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Gregory M. Mohrman

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## POLICE POWER, GIFTS, AND THE WASHINGTON CONSTITUTION: A FRAMEWORK FOR DETERMINING THE VALIDITY OF PROPERTY RIGHTS LEGISLATION

Gregory M. Mohrman

*Abstract:* In November 1995, Washington voters rejected Initiative 164, a revolutionary property rights law that would have required governmental entities to compensate landowners for any loss in property value due to regulations on land use, unless those regulations were designed to prevent a public nuisance. Despite the initiative's defeat at the polls, a strong property rights movement is likely to prompt legislators to consider implementing a percentage-loss formula for determining when regulators owe compensation to property owners. This Comment discusses the inherent police power of the state to regulate property use in the public interest and argues that percentage-loss laws would violate article 8, sections 5 and 7 of the Washington Constitution, which prohibit the state and municipal corporations from giving gifts to private entities.

During 1990 and 1991, the Washington State Legislature enacted successive portions of the Growth Management Act (GMA).<sup>1</sup> Among the most ambitious controlled-growth laws in the nation, the GMA created a comprehensive framework for coordinated county and state development planning.<sup>2</sup> In recent years, this legislation has generated intense, negative reactions from property owners due to what many view as overly-bureaucratic structures and burdensome regulations. The resulting clamor for increased fairness to landowners spawned Initiative 164, which was adopted by the Legislature in April 1995 as the Property Rights Regulatory Fairness Act.<sup>3</sup> The Act, intended to "provide remedies to property owners in addition to any constitutional rights,"<sup>4</sup> would have required, among other things, that the government compensate landowners for any loss in property value due to regulation for "public benefit," unless a "public nuisance [would] be created absent the regulation."<sup>5</sup> Opponents successfully petitioned for a referendum on the Act, and on November 7, 1995, voters rejected the initiative.<sup>6</sup>

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1. Wash. Rev. Code ch. 36.70A (1994).

2. See generally Richard L. Settle & Charles G. Gavigan, *The Growth Management Revolution in Washington: Past, Present, and Future*, 16 U. Puget Sound L. Rev. 867 (1993).

3. 1995 Wash. Laws Ch. 98 (Wash. Init. 164).

4. Wash. Initiative 164, § 1.

5. Wash. Initiative 164, § 4(1).

6. Jim Simon & David Postman, *Voters Say No to Sweeping Change*, Seattle Times, Nov. 8, 1995, at A1. Referendum 48 failed by a 60% percent (against) to 40% percent (for) margin. *Id.*

Undaunted, property rights advocates in the Legislature and in the public at large are confident that a solution will be found to perceived problems of unreasonable government regulation. This solution probably will come in the form of legislative action.<sup>7</sup> Environmental and local government groups counter that the voters have spoken and that strong support for land use and environmental regulation should block attempts to dilute the GMA and similar controlled-growth measures.<sup>8</sup> The tensions embodied in this debate are more fundamental, however, than simply reconciling the desire to harness development and protect Washington's natural resources with a belief that individual property owners should not bear the brunt of such legislation. At their core, proposals similar to Initiative 164 question the nature of the state government's role as expressed in the Washington State Constitution.

Government's authority to regulate the use of property in the interest of the public welfare comes directly from inherent legislative police power, delegated by the Washington Constitution to municipal corporations.<sup>9</sup> The state's police power is limited only by the state and federal constitutions, which together delineate the proper realm of governmental action in the State of Washington. Furthermore, the framers of the state constitution included prohibitions against government gifts of money or property to any "individual, association, company or corporation," except to support the "poor and infirm."<sup>10</sup> Insofar as legislation might require that government pay property owners for obeying laws passed through the legitimate exercise of the police power, measures bolstering property rights may violate the constitutional ban on gifts to private entities.

The purpose of this Comment is to explore these issues in more detail and to help define the constitutional context for future property rights legislation in Washington. Part I presents a background of the state's police power to regulate the use of property. Its focus is the existing constitutional limits on the exercise of that power. It examines in detail the requirements of substantive due process and just compensation for

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7. See Michael Paulson, *Lawmakers Still Back Land-Use Compensation*, Seattle Post-Intelligencer, Nov. 9, 1995, at A1, A4.

8. *Id.* at A4.

9. Wash. Const. art. XI, § 11 ("Any county, city, town or township may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws.").

10. Wash. Const. art. VIII, § 7 (stating that counties, cities, towns, or other municipal corporations may not give money or lend credit). Article 8, section 5, although worded slightly differently, has been interpreted to extend similar prohibitions to the state itself. See *infra* notes 95-97.

takings of property, which together form the most prominent restrictions on land use regulations. Part II examines case law interpreting the constitutional prohibition on governmental gifts to private individuals and corporations. Finally, part III argues that any law mandating payments to landowners in cases where property value is decreased by regulation, but where “just compensation” is not constitutionally mandated, would be invalid because such payments would amount to unconstitutional gifts to private persons.

## I. POLICE POWER TO REGULATE PROPERTY AND THE CONSTITUTIONAL LIMITS ON THAT POWER

### A. *Police Power in Washington*

The state’s inherent police power<sup>11</sup> to protect the health, safety, and welfare of its citizens is an essential attribute of sovereignty.<sup>12</sup> Not only is this power fundamental, but organized government cannot divest itself of it.<sup>13</sup> This general police power to protect public welfare is reserved to the states by the Tenth Amendment.<sup>14</sup> The power of the state legislature is unlimited, except by provisions of the federal and state constitutions.<sup>15</sup> This power has been expressly granted to any “county, city, town or township” by article 11, section 11 of the Washington State Constitution.<sup>16</sup> Thus, these entities exercise power within their jurisdictions that is equivalent to that of the Legislature,<sup>17</sup> unless that power is restricted or pre-empted by the state.<sup>18</sup>

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11. “The word ‘police’ is derived from the Greek word ‘polis,’ meaning city. . . . Accordingly, the term ‘police power’ in its original and most comprehensive meaning, denotes the power of government in every sovereignty, that is to say, the power to govern men and things.” 6A Eugene McQuillin, *Municipal Corporations* § 24.02 (3d ed. 1988).

12. *See* County of Spokane v. Valu-Mart, Inc., 69 Wash. 2d 712, 719, 419 P.2d 993, 998 (1966) (citing *Shea v. Olson*, 185 Wash. 143, 153, 53 P.2d 615, 619 (1936)) (additional citations omitted).

13. *Shea*, 185 Wash. at 153, 53 P.2d at 619.

14. U.S. Const. amend X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).

15. *See* Philip A. Trautman, *Legislative Control of Municipal Corporations in Washington*, 38 Wash. L. Rev. 743, 743–44 (1963). While the U.S. Constitution grants powers to the federal government, the Washington State Constitution places limits on the powers of the state legislature. *Id.* at 743.

16. Wash. Const. art. XI, § 11.

17. *Detamore v. Hindley*, 83 Wash. 322, 326, 145 P. 462, 463 (1915) (stating that article 11, section 11 “is a direct delegation of the police power as ample within its limits as that possessed by the legislature itself”).

18. *See* State v. City of Seattle, 94 Wash. 2d 162, 166–67, 615 P.2d 461, 463 (1980); *Winkenwerder v. City of Yakima*, 52 Wash. 2d 617, 622, 328 P.2d 873, 877 (1958).

Early in the state's existence, Washington courts acknowledged a general inability to precisely define the police power and attempted to determine whether specific government actions could be included or excluded from this power based on the generalized principle that "the welfare of the people is the highest law."<sup>19</sup> This concept of police power not only embraced the protection of health, safety, and the suppression of public nuisances, but was expanded to include "all those regulations designed to promote public convenience, the general welfare, the general prosperity, and . . . all great public needs."<sup>20</sup> This power was determined to be primary to most private rights, including the right to contract<sup>21</sup> and the right to pursue a livelihood.<sup>22</sup> The broadening view of the police power also was articulated in terms of judicial deference to legislative determinations of the public interest.<sup>23</sup> Under this doctrine, the judiciary does not evaluate whether the actions of the legislature in fact promote the public welfare. Instead, courts presume "every such act . . . to be in the interest of the public welfare if a state of facts might reasonably exist which would justify it."<sup>24</sup> This principle of deference to legislative enactments reflects, in the eyes of the courts, "the line of demarcation between legislative and judicial functions."<sup>25</sup>

Property rights are subject to the proper exercise of police power.<sup>26</sup> As early as 1900, the Washington Supreme Court held that the Legislature may restrict the use of land to protect against private nuisances.<sup>27</sup> In *Bowes v. Aberdeen*,<sup>28</sup> the court described the right of property as a "legal and not a natural right."<sup>29</sup> As such, it "must be measured always by

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19. *State v. Mountain Timber Co.*, 75 Wash. 581, 588, 135 P. 645, 648 (1913); *see also City of Tacoma v. Boutelle*, 61 Wash. 434, 112 P. 661 (1911).

20. *State v. Pitney*, 79 Wash. 608, 611, 140 P. 918, 919 (1914).

21. *City of Seattle v. Hurst*, 50 Wash. 424, 97 P. 454 (1908) (holding that ordinance restricting hack drivers from soliciting business in train stations was reasonable and valid exercise of police power which prohibited train station from entering exclusive contract with private agency for such services).

22. *Smith v. City of Spokane*, 55 Wash. 219, 104 P. 249 (1909) (upholding ordinance creating exclusive city function to collect and dispose of garbage and other noxious substances).

23. *See City of Tacoma v. Fox*, 158 Wash. 325, 290 P. 1010 (1930).

24. *Id.* at 331, 290 P. at 1012.

25. *Duckworth v. City of Bonney Lake*, 91 Wash. 2d 19, 33, 586 P.2d 860, 869 (1978); *Lenci v. City of Seattle*, 63 Wash. 2d 664, 668, 388 P.2d 926, 929 (1964).

26. The right to keep and bear arms provides a useful analogy. The right of ownership and possession of firearms is also necessarily qualified by certain limitations imposed in the public interest. *See Second Amendment Found. v. City of Renton*, 35 Wash. App. 583, 668 P.2d 596 (1983).

27. *Karasek v. Peier*, 22 Wash. 419, 61 P. 33 (1900).

28. 58 Wash. 535, 109 P. 369 (1910).

29. *Id.* at 542, 109 P. at 371.

reference to the rights of others and of the public,"<sup>30</sup> and the public need not provide compensation when the police power is invoked to protect these rights.<sup>31</sup> In this way, police power is distinct from the power of eminent domain, where the government may appropriate property for public use provided it adequately compensates the property owner.<sup>32</sup>

The police power has long been interpreted to allow state and local governments to regulate the use of property through zoning ordinances<sup>33</sup> and environmental regulation.<sup>34</sup> Such practices have been justified on the grounds that the motivation behind them is not to change the value of individual tracts, but to benefit the community as a whole through intelligent planning of land uses.<sup>35</sup> These regulations have become more exacting as growing populations and scientific knowledge have increased the complexity and scope of state planning.<sup>36</sup> The Washington Supreme Court has stressed that economic hardship caused by a regulation does not in itself render the regulation unconstitutional.<sup>37</sup> However, escalating numbers of lawsuits<sup>38</sup> challenging the burdens imposed on landowners to preserve the environment and promote rational community growth have prompted courts to increasingly implement constitutional checks on the police power to regulate land use.

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30. *Id.*

31. *Id.*, 109 P. at 372. The court stated:

Neither an individual nor the public has the right to take the property of another and put it to a private use. But it would be manifestly destructive to the advancement or development of organized communities to put the public to the burden of rendering compensation to one, or to many, when the individual use is, or might be, a menace to the health, morals, or peace of the whole community.

*Id.* See also McQuillin, *supra* note 11, § 24.06.

32. See *infra* part I.B.3.

33. *McNaughton v. Boeing*, 68 Wash. 2d 659, 414 P.2d 778 (1966); see also G. Bruce Clement & Egil Krogh, Jr., *Regional Planning and Local Autonomy in Washington Zoning Law*, 45 Wash. L. Rev. 593, 595-99 (1970) (describing constitutional basis for local authority to zone in Washington).

34. See, e.g., *Sittner v. City of Seattle*, 62 Wash. 2d 834, 384 P.2d 859 (1963) (holding that regulation of air contaminant emissions is valid exercise of police power).

35. *Duckworth v. City of Bonney Lake*, 91 Wash. 2d 19, 27-28; 586 P.2d 860, 866 (1978) ("The general purpose of zoning is to stabilize uses, conserve property values, preserve neighborhood characters, and promote orderly growth and development.").

36. For an in-depth look at this process in Washington, see Settle & Gavigan, *supra* note 2.

37. See, e.g., *State v. CSG Job Ctr.*, 117 Wash. 2d 493, 506, 816 P.2d 725, 732 (1991); *Sittner*, 62 Wash. 2d at 839, 384 P.2d at 862.

38. The U.S. Supreme Court, for example, has reviewed more land use cases since 1980 than during its entire previous history. See Richard L. Settle, *Exploring the Uncharted Waters of Regulatory Taking Doctrine*, in *The New Frontier of Takings Law and What it Means to You: A Practical Primer for Land Use Attorneys, Planners, and Developers*, at 1 (Washington Law School Foundation ed., 1995) [hereinafter *The New Frontier*].

## B Limits on Police Power

Washington's inherent police power is limited only by the federal and state constitutions, which set forth the rights of persons with respect to government's power.<sup>39</sup> The state's capacity to regulate land use is subject to the requirements of procedural<sup>40</sup> and substantive due process,<sup>41</sup> equal protection,<sup>42</sup> and free speech,<sup>43</sup> and to the prohibition against takings without adequate compensation.<sup>44</sup> Equal protection, procedural due process, and the First Amendment play relatively minor roles in challenges to land use regulations. Substantive due process and the takings clauses of the Washington and U. S. Constitutions form the basis of most adjudicated actions and are governed by complex, evolving standards.

### 1. Substantive Due Process

The constitutional principle of substantive due process<sup>45</sup> requires that governments act fairly and reasonably. To be valid, legislation must not only have a legitimate public purpose, but also must use means which are appropriate to achieving this purpose and which do not impose an unfair burden on those affected.<sup>46</sup> The Washington Supreme Court has recently rejuvenated substantive due process as an important constitutional check on police power legislation.<sup>47</sup> This trend represents a substantial divergence from federal courts, which continue to uphold the validity of

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39. See *supra* note 15 and accompanying text.

40. U.S. Const. amend. XIV. This requirement mandates that fair procedures be adopted by the Legislature allowing the property owner notice and a chance to be heard. See G. Richard Hill, *Regulatory Taking and the Administrative Process*, in *The New Frontier*, *supra* note 38, at 6.

41. See discussion *infra* part I.B.1.

42. To overcome this requirement, the government entity must demonstrate that any different treatment had some rational relationship to the legitimate goals of the regulation. See Hill, *supra* note 40, at 7; see also *County of Spokane v. Valu-Mart, Inc.*, 69 Wash. 2d 712, 716-17, 419 P.2d 993, 996-97 (1966).

43. See *Collier v. City of Tacoma*, 121 Wash. 2d 737, 854 P.2d 1046 (1993) ('striking down sign ordinance impermissibly based upon signs' political content).

44. See discussion *infra* part I.B.2.

45. Under the 14th Amendment, states are prohibited from "depriv[ing] any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

46. See *Lawton v. Steele*, 152 U.S. 133 (1894).

47. See, e.g., *Guimont v. Clarke*, 121 Wash. 2d 586, 854 P.2d 1 (1993), *cert denied*, 114 S. Ct. 1216 (1994).

statutes absent a clear showing that government could have had no legitimate reason for enacting the legislation.<sup>48</sup>

In contrast, the Washington Supreme Court has begun to express substantive due process tests in terms that indicate their willingness to play a more active role in analyzing the connection between a statute's methods and its stated purpose. The court's broadening vision of its own role as evaluator of the rationality of legislation under substantive due process is strikingly evident in recent cases regarding land-use regulations. In *Presbytery of Seattle v. King County*,<sup>49</sup> the Washington Supreme Court applied a three-part analysis to test the validity of statutes regulating the use of private property.<sup>50</sup> First, the regulation should be aimed at achieving a legitimate public purpose.<sup>51</sup> Second, the means used should be reasonably necessary to achieve this purpose.<sup>52</sup> And third, the regulation should not be unduly oppressive on the landowner.<sup>53</sup> Since *Presbytery*, the "unduly oppressive" test has been utilized with potent effect as a separate element of substantive due process that alone can invalidate a land-use regulation. In a series of recent land use cases, the Washington Supreme Court has explicitly balanced the state interest against the private burden to find statutes void under a substantive due process analysis.<sup>54</sup>

Recent Washington interpretations of the protections granted to land owners by substantive due process reveal two important trends. First, Washington law has diverged significantly from federal law. The Washington Supreme Court, in analyzing the reasonableness of a challenged regulation partly in terms of the fairness of the economic burden placed upon the landowner, has adopted a test for substantive due

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48. See Patrick J. Schneider, *Land Use Litigation: The Government's Perspective*, in *The New Frontier*, *supra* note 38, at 9–10.

49. 114 Wash. 2d 320, 787 P.2d 907, *cert. denied*, 498 U.S. 911 (1990).

50. *Id.* at 330–31, 787 P.2d at 913.

51. *Id.* at 330, 787 P.2d at 913. Other opinions have stated that this test is satisfied as long as the legislation is reasonably necessary to promote the health, peace, morals, education, good order, and general welfare. *Hass v. City of Kirkland*, 78 Wash. 2d 929, 481 P.2d 9 (1971); *Petstel, Inc. v. County of King*, 77 Wash. 2d 144, 154–55; 459 P.2d 937, 942–43 (1969).

52. *Presbytery*, 114 Wash. 2d at 330, 787 P.2d at 913.

53. *Id.* The court mentioned a number of factors which might be relevant in making this determination, including the seriousness of the public necessity, the extent to which the owner's land contributes to the problem, the nature of remaining land uses, and the extent to which the owner should have anticipated such regulation. *Id.* at 331, 787 P.2d at 913.

54. See *Guimont v. Clarke*, 121 Wash. 2d 586, 854 P.2d 1 (1993), *cert. denied*, 114 S. Ct. 1216 (1994); *Robinson v. City of Seattle*, 119 Wash. 2d 34, 830 P.2d 318, *cert. denied*, 506 U.S. 1028 (1992); *Sintra, Inc. v. City of Seattle*, 119 Wash. 2d 1, 829 P.2d 765, *cert. denied*, 506 U.S. 1028 (1992).



process that has been explicitly rejected by the U.S. Supreme Court.<sup>55</sup> Second, the Washington Supreme Court has displayed a greater willingness to re-evaluate legislative determinations.<sup>56</sup> This trend is glaring in cases evaluating property regulations, where the heavy presumption of constitutionality has all but disappeared.<sup>57</sup>

By engaging in such detailed balancing analyses of the relative interests of the public versus those of the regulated land owner, the court has in fact taken on a quasi-legislative role.<sup>58</sup> It remains unclear whether the "undue oppression" test will extend to police actions that do not involve restrictions on the use of property, such as economic regulation.<sup>59</sup> What is evident, however, is that strong due process requirements have developed in Washington and now form a substantial, constitutional restraint upon the government's regulatory power.

## 2. Takings

The Fifth Amendment<sup>60</sup> of the U.S. Constitution and article 1, section 16 of the Washington Constitution<sup>61</sup> mandate that government cannot take private property for public use without justly compensating the landowner. The difference in wording between the state and federal provisions provides the basis for a slight difference in interpretation, with the federal approach representing a floor beneath which state protections may not fall.<sup>62</sup> Both clauses limit the power of eminent domain, through which state or federal government may invade or appropriate private

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55. See, e.g., *Brotherhood of Locomotive Firemen & Enginemen v. Chicago, Rock Island, & Pac. R.R.*, 393 U.S. 129, 143 (1968); *Nebbia v. New York*, 291 U.S. 502, 536-39 (1934).

56. This growing distrust of legislative findings is evident on the part of federal courts as well. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1025 n.12 (1992) (advancing that Takings Clause requires courts to "do more than insist upon artful harm-preventing characterizations" of legislative action).

57. See Melody B. McCutcheon, *The Uncharted Waters of Takings*, in *The New Frontier*, *supra* note 38, at 10.

58. See *Schneider*, *supra* note 48, at 12.

59. See, e.g., *State v. CSG Job Ctr.*, 117 Wash. 2d 493, 506, 816 P.2d 725, 732 (1991) ("[I]n determining whether a particular statute is reasonable, we must conclude . . . only that there is a rational connection between the purpose of the statute and the method the statute uses to accomplish that purpose.").

60. The Fifth Amendment states, in part, "nor shall private property be taken for a public use without just compensation." U.S. Const. amend. V. This amendment binds states under the 14th Amendment. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

61. Wash. Const. art. I, § 16 ("No private property shall be taken or damaged for public or private use without just compensation having first been made . . .").

62. See *supra* notes 61, 62; see also William B. Stoebe, *The Future of Takings*, in *The New Frontier*, *supra* note 38, at 1.

property. Through the doctrine of “inverse condemnation,” governmental actions which result in an usurpation of private property rights can be challenged as a taking and compensation can be obtained.<sup>63</sup>

Until the 1922 landmark case of *Pennsylvania Coal Co v. Mahon*,<sup>64</sup> the Takings Clause was considered inapplicable to regulation of the use of private property.<sup>65</sup> In *Mahon*, Justice Holmes paved the way for modern takings jurisprudence by indicating that there are constitutional limits on the private burden that can be imposed in the public interest.<sup>66</sup> He stated that when a regulation goes “too far” it will be considered a taking.<sup>67</sup> Today, when a police power action is determined to be a regulatory taking, not only will the action be invalidated, but damages may be due for temporary losses in property value incurred as a result of the overly burdensome regulation.<sup>68</sup>

Washington’s ability to regulate property is limited in two principal ways by the takings clauses of the state and federal constitutions. First, a police action is invalid if it invades or appropriates any of the “bundle” of fundamental property rights associated with ownership of a property interest.<sup>69</sup> Second, a regulation may not go “too far” by imposing inappropriate burdens upon the landowner.<sup>70</sup>

Recent U.S. Supreme Court decisions have indicated that if a fundamental attribute of property ownership<sup>71</sup> is absolutely and permanently denied, this constitutes a taking per se, regardless of the

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63. See, e.g., Richard L. Settle, *Regulatory Taking Doctrine in Washington: Now You See It, Now You Don't*, 12 U. Puget Sound L. Rev. 339, 343–45 (1989); First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 314–15 (1987).

64. 260 U.S. 393 (1922).

65. See *Mugler v. Kansas*, 123 U.S. 623, 668 (1887).

66. 260 U.S. at 415.

67. *Id.*

68. First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987). See *infra* part I.B.3.

69. See, e.g., *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982). An exception to this rule occurs when the infringement is imposed as a condition for granting a permit for development. As long as an “essential nexus” exists between the purpose of the exaction and the exaction itself, and the burden on the landowner is “roughly proportional” to the impact of the proposed development, then no taking has occurred. *Dolan v. City of Tigard*, 114 S. Ct. 2309, 2317–20 (1994). For a recent formulation of these tests in Washington, see *Sparks v. Douglas County*, 127 Wash. 2d 901, 904 P.2d 738 (1995).

70. See, e.g., *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470 (1987).

71. These include the right to possess, the right to exclude others, and the right to dispose of one’s property. *Id.* See also *Presbytery of Seattle v. King County*, 114 Wash. 2d 320, 329–30, 787 P.2d 909, 912, cert. denied, 498 U.S. 911 (1990).

importance of the state interest<sup>72</sup> and despite the fact that the invasion might be relatively trivial.<sup>73</sup> Defining the possibilities originally generated by *Mahon* more exactly, the Supreme Court also has created a new categorical taking for regulations which deny property owners of all economically viable use of their land.<sup>74</sup> While conceptually this new formulation of a per se taking arises from Holmes's "too far" test, the Court has in effect added a new right—the right to make some economically viable use of one's property—to the list of fundamental property rights protected by the Fifth Amendment.<sup>75</sup> According to this analysis, a finding that a regulatory action is a categorical taking is rebuttable only if the regulation is designed to prevent a common law nuisance.<sup>76</sup> The Washington Supreme Court adopted the federal tests for determining a per se taking in *Guimont v. Clarke*,<sup>77</sup> where it "reordered" the takings formula it previously had expressed in *Presbytery*.<sup>78</sup>

The takings clauses further limits the state's police power by requiring that a regulation not go "too far" in burdening the use of private property. The specific process used for making this determination remains obscured by a haze of shifting court opinions and substantial conflict between federal and Washington state tests. Under the federal test, if a regulation either does not advance a legitimate state interest, or denies the property owner substantially all use of property or reasonable investment-backed expectations, then the court will engage in an ad hoc, factual inquiry to balance the private burden against the public interest to

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72. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1014–15 (1992); *Loretto*, 458 U.S. at 426.

73. *Loretto*, 458 U.S. at 426.

74. *Lucas*, 505 U.S. at 1019.

75. See *Guimont v. Clarke*, 121 Wash. 2d 585, 599, 854 P.2d 1, 8 (1993), cert. denied, 114 S. Ct 1216 (1994).

76. *Id.* at 602–03, 854 P.2d at 9. This exception arises from the doctrine of *sic utere tuo ut alienum non laedas* (so use your property as to not damage the rights of others), which imposes fundamental restrictions on an owner's property rights. See *Lucas*, 505 U.S. at 1031.

77. 121 Wash. 2d 586, 854 P.2d 1.

78. *Id.* at 600, 854 P.2d at 9 (citing *Presbytery of Seattle v. King County*, 114 Wash. 2d 320, 329–30, 787 P.2d 907, 912, cert. denied, 498 U.S. 911 (1990)). In *Presbytery*, the court made two determinations: (1) whether the regulation went beyond preventing a public harm to "enhance[] a publicly owned right in property," and (2) whether the regulation destroyed one of the fundamental attributes of property ownership. 114 Wash. 2d 320, 329–30, 787 P.2d 907, 912. The *Guimont* court rearranged this preliminary test by asking instead only whether the government action deprived the owner of a fundamental attribute of property, including the *Lucas* right to viable economic use. 121 Wash. 2d at 600, 854 P.2d at 9. If this question is answered affirmatively, *Guimont* would hold that a taking has occurred.

determine whether a taking has occurred.<sup>79</sup> In essence, this inquiry allows the court to make an individualized determination of whether the regulation was fair to the landowner, but only when either the public interest it serves is minimal or the private burden it creates is inordinately high.<sup>80</sup>

The federal approach differs significantly from that used by the Washington Supreme Court. To determine whether takings analysis is applicable, the court asks the preliminary question of whether the regulation is intended to prevent harm to the public or to produce an affirmative collective benefit,<sup>81</sup> an inquiry considered by the U.S. Supreme Court to be entirely subjective and useless.<sup>82</sup> Second, Washington balances the state interest against the adverse economic impact on landowners even if the regulation serves a legitimate public purpose. The existence of an important public interest would end the federal inquiry.<sup>83</sup>

Together, these divergences from federal law greatly expand the class of regulatory activities to which the takings analysis applies. This expansion makes it theoretically possible for a regulation that both is reasonably necessary to promote the general welfare and does not infringe on any fundamental right to property to nonetheless be deemed a taking if the court finds that the burden placed upon the landowner is too extreme.<sup>84</sup>

### 3. *Police Power Versus Eminent Domain*

When a police regulation is deemed unconstitutional because it is unreasonable under substantive due process, the only directly available

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79. See, e.g., *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987); *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 123–24 (1978).

80. See *Schneider*, *supra* note 48, at 1–3.

81. *Guimont*, 121 Wash. 2d at 603, 854 P.2d at 11.

82. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1024 (1992) (“[T]he distinction between ‘harm-preventing’ and ‘benefit-conferring’ regulation is often in the eye of the beholder.”). In his concurrence to *Guimont*, Justice Utter also questioned the utility of the harm/benefit analysis, noting that a pollution-control ordinance could be seen as either “prevent[ing] the harm of pollution” or “provid[ing] the benefit of clean air.” 121 Wash. 2d at 619, 854 P.2d at 19–20 (Utter, J., concurring).

83. See *McCutcheon*, *supra* note 57, at 4.

84. In practice, however, Washington courts usually have resolved such fairness issues through a substantive due process analysis. See, e.g., *Guimont*, 121 Wash. 2d 586, 854 P.2d 1 (using substantive due process to overturn statute even though court did not find an unconstitutional taking).

remedy is invalidation of the statute.<sup>85</sup> In contrast, if a regulation is deemed to be a takings violation, money damages may be paid to the aggrieved landowners as "just compensation" for the taking of their land for public purposes.<sup>86</sup> This remedial distinction is extremely useful in understanding the conceptual differences between the substantive due process and takings limitations on government's powers. It also distinguishes the police power, which is strictly bounded by these limits, from eminent domain, which enables government to lawfully take private property as long as it provides just compensation.<sup>87</sup>

A statute which is invalid because it violates substantive due process is outside the permissible scope of the police power and therefore is unconstitutional.<sup>88</sup> Takings claims, on the other hand, are rooted not in an absolute bar to government action, but rather in a requirement of compensation if that action appropriates private property for public use. In an "inverse condemnation" proceeding, a property holder can make a claim for compensatory damages without attempting to invalidate the government action itself, because an exercise of the power of eminent domain is constitutional as long as the state compensates the landowner.<sup>89</sup> In *First English Evangelical Lutheran Church v. County of Los Angeles*,<sup>90</sup> the Supreme Court ruled, additionally, that when a police power regulation causes a taking of a specific landowner's property, not only will the government action be invalidated, but retrospective damages may be due for temporary losses in property value or use.<sup>91</sup> Under the *First English* framework, the regulating entity has the option to continue enforcing the regulation without modification by invoking its power of eminent domain to pay prospective damages for the property value to be "taken" in the future.<sup>92</sup>

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85. *Presbytery of Seattle v. King County*, 114 Wash. 2d 320, 331-32, 787 P.2d 907, 913, *cert. denied*, 498 U.S. 911 (1990). Money damages may be available indirectly through 42 U.S.C. § 1983 (1994), which provides tort remedy for violations of federal civil rights. *See Parratt v. Taylor*, 451 U.S. 527, 535 (1981), *overruled on other grounds by Daniels v. Williams*, 474 U.S. 327 (1986); *Sintra, Inc. v. City of Seattle*, 119 Wash. 2d 1, 829 P.2d 765, *cert. denied*, 506 U.S. 1028 (1992).

86. *See, e.g., First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987).

87. *See supra* notes 60-63 and accompanying text.

88. *See Presbytery*, 114 Wash. 2d at 331-32, 787 P.2d at 913; *see also Settle, supra* note 63, at 369-71.

89. *See supra* notes 60-63 and accompanying text.

90. 482 U.S. 304 (1987).

91. *Id.* at 321.

92. *Id.* at 319-21.

A police power regulation is thus invalid to the extent that it constitutes a taking of property without just compensation, because at the point that compensation is required, the regulation becomes a de facto exercise of the power of eminent domain. Similarly, when a regulatory action causes a temporary taking, retrospective damages arise due to an abuse of government powers reminiscent of a temporary application of the power of eminent domain.<sup>93</sup> At no time, therefore, does government ever need to compensate individuals for the effects of valid police power actions.<sup>94</sup>

## II. PROHIBITION OF GIFTS BY THE STATE "IN AID OF ANY INDIVIDUAL, ASSOCIATION, COMPANY, OR CORPORATION"

Article 8, sections 5<sup>95</sup> and 7,<sup>96</sup> which prohibit state and municipal corporations from giving any money or property "in aid of any individual, association, company or corporation,"<sup>97</sup> were part of Washington's original constitution. They arose from hotly debated concerns that railroad subsidies, which at the time were widely employed by many states, entangled the public in corrupt private enterprises and exposed the public to financial liability over which it could exert no control.<sup>98</sup> Although interpretation of these provisions has at times been

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93. See *supra* notes 90–91 and accompanying text. Government violations of a citizen's due process rights may trigger statutory damages under 42 U.S.C. § 1983 (1994), but, importantly, these damages only arise when government has acted impermissibly. See *supra* note 85.

94. See *supra* note 31 and accompanying text.

95. Wash. Const. art. VIII, § 5 ("The credit of the state shall not, in any manner be given or loaned to, or in aid of, any individual, association, company or corporation.").

96. Wash. Const. art. VIII, § 7 provides:

No county, city, town or other municipal corporation shall hereafter give any money, or property, or loan its money, or credit to or in aid of any individual, association, company or corporation, except for the necessary support of the poor and infirm, or become directly or indirectly the owner of any stock in or bonds of any association, company or corporation.

97. The lexical differences between the two sections, most notably the exception for aid to the poor and infirm in section 7 and the omission of the gift provision from section 5, have not resulted in different limitations upon state and local governments. Instead, section 5 has been read by the courts to create the exact same prohibitions for states as section 7 creates for counties and other municipal corporations. *Health Care Fac. v. Ray*, 93 Wash. 2d 108, 115–16, 605 P.2d 1260, 1264 (1980). See also Colin Kippen, *Article VIII, Sections 5 and 7: An Examination of the Provisions, Their Impact and the Prospects for Change* 1–11 to 1–17 (1979).

98. Kippen, *supra* note 97, at 1–9. For a more detailed history, see James M. Dolliver, *Condemnation, Credit, and Corporations in Washington: 100 Years of Judicial Decisions—Have the Framers' Views Been Followed?*, 12 U. Puget Sound L. Rev. 163, 182–84 (1989).

erratic and confusing,<sup>99</sup> a coherent framework has emerged from recent decisions which enables a reasonable prediction about how these sections are likely to be applied.<sup>100</sup>

For years, the language of these sections was interpreted strictly. Beginning with *Johns v. Wadsworth*,<sup>101</sup> courts consistently held that any voluntary payments by municipal corporations to private individuals without proper consideration were unconstitutional gifts.<sup>102</sup> Since the 1970's, however, courts have shown considerably more willingness to uphold the validity of payments from government to individuals on the grounds that the public entity received proper consideration for its payments,<sup>103</sup> that donative intent was lacking,<sup>104</sup> or that the payments were merely incident to a "recognized government function."<sup>105</sup>

In *City of Tacoma v. Taxpayers of Tacoma*,<sup>106</sup> the Washington Supreme Court analyzed the constitutionality of Tacoma's electricity conservation program, which involved payments to ratepayers who installed city-approved equipment to lessen energy consumption. The court used a two-part test to decide whether the transfer of money from public to private hands was unconstitutional under article 8, section 7.

99. Dolliver, *supra* note 98, at 185-90; Hugh Spitzer, *An Analytical View of Recent "Lending of Credit" Decisions in Washington State*, 8 U. Puget Sound L. Rev. 195, 195 (1985).

100. As discussed in Spitzer, *supra* note 99, at 198, the absence of any one of the elements necessary to cause a payment to be unconstitutional via section 5 or 7 is sufficient to validate a state action. For purposes of this discussion, the following elements alone are relevant: "No county, city, town or other municipal corporation [or the state itself] shall hereafter give any money, or property . . . to or in aid of any individual, association, company or corporation, except for the necessary support of the poor and infirm . . ." Wash. Const. art. VII, § 7. Since property rights legislation similar to Initiative 164 would mandate payments from public funds to private property owners, this discussion will focus narrowly on the question of what constitutes a "gift" according to these sections.

101. *Johns v. Wadsworth*, 80 Wash. 352, 141 P. 892 (1914). Interpreting the language of section 7 literally, the *Johns* court invalidated payments in aid of an agricultural fair, commenting that "[i]f the framers of the constitution had intended only to prohibit counties from giving money or loaning credit for other than corporate or public purposes, they would doubtless have said so in direct words." *Id.* at 354, 141 P. at 893.

102. See *State ex. rel. O'Connell v. Port of Seattle*, 65 Wash. 2d 801, 399 P.2d 623 (1965); *State ex. rel. Wash. Navigation Co. v. Pierce County*, 184 Wash. 414, 51 P.2d 407 (1935).

103. See, e.g., *Louthan v. King County*, 94 Wash. 2d 422, 617 P.2d 977 (1980) (holding that bond measure through which county raised money to obtain development rights in private land was not gift because development rights constituted consideration for payments).

104. See, e.g., *City of Bellevue v. State*, 92 Wash. 2d 717, 600 P.2d 1268 (1979) (holding that reimbursement of city employees for tips paid is not violation of gift prohibition because payment was made in recognition of services rendered and thus was made without donative intent).

105. See, e.g., *In re Marriage of Johnson*, 95 Wash. 2d 255, 264, 634 P.2d 877, 882 (1981) (holding that child support is "recognized public function" and payments incidental to this function are therefore exempt from article 8, section 5).

106. 108 Wash. 2d 679, 743 P.2d 793 (1987).

This test has been followed in subsequent cases.<sup>107</sup> First, if funds are spent carrying out a government's "fundamental purposes," then no unconstitutional gift can occur. Second, the nature of the transfer must be examined to determine whether the elements of a gift are present.<sup>108</sup>

Although the high court in *Tacoma* found that the city's actions had been taken pursuant to its proprietary functions only, rather than in pursuit of a "fundamental government purpose," it overruled the trial court's determination that these payments constituted an unconstitutional gift to ratepayers. The court emphasized that because there was no showing of donative intent, it should determine only whether the city had received legally-sufficient consideration.<sup>109</sup> According to the court, the Tacoma program met this test because it clearly would result in a savings of electricity during the first year of operation.<sup>110</sup> Furthermore, the amount of payments to participants in excess of reimbursement for the newly-installed conservation measures depended directly upon the amount of electricity that was actually saved.<sup>111</sup>

The *Tacoma* court also rejected a claim that additional benefits to participants, such as increases in property values and lower energy bills, constituted invalid gifts.<sup>112</sup> The court held that these benefits were incidental to the larger public benefit of reducing energy consumption, and therefore the demonstrated savings of electricity again served as sufficient consideration.<sup>113</sup> Without explicitly saying so, the court in essence indicated that the city's intent was to reduce community electrical consumption, not to tangentially benefit each individual property owner; therefore, there was no donative intent.

There are two important elements to the *Tacoma* approach. Initially, a court must determine whether the nature of the government activity places it within the realm of "fundamental purposes" which have been exempted from the strictures of the gift prohibition.<sup>114</sup> If so, there is no need to determine whether the elements of a gift are present, because a

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107. See *Northlake Marine Works, Inc. v. City of Seattle*, 70 Wash. App. 491, 857 P.2d 283 (1993); *Citizens for Clean Air v. City of Spokane*, 114 Wash. 2d 20, 785 P.2d 447 (1990).

108. *Tacoma*, 108 Wash. 2d at 702, 743 P.2d at 805.

109. *Id.* at 703, 743 P.2d at 805.

110. *Id.* at 704, 743 P.2d at 806. The court distinguished this from cases in which a "generalized public benefit" was held not to be sufficient consideration. *Id.* (citing *Adams v. University of Washington*, 106 Wash. 2d 312, 722 P.2d 74 (1986)).

111. *Id.*

112. *Id.* at 704-05, 743 P.2d at 806.

113. *Id.*

114. *Id.* at 702, 743 P.2d at 805.



transfer made to private persons in administering a program with such purposes should not be viewed as a gift.<sup>115</sup> If an activity does not fulfill a fundamental purpose, a court should examine the nature of the transfer itself, to determine whether it was made with donative intent and with proper consideration in return.<sup>116</sup> If all attributes of a gift are present, then the transfer is unconstitutional.

In implementing the first inquiry, the court must distinguish between a "fundamental government purpose," which is not subject to the gift ban, and a "public purpose," which is constitutionally necessary to expend public funds at all.<sup>117</sup> A proposed amendment that would have created an exception for gifts, loans of money, and other credit in service of a public purpose was in fact rejected by the framers during the constitutional convention.<sup>118</sup> However, the framers did adopt an exception for the "necessary support of the poor and infirm,"<sup>119</sup> and this textual protection has been joined by several judicially-created exemptions.<sup>120</sup> Among those fundamental government functions that have been held to be insulated from the gift prohibitions are administration of political campaign contributions,<sup>121</sup> child support,<sup>122</sup> maintenance of peaceful labor relations,<sup>123</sup> industrial insurance,<sup>124</sup> and the disposal of solid waste.<sup>125</sup>

The rationale behind such exemptions was expressed in *In re Marriage of Johnson*,<sup>126</sup> in which the court stated that "[r]ecognized governmental functions are excepted because applying constitutional

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115. See Spitzer, *supra* note 99, at 210.

116. *Tacoma*, 108 Wash. 2d at 702, 743 P.2d at 805.

117. Wash. Const. art. VII, § 1 (amend. XIV) ("All taxes . . . shall be levied and collected for public purposes only."). An expenditure of public funds must be in line with both article 7, section 1, and article 8, sections 5 and 7 to be constitutional. See *United States v. Town of N. Bonneville*, 94 Wash. 2d 827, 621 P.2d 127 (1980).

118. *In re Marriage of Johnson*, 96 Wash. 2d 255, 266, 634 P.2d 877, 883 (1981).

119. Wash. Const. art. VIII, § 7.

120. The exemption for fundamental governmental functions originated in *Morgan v. Department of Social Sec.*, 14 Wash. 2d 156, 127 P.2d 686 (1942), in which the court seemed to create an exception to article 8, section 5 for the support of the poor and needy parallel to the section 7 exemption on the grounds that the support of the needy represented a "recognized public governmental function." *Id.* at 169, 127 P.2d at 691. See generally Kippen, *supra* note 97, at I-12 to I-18.

121. *City of Seattle v. State*, 100 Wash. 2d 232, 668 P.2d 1266 (1983).

122. *Johnson*, 96 Wash. 2d 255, 634 P.2d 877.

123. See *Public Employment Relations Comm'n v. City of Kennewick*, 99 Wash. 2d 832, 664 P.2d 1240 (1983).

124. *Hadley v. Labor & Indus.*, 116 Wash. 2d 897, 907, 810 P.2d 500, 504-05 (1991); *Labor & Indus. v. Wendt*, 47 Wash. App. 427, 735 P.2d 1334 (1987).

125. *Citizens For Clean Air v. City of Spokane*, 114 Wash. 2d 20, 785 P.2d 447 (1990).

126. 96 Wash. 2d 255, 634 P.2d 877.

debt limitations such as article 8, section 5, ‘would destroy the efficiency of the agencies established by the constitution to carry out the recognized and essential powers of government.’”<sup>127</sup> The underlying rationale of this exception should not be understood to be that the existence of a public benefit in itself constitutes sufficient consideration for a transfer of money, property, or credit from government to a private person,<sup>128</sup> although a number of cases have hinted that this is so.<sup>129</sup> Commentators have emphasized that such a doctrine would jeopardize the viability of these constitutional provisions by permitting the specific government activities that the framers wished to prevent.<sup>130</sup> By making the nature of the governmental action a threshold inquiry, the *Tacoma* court expressly separated this factor from its resolution of whether the elements of a gift are present.<sup>131</sup> If a generalized public benefit were to be considered consideration for payments from government to private entities, not only would the court’s second test subsume its first, but the test would be so broad as to make the gift ban effectively meaningless.

If the payments are not exempt as fulfilling a fundamental government purpose, then a court will next examine the transfer itself to determine whether the elements of a gift are present. Under article 8, sections 5 and 7, to determine whether a gift has been made courts must look first to whether there is evidence of donative intent.<sup>132</sup> Although the standard is somewhat vague, a transfer voluntarily made, without an exchange of

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127. *Id.* at 262, 634 P.2d at 881 (quoting *Rauch v. Chapman*, 16 Wash. 568, 575, 48 P. 253, 257 (1897)).

128. See *Lassila v. City of Wenatchee*, 89 Wash. 2d 804, 576 P.2d 54 (1978) (holding that despite public function served by purchase and resale of land to private entity, the transaction was invalid as gift of credit, because donative intent was strong and no consideration existed other than public purpose).

129. *Citizens For Clean Air*, 114 Wash. 2d 20, 785 P.2d 447; *Public Employment Relations Comm’n v. City of Kennewick*, 99 Wash. 2d 832, 664 P.2d 1240 (1983); *Johnson*, 96 Wash. 2d at 262, 634 P.2d at 881. Perplexingly, the *Johnson* court managed to cite both explanations in sequential sentences. After explaining that to bar recognized government functions would “destroy the efficiency of . . . agencies,” it stated that “[t]he public benefit achieved from such activities is the ‘consideration’ for the funds expended.” *Id.*

130. See, e.g., *Spitzer*, *supra* note 99, at 210–11. *Spitzer* argues:

If, as stated in *Johnson*, the “public benefit achieved from such activities is the consideration for the funds expended, logically *any* public benefit from what would otherwise be a gift to a private individual or entity would be constitutionally acceptable. For example, increased employment from government investment in the stock of local high-technology corporations might be held adequate “public benefit” for what would otherwise be barred. . . . Yet, the framers meant to bar this very form of government investment regardless of the resulting public benefit.

*Id.* (quoting *Johnson*, 96 Wash. 2d at 262, 634 P.2d at 881).

131. *City of Tacoma v. Taxpayers of Tacoma*, 108 Wash. 2d 679, 702, 743 P.2d 793, 805 (1987).

132. *Id.* at 702–03, 743 P.2d at 805.

things of value, seems to demonstrate donative intent unless another, legitimate, non-donative purpose can be shown. The Washington Supreme Court has found a non-donative purpose if the transfer was made with the intention of obtaining adequate consideration in return,<sup>133</sup> or with the idea that it was payment for services rendered.<sup>134</sup> The Court also has indicated that when benefits to private persons occur only incidentally to achieving a valid public purpose, there is strong evidence that no unconstitutional gift has been made.<sup>135</sup>

Finally, and most importantly, the element of consideration must be examined. Washington courts have recognized different standards for analyzing consideration, depending upon whether donative intent is present. If donative intent is found, then the court must determine that "fair and adequate" consideration has been received or rule that an unconstitutional gift has been made.<sup>136</sup> Even without a finding of donative intent, however, a gift has occurred if the payments lack legally sufficient consideration. This test is satisfied by finding a bargained-for "act or forbearance."<sup>137</sup> Thus, the preliminary inquiry into the existence of donative intent is relevant only so far as it determines how closely the court will examine the sufficiency of the consideration.<sup>138</sup>

When applied, these standards blend together, but it is clear that consideration is legally adequate when the government receives fair

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133. *Scott Paper Co. v. City of Anacortes*, 90 Wash. 2d 19, 578 P.2d 1292 (1978) (holding that extension of water main for benefit of private company was without donative intent, even though costs far outran revenue from set payments in contract, because city had full intention of profiting from agreement when it entered contract).

134. *See City of Bellevue v. State*, 92 Wash. 2d 717, 721, 600 P.2d 1268, 1270 (1979) (finding that because tips are considered to be "a reasonable and necessary cost for . . . service" by city, ordinance authorizing their reimbursement was without donative intent). However, *compare City of Marysville v. State*, 101 Wash. 2d 50, 676 P.2d 989 (1984), in which past services are characterized simply as consideration for pension funds.

135. *See United States v. Town of N. Bonneville*, 94 Wash. 2d 827, 621 P.2d 127 (1980) (holding that contract to purchase municipal lands, a portion of which would be eventually sold to private enterprise, did not constitute an unconstitutional gift of credit, because there was no evidence that city intended lands to be sold to any specific private entity, and thus any benefit to private parties would be incidental to municipal development plan).

136. *See, e.g., Scott Paper Co. v. City of Anacortes*, 90 Wash. 2d 19, 32, 578 P.2d 1292, 1300 (1978). Policy considerations justify this divergence from contract law. In gift and lending of credit cases, the court is not concerned with the encouragement of contracts. It instead oversees such transactions to make sure government does not transgress its constitutionally apportioned role. *See Kippen, supra* note 97, at IV-2 to IV-5.

137. *See, e.g., Adams v. University of Washington*, 106 Wash. 2d 312, 327, 722 P.2d 74, 82 (1986).

138. *See City of Tacoma v. Taxpayers of Tacoma*, 108 Wash. 2d 679, 703, 743 P.2d 793, 805 (1987) (citing *Adams*, 106 Wash. 2d at 327, 722 P.2d at 82).

market value,<sup>139</sup> valuable property rights,<sup>140</sup> or enough return to cover its initial investment.<sup>141</sup> Unless there is a showing of donative intent, however, Washington courts generally investigate only whether the state or municipal corporation has received a bargained-for act or forbearance.<sup>142</sup> Under this sufficiency test, the actual value of the consideration is irrelevant so long as the government receives something tangible or quantifiable in return for its expenditures.<sup>143</sup>

### III. MANDATORY COMPENSATION OF PROPERTY OWNERS AS AN UNCONSTITUTIONAL GIFT

Washington's power to regulate the use of private land comes from its inherent police powers.<sup>144</sup> This power is significantly restricted by substantive due process,<sup>145</sup> which requires that government enact laws that treat citizens fairly and reasonably, and the prohibition against takings,<sup>146</sup> which dictates that property may not be confiscated for public use without first compensating the property owner. However, if the state or municipal corporation uses its police power within the ambit of these constitutional restrictions, it may do so without remunerating affected citizens for economic losses that its regulations may cause.<sup>147</sup> Because only the judiciary, not the legislature, has the power to interpret the state and federal constitutions, a property rights statute cannot re-interpret existing constitutional restrictions upon legislative actions.<sup>148</sup> As a legislative, rather than a constitutional, expression of individual rights, any percentage-loss statute must conform with the mandatory provisions of article 8, sections 5 and 7.

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139. *State ex rel. Gorton v. Port of Walla Walla*, 81 Wash. 2d 872, 876, 505 P.2d 796, 798 (1973).

140. *Louthan v. King County*, 94 Wash. 2d 422, 428, 617 P.2d 977, 981 (1980).

141. *Scott Paper Co. v. City of Anacortes*, 90 Wash. 2d 19, 32, 578 P.2d 1292, 1300 (1978).

142. *City of Tacoma v. Taxpayers of Tacoma*, 108 Wash. 2d 679, 703, 743 P.2d 793, 805 (1987); *Adams v. University of Wash.*, 106 Wash. 2d 312, 327, 722 P.2d 74, 82 (1986); *Northlake Marine Works, Inc. v. City of Seattle*, 70 Wash. App. 491, 507, 857 P.2d 283, 293 (1993).

143. *See Adams*, 106 Wash. 2d at 327–28, 722 P.2d at 82–83 (ruling that paying employees at salary level higher than that corresponding to skill level required by their job was not unconstitutional, because university received some consideration for wages paid); *Northlake Marine Works*, 70 Wash. App. at 507–09, 857 P.2d at 293–94 (determining that perpetual easement and forbearance of legal rights to disputed property are sufficient consideration for conveyance of public land to private company).

144. *See supra* part I.A.

145. *See supra* part I.B.1.

146. *See supra* part I.B.2.

147. *See supra* part I.B.3.

148. *See infra* part III.A.

Under the *City of Tacoma v. Taxpayers of Tacoma*<sup>149</sup> two-part analysis, a statute that provides for compensation to landowners for property value lost because of government regulation would violate article 8, sections 5 and 7 of the Washington Constitution because such compensation: (1) would not be merely incidental to a fundamental government purpose; and (2) would be made with donative intent and without sufficient consideration. The payments themselves would not be "incidental" to any fundamental government purpose because the creation of individual rights at the expense of public powers should not be viewed as an integral function of government, and the transfers would result from a political choice rather than a fundamental public responsibility.<sup>150</sup> The compensation would not be incidental but central to the conceivable purposes for the law, and so donative intent would very likely be present. With or without donative intent, though, compensating regulated property owners would be done gratuitously, because neither a generalized public benefit nor compliance with the law represent sufficient consideration for payments made by government to private persons.<sup>151</sup> Initiative 164 and similar measures setting mathematical thresholds for compensating landowners would therefore be unconstitutional in Washington.

*A. Compensatory Statutes Extend Property Owners' Rights Beyond Those Articulated By the Washington Constitution*

Any future property rights legislation in Washington likely will establish a percentage level loss in a landowner's property value which will be used as a threshold for determining when government must compensate for land use regulations which have caused that loss.<sup>152</sup> Such a law would mandate compensation when a regulation causes a reduction in property value, or similar economic loss to a landowner, that is greater than a certain percentage of the land's original value. A handful of states, including Texas and Florida, have already adopted this sort of percentage threshold for compensation claims.<sup>153</sup>

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149. 108 Wash. 2d 679, 743 P.2d 793 (1987).

150. See *infra* part III.B.

151. See *infra* part III.C.

152. See Stoebe, *supra* note 62, at 4-6 (describing possible forms for property rights laws).

153. Louisiana, Mississippi, and Oregon are the others, although only Texas and Florida require compensation for all real property. Rob Taylor, *Referendum 48 Breaks New Ground in Property Law*, Seattle Post-Intelligencer, Oct. 17, 1995, at A1, A10.

Initiative 164 presents a useful model for examining the specifics of the exchanges that might be compelled by percentage-loss legislation. Under the initiative, government would have been required to "pay full compensation of reduction in value to the owner" within three months of adoption of most land use regulations.<sup>154</sup> While less extreme in effect, percentage-level laws have the same basic structure: Once a regulation crosses a certain statutorily-imposed perimeter outlining permissible, non-compensable regulatory actions, government must compensate for the losses it causes to property owners.<sup>155</sup>

Two major rationales for such property rights laws exist. First, such laws rest on a belief that, in the interest of fairness, government should compensate landowners who are disproportionately affected by land-use laws. In certain circumstances, a few property owners bear the brunt of burdens which advocates believe should properly be borne by the public as a whole.<sup>156</sup> Existing constitutional protections, under such a view, are simply not sufficient to make sure that all citizens are treated fairly. A second, related rationale is that by obligating government to compensate for burdensome regulations, this sort of lawmaking will be deterred.<sup>157</sup>

However percentage-loss laws are justified, their overarching characteristic is that they require payment by the government for valid exercises of its police power, necessarily extending property rights beyond those outlined by the state and federal constitutions. While the Legislature is free to use its understandings of the constitution to inform its policy choices, it lacks the power to draft laws casting a specific constitutional interpretation.<sup>158</sup> This means, for example, that the Legislature cannot mold a new interpretation of the state and federal

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154. Initiative 164, § 4(1)–(3). Initiative 164 would have compensated property owners for any loss of value caused by government regulation. It was not a percentage-loss law.

155. See, e.g., Tex. Gov't Code Ann. §§ 2007.001–.045 (West 1996) (requiring compensation for government actions that reduce the value of private property by at least 25%).

156. See, e.g., Kemper Freeman, *Don't Believe Opponents, R-48 Protects the Little Guy*, Seattle Times, Nov. 5, 1995, at B7. But see Institute for Public Policy and Management, University of Washington, *Referendum 48: Economic Impact Study of the Property Rights Initiative 5* (1995) (indicating that to complete the regulatory fairness framework it would be necessary to offset government liability by taking to account windfalls to property owners from government actions that produce land scarcity, amenities or infrastructure).

157. See James J. Klausner, *Referendum 48: A Prod to Government Restraint*, Seattle Times, Oct. 23, 1995, at B5. This rationale raises the policy question of whether a legislature should ever write laws in order to deter itself. Legislators could perhaps achieve the same result by simply refraining from drafting burdensome laws in the first place.

158. See, e.g., Seattle Sch. Dist. No. 1 v. State, 90 Wash. 2d 476, 496, 585 P.2d 71, 83 (1978) ("The ultimate power to interpret, construe, and enforce the constitution of this state belongs to the judiciary.").

constitutions by declaring that when a certain percentage loss in land value occurs due to regulatory actions, a taking has occurred or the landowner's due process rights have been violated. Legislators can, however, create certain rights or responsibilities for individuals which they consider to be consistent with constitutional due process or takings requirements.<sup>159</sup> As discussed earlier, the police power of the state Legislature is limited only by constitutional restrictions on its exercise.<sup>160</sup> Because the Legislature cannot define what these restrictions are, any percentage-loss scheme it adopts will require payment by the government for actions that fall within the legitimate realm of its police powers.

Legislatively created reimbursements thus find their authority not in the takings or the due process clauses, but in the State's inherent power to promote the welfare of its citizens.<sup>161</sup> The Legislature has the power to create private causes of action to remedy the adverse effects wrought by government activities upon persons.<sup>162</sup> However, because the ability of the Legislature to draft laws is bound by the mandates of the constitution,<sup>163</sup> its ability to grant rights to its citizens is also necessarily limited. Article 8, sections 5 and 7 of the Washington Constitution are examples of such limitations. These provisions have been interpreted to act as mandatory restrictions on all types of government actions, including those undertaken via the police power.<sup>164</sup> Police power actions that contravene the requirements of the two lending-of-credit provisions

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159. For example, although Initiative 164 expressly defined when property should be considered to be "taken for general public use," this definition necessarily could only be for purposes of the statute, because it is beyond the power of the Legislature to define constitutional terms. Wash. Initiative 164, § 4. However, the drafters of I-164 undoubtedly had certain notions of existing constitutional protections for landowners and likely crafted the legislation to be in conformance with these notions.

160. See *supra* notes 37-42 and accompanying text.

161. Article 1, section 1 of the Washington Constitution, which states that "governments . . . are established to protect and maintain individual rights," presents a possible constitutional justification for passing such laws. Wash. Const. art. I, § 1. However, this clause does not describe a power, but rather a purpose, for government action. It is also doubtful that this section espouses the active creation of new individual rights as one of government's purposes. See *infra* notes 163-68 and accompanying text.

162. This is what Congress did when it drafted 42 U.S.C. § 1983 (1994), which created a right to damages when a governmental entity violates the civil rights of one of its citizens. See *supra* note 85 and accompanying text.

163. See *Winkenwerder v. City of Yakima*, 52 Wash. 2d 617, 328 P.2d 873 (1958); Trautman, *supra* note 15, at 743-44.

164. See *Washington State Highway Commissioners v. Pacific Northwest Bell Tel. Co.*, 59 Wash. 2d 216, 223-24, 367 P.2d 605, 609-10 (1961) (holding that state entity carrying out police power function of highway construction could not compensate displaced utility companies when these companies were already contractually obligated to move).

are invalid,<sup>165</sup> as are laws which deprive citizens of their rights to substantive due process.<sup>166</sup> Since the Legislature cannot create a constitutional right that would make payments to landowners obligatory, property rights laws, like all other government actions, must comply with article 8, sections 5 and 7.<sup>167</sup>

*B. Compensation to Regulated Property Owners Is Not Merely Incidental to a Fundamental Government Purpose*

The Washington Supreme Court has insulated from the gift prohibitions a number of state activities that accomplish their vital public purposes directly by benefiting certain private individuals. The court has often protected public assistance to individuals that “further[s] an overriding public purpose or satisf[ies] a moral obligation,” thus making any private benefit incidental.<sup>168</sup> One intriguing potential argument is that because the Washington Constitution states that governments are “established to protect and maintain individual rights,”<sup>169</sup> proposals such as Initiative 164 fulfill a fundamental purpose by protecting citizens’ rights to be treated fairly by government actions. While article 1, section 1 of the Washington Constitution may indeed indicate that the maintenance of recognized individual rights is a fundamental government purpose, this clause does not imply that broadening the scope of individual rights whenever it is deemed politically prudent should similarly be classified among government’s basic functions.

A percentage-loss property rights law would augment, rather than protect, landowners’ rights in relation to the government. As discussed earlier, such a law would not maintain the existing rights of landowners,<sup>170</sup> nor would it redefine constitutional provisions that outline

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165. *Id.* at 223–24, 367 P.2d at 610.

166. *See supra* part I.B.1.

167. Members of the Legislature of course could propose a Constitutional amendment. Adoption of an amendment requires a two-thirds vote by both houses and ratification by a majority of citizens. Wash. Const. art. XXIII, § 1. This process is “manifestly distinct” from the legislature’s law-making capabilities. *See Ford v. Logan*, 79 Wash. 2d 147, 155, 483 P.2d 1247, 1251 (1971).

168. *See City of Seattle v. State*, 100 Wash. 2d 232, 241–42, 668 P.2d 1266, 1270 (1983). Among those “entitlements” which the *Seattle* court indicated to be within this protected class of government functions were day care for working mothers, free vaccinations to control disease, fare-free bus-zones, tax deferrals for certain preferred investment projects, and compensation to felony victims. *Id.*, 668 P.2d at 1270–71. *See also supra* notes 120–25 and accompanying text.

169. Wash. Const. art. I, § 1 (“All political power is inherent in the people, and governments derive their just powers from the consent of the governed, and are established to protect and maintain individual rights.”).

170. *See supra* parts I.B.1–2.



the scope of government power.<sup>171</sup> Instead, the Legislature would limit its own law-making capabilities by extending citizens' right to be free from unfair regulation beyond this right's constitutional due process and takings formulations. The question to be answered, therefore, is not whether government has an intrinsic obligation, emphasized by article 1, section 1, to be fair to its citizens. Such an obligation clearly exists.<sup>172</sup> Rather, the inquiry should be whether it should be deemed a fundamental function of government to gradually curtail its own powers.

Unlike the federal Bill of Rights, article 1 of the Washington Constitution does not just outline individual rights vis-à-vis the government, but establishes personal rights which may not be violated by anyone, including other private citizens.<sup>173</sup> Under this conception, article 1, section 1 represents an obligation on the part of government to protect the core of personal liberty, as expressed in the constitution, from society at large. The state's police power exists in part to accomplish this task. It would be illogical to interpret article 1, section 1 to create a governmental duty to decrease its own powers in relation to its citizens while at the same time relying upon those same powers to protect the personal rights enshrined in article 1 from non-governmental actors.

Furthermore, if article 1, section 1 is interpreted not just to create an obligation for government to protect existing individual rights but to give a blanket justification for Legislatively enacted expansion of these rights as well, this provision would in essence encourage government to annul itself. Under such an understanding, individual rights could theoretically be extended to such a point that no public powers remain. The effect of inferring such a fundamental function from article 1, section 1 would be to declare that one of government's primary tasks is the incremental elimination of its own existence. The very nature of the sovereign state and the police power dictates that this cannot be so.<sup>174</sup>

Far from being pursuant to a fundamental government purpose, legislation requiring compensation to certain classes of regulated property owners should not be exempt from article 8, sections 5 and 7,

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171. See *supra* notes 152-53 and accompanying text.

172. The enactment of unreasonable or overly-confiscatory regulations are in fact beyond government's constitutionally-allotted powers. See *supra* note 163.

173. See *Alderwood Ass'n v. Washington Envtl. Council*, 96 Wash. 2d 230, 635 P.2d 108 (1981). But see *Southcenter Joint Venture v. National Democratic Policy Comm.*, 113 Wash. 2d 413, 425, 780 P.2d 1282, 1288 (1989) (finding state action requirement implicit in Washington's free speech provision).

174. See *Shea v. Olson*, 185 Wash. 143, 153, 53 P.2d 615, 619 (1936) ("Police power is an attribute of sovereignty, an essential element of the power to govern, and a function that cannot be surrendered."); see also *supra* notes 11-16 and accompanying text.

because such government action is exactly what these provisions have been interpreted to restrict. An important distinction here is that between a fundamental government function and merely a public purpose.<sup>175</sup> Restricting government's ability to grant "entitlements" and pursue other protected government functions impinges on its efficiency in promoting the basic needs of its citizens.<sup>176</sup> In contrast, a politically-motivated choice to promote the economic interests of a certain segment of the populace through monetary payments to private entities, albeit in the interest of "fairness," represents the type of public entanglement with the private sector that the framers regarded as undesirable<sup>177</sup> and that subsequent courts have ruled to be impermissible absent a concrete benefit to the public received in return.<sup>178</sup>

*C. Compensation to Landowners Would Be Made with Donative Intent and Without Sufficient Consideration*

As long as the accrued private benefits are merely incidental to a legitimate public purpose, Washington courts have been reluctant to find donative intent present in transfers to private individuals.<sup>179</sup> A property rights law might have several purposes, including acting fairly towards property owners, deterring burdensome regulations, or perhaps even promoting responsible land use. While the preservation of Washington's public environmental resources and other goals of land use regulations themselves constitute a legitimate public purpose, compensation to landowners made ostensibly in aid of such lofty pursuits remains vulnerable to a finding of donative intent, because the benefit to private individuals would not be "incidental" to protecting the state's natural resources. Comparable logic was used by the court in *Lassila v. City of Wenatchee*<sup>180</sup> in holding that the city unconstitutionally lent its credit when it purchased and then re-sold property to a private party. Although Wenatchee made the purchase pursuant to a program of municipal development, the court distinguished this general purpose from the city's central intent in making the transaction, which was to gift public credit to

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175. See *supra* notes 127–30 and accompanying text.

176. See *supra* notes 126–27, describing rationale for holding "recognized public governmental functions" beyond the reach of article 8, section 5.

177. See Dolliver, *supra* note 98, at 182–84; Kippen, *supra* note 97, at I-6 to I-11.

178. See *Lassila v. City of Wenatchee*, 89 Wash. 2d 804, 576 P.2d 54 (1978); *State ex. rel. O'Connell v. Port of Seattle*, 65 Wash. 2d 801, 399 P.2d 623 (1965); *Johns v. Wadsworth*, 80 Wash. 352, 141 P. 892 (1914).

179. See *supra* note 135 and accompanying text.

180. 89 Wash. 2d 804, 576 P.2d 54.

a private entity.<sup>181</sup> The remunerative benefit to landowners similarly would be the primary goal of any statute extending property owners' rights.

The goals of affirmatively creating individual rights by the Legislature and deterring the passage of certain laws are more difficult to divorce from the intent underlying the compensation of property owners. Admittedly, payments to property owners could be seen as "incidental" to these goals, although it is perhaps uncertain whether either is a truly legitimate public purpose. Both were the subject of lively debate throughout the referendum campaign.<sup>182</sup> This question is political, rather than legal, however, and in final analysis it has no bearing upon whether percentage-loss compensation schemes amount to unconstitutional gifts. Regardless of whether or not the state intends to gratuitously benefit private individuals, an unconstitutional gift has occurred as long as the government does not receive value for its payments. No such consideration exists for the compensation of regulated landowners.

It is evident, first of all, that under a percentage-loss statute the Legislature would not be mandating payments to property owners for the purpose of compensating past services or with any realistic expectation that adequate consideration would be received. Because the state Legislature is already constitutionally empowered to enact regulations without compensating those who experience economic loss as a result, any past service or other consideration rendered by those receiving remuneration would simply amount to compliance with valid police power ordinances. Such compliance is not a service, but an obligation. In *Washington State Highway Commission v. Pacific Northwest Bell Telephone*,<sup>183</sup> the state supreme court held that compensating utility companies for moving their facilities to make way for highway expansion was an unconstitutional gift to these entities<sup>184</sup> because a provision in the franchises granted to them by the state already obligated the companies to move their facilities at their own expense.<sup>185</sup> In a similar manner, actions by landowners that are already obligated under the state constitution, conceptually a contract between the State and its citizens,

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181. *Id.* at 810–11, 576 P.2d at 57–58.

182. *See, e.g.,* Freeman, *supra* note 156; Roger Wynne, *Empty and Irresponsible, Measure Will Bankrupt Us*, *Seattle Times*, Nov. 5, 1995, at B7. This pair of pro/con articles by Freeman, president of Kemper Development in Bellevue, and Wynne, a Seattle land-use attorney, is illustrative of the political debate which occurred during the campaign.

183. 59 Wash. 2d 216, 367 P.2d 605 (1961).

184. *Id.* at 224, 367 P.2d at 610.

185. *Id.* at 218, 367 P.2d at 606.

cannot give rise to an imputation that government transfers to the landowners were made with an expectation of return value. These payments would be entirely superfluous to any conceivable service rendered.

If a court were to find donative intent, the consideration for governmental transfers to private entities would have to be examined for adequacy.<sup>186</sup> Even without a finding of donative intent, the court should invalidate payments from government to private persons if no bargained-for act or forbearance were received in return.<sup>187</sup> Any consideration that might buttress payments to property owners fails even this legal sufficiency test. Washington courts have repeatedly emphasized that a generalized public benefit does not satisfy this requirement.<sup>188</sup> Thus, the only concrete act or forbearance that might be offered by landowners in return for state expenditures is to comply with lawfully-enacted regulations, which citizens already are constitutionally required to do. Applying traditional Lockean notions of the state, the bargain here has already occurred. By living in a society which is governed via the consensual authority granted to the state by a constitution, property owners as well as all other citizens have the reciprocal obligation to live by all rules properly enacted by society's governing bodies.

Compensating property owners for adverse economic effects of constitutionally valid government regulations simply because conceivable land uses are restricted is akin to paying drivers of Porsches not to speed. Although Porsche owners might like to drive at the speed their machine is capable of traveling, and in fact may pay extra money with the expectation of superior performance, the public welfare requires that the speed of all drivers be regulated. Similarly, when an investor buys a piece of real estate, the uses of the property are subject to restriction in the interest of the general welfare. This is true regardless of the severity of the differential between potential and legal uses, as long as the restriction does not entirely prevent the owner from using the property. The role of the Legislature, within the constitutional bounds of

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186. See *supra* notes 136–41 and accompanying text.

187. See *City of Tacoma v. Taxpayers of Tacoma*, 108 Wash. 2d 679, 703, 743 P.2d 793, 805 (1987); *Adams v. University of Washington*, 106 Wash. 2d 312, 327, 722 P.2d 74, 82 (1986); *Northlake Marine Works, Inc. v. City of Seattle*, 70 Wash. App. 491, 507, 857 P.2d 283, 293 (1993).

188. See *Tacoma*, 108 Wash. 2d at 704, 743 P.2d at 806 (stressing that city attained "actual savings," not just "generalized public benefit," from its payments to ratepayers); *State ex. rel. O'Connell v. Port of Seattle*, 65 Wash. 2d 801, 804–06, 399 P.2d 623, 625–26 (1965) (holding that despite possible promotion of port facilities which might be achieved through hosting potential business partners, expenditure of funds for this purpose was unconstitutional gift to prospective customers).

its authority, is to determine at what point to draw these limitations. According to the mandatory provisions of article 8, sections 5 and 7 of the Washington Constitution, it is beyond the realm of permissible government action for legislators to choose to gratuitously benefit private entities, regardless of their professed motivation to minimize the adverse effects of their decisions upon certain segments of the population.

#### IV. CONCLUSION

Washington's inherent sovereign police power is constitutionally delegated to municipal corporations and is restricted solely, but significantly, by the state and federal constitutions. This power enables the Washington State Legislature, as well as cities and counties, to regulate the use of property in the public interest. Both percentage-loss schemes and more extreme compensatory statutes such as Initiative 164 would pay regulated landowners for lost property value caused by permissible requirements and exactions that do not amount to constitutional takings or otherwise invalid exercises of the police power. Because landowners already are constitutionally obligated to comply with valid land-use regulations, a governmental compensation statute in this form would violate article 8, sections 5 and 7 of the Washington Constitution.

This analysis indicates that to properly address issues of fairness in property regulation, the Legislature should modify regulatory actions and streamline permitting and other processes to be less frustrating for the regulated. Washington seems to be attempting this.<sup>189</sup> Alternatively, or perhaps in conjunction with legislative efforts, Washington courts should intensify their quest to develop a clear constitutional standard for what amounts to a regulatory taking and what does not. Paying regulated landowners is not among the procedural alternatives contemplated by the framers of our state constitution.

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189. See 1995 Wash. Laws Ch. 347 (integrating a variety of environmental and growth management laws into a comprehensive permit review process to simplify and expedite the application of land-use regulations).