far-reaching powers to non-federal agencies, especially to that level of control most susceptible to heavy economic pressure, local government.[5]

This book will serve as a clarion call to rally those who have long believed that the taking issue is to land use regulation what the Emperor's New Clothes are to the Emperor. In view of the problems faced by the public in land use planning and environmental law the book could not be any more timely.

Perhaps the most useful aspect of the book is the historical treatment of the "taking" clause of the fifth amendment to the federal Constitution.[6] The authors find that clause to address itself to expropriation of lands[7] or physical invasions of realty by government.[8]

The historical basis of the "taking" clause arose out of conflicts between lay and ecclesiastical lords and the king and attempts to resolve the same by the exaction of concessions from kings by the Magna Carta and oaths, taken upon coronation, to respect feudal holdings.[9] However, these loyal concessions did not

4. *See* cases cited at note 2, *supra*, and Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

5. At 229-35 of their work, the authors note a differing standard of review dependent upon the levels of government exercising the police power, with state and regional levels enjoying a greater presumption of validity than local governments. This trend, the authors note, has continued into the seventies. *See also* Fasano v. Board of County Comm'rs, 264 Ore. 574, 580, 507 P.2d 23, 26 (1973) in which Justice Howell stated: "Local and small decision groups are simply not the equivalent in all respects of state and national legislatures."

6. In relevant part, that amendment reads: "[N]or shall private property be taken for public use, without just compensation."

7. This taking is normally accomplished through "eminent domain" proceedings.

8. *See, e.g.*, Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166 (1871) involving occupation of land by water which was backed up by a state dam erected for flood control. This basic rationale can also be used in the "airport cases" in which non-regulatory action can amount to a taking. *See* United States v. Causby, 328 U.S. 256, 268 (1946) (Black, J., dissenting).

9. Article 39 of the original Magna Carta of 1215 stated in relevant part: "No

affect the first land use regulations such as afforestation, enclosure and attempts at growth limitation in 16th century London.[10]

Bosselman and his colleagues trace the new emphasis placed upon the "deprivation of freehold" provision of the Magna Carta in the 17th century as an integral part of the middle class Puritan Revolt against the Stuart Kings, James I and Charles I, especially the biased historiography provided by that corrupt opportunist, Sir Edward Coke, one of those who justified the Whig Revolt of 1688 against James II, John Locke, and the author of the *Commentaries*, Sir William Blackstone. Each of these writers influenced the thinking of those who supported the American Revolution and the authors of the Constitution and Bill of Rights.

At the time of the American Revolution the concept of property rights required only that property not be confiscated by executive action. Later, the idea of compensation for such confiscation as was found necessary was added. Although some pre-colonial constitutions had a "taking" clause arising out of the foregoing considerations, the fifth amendment provisions juxtaposing "taking" and "just compensation" were Madison's product and not greatly discussed at the Constitutional Convention.[11]

Yet even with the exaltation of property rights by the Whigs and their successors in 19th century American trade and industry, the authors establish that the courts did not equate regulation, even severe regulation, with a proscribed taking.[12] Strict regulation of property was upheld by the courts in the face of taking arguments.[13]

In 1922 the peace which had existed on the taking issue was once again shattered by revisionist historiography. The battle-axe was wielded by none other than Oliver Wendell Holmes, a fit repo-

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free man shall be *** disseised *** except by the lawful judgment of his peers or by the law of the land."

10. THE TAKING ISSUE at 60-81: "Afforestation" was the royal designation of lands for royal hunting. Enclosure was the asserted right to reduce theretofore common grazing land to the use of the lord. In 1580 Queen Elizabeth forbade construction of new housing within 3 miles of London and in 1588 the Queen set a minimum lot size of 4 acres for new housing within the city.

11. *Id.* at 92-99.

12. *See* Hadacheck v. Sebastian, 239 U.S. 394 (1915); Powell v. Pennsylvania, 127 U.S. 678 (1888); Mugler v. Kansas, 123 U.S. 623 (1887).

13. *See* Comment, *Land Use Regulation and the Concept of Taking in Nineteenth Century America*, 40 CHI. L. REV. 854 (1973).

sitory for the Whig tradition.[14] As the authors describe, Holmes "rewrote the Constitution" in the celebrated case of *Pennsylvania Coal Co. v. Mahon*,[15] a case which invalidated state regulation of plaintiff's subsurface mineral rights on grounds that the regulation went "too far" and amounted to a prohibited taking.[16]

*Pennsylvania Coal* has not been followed by the United States Supreme Court; indeed it has been avoided and ignored, but never specifically overruled. When, four years after *Pennsylvania Coal*, that same Court upheld land use regulations as a valid police power exercise in *Village of Euclid v. Ambler Realty Co.*,[17] *Pennsylvania Coal* was not mentioned. Indeed, a good argument may be made that the Supreme Court overruled *Pennsylvania Coal, sub silentio*, in *Goldblatt v. Hempstead*,[18] which upheld severe regulation in the face of a "taking" claim.

Although the United States Supreme Court has largely failed to deal with the taking issue, state courts have had to face the problem more frequently, and with the "assistance" of *Pennsylvania Coal* as precedent. It is fair to state that the cases have fallen into three categories:

> 1. The orthodox line of cases which attempt to follow *Pennsylvania Coal* by making adjudications as to the application of Holmes's "too far" doctrine. These cases prevail in those instances in which the courts are not convinced that the governmental agency has undertaken a legitimate governmental regulatory purpose.[19]
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> 2. The line of cases which take a moderate point of view that a balance must be struck between public and private rights, presuming the former to be present and placing the burden on the person challenging the public to demonstrate

14. *See* the authors' interesting psychohistory of Holmes at 124-26, 133-35 and 240-48.

15. 260 U.S. 393 (1922).

16. *Id.* at 415. Justice Holmes stated the test to be as follows: "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes *too far* it will be recognized as a taking." *Id.* (emphasis added). *See also* the dissent of Justice Brandeis, *id.* at 416, which relies on the traditional interpretation of the relation of the police power to the taking clause as established by *Hadacheck* and *Mugler*, cited at note 12 *supra*.

17. 272 U.S. 365 (1926).

18. 369 U.S. 590 (1962).

19. *See* Nectow v. Cambridge, 277 U.S. 183 (1928); MacGibbon v. Board of Appeals, 356 Mass. 696, 255 N.E.2d 347 (1970). *See also* the discussion at note 5 *supra*.

that his property cannot be used for any purpose or cannot make a reasonable return for its owner.[20] This line of cases is now presumptively the majority rule.

3. The emerging line of cases which revert to the traditional definition of the taking clause prior to *Pennsylvania Coal* and uphold regulations which may result in denying use of property for profitable purposes.[21]

Bosselman and his colleagues profess neutrality throughout their scholarly analysis of the taking issue. Yet no one can deny that the proponents of the third alternative above are most comforted by this work. With the current re-evaluation of the taking clause by the courts, prompted by the ascendancy of environmental law, the ranks of those states opting for the third alternative should swell further.

The Oregon experience with the taking issue has been somewhat mixed. The Oregon Constitution contains a "taking" clause[22] which was not the subject of litigation *vis a vis* regulation until 1920, when the state supreme court found that the rate-setting function of the Public Service Commissioner could go so far as to constitute a "taking."[23]

Many Oregon cases discussing "taking" relate to outright use of eminent domain power[24] or involve street uses which affect abut-

20. HFH, Ltd. v. Superior Court, 116 Cal. Rptr. 436 (Cal. App. 1974); Selby Realty Co. v. City of San Buenaventura, 10 Cal. 3d 110, 514 P.2d 111, 109 Cal. Rptr. 799 (1973); Arverne Bay Constr. Co. v. Thatcher, 278 N.Y. 222, 15 N.E.2d 587 (1938).

21. Just v. Marinette County, 56 Wis. 2d 7, 201 N.W.2d 761 (1972).

22. ORE. CONST. art. I, § 18 states, in relevant part: "Private property shall not be taken for public use, nor the particular services of any man be demanded, without just compensation ***."

23. In Hammond Lumber Co. v. Public Service Comm'n, 96 Ore. 595, 604-5, 189 P.639, 641-42 (1920), the court stated:

> "The carrier devotes its private property to public service, but it is none the less on that account within the protection of the Constitution that such property shall not be taken for public use ***. But it is equally true in principle that the company is entitled to such rates as will fairly compensate it for the services rendered and for depreciation of its plant ***. In other words, the company ought to be allowed to come out even, in an undertaking *** and besides quitting whole, to receive a fair compensation for its services."

*See also* Valley & Siletz R.R. v. Flagg, 195 Ore. 683, 247 P.2d 639 (1952); Valley & Siletz R.R. v. Thomas, 151 Ore. 80, 48 P.2d 358 (1935) (including the dissent by Justice Rossman); Pacific Tel. & Tel. Co. v. Wallace, 158 Ore. 210, 75 P.2d 942 (1938).

24. *See, e.g.*, State Hwy. Comm'n v. Hooper, 259 Ore. 555, 488 P.2d 421 (1971); State Hwy. Comm'n v. Bailey, 212 Ore. 261, 319 P.2d 906 (1957). It can be safely

ting property.[25] One case even equated Oregon's taking clause to require "due process" in its exercise.[26]

Outside of the eminent domain cases, a difficult area of the "taking" issue has been destruction or damage of property by governmental action or negligence. While Oregon courts have recognized as part of the "taking" rule that invasion of property without acquisition of title can be recognized as a taking,[27] the rule has been extended to include damages to private property resulting from public improvements negligently undertaken.[28]

The most difficult line of cases to analyze are those which involve the theory of inverse condemnation,[29] which is a legal fic-

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said that most cases arising out of the ORE. CONST. art. I, § 18 are over money, rather than principle.

25. Oregon Investment Co. v. Schrunk, 242 Ore. 63, 408 P.2d 89 (1965); Ail v. City of Portland, 136 Ore. 654, 299 P. 306 (1931); Cooke v. City of Portland, 136 Ore. 233, 298 P. 900 (1931); Wilson v. City of Portland, 132 Ore. 509, 285 P. 1030 (1930); Barrett v. Union Bridge Co., 117 Ore. 220, 243 P. 93, 117 Ore. 566, 245 P. 308 (1926); Kurtz v. Southern Pac. Co., 80 Ore. 213, 155 P. 367, 156 P. 749 (1916); Tooze v. Willamette Valley So. Ry., 77 Ore. 157, 150 P. 252 (1915); Brand v. Multnomah County, 38 Ore. 79, 60 P. 390, 62 P. 609 (1900); Willamette Iron Works Co. v. Oregon Ry. & Nav. Co., 26 Ore. 224, 37 P. 1016 (1894).

26. Hill Military Academy v. City of Portland, 152 Ore. 272, 53 P.2d 55 (1936); MacVeagh v. Multnomah County, 126 Ore. 417, 270 P. 502 (1928); Lauderback v. Multnomah County, 111 Ore. 681, 226 P. 697 (1924). *But see* Linde, *Without "Due Process,"* 49 ORE. L. REV. 125 (1970).

27. In Kerns v. Couch, 141 Ore. 147, 12 P.2d 1011, 17 P.2d 323 (1932), plaintiff waived the tort of trespass (from which defendants were immune) and sued in implied contract for the use of her property for a highway without benefit of condemnation proceedings. The court apparently used the "taking by occupation" rationale set forth in note 8, *supra*, and stated:

> "Moreover, the rule has been announced by this court that a county may be sued for trespass upon private property when such invasion practically amounts to a taking of any part of the premises without a condemnation ***."

*Id.* at 149, 12 P.2d at 1011. *See also* Walker v. Mackey, 197 Ore. 197, 251 P.2d 118, 253 P.2d 280 (1953).

28. Lanning v. State Hwy. Comm'n, 515 P.2d 1355 (Ore. App. 1973); Cereghino v. State Hwy. Comm'n, 230 Ore. 439, 370 P.2d 694 (1962); Tomasek v. State Hwy. Comm'n, 196 Ore. 120, 248 P.2d 703 (1952); Levene v. City of Salem, 191 Ore. 182, 229 P.2d 255 (1951); Patterson v. Horsefly Irrigation Dist., 157 Ore. 1, 69 P.2d 282, 70 P.2d 36 (1937); Wilson v. City of Portland, 153 Ore. 679, 58 P.2d 257 (1936); Metzger v. City of Gresham, 152 Ore. 682, 54 P.2d 311 (1936); Morrison v. Clackamas County, 141 Ore. 564, 18 P.2d 814 (1933); Beck v. Lane County, 141 Ore. 580, 18 P.2d 594 (1933).

29. Arneburgh, *Recent Developments in the Law of Inverse Condemnation*, 1974 PLANNING, ZONING AND EMINENT DOMAIN DISTRICT 319 (1974); Comment, *Air*

tion implying the "taking" of a property right without benefit of condemnation proceedings.[30] The rationale is apparently the same as that of the "invasion of property" cases — the law implies a promise to pay for the property rights acquired.[31]

Moving from those cases involving, even arguably, the acquisition of a property right by invasion or occupation of land on the one hand or the acquisition of title on the other, to the cases involving "pure" regulation, one encounters a considerable grey area. For example, the Oregon supreme court previously avoided a taking issue by finding no taking of dry sand areas by legislative declaration of public use, reaching far back to the ancient doctrine of "custom" as a rationale.[32] Similarly, those cases involving franchises turn upon whether the same were granted[33] and whether regulation of vested rights or franchises went "too far" so as to amount to a taking.[34]

"Pure" regulation, however, when encountered, has not been treated uniformly. As noted above, setting utility rates too low has been found to involve a taking problem.[35] Similarly, in an early case, the application of a fire code requiring more than minimum

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*Pollution Suit Under Theory of Inverse Condemnation*, 15 S. TEX. L.J. 57 (1974); Note, *Inverse Condemnation and Nuisance: Alternative Remedies for Airport Noise Damage*, 24 SYRACUSE L. REV. 793 (1973); Comment, *Inverse Condemnation - Stream Pollution As Taking of Property for Public Use*, 40 TENN. L. REV. 514 (1973); Kramdon, *Inverse Condemnation and Air Pollution*, 11 NAT. RESOURCES J. 148 (1971); Kline, *The SST and Inverse Condemnation*, 15 VILL. L. REV. 887 (1970); Van Alstyne, *Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria*, 44 So. CAL. L. REV. 1 (1970).

30. *See* Thornburg v. Port of Portland, 233 Ore. 178, 376 P.2d 100 (1963). *But see* Moeller v. Multnomah County, 218 Ore. 413, 345 P.2d 813 (1959). *See also* authorities cited at note 27 *supra*.

31. In Lanning v. State Hwy. Comm'n, 515 P.2d 1355 (Ore. App. 1973), the Oregon court of appeals noted that inverse condemnation is a vehicle used to circumvent the theory of sovereign immunity. *See also* Borden v. City of Salem, 249 Ore. 39, 49, 436 P.2d 734, 739 (1968) (concurring opinion of Goodwin, J.).

32. State ex rel. Thornton v. Hay, 254 Ore. 584, 462 P.2d 671 (1969). *See also* County of Hawaii v. Sotomura, 517 P.2d 57 (Hawaii 1973). *But see*, City of Daytona Beach v. Tona-Rama, Inc., 294 So. 2d 73 (Fla. 1974); In re Opinion of the Justices, 313 N.E.2d 561 (Mass. 1974), which treat and reject the views of the authors. *See* Delo, *The English Doctrine of Custom in Oregon Property Law: State ex rel. Thornton v. Hay*, 4 ENV. L. 383 (1974).

33. *Compare* Pacific Elevator Co. v. City of Portland, 65 Ore. 349, 133 P. 72 (1913) *with* Mills v. Learn, 2 Ore. 215 (1867).

34. *Compare* the cases set forth in note 23, *supra*, *with* Yamhill Electric Co. v. City of McMinnville, 130 Ore. 309, 274 P. 118, 280 P. 564 (1929).

35. *See* authorities cited at note 23, *supra*.

repairs to a building which was not a "nuisance" crossed the "too far" line.[36] A later case involving the constitutionality of the Oregon Horse Roundup Statute found those provisions unconstitutional, despite three dissents, as the application was "unreasonable" and there was no satisfactory provision for notice and an opportunity to be heard.[37]

There is a contrary line of cases, however, which parallel the United States Supreme Court trend. Just as *Pennsylvania Coal* was not dealt with substantively in *Euclid*, the first Oregon case finding a "taking" by regulation was not overruled or dealt with substantively in *Kroner v. City of Portland*,[38] the first Oregon decision to uphold land use regulations. Taking claims have also been rejected in cases involving regulation of housing structures,[39] dancehalls,[40] milk price and distribution controls[41] and fish catches.[42] Most recently in a brilliant opinion by Judge Tanzer, a "taking" claim was rejected in a case upholding the Oregon "Bottle Bill."[43]

In a land use case the issue has been raised, in recent times, but once,[44] and rejected. The claim was raised in successful attacks on the Oregon Alien Property Law[45] and municipal water rate structures,[46] but these cases could well have been decided on other

36. Hill Military Academy v. City of Portland, 152 Ore. 272, 53 P.2d 55 (1936).

37. Bowden v. Davis, 205 Ore. 421, 289 P.2d 1100 (1955). *Bowden* probably turned more on federal due process claims of lack of adequate notice and opportunity to be heard before one's stray horses could be sold, but the court used ORE. CONST. art. I, § 18, *inter alia*, to reach the result.

38. 116 Ore. 141, 240 P. 536 (1925). The court noted at 151-52, 240 P. at 539-40:

> "The property of the plaintiffs is not taken. They have precisely the same estate that they had before. All that the people of Portland have said is, that within certain districts certain businesses shall not be carried on and the property situated therein shall not be used for such undertakings. ***.
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> "In brief, the people of the city have exercised their legislative discretion in the application of the police power."

*See also* Berger v. City of Salem, 131 Ore. 674, 284 P. 273 (1930).

39. Daniels v. City of Portland, 124 Ore. 677, 265 P. 790 (1928).

40. State v. Kincaid, 133 Ore. 95, 285 P. 1105, 288 P. 1015 (1930).

41. Savage v. Martin, 161 Ore. 660, 91 P.2d 273 (1939) (per Lusk, J., with the dissents based on taking).

42. Miles v. Veatch, 189 Ore. 506, 220 P.2d 511, 221 P.2d 905 (1950).

43. American Can Co. v. OLCC, 517 P.2d 691 (Ore. App. 1974), *review denied, id.* (Ore. 1974).

44. Multnomah County v. Howell, 9 Ore. App. 374, 496 P.2d 235 (1972), *review denied, id.* (1973).

45. Namba v. McCourt, 185 Ore. 579, 204 P.2d 569 (1949).

46. Kliks v. Dalles City, 216 Ore. 160, 335 P.2d 366 (1959).

grounds. Finally, in a recent case,[47] the Oregon court of appeals applied a "reasonableness" standard to taking, perhaps without warrant, to delay the application of the Oregon Scenic Waterways Act under the peculiar facts of that case, weighing "vested" property rights more heavily than environmental protection.[48]

The Oregon experience is illustrative of the national ambivalence toward the taking issue. On one hand, the strong tradition favoring property rights dies hard. On the other hand, environmental protection devices often have the effect of reducing the property values of some of those regulated. Where then, do we go from here?

The response seems to be less of a legal matter than one of economics, politics and morality. For a return to the traditional view of "taking" would allow severe regulation without compensation. If that is what the public desires, it is so entitled.[49]

For those unwilling or unable to withstand the political pressures involved in "stonewalling it," however, there remain other alternatives. The most discussed alternative is compensation to those who are "wiped out" by government regulations[50] with little consideration to the other side of the coin — recognizing windfall

47. State Hwy. Comm'n v. Chapparal Recreation Ass'n, 13 Ore. App. 346, 510 P.2d 352 (1973).

48. *See* California Central Coast Regional Coastal Zone Conservation Comm'n v. McKeon Constr., 38 Cal. App. 3d 154, 112 Cal. Rptr. 903 (1974) and San Diego Coast Regional Comm'n for San Diego County v. See by the Sea, Ltd., 9 Cal. 3rd 888, 513 P.2d 129, 109 Cal. Rptr. 377 (1973) (with three dissenting opinions). *See also* Cable & Hauck, *The Property Owner's Shield - Nonconforming Uses and Vested Rights*, 10 WILL. L. J. 404 (1974).

49. Two recent cases illustrate the point of the authors that the purposes of legislation and the statistical base upon which it is predicated should be presented in a "Brandeis brief" fashion. *Compare* Golden v. Town Planning Board of Ramapo, 30 N.Y.2d 359, 334 N.Y.S.2d 138, 285 N.E.2d 291, *cert. denied*, 409 U.S. 1003 (1972) (in which a highly sophisticated system of growth controls was well presented and survived a taking claim) *with* Construction Industry of Sonoma County v. City of Petaluma, 375 F. Supp. 574 (N.D. Cal. 1974) (in which a growth control system fell on grounds other than "taking" but in which the court apparently did not have confidence in the purported basis for the city's controls).

50. U.S. DEPT. OF H.U.D., COMPREHENSIVE PLANNING RESEARCH AND DEMONSTRATION PROJECT N. CALIF. PD-13 (June 30, 1973). For an overview of recent state environmental legislation efforts using the stricter view of taking, *see* E. HASKELL & V. PRICE, STATE ENVIRONMENTAL MANAGEMENT: CASE STUDIES OF NINE STATES (New York, Praeger, 1973) and F. BOSSELMAN & D. CALLIES, THE QUIET REVOLUTION IN LAND USE CONTROL (GPO 1972). *See also* the study being undertaken by the State of Oregon in the area of compensation for "loss of use" as a result of land use regulations as mandated by ORE. REV. STAT. § 197. 135(4) (1973).

profits from those who gain by positive governmental action.[51]

Finally, some consideration must be given to the use of land banking, especially in densely populated metropolitan areas, to resolve land use conflicts and to provide regulation not only of land use, but of the land market itself.[52] The system has been tried in Puerto Rico[53] and has been approved by the federal courts. Such a step would require a virtual abandonment of present popular views of property concepts.

The legal miasma currently surrounding the taking issue requires that both bench and bar undertake a re-evaluation of their assumptions in this area. *The Taking Issue* is a provocative work, well written, complete and an excellent contribution to American Constitutional law. More importantly, the book is a major step towards our self-understanding as a nation.

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51. Vermont has established a system wherein "windfall" profits from land sales are taxed on a capital gains basis. *See* VT. STAT. ANN. tit. 32, § 1001 *et seq.* (Supp. 1974). *See also* Hamilton, *Land Compensation Act 1973-I*, 117 SOL. J. 514 (1973); Andrews v. Lathrop, 315 A.2d 860 (Vt. 1974).

52. *See* MODEL LAND DEV. CODE, art. 6 Commentary (Tent. Draft No. 6, 1974) and materials cited therein.

53. *See* Puerto Rico Land Admin. Act, P.R. LAWS ANN. tit. 23, § 311 (1964), *construed in* Commonwealth v. Rosso, 95 P.R.R. 488 (1967), *appeal dismissed*, 393 U.S. 14 (1968).