

Dr. Dave: Last November the voters of my state (Oregon) approved a ballot measure on “takings”. The government must pay compensation if any of its regulatory or other actions reduce even modestly the value of my property. I’d like to know if anyone has done anything about the flip side of the “takings” issue, that is, “givings”. Does any community have a “givings” law?

A. Not yet, but they should.

The takings issue is based on the 5th amendment, which says, in part, “nor shall private property be taken for public use, without just compensation.” The clause referred to the right of government to seize private property for a public purpose.

In the 1980s the courts expanded the concept of “takings” from the physical seizure of property to the reduction in value of property based on government regulatory actions. After Ronald Reagan won the presidency, the takings clause became one of the conservative movement’s principal levers for restricting the public sector.

University of Chicago law professor Richard Epstein's 1985 book, “Takings”, became the movement's bible. Epstein asserted that a compensable taking occurs even when there is only a minor and even hypothetical economic impact on the affected land. Moreover, he declared that the takings clause could and should be extended to hobble many government actions.

He boldly maintained that the clause renders "constitutionally infirm or suspect many of the heralded reforms and institutions of the 20th century: zoning, rent control, workers' compensation laws, transfer payments [and] progressive taxation."

In March 1988, Reagan adopted Epstein's thesis as federal policy by issuing Executive Order 12630: "(e)xecutive departments and agencies should review their actions carefully to prevent unnecessary takings ... "

In his memoir, Reagan administration Solicitor General Charles Fried recalls that era. "Attorney General Meese and his young advisers--many drawn from the ranks of the then fledgling Federalist Societies and often devotees of the extreme libertarian views of Chicago professor Richard Epstein--had a specific, aggressive, and it seemed to me, quite radical project in mind: to use the Takings Clause of the Fifth Amendment as a severe brake upon federal and state regulation of business and property."

In 1989 and again through the early 1990s, legislation was introduced in Congress to make Reagan’s Executive Order the law of the land. These attempts failed, but in 1994 conservative Republicans took over the House of Representatives in a campaign based on their Contract With America. The Contract contained specific language for a federal anti-takings law that called for compensation if a property value was reduced by more than 20 percent.

The Contract’s language passed the House but was stymied in the Senate. But state legislatures began to introduce similar language. Some 14 states enacted anti-takings bills. The most radical such laws were enacted in Louisiana, Mississippi, Texas and Florida, in 1994 and 1995.

Oregon’s passage of Measure 37 in November 2004 marks the high point in takings legislation. The law reads, in part,

“(1) If a public entity enacts or enforces a new land use regulation or enforces a land use regulation enacted prior to the effective date of this amendment that restricts the use of private real property or any interest therein and has the effect of reducing the fair market value of the property, or any interest therein, then the owner of the property shall be paid just compensation.”

Takings has legal weight. Givings does not. However, a number of scholars have argued that the government “gives” far more than it “takes”; that is to say, governmental actions far more often raise the value of property than reduce it. When the government increases the zoning to allow for more valuable uses or higher densities on a land, it can raise the land’s market value tenfold. Yet there is no givings legislation that would require the lucky (or politically powerful) developer to offer the public “just compensation” for the givings that occurred. On the other hand, in Oregon and a growing number of other states, if the government were to downzone the property, that is, allow less valuable uses than the owner of

that undeveloped land thought he or she could allow, then the public must pay the private owner compensation.

Real estate and economic developer Donald Rypkema of Place Economics has explained that real estate is a unique form of property, for two reasons. First, the way one uses one's land affects the value of surrounding land. Second, the primary source of value in real estate is largely external to the property lines.

As to the first point, if I owned two residential lots and built a 20-story apartment building, it would reduce the value of my neighbors' lands. Installing a car repair shop on my property would cause an even greater reduction.

As to the second point, the old real estate cliché is valid, "The three most important things in real estate are location, location, location". Public decisions affect the value of real estate in both directions, notes Rypkema. If the government puts a garbage transfer station in the neighborhood, property values decline. If it puts a park in the neighborhood property values increase.

A givings movement would have to grapple with the same questions as the takings movement. When does givings occur? What form of compensation should be required? If we were to use Oregon's Measure 37 as the basis for a givings law, then 100 percent of the increased value of land due to government actions would be taxed. The tax need not be applied immediately. It could be taken when the land is sold.

More than a century ago, Henry George led a powerful movement based on the idea that by taxing the increase in the value of land resulting from public actions, many other taxes could be eliminated. Recent studies have shown that much of our urban and suburban infrastructure could be financed by taxing the increased value of the land that results from these roads or sewers or pipelines.

When government builds a road, or a train line or a bus route, the value of land within a short distance of road access points or transit stops increases. Nobel laureate in economics William Vickrey proposed that government finance transportation improvements by taxing this increased value of land near the improvements.

The concept has been successfully applied in Hong Kong. Its rail transit system receives no subsidy. All costs are paid from land rents derived from the nearby development in station areas.

Many studies have substantiated the basic point. Indeed, as William Batt, Executive Director of the Central Research Group, has concluded, "There are now enough cases where value capture has been employed to finance infrastructure that there is no longer doubt about its merit."

One case study found that by taxing the increased value of land near access ramps, the entire cost of the interstate highway system could have been paid. Another study found that the massive Washington, D.C. subway system could have been paid for by a similar land value tax.

What would a givings law look like. I'll use Oregon's Measure 37 as the basic document. A givings ballot would need to change just a few words. I've italicized the changes.

"(1) If a public entity enacts or enforces a new land use regulation or enforces a land use regulation enacted prior to the effective date of this amendment that *expands* the use of private real property or any interest therein and has the effect of *increasing* the fair market value of the property, or any interest therein, then the *public entity* shall be paid the increased value."

In a 2001 *Yale Law Journal* article, law professors Abraham Bell and Gideon Parchomovsky discuss in some detail the structure and components of a givings law.^[1] They argue that since fairness and efficiency are the driving forces behind takings laws, these principles should also animate the discussion behind givings laws.

The professors identify three varieties of takings: physical takings, regulatory takings and derivative takings. Physical taking occurs when the state seizes a property in order to put it to public use. A regulatory taking occurs when the state does not seize the property, but regulates its use in a manner that unduly diminishes its value. A derivative taking occurs when a taking diminishes the value of surrounding property. Givings are the opposite side of the coin. The table below shows examples of each type of takings or givings.

Six Types of Takings and Givings

	Physical	Regulatory	Derivative
Takings	Seizure	Downzoning	New dump nearby
Givings	Grant	Upzoning	New park nearby

The professors note that just as takings occur when a few are penalized by governmental actions, so givings should occur when a few benefit disproportionately by governmental actions. They see a “magnetic effect of givings toward corruption. Givings allow the unscrupulous to tap the vast resources accumulated by the government in state coffers.”

William Riordan, in his biography of Tammany Hall leader George Washington Plunkett quoted Plunkett’s on givings. “My party’s in power in the city and it’s goin’ to undertake a lot of public improvements. Well, I’m tipped off, say, that they’re going to lay out a new park in a certain place. I see my opportunity and I take it. I go to that place and I buy up all the land I can in the neighborhood. Then the board of this or that makes its plan public and there is a rush to get my land, which nobody cared particularly for before. Ain’t it perfectly honest to charge a good price and make a profit on my investment and foresight? Of course it is. Well, that’s honest graft.”

We need a givings movement that recognizes the flip side of the takings coin, one that recognizes the benefits of government action and reduces or eliminates the incentive for individuals to seek disproportionate benefits. There is a surprising amount of research that has gone into examining the hows and whys of such a movement. The passage of Oregon’s Measure 37 might be the catalytic agent that creates such an initiative.

[1] Abraham Bell and Gideon Parchomovsky, “Givings”, *Yale Law Journal*. November 28, 2001.