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THE MYTH OF PROPERTY ABSOLUTISM AND MODERN GOVERNMENT: THE INTERACTION OF POLICE POWER AND PROPERTY RIGHTS

Justice Philip A. Talmadge*

Abstract: A new movement in America espousing a novel doctrine, property-rights absolutism, has gained some popular and political appeal. But the property rights absolutists tend to ignore the societal foundations of property, and especially de-emphasize the responsibilities property owners have to the community in which they live. They fail to consider properly the significance of the police power and its vital role in the American and Washington State constitutional systems. This Article debunks the newly minted mythology of the property-rights absolutists and places the police power and property rights in their proper historical perspective.

The fundamental roles of government are to regulate public health and safety, maintain the peace, and provide for the general welfare. The authority to do these things is usually referred to as the police power.1 The origin of the police power coincides with the dawn of government generally and certainly finds expression in Washington State’s Constitution, enacted in 1889.

Increasingly, however, the exercise of police power by state and local government has come under fire by those who assert that the exercise of

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1. The term “police power” made its first appearance in the U.S. Supreme Court in Brown v. Maryland, 25 U.S. (12 Wheat.) 419, 443 (1827). The concept, however, is much older. Blackstone described the police power as follows: “[T]he due regulation and domestic order of the kingdom, whereby the individuals of the state, like members of a well-governed family, are bound to conform their general behaviour to the rules of propriety, good neighbourhood, and good manners; and to be decent, industrious, and inoffensive in their respective stations.” 4 Blackstone’s Commentaries 162 (St. George Tucker ed., Rothman Reprints, Inc. 1969) (1803). “The term ‘police power’ connotes the time-tested conceptional limit of public encroachment upon private interests. Except for the substitution of the familiar standard of ‘reasonableness,’ this Court has generally refrained from announcing any specific criteria.” Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962). The Supreme Court of Washington has opined that the police power precedes constitutional government: “It is probable that this power is the most exalted attribute of government, and, like the power of eminent domain, it existed before and independently of constitutions.” Conger v. Pierce County, 116 Wash. 27, 35, 198 P. 377, 380 (1921).
such power impinges too dramatically on property rights.\textsuperscript{2} Property rights are, of course, important in the American view of ordered liberty. The ideologically driven views of modern-day property-rights advocates, however, would effectively undercut the police power by elevating policy disputes to constitutional dimensions, thereby transferring the decision-making process from the people acting through their elected representatives to the courts. They would turn back the clock to the days of \textit{Lochner v. New York},\textsuperscript{3} when an activist Supreme Court routinely overturned state and federal economic regulations.\textsuperscript{4} Indeed, one commentator has referred to the Supreme Court’s decision in \textit{Lucas v. South Carolina Coastal Council}\textsuperscript{5} as “superactive” and the opinion’s author, Justice Scalia, as a “judicial imperialist.”\textsuperscript{6} Property-rights activists would reverse seventy years of American constitutional law and confer upon courts the power to make local land-use decisions.\textsuperscript{7} Modern challenges to the exercise of police power, based on the Takings Clause and substantive due process, are now common.

Modern property absolutists contend the police power may not extend to any “use” of property. That is, any governmental action affecting a

\textsuperscript{2} See generally Richard A. Epstein, \textit{Takings: Private Property and the Power of Eminent Domain} (1985). Epstein contended the U.S. Supreme Court should alter its historic takings jurisprudence by applying the Takings Clause of the Fifth Amendment to individual uses of property. As Epstein theorized, the Takings Clause not only made every government action affecting a property use compensable, it rendered anything resembling a re-distribution of wealth unconstitutional. Indeed, Epstein boldly acknowledged the consequences of his views: “I argue that the eminent domain clause and parallel clauses in the Constitution render constitutionally infirm or suspect many of the heralded reforms and institutions of the twentieth century: zoning, rent control, workers’ compensation laws, transfer payments, progressive taxation.” \textit{Id.} at x.

\textsuperscript{3} 198 U.S. 45 (1905); see infra notes 83–86 and accompanying text.

\textsuperscript{4} See, e.g., \textit{Adkins v. Children’s Hosp.}, 261 U.S. 525 (1923) (holding Congress cannot redress unequal bargaining power between employer and employee); \textit{Coppage v. Kansas}, 236 U.S. 1 (1915) (striking statute making it illegal for employer to require employee to agree not to join union as condition of employment).

\textsuperscript{5} 505 U.S. 1003 (1992).


\textsuperscript{7} Some federal courts have not taken kindly to being used for such purposes. See, e.g., \textit{Harding v. County of Door}, 870 F.2d 430, 432 (7th Cir. 1989) (“Federal courts are ordinarily not vehicles to review zoning board decisions.”); \textit{Sullivan v. Town of Salem}, 805 F.2d 81, 82 (2d Cir. 1986) (“Federal courts should not become zoning boards of appeal to review nonconstitutional land use determinations.”).
Police Power and Property Rights

person’s use of property, in any fashion, constitutes a taking entitling that person to compensation. This extreme, indeed revolutionary, conception of property essentially undercuts any land-use regulation. The people of Washington State rejected this view at the polls in 1995.9

While proponents of this view have confined their argument to interests in land, there is no reason to believe the principle would be so limited. Certainly intangible property such as stocks and bonds would be likewise included. Yet the analysis need not stop at personal property. The so-called “new property”10 interests, such as public assistance or Social Security, could also be viewed as property worthy of this constitutional protection.11 An unbounded view of property rights would relegate to the courts nearly all disputes over the propriety of a police-power regulation. This is precisely why the courts should be reluctant to allow property-rights absolutists to “constitutionalize” the line of

8. Some commentators have suggested that well-financed political organizations advance this extreme view, intending to limit government involvement in land-use matters specifically and to diminish the influence of government generally. This “Takings Project,” using funds from wealthy individuals benefiting from a limited government, finances legal groups bringing test cases and attempts to influence judges by paying for judicial-edu cat ion seminars espousing its views at prime vacation locales. See Douglas T. Kendall & Charles P. Lord, The Takings Project: A Critical Analysis and Assessment of the Progress So Far, 25 B.C. Envtl. Aff. L. Rev. 509, 539–54 (1998).

9. The Private Property Regulatory Fairness Act, ch. 98, 1995 Wash. Laws 360, purported to require full compensation for any action by government regulating or limiting any use of property. With respect to takings, the statute stated:

A portion or parcel of private property shall be considered to have been taken for general public use when:

(a) a governmental entity regulates or imposes a restraint of land-use on such portion or parcel of property for public benefit including wetlands, fish or wildlife habitat, buffer zone, or other public benefit designations; and

(b) no public nuisance will be created absent the regulation . . . .

Private Property Regulatory Fairness Act, § 4(1), 1995 Wash. Laws 360–61. The statute further defined “restraint of land use” in this very broad fashion: “any action, requirement, or restriction by a governmental entity, other than actions to prevent or abate public nuisances, that limits the use or development of [sic] private property.” §7(4), 1995 Wash. Law at 362. This statutory conception of a taking would have enshrined Professor Epstein’s view on takings in Washington law.

Opponents subsequently gathered the requisite signatures to force a vote on the legislation. In the 1995 general election, Referendum 48 passed, 796,869 to 544,788 (or 59 percent to 41 percent), voiding the legislative enactment. See Wash. Rev. Code § 64.42 (1995).


demarcation between property rights and police power. Public-policy disputes should remain in the popular branches of government.

The critical concern, however, is the lack of attention the property-rights absolutists pay to the needs of society and the social responsibilities of property ownership. Eschewing any communitarian impulses,12 the more extreme property advocates contend for an absolute interest in property protected by the constitution, free of any social or political regulation. This concept of property is both dangerous and mythical; neither American heritage nor constitutional law lends support to an absolutist right to property free of considerations of the community’s interests.

12. See, e.g., Amitai Etzioni, The Spirit of Community: Rights, Responsibilities and the Communitarian Agenda (1993). Etzioni describes the reason he and others founded the communitarian movement in 1990:

We were troubled by the finding that many Americans are rather reluctant to accept responsibilities. We were distressed that many Americans are all too eager to spell out what they are entitled to but are all too slow to give something back to others and to the community. We adopted the name Communitarian to emphasize that the time had come to attend to our responsibilities to the conditions and elements we all share, to the community.

As Communitarians we also recognized a need for a new social, philosophical, and political map. The designation of political camps as liberals or conservatives, as left or right, often no longer serves. We see at one extreme Authoritarians (such as the Moral Majority and Liberty Bell). They urge the imposition on all others of moral positions they believe in, from prayer in schools to forcing women to stay in the kitchen. At the other end we see Radical Individualists (libertarians such as the intellectuals at the Cato Institute; civil libertarians, especially the American Civil Liberties Union; and laissez-faire conservatives), who believe that if individuals are left on their own to pursue their choices, rights, and self-interests, all will be well. We suggest that free individuals require a community, which backs them up against encroachment by the state and sustains morality by drawing on the gentle prodding of kin, friends, neighbors, and other community members, rather than building on government controls or fear of authorities.

Id. at 15. Etzioni suggests communitarians are direct intellectual heirs of the Progressive movement in American politics. Id. at 231–33. The communitarian platform emphasizes the perspective that social values and individual rights must be considered in our society:

A Communitarian perspective recognizes that the preservation of individual liberty depends on the active maintenance of the institutions of civil society where citizens learn respect for others as well as self-respect; where we acquire a lively sense of our personal and civic responsibilities, along with an appreciation of our own rights and the rights of others; where we develop the skills of self-government as well as the habit of governing ourselves and learn to serve others—not just self.

A Communitarian perspective recognizes that communities and polities, too, have obligations—including the duty to be responsive to their members and to foster participation and deliberation in social and political life.

Id. at 253–54.
Washington State's treatment of police power and its limitations are representative of state law in America. Part I of this Article addresses the historical treatment of police power and property rights and the Washington Constitution's treatment of those issues. Part II considers the development of police-power case law in federal courts and Washington from 1889 to the present. Part III assesses the limitations on the exercise of police power found in the law of takings and substantive due process. Finally, Part IV of this Article offers thoughts on the proper role of the police power and property rights at the start of the twenty-first century.

I. POLICE POWER AND PROPERTY RIGHTS IN CONSTITUTIONAL GOVERNMENT

The extreme advocates of absolute property rights deny the importance of the police power as a fundamental attribute of the government in the regulation of property. Their position is based on an unsound view of property in Western political philosophy and historical fact. They mythologize the role of property when human beings were in the state of nature. More troubling is their failure properly to treat property and police power in American constitutional law. They argue for a revolutionary reversal of the relationship between police power and property unprecedented in the nation's history and unsupported by federal or Washington constitutional law.

A. Police Power and Property in Western Political Philosophy

The exercise of police power—governmental action to advance public health, safety, peace, and welfare—has long been a part of the very nature of government itself. The ancient Greeks recognized early on the importance of police power in their political philosophy. Indeed, Aristotle considered the state the highest form of community, existing to achieve the highest good for its citizens: "The end of the State is the good life . . . . And the State is the union of families and villages in a perfect and self-sufficing life, by which we mean a happy and honourable life." In the Aristotelian model, the government's exercise

13. See Martin Flaherty, History "Lite" in Modern American Constitutionalism, 95 Colum. L. Rev. 523, 525 (1995) (criticizing legal academicians for "historical assertions that are at best deeply problematic and at worst, howlers").

of police power was undiminished and unrestrained because the objective of the state coincided with the highest good.\textsuperscript{15}

Later, in the great eighteenth century liberal tradition that so influenced the American constitutional experience, the treatment of police power was a live controversy, touching upon the extent of governmental authority generally. John Locke contended government was a social compact between the governed and the government, existing to preserve life, liberty, and property; government could take the necessary steps to secure these fundamental interests.\textsuperscript{16} Thomas Hobbes

\footnotesize{\textsuperscript{15} See id. at 1–2. This notion of virtue being an objective of government is echoed in communitarian writing:
At stake is the question “What constitutes the good society, the virtuous society?” Not everybody agrees that this question should be asked, let alone answered. Radical individualists argue that once a certain conduct is defined as virtuous, then an essential foundation of our society is undermined. They fear that those members of society who fail to display the characteristics considered virtuous will be treated as inferior, if they are not discriminated against outright.

Communitarians argue that a society without some shared virtues cannot exist. A society cannot tolerate a condition in which all behavior is considered of equal merit. We must condemn not merely murder, rape, robbery, and other behaviors we call crimes (that is, counter to virtue), but also the destruction of the environment, discrimination against others, and many behaviors that endanger the sustainability of our communities and the values we hold dear. Moreover, the ultimate defense against intolerance is not to regard all behavior as equally meritorious but to consider mutual respect a key societal strength. It is within a healthy social context that social responsibilities and individual rights find their ultimate home. Struggling to ensure that both are well attended to goes a long way to make society virtuous.


\textsuperscript{16} John Locke, \textit{Two Treatises of Government} 303–20 (Peter Laslett ed., Cambridge Univ. Press 1960) (1690). Those who assume Locke carved out an impenetrable right of property ownership read too much into into Locke. Locke believed a person’s agreement to enter into society resulted in the submission of the individual and his property to government as they became “both of them, Person and Possession, subject to the Government and Dominion of that Commonwealth, as long as it hath a being.” \textit{Id.} at 366. Locke noted:

For it would be a direct Contradiction, for any one, to enter into Society with others for the securing and regulating of Property: And yet to suppose his Land, whose Property is to be regulated by the Laws of the Society, should be exempt from the Jurisdiction of that Government, to which he himself the Proprietor of the Land, is a Subject.

\textit{Id.} Further, as Professor James Tully of McGill University observed, Locke believed property created certain obligations, including charity:

In the same sentence in which he first announces that honest industry naturally entitles a person to his just products, he also proclaims two other natural titles: charity and inheritance (I.42). “Charity gives every Man a Title to so much out of another’s Plenty, as will keep him from extreme want, where he has no means to subsist otherwise.” Where no means are available for a man to provide for himself, the right to the means of subsistence applies directly to another person’s goods. “God the Lord and Father of all, has given no one of his Children such a
Property, in his peculiar Portion of the things of this World, but that he has given his needy Brother a Right to the Surplusage of his Goods." A proprietor who has more than enough to sustain himself is under a positive duty to sustain those who do not: "twould always be a Sin in any man of Estate, to let his Brother perish for want of affording him Relief out of his plenty."

James Tully, *A Discourse on Property: John Locke and His Adversaries* 131–32 (1980). Locke's invocation of the charitable obligation property ownership conveys upon the owner is perhaps a reflection of the Biblical injunction:

And when ye reap the harvest of your land, thou shalt not wholly reap the corners of thy field, neither shalt thou gather the gleanings of thy harvest.

And thou shalt not glean thy vineyard, neither shalt thou gather every grape of thy vineyard; thou shalt leave them for the poor and stranger: I am the Lord your God.

*Leviticus* 19:9–10 (King James).

As Professor Mary Ann Glendon of Harvard Law School contends, however, Locke based his conception of property on an idealized conception of humans in the state of nature:

The American property saga starts with John Locke—not with Locke the philosopher or Locke the political theorist, but with Locke the story-teller. Property acquired its near-mythic status in our legal tradition, in part, because the language and images of John Locke played such a key role in American thinking about government. The centerpiece of Locke's *Second Treatise of Government* was the chapter on property where he presented his famous account of the origin of individual ownership in an imaginary "state of nature." Like the story of Adam and Eve, Locke's fable is set in a time and place when the good things of the earth were available in abundance: "all the World was America." In the beginning, said Locke, God gave the world to men in common. In the "state of nature," no one originally had dominion over the plants, animals, and land to the exclusion of others. Yet even then, Locke asserted, there was property—for "every Man has a Property in his own Person," and in the "Labour of his Body, and the Work of his Hands." When a man "mixed" his labor with something by removing it from its natural state, Locke argued, he thereby made that acorn, or apple, or fish, or deer, his property—"at least where there is enough, and as good left in common for others." The same was true, Locke said, for appropriation of land by tilling, planting, and cultivating.

Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* 20–21 (1991). It is interesting to note how much credence academicians such as Epstein give to Locke's account of early society without regard to what modern science knows about anthropology and the development of human civilization. *See generally supra* note 2. Glendon notes Locke may have had an ulterior motive for his story:

[I]t is important to remember that Locke, in the *Second Treatise*, was engaged in no mere abstract philosophical exercise. His aim was less to propound a rigorous theoretical treatment of the origins of government than it was to marshal persuasive arguments to legitimate the transition from unfettered royal power to constitutional monarchy. The *Second Treatise* is in many ways more like a lawyer's brief than a learned tract, though it is not always read that way. As an advocate, Locke knew the case against the divine right of kings would be strengthened if he could persuasively establish that there are natural rights that exist prior to and independent of the sovereign state. In the agrarian society of seventeenth-century England, property was the most appealing candidate for such a right. Locke's inspired choice of property as the prototypical natural right served simultaneously to delegitimate the monarchy as it then existed, and to buttress the political power of both the landed gentry and the rising merchant classes. Property was the linchpin in his foundations for government based on consent. Once the goal of parliamentary supremacy was established in England, the Lockean property story faded into the background there. Property rights continued to be subject to significant limitation by custom
observed "the life of man [is], solitary, poor, nasty, brutish, and short"\(^\text{17}\) in the state of nature, and strong government—the Leviathan—is needed to protect the life, liberty, and property of the weak from the depredations of the strong and ruthless.\(^\text{18}\) Indeed, Jefferson's formulation in the Declaration of Independence that "life, liberty, and the pursuit of happiness" were "unalienable"\(^\text{19}\) rights of individuals to be protected by government provides an American expression of the principles of the Liberal tradition. It is noteworthy Jefferson felt governments were instituted to "secure" these fundamental rights.\(^\text{20}\)

To secure life, liberty, and the pursuit of happiness, government plainly required sufficient authority to regulate the lives of the governed. In fact, the Preamble to the U.S. Constitution, recognized constitutional government must "establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity."\(^\text{21}\) These purposes strongly resemble the purposes of the police power.

\(\text{Id.}\) at 21–22.

Other liberal thinkers were not so effusive as Locke about the benefits of private property in the natural state. Rousseau theorized property had much to do with greed, power, and violence:

> The first person who, having fenced off a plot of ground, took it into his head to say *this is mine* and found people simple enough to believe him, was the true founder of civil society. What crimes, wars, murders, what miseries and horrors would the human race have been spared by someone who, uprooting the stakes or filling up the ditch, had shouted to his fellow-men: Beware of listening to this impostor; you are lost if you forget that the fruits belong to all, and the earth to no one.


18. See *id.* at ch. 17 *passim*.
20. The Declaration of Independence preamble (U.S. 1776).
B. Police Power and the U.S. Constitution

The Framers, influenced by the Liberal tradition, never believed the U.S. Constitution created an unrestricted right to use property. Chief

22. The Framers thought property rights were conferred by society and were not natural rights. For instance, Thomas Jefferson wrote:

But while it is a moot question whether the origin of any kind of property is derived from nature at all... It is agreed by those who have seriously considered the subject that no individual has, of natural right, a separate property in an acre of land, for instance. By an universal law, indeed, whatever, whether fixed or movable, belongs to all men equally and in common is the property for the moment of him who occupies it; but when he relinquishes the occupation, the property goes with it. Stable ownership is the gift of social law, and is given late in the progress of society.


A right of property in moveable things is admitted before the establishment of government. A separate property in lands, not till after that establishment. The right to moveables is acknowledged by all the hordes of Indians surrounding us. Yet by no one of them has a separate property in lands been yielded to individuals. He who plants a field keeps possession till he has gathered the produce, after which one has as good a right as another to occupy it. Government must be established and laws provided, before lands can be separately appropriated, and their owner protected in his possession. Till then, the property is in the body of the nation, and they, or their chief as trustee, must grant them to individuals, and determine the conditions of the grant.


These thoughts were consistent with the thoughts of other lawyers and thinkers of the Revolutionary Era. For instance, in oral argument as an attorney before the Supreme Court in Ware v. Hylton, 3 U.S. (3 Dall.) 199, 210 (1796), future Chief Justice John Marshall said: “[P]roperty is the creature of civil society, and subject, in all respects, to the disposition and control of civil institutions.” In a similar vein, Benjamin Franklin noted: “Private Property... is a creature of Society, and is subject to the Calls of that Society... even to its last Farthing.” Queries and Remarks Respecting Alterations in the Constitution of Pennsylvania, in The Writings of Benjamin Franklin 54, 59 (Albert Henry Smyth ed., 1907) (1778). Franklin was even more direct in other writings:

All property, indeed, except the savage’s temporary cabin, his matchcoat, and other little acquisitions, absolutely necessary for his subsistence... seems to me to be the creature of public convention. Hence the public has the right to regulate descents, and all other conveyances of property, and even of limiting the quantity and uses of it... But all property superfluous to such purposes [i.e., the productive resources necessary for subsistence] is the property of the public, who by their laws, have created it, and who may therefore by other laws dispose of it, whenever the welfare of the public shall demand such disposition. He that does not like civil society on these terms, let him retire and live among savages.

Justice Marshall declared as early as 1823 that "[t]he right to use all property, must be subject to modification by municipal law. Sic utere tuo ut alienum non loedas is a fundamental maxim. It belongs exclusively to the local State Legislatures, to determine how a man may use his own, without injuring his neighbour."\(^{23}\) In 1837, the U.S. Supreme Court further confirmed the limitations on property rights and their necessary relationship to social interests: "While the rights of private property are sacredly guarded, we must not forget that the community also have rights, and that the happiness and well being of every citizen depends on their faithful preservation."\(^{24}\)

It seems to me, that the right of property, in its origin, could only arise from compact express, or implied, and I think it the better opinion, that the right, as well as the mode, or manner, of acquiring property, and of alienating or transferring, inheriting, or transmitting it, is conferred by society; is regulated by civil institution, and is always subject to rules prescribed by positive law. When I say that a right is vested in a citizen, I mean, that he has the power to do certain actions; or to possess certain things, according to the law of the land.

Id. (emphasis added). The thinking of Jefferson, Marshall, Franklin, and Chase was surely informed by the earlier work of Blackstone, who wrote:

> It was clear that the earth would not produce her fruits in sufficient quantities, without the assistance of tillage: but who would be at the pains of tilling it, if another might watch an opportunity to seize upon and enjoy the product of his industry, art and labor? Had not, therefore, a separate property in lands, as well as movables, been vested in some individuals, the world must have continued a forest, and men have been mere animals of prey; which, according to some philosophers, is the genuine state of nature. Necessity begat property; and in order to insure that property, recourse was had to civil society, which brought along with it a long train of inseparable concomitants; states, government, laws, punishments, and the public exercise of religious duties. Thus connected together, it was found that a part only of society was sufficient to provide, by their manual labor, for the necessary subsistence of all; and leisure was given to others to cultivate the human mind, to invent useful arts, and to lay the foundations of science.

J. W. Ehrlich, *Ehrlich's Blackstone* 117–18 (1959) (emphasis added). Thomas Paine doubted, to say the least, that property rights were of divine emanation: ""The Creator of the earth" did not "open a land-office from whence the first title-deeds were issued."" Paschal Larkin, *Property in the Eighteenth Century* 129 (1930) (quoting Thomas Paine, *Agrarian Justice*, in *The Pioneers of Land Reform* 185 (Max Beer ed., 1796)). More modernly, Justice Antonin Scalia, no enemy of property rights, said: "It seems to us that the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers." Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1019 (1992) (stating, however, that State may not deprive property of all economically beneficial use without effecting a taking).


24. Charles River Bridge v. Warren Bridge, 36 U.S. (11 Pet.) 420, 548 (1837). Similarly, the Washington Supreme Court later noted, "All property is held subject to such restraints and regulations as the state may constitutionally make in the exercise of its police power." State v. Lawrence, 165 Wash. 508, 517, 6 P.2d 363, 366 (1931).
Police Power and Property Rights

Even the advocates of a smaller federal governmental presence, such as Madison, conceded the need for vigorous exercise of government power by the states:

The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.\(^{25}\)

This view was consistent with the law of most of the early state governments.\(^{26}\) Commentators often overlook the plain differences between the limited federal government the Founders established and the

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\(^{26}\) The contention of property-rights absolutists that colonial America minimally regulated land is a myth unsupported by any historical scholarship. At the time of the Revolution, the colonies vigorously regulated land use for purposes other than preventing harm. See John F. Hart, Colonial Land Use Law and Its Significance for Modern Takings Doctrine, 109 Harv. L. Rev. 1252, 1259–87 (1996).

Many early state laws, for example, allowed community access to private property despite the hallowed right of property owners to exclude others from their property. For example, the Pennsylvania Supreme Court in 1788 listed some of the lawful opportunities for others to enter upon private land without explicit consent from the owner:

If a road be out of repair, a passenger may lawfully go through a private enclosure. So, if a man is assaulted, he may fly through another’s close. In time of war, bulwarks may be built on private ground .... Thus, also, every man may, of common right, justify the going of his servants or horses, upon the banks of navigable rivers, for towing barges, &c., to whomsoever the right of the soil belongs. The pursuit of Foxes through another’s ground is allowed, because the destruction of such animals is for the public good. And, as the safety of the people is a law above all others, it is lawful to part affrayers, in the house of another man. Houses may be razed, to prevent the spreading of fire, because for the public good. We find, indeed, a memorable instance of folly recorded in the 3 vol. of Clarendon’s History, where it is mentioned, that the Lord Mayor of London, in 1666, when that city was on fire, would not give directions for, or consent to, the pulling down forty wooden houses, or to removing the furniture, &c. belonging to the Lawyers of the Temple, then on the circuit, for fear he should be answerable for a trespass; and in consequence of this conduct half that great city was burnt.

Respublica v. Sparhawk, 1 Dall. 357, 363 (Pa. 1788). The current Vermont Constitution contains a provision that has been intact since 1777: “The inhabitants of this State shall have liberty in seasonable times, to hunt and fowl on the lands they hold, and on other lands not enclosed.” Vt. Const. ch. II, § 67. Thus, unless a piece of land in Vermont is enclosed, hunters and fowlers may enter it at will “to hunt and fowl.”
plenary powers all state governments had during the early years of the republic. 27

Although the U.S. Constitution does not specifically reference the police power, the Founders envisioned a federal government actively exercising police powers within the sphere of its enumerated powers. 28 The Framers considered the police power an essential attribute of government sovereignty. 29 Hamilton propounded this view in the Federalist Papers:

A government ought to contain in itself every power requisite to the full accomplishment of the objects committed to its care, and to the complete execution of the trusts for which it is responsible, free from every other control but a regard to the public good and to the sense of the people. 30

27. See, e.g., James W. Ely, Jr., The Oxymoron Reconsidered: Myth and Reality in the Origins Of Substantive Due Process, 16 Const. Commentary 315, 324 (1999) (noting that “[t]he newly independent Americans emphatically rejected the English notion of legislative supremacy in favor of a limited government”). The federal government was limited; state governments were not.

28. The Necessary and Proper Clause exemplifies the Framers’ understanding that the government would have at least the power to carry out its constitutionally mandated functions. U.S. Const. art. I, § 8, cl. 18 (“The Congress shall have the power to... make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”).

29. This is consistent with the Washington tradition. “The police power of the State is an attribute of sovereignty, an essential element of the power to govern, and this power exists without declaration, the only limitation upon it being that it must reasonably tend to promote some interest of the State, and not violate any constitutional mandate.” CLEAN v. State, 130 Wash. 2d 782, 805, 928 P.2d 1054 (1996).

30. The Federalist No. 31, at 194 (Alexander Hamilton). Hamilton also noted: Every view we may take of the subject, as candid inquires after truth, will serve to convince us that it is both unwise and dangerous to deny the federal government an unconfined authority in respect to all those objects which are intrusted to its management. It will indeed deserve the most vigilant and careful attention of the people to see that it be modeled in such a manner as to admit of its being safely vested with the requisite powers. If any plan which has been, or may be, offered to our consideration should not, upon a dispassionate inspection, be found to answer this description, it ought to be rejected. A government, the constitution of which renders it unfit to be trusted with all the powers which a free people ought to delegate to any government, would be an unsafe and improper depository of the National Interests. Wherever These can with propriety be confided, the co-incident powers may safely accompany them. This is the true result of all just reasoning upon the subject.

Id., No. 23, at 156.
C. Police Power and the Washington Constitution

Washington’s Constitution is representative of state constitutions of the late nineteenth century and a creature of one hundred years of American constitutional experience. Washington’s constitutional framers in 1889 were also influenced by the outlook of the Progressive movement of that period.\(^{31}\)

Washington’s framers understood that the power of state government, unlike the power of federal government, was plenary, absent constitutional restrictions.\(^{32}\) Consequently, to inhibit abuse of that

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31. The convention mirrored the Progressive politics of the era:

The Washington constitution, as adopted by the convention August 22, 1889, exhibited a number of features and characteristics that were typical of the political thinking of the day. A reform mood is evident in the repeated efforts to deal with political corruption, in the well-intentioned, if unwise, attempts to provide safeguards against public extravagance, in a general distrust of government (even of representative government), and in similar doubts about the large business corporations which were then becoming so powerful, especially in manufacturing, transportation, and banking. Reform thinking expressed itself in numerous prohibitions and restraints which included specific stipulations that the convention might well have left for future legislatures to prescribe rather than including them in the constitution itself. When it came to finding protection against public officials who might be guilty of misdeeds, the answer was to make administrative and judicial officers individually responsible to the electorate, and to establish procedures for their impeachment or removal, should disciplinary action become necessary.


The Progressive movement marked a new emphasis in American politics on collective action through government to address the consequences of the post-Civil War industrialization and urbanization of American life. See generally Richard Hofstadter, The American Political Tradition (1948). Theodore Roosevelt summarized the essence of the Progressive ideal:

[A] simple and poor society can exist as a democracy on the basis of sheer individualism. But a rich and complex industrial society cannot so exist; for some individuals, and especially those artificial individuals called corporations, become so very big that the ordinary individual is utterly dwarfed beside them, and cannot deal with them on terms of equality. It therefore becomes necessary for these ordinary individuals to combine in their turn, first in order to act in their collective capacity through the biggest of all combinations called the government, and second to act, also in their own self-defense, through private combinations, such as farmers’ associations and trade unions.


32. See Brower v. State, 137 Wash. 2d 44, 55, 969 P.2d 42, 50 (1998), cert. denied, 526 U.S. 1088 (1999) ("The state constitution is not a grant but rather is a restriction on the law-making power."); Clark v. Dwyer, 56 Wash. 2d 425, 431, 353 P.2d 941, 945 (1960) ("[T]he power of the legislature to enact all reasonable laws is unrestrained except where, either expressly or by fair inference, it is prohibited by the state and federal constitutions.").
plenary power, the first Article of the Washington Constitution is a declaration of rights limiting the authority of government over the individual.\textsuperscript{33} In the legislative article, Article II, the framers restricted the plenary power of the legislature as well.\textsuperscript{34} The legislature could not enact bills containing more than one subject,\textsuperscript{35} pass special legislation,\textsuperscript{36} introduce last-minute bills,\textsuperscript{37} amend laws without clearly indicating what was being amended,\textsuperscript{38} or adopt non-germane riders to legislation.\textsuperscript{39} The taxation and appropriation powers of the legislature,\textsuperscript{40} as well as the power to incur debt,\textsuperscript{41} were limited. The legislature could not lend the state's credit\textsuperscript{42} or make gifts of public funds.\textsuperscript{43}

\begin{itemize}
  \item \textsuperscript{33} See Wash. Const. art. I.
  \item \textsuperscript{34} See Wash. Const. art. II.
  \item \textsuperscript{35} See Wash. Const. art. II, § 19 ("No bill shall embrace more than one subject, and that shall be expressed in the title.").
  \item \textsuperscript{36} Article II, section 28 of the Washington Constitution forbids enactment of a variety of private or special legislation from name changes to changing county lines. See, e.g., Island County v. State, 135 Wash. 2d 141, 155, 955 P.2d 377, 384 (1998) (invalidating as special legislation act creating community councils only in counties consisting entirely of islands). Article II, section 24 in 1889 prohibited lottery bills as well as bills of divorce. Wash. Const. art II, § 24.
  \item \textsuperscript{37} Article II, section 36 provides:
    No bill shall be considered in either house unless the time of its introduction shall have been at least ten days before the final adjournment of the legislature, unless the legislature shall otherwise direct by a vote of two-thirds of all the members elected to each house, said vote to be taken by yeas and nays and entered upon the journal, or unless the same be at a special session. Wash. Const. art. II, § 36.
  \item \textsuperscript{38} See Wash. Const. art. II, § 37 ("No act shall ever be revised or amended by mere reference to its title, but the act revised or the section amended shall be set forth at full length."). The purpose of this section is to protect legislators and the public from fraud and deception and make reference to what is being amended as certain and clear as possible. See Washington Educ. Ass'n v. State, 93 Wash. 2d 37, 40-41, 604 P.2d 950, 952 (1980); Spokane Grain & Fuel Co. v. Lyttaker, 59 Wash. 76, 79, 109 P. 316,318 (1910).
  \item \textsuperscript{39} See Wash. Const. art. II, § 38 ("No amendment to any bill shall be allowed which shall change the scope and object of the bill.").
  \item \textsuperscript{40} The legislature was required to enact general laws for the assessment and levying of taxes on persons and corporations. See Wash. Const. art. VII, §§ 1–3, 5. The moneys received had to be placed in the state treasury. See Wash. Const. art VII, § 6. Moneys could be spent only by appropriation, see Wash. Const. art. VIII, § 4, and had to be annually accounted for by the legislature, see Wash. Const. art. VII, § 7. The purpose of the appropriation section was accountability—to prevent expenditures by public officers without express legislative direction. See State ex rel. Peel v. Clausen, 94 Wash. 166, 172, 162 P. 1, 3 (1917). The legislature could not surrender or suspend the power to tax corporations. See Wash. Const. art. VII, § 4.
  \item \textsuperscript{41} See Wash. Const. art. VIII, §§ 1, 3.
  \item \textsuperscript{42} See 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."); see generally Hugh
Moreover, the framers mistrusted the concentration of executive power. They provided for an executive branch consisting of eight elected officials—governor, lieutenant governor, secretary of state, treasurer, auditor, attorney general, superintendent of public instruction, and commissioner of public lands—rather than an all-powerful governor appointing officials to those posts.\textsuperscript{44}

In sum, while Washington’s constitutional framers understood the plenary power of the State, they were sufficiently mistrustful of the exercise of political power to delineate carefully protected individual rights in the Constitution, restrict the power of the legislature, and disperse the executive authority. Were a casual reader of the Washington Constitution to stop with these observations, the reader might conclude the Washington Constitution severely restricted governmental power generally and the police power specifically. Such a conclusion would be far wide of the mark.

True to their Progressive-era roots, the Washington framers added prescriptive language to the constitution directing the legislature to create a vigorous government with expansive authority to exercise police power to preserve public peace, safety, health, and welfare. A careful inventory of the constitutional mandates to the legislature to establish governmental agencies and create governmental programs reveals a state government remarkable in its scope and authority. The framers mandated creation of specific government departments, including a bureau of statistics, agriculture, and immigration within the secretary of state’s office;\textsuperscript{45} a harbor lines commission;\textsuperscript{46} a state board of health and a bureau of vital statistics;\textsuperscript{47} and a railroads and transportation commission.\textsuperscript{48}

\begin{footnotesize}
\begin{enumerate}
\item See Wash. Const. art. III, § 1.
\item See Wash. Const. art. II, § 34 (“There shall be established in the office of the secretary of the state, a bureau of statistics, agriculture and immigration, under such regulations as the legislature may provide.”).
\item See Wash. Const. art. XV, § 1.
\item See Wash. Const. art. XX, § 1 (“There shall be established by law a state board of health and a bureau of vital statistics in connection therewith, with such powers as the legislature may direct.”).
\item See Wash. Const. art. XII, § 18.
\end{enumerate}
\end{footnotesize}
federal constitution, in contrast, references departments in the executive branch,49 but describes none with specificity.

More important, the framers of the Washington State Constitution directed the legislature to establish specific governmental programs, in some instances involving very significant regulatory powers. Local governments were free to enact such police, sanitary, and other regulations as were not in conflict with state law.50 The legislature was to make ample provision for the education of children by establishing a public school system including “common schools, and such high schools, normal schools, and technical schools” as may be necessary.51 The framers thus envisioned a system of common-school and post-secondary education as a state constitutional obligation.52 The Washington Constitution also directs the legislature to create a soldiers’ home,53 penal institutions, and facilities for the disabled.54

49. See U.S. Const. art. II, § 2.
50. See 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.”).
51. Article IX, Section 2 of the Washington Constitution provides:
The legislature shall provide for a general and uniform system of public schools. The public school system shall include common schools, and such high schools, normal schools, and technical schools as may hereafter be established. But the entire revenue derived from the common school fund and the state tax for common schools shall be exclusively applied to the support of the common schools.

Article IX, Section one states: “It is the paramount duty of the state to make ample provision for the education of all children residing within its borders, without distinction or preference on account of race, color, caste, or sex.” Wash. Const. art. IX, § 1.

These provisions formed the basis for the Supreme Court of Washington holding in Seattle School District v. State, 90 Wash. 2d 476, 585 P.2d 71 (1978), that the legislature had a constitutional duty to define and fund basic education.
52. Wash. Const. art. IX, § 2.
54. Article XIII, Section one provided:

Educational, reformatory, and penal institutions: those for the benefit of blind, deaf, dumb, or otherwise defective youth; for the insane or idiotic; and such other institutions as the public good may require, shall be fostered and supported by the state, subject to such regulations as may be provided by law. The regents, trustees, or commissioners of all such institutions existing at the time of the adoption of this Constitution, and of such as shall thereafter be established by law, shall be appointed by the governor, by and with the advice and consent of the senate; and upon all nominations made by the governor, the question shall be taken by ayes and noes, and entered upon the journal.

Wash. Const. art. XIII, § 1 (1889).
Police Power and Property Rights

In the economic sphere, the framers’ directions to the legislature were dramatic in their scope. The legislature was required to pass work-place safety legislation for persons “working in mines, factories and other employments dangerous to life and deleterious to health” and to establish an enforcement mechanism for such laws. The legislature was directed to regulate corporations generally. The constitution grants the legislature more specific power to regulate common carriers, including their conduct of business, rates, relationship to telephone, telegraph,


56. Article XII, Section one provides:
Corporations may be formed under general laws, but shall not be created by special acts. All laws relating to corporations may be altered, amended or repealed by the legislature at any time, and all corporations doing business in this state may, as to such business, be regulated, limited or restrained by law.

Wash. Const. art. XII, § 1; see also Wash. Const. art. XII, §§ 2–12 (permitting regulation of corporations); see generally 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 (1989).

57. Article XII, Section thirteen provides:
All railroad, canal and other transportation companies are declared to be common carriers and subject to legislative control. Any association or corporation organized for the purpose, under the laws of this state, shall have the right to connect at the state line with railroads of other states. Every railroad company shall have the right with its road, whether the same be now constructed or may hereafter be constructed, to intersect, cross or connect with any other railroad, and when such railroads are of the same or similar gauge they shall at all crossings and at all points, where a railroad shall begin or terminate at or near any other railroad, form proper connections so that the cars of any such railroad companies may be speedily transferred from one railroad to another. All railroad companies shall receive and transport each the other’s passengers, tonnage and cars without delay or discrimination.

Wash. Const. art. XII, § 13; see also Wash. Const. art. XII, § 14 (prohibiting combinations by carriers); Wash. Const. art. XII, § 16 (prohibiting consolidation of competing lines).

58. Article XII, Section eighteen provides:
The legislature may pass laws establishing reasonable rates of charges for the transportation of passengers and freight, and to correct abuses and prevent discrimination and extortion in the rates of freight and passenger tariffs on the different railroads and other common carriers in the state, and shall enforce such laws by adequate penalties. A railroad and transportation commission may be established and its powers and duties fully defined by law.

Wash. Const. art. XII, § 18.
and express companies,\textsuperscript{59} and even their conduct toward public officials.\textsuperscript{60} The legislature was to enact legislation forbidding trusts and monopolies.\textsuperscript{61} The State was to regulate tidelands and port facilities,\textsuperscript{62} even going so far as to assume public ownership of tidelands.\textsuperscript{63} For

\textsuperscript{59} Article XII, Section 19 provides:

Any association or corporation, or the lessees or managers thereof, organized for the purpose, or any individual, shall have the right to construct and maintain lines of telegraph and telephone within this state, and said companies shall receive and transmit each other's messages without delay or discrimination and all of such companies are hereby declared to be common carriers and subject to legislative control. Railroad corporations organized or doing business in this state shall allow telegraph and telephone corporations and companies to construct and maintain telegraph lines on and along the rights of way of such railroads and railroad companies, and no railroad corporation organized or doing business in this state shall allow any telegraph corporation or company any facilities, privileges or rates for transportation of men or material or for repairing their lines not allowed to all telegraph companies. The right of eminent domain is hereby extended to all telegraph and telephone companies. The legislature shall, by general law of uniform operation, provide reasonable regulations to give effect to this section.

Wash. Const. art. XII, § 19; see also Wash. Const. art XII, § 21 (covering express companies).

\textsuperscript{60} Article XII, Section 20 provides

No railroad or other transportation company shall grant free passes, or sell tickets or passes at a discount, other than as sold to the public generally, to any member of the legislature, or to any person holding any public office within this state. The legislature shall pass laws to carry this provision into effect.

Wash. Const. art. XII, § 20; see also Wash. Const. art. II, § 39 (making it illegal for public official to receive free transportation from a "railroad or other corporation.").

\textsuperscript{61} Article XII, Section 21 provides:

Monopolies and trusts shall never be allowed in this state, and no incorporated company, copartnership, or association of persons in this state shall directly or indirectly combine or make any contract with any other incorporated company, foreign or domestic, through their stockholders, or the trustees or assignees of such stockholders, or with any copartnership or association of persons, or in any manner whatever for the purpose of fixing the price or limiting the production or regulating the transportation of any product or commodity. The legislature shall pass laws for the enforcement of this section by adequate penalties, and in case of incorporated companies, if necessary for that purpose, may declare a forfeiture of their franchises.


\textsuperscript{62} See Wash. Const. art. XV, §§ 1–2.

\textsuperscript{63} Article XVII, Section 1 provides:

The state of Washington asserts its ownership to the beds and shores of all navigable waters in the state up to and including the line of ordinary high tide, in waters where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable
individuals, the homestead exemption, forbidding creditors access to certain debtor assets, was given constitutional status.\textsuperscript{64}

Finally, in the health sphere, the legislature was to invest the state board of health with such general powers as the legislature saw fit to grant.\textsuperscript{65} The framers, however, specifically directed the legislature to regulate the practice of medicine and surgery and the sale of drugs and medicines.\textsuperscript{66}

rivers and lakes: Provided, that this section shall not be construed so as to debar any person from asserting his claim to vested rights in the courts of the state.


64. See Wash. Const. art. XIX, § 1 ("The legislature shall protect by law from forced sale a certain portion of the homestead and other property of all heads of families.").

65. See Wash. Const. art. XX, § 1.

66. See Wash. Const. art. XX, § 2. Public health has historically been a fundamental basis for the exercise of the police power. See State v. Carey, 4 Wash. 424, 428, 30 P. 729, 730 (1892). Indeed, subsequent cases have acknowledged exceedingly broad state power to regulate in the public health sphere. In Spokane County Health Dist. v. Brockett, 120 Wash. 2d 140, 839 P.2d 324 (1992), the Supreme Court of Washington upheld a local public health district's needle exchange program to combat the spread of HIV/AIDS. Id. at 155, 839 P.2d at 332. The court noted its policy of liberal construction of public health statutes, going so far as to state "we have said the subject matter and expediency of public health disease prevention measures are 'beyond judicial control, except as they may violate some constitutional right guaranteed to [defendants].'" Id. at 149 (citing Kaul v. City of Chehalis, 45 Wash. 2d 616, 621, 277 P.2d 352 (1954)). The Supreme Court of Washington has upheld the quarantining of individuals in the face of epidemics despite due process constraints. See City of Seattle v. Cottin, 144 Wash. 572, 258 P. 520 (1927) (smallpox); State \textit{ex rel.} McBride v. Superior Ct., 103 Wash. 409, 174 P. 973 (1918) (syphilis). The courts have also upheld mandatory tuberculosis screening for incoming university students even when students claim a religious belief against such screening. See \textit{State \textit{ex rel.} Holcomb} v. Armstrong, 39 Wash. 2d 860, 239 P.2d 545 (1952). The legislative power over drugs is extensive. See Seeley v. State, 132 Wash. 2d 776, 789, 812, 940 P.2d 604 (1997).

As early as 1892, Justice Dunbar viewed regulation of the health professions as an important aspect of the police power:

In the profession of medicine, as in that of law, so great is the necessity for special qualifications in the practitioner, and so injurious the consequences likely to result from the want of it, that the power, of the legislature to prescribe such reasonable conditions as are calculated to exclude from the profession those who are unfitted to discharge its duties cannot be doubted.

The practice of medicine and surgery is a vocation that very nearly concerns the comfort, health and life of every person in the land. Physicians and surgeons have committed to their care the most important interests, and it is an almost imperious necessity that only persons possessing skill and knowledge should be permitted to practice medicine and surgery. For centuries the law has required physicians to possess and exercise skill and learning, for it has mulcted in damages those who pretend to be physicians and surgeons who have neither learning nor skill. It is, therefore, no new principle of the law that is asserted by our statute, but if it were it would not condemn the statute, for the statute is an exercise of police power inherent in the state. It is, no
Far from creating a government devoid of authority to address issues of public peace, safety, health, and welfare, Washington’s constitution establishes a vigorous state government designed to actively regulate social and commercial interactions of its citizens. By the terms of the constitution itself, state government was to be active in the economic sphere as well as in health, education, and the needs of the disabled. This active state government was consistent with the pattern of expansive exercise of police powers undertaken by the territorial government.\(^6\)

Clearly, Washington framers did not live in a libertarian dream world devoid of governmental regulation. They expected government, properly limited to observe and preserve individual rights, to exercise vigorously the police power where the needs of Washington citizens so required. Washington case law on the police power reflects this basic constitutional understanding, contradicting the hazy historical mythology of those who believe late-nineteenth-century American constitutions were proto-libertarian charters.

II. DEVELOPMENT OF THE POLICE POWER IN FEDERAL LAW AND IN WASHINGTON LAW SINCE STATEHOOD

A. Federal Law

The U.S. Constitution does not specifically describe the police power, but federal case law has given it structure and content over the years. Cases before the Civil War largely reflected the limited role the Constitution entrusted to the federal government regarding state enactments. Federal courts were reluctant to strike state statutes, recognizing the states’ broad power to govern their citizens.\(^6\) Chief Justice Marshall eloquently expressed the scope of the states’ police power:

[State inspection laws] form a portion of that immense mass of legislation, which embraces every thing within the territory of a

one can doubt, of high importance to the community that health, limb and life should not be left to the treatment of ignorant pretenders and charlatans.

Carey, 4 Wash. at 428, 30 P. at 730 (citations omitted); see also State v. Sharpless, 31 Wash. 191, 71 P. 737 (1903) (concerning regulation of barbers); Fox v. Territory, 2 Wash. Terr. 297, 5 P. 603 (1884) (deciding regulation of practice of medicine does not violate Fourteenth Amendment).


Police Power and Property Rights

State, not surrendered to the general government: all which can be most advantageously exercised by the States themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, and those which respect turnpike roads, ferries, &c., are component parts of this mass.

No direct general power over these objects is granted to Congress; and, consequently, they remain subject to State legislation.69

Even before the Civil War, federal courts recognized “[t]he suppression of nuisances injurious to public health or morality is among the most important duties of government.”70 In discussing the scope of the states’ police power, the U.S. Supreme Court concluded:

The object of all well-regulated governments is to promote the public good, and to secure the public safety; and the powers of that legislation necessarily extends to all those objects; and unless, therefore, in any particular case the power is given to the general government, it necessarily still remains in the states.71

With the ratification of the Fourteenth Amendment, which imposed federal due process law on the states, federal-court involvement with state enactments grew. Turning sharply from the pre-Civil War atmosphere, in which due process of law was of little constitutional significance,72 the U.S. Supreme Court began to examine and frequently strike down state regulations. In the Slaughter-House Cases,73 which marked the beginning of this activist trend, the Court narrowly upheld a Louisiana law granting a corporation exclusive rights to operate facilities for the slaughter of livestock.74 The Court found the law a valid exercise of the state’s essential police power.75 Recognizing the importance of this power, the Court wrote that “[u]pon [the state’s police power] depends the security of social order, the life and health of the citizen, the comfort

70. Phalen v. Virginia, 49 U.S. 163, 168 (1850) (mem.) (upholding Virginia’s law prohibiting lotteries and sale of lottery tickets).
71. Miln, 36 U.S. at 128.
73. 83 U.S. 36 (1872).
74. Id. at 82.
75. Id. at 62.
of an existence in a thickly populated community, the enjoyment of private and social life, and the beneficial use of property."  

Justice Field's dissent in the *Slaughter-House Cases* argued the regulation interfered with the Louisiana butchers' freedom of contract. Field's dissent is widely recognized as the first articulation of the doctrine of substantive due process, later adopted in U.S. Supreme Court cases such as *Chicago &c. Railway Co. v. Minnesota*, Allgeyer *v. Louisiana*, *Coppage v. Kansas*, *Hammer v. Dagenhart*, and *New State Ice Co. v. Liebmann*.

The most infamous of these substantive due process decisions was *Lochner v. New York*, in which the Court struck down a New York law setting maximum work hours for bakers. Despite evidence of the health hazards posed to bakers working long hours in poorly ventilated bakeries, the Court concluded the law unreasonably interfered with the bakers' freedom of contract. According to the Court, the maximum-hour law exceeded the limit of the state's police power: "There is, in our judgment, no reasonable foundation for holding this to be necessary or appropriate as a health law to safeguard the public health . . . ." Rather than relying on the state's judgment, the Court substituted its own judgment and declared the law unconstitutional. This case gave rise to the phrase "the *Lochner* era," which refers to the approximately forty years of U.S. Supreme Court decisions invalidating state laws intended to  

76. *Id.*  
77. *Id.* at 96 (Field, J., dissenting).  
78. 134 U.S. 418 (1890) (striking down Minnesota law establishing commission to set railroad rates).  
79. 165 U.S. 578 (1897) (striking down Louisiana statute prohibiting residents from doing business with New York life insurance company).  
80. 236 U.S. 1 (1915) (striking down Kansas statute that prohibited unionizing in employment contracts).  
81. 247 U.S. 251 (1918) (holding unconstitutional federal statute prohibiting interstate commerce in products of child labor).  
82. 285 U.S. 262 (1932) (striking down Oklahoma law requiring ice manufacturers to obtain certification).  
83. 198 U.S. 45 (1905).  
84. *See id.* at 64–65.  
85. *See id.* at 60–61.  
86. *Id.* at 58.  
87. *See id.* at 64.

878
Police Power and Property Rights

remedy oppressive employment practices and otherwise regulate state economic affairs.

The tide turned once again, however, with *West Coast Hotel Co. v. Parrish*, in which the U.S. Supreme Court upheld Washington State's minimum-wage law for women. In *West Coast Hotel*, the Court seemed to return to its pre-Civil War deference to state regulations passed under the police power. The Court specifically recognized liberty of contract did not preclude legislative supervision of contractual activities, nor denied the government the power to provide restrictive safeguards.

The state legislature "has necessarily a wide field of discretion in order that there may be suitable protection of health and safety, and that peace and good order may be promoted ...." The Court declined to second-guess the legislative determinations behind the minimum-wage law, noting "with the wisdom of the policy adopted, with the adequacy or practicability of the law enacted to forward it, the courts are both incompetent and unauthorized to deal ...."

The Court concluded the Washington legislature "is primarily the judge of the necessity of such an enactment ... and that though the court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power."

Federal court involvement in state economic regulation has remained limited since *West Coast Hotel*. The U.S. Supreme Court has recognized that states may interfere "wherever the public interests demand it" and continues to afford states considerable deference as to both the decision to legislate and the specific measures adopted. The modern court has turned away due process challenges to economic regulation with a broad "hands off" approach. No such law has been invalidated on substantive due process grounds since 1937.

Federal courts uphold state regulations as valid exercises of the police power if the measures bear a reasonable

88. 300 U.S. 379 (1937).
89. See id. at 400.
90. See id. at 395–96.
91. Id. at 393.
92. Id. at 398 (quoting Nebbia v. New York, 291 U.S. 502, 537–38 (1935)).
93. Id.
relationship to a proper legislative purpose, and are neither arbitrary nor capricious.96

A deferential federal review of the police power was expressed by Justice Douglas in Berman v. Parker.97

An attempt to define its reach or trace its outer limits is fruitless, for each case must turn on its own facts. The definition is essentially the product of legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition. Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation . . . .98

B. Washington Law

Although Washington’s Constitution does not specifically enumerate or define the police power state government may employ, Washington case law reflects the basic understanding that government can regulate the social interactions of its citizens. Washington courts have considered the scope of state police power since the early 1890s. The earliest cases dealing with the scope of the police power in Washington generally upheld statutes and ordinances as valid exercises of police power, with very limited discussion of the parameters of this power.99 Those cases illustrate, however, the court’s early recognition that “[t]he legislature is itself primarily the judge of how far police restrictions shall go.”100

The Supreme Court of Washington’s first real discussion of the scope of the police power came in State v. Buchanan,101 a case decided three

96. See West Coast Hotel, 300 U.S. at 398.
97. 348 U.S. 26 (1954)
98. Id. at 32.
99. See generally, e.g., State v. Considine, 16 Wash. 358, 47 P. 755 (1897) (upholding law prohibiting employment of women in saloons); Wilson v. Beyers, 5 Wash. 303, 32 P. 90 (1892) (upholding law directing marshals to seize stock running at large in streets); City of Olympia v. Mann, 1 Wash. 389, 25 P. 337 (1890) (upholding fire ordinance prohibiting construction of wooden buildings). But see Askam v. King County, 9 Wash. 1, 36 P. 1097 (1894) (striking down law providing for drainage of swamps without compensating owner of land).
101. 29 Wash. 602, 70 P. 52 (1902).
years before *Lochner*. In *Buchanan*, the court upheld a law prohibiting the employment of females for more than ten hours a day. The court defined the police power as "that power which enables the state to promote and protect the health, welfare, and safety of society . . . ." The court specifically recognized the difficulty of defining the scope of the state's police power, and suggested changing conditions of society would make a change in the administration of government "absolutely necessary."

In a more thorough examination of the scope of the police power, the court upheld a law requiring assessments according to surface area for the cost of filling low lands. Filling in the private property was necessary because municipal improvements had created unsanitary conditions. The court again noted the difficulty of defining the scope of the police power, but concluded that the states had such power:

Incapacity of definition, however, does not destroy the right of the public to safeguard property, insure the general health, protect the morals, preserve the peace, or compel the use of property consistent with surrounding conditions by the exercise of arbitrary power and in disregard of the primary right of the individual . . . . Its exercise in proper cases marks the growth and development of the law rather than, as some assert, a tyrannical assertion of governmental powers denied by our written constitutions.

In upholding the ordinance, the court concluded the right of property is "a legal right . . . and it must be measured always by reference to the rights of others and of the public."

The court also recognized municipalities could promote public health through the exercise of the police power. In *Shepard v. City of Seattle*, the court upheld a law requiring hospitals harboring persons with infectious or contagious diseases to connect with the public sewer

102. See *id.* at 610, 70 P. at 54.
103. *Id.* at 604--05, 70 P. at 52.
104. *Id.* at 610, 70 P. at 54.
106. See *id.* at 549, 109 P.2d at 374.
107. See *id.* at 538, 109 P.2d at 370.
108. *Id.* at 542, 109 P. at 371.
109. *Id.*
According to the court, the law was reasonable in light of the city's power to preserve the public health and safety. The Washington court also upheld a municipal ordinance regulating the frequency of street-car service as a valid exercise of police power. "In its broadest acceptation [the police power] means the general power of the state to preserve and promote the public welfare, even at the expense of private rights":

The police power to regulate comprehends all necessary and convenient regulations designed to protect life or limb or to promote the comfort of the public in the use of the streets and thoroughfares. Not only does such power exist, but the duty to exercise it is imposed as a solemn obligation upon the municipal authorities.

The idea that the scope of the police power has expanded beyond its original meaning emerged during the first decades of this century. The Supreme Court of Washington acknowledged the definition of police power was not only elusive, but was necessarily tied to the social and economic conditions in which it was exercised. For example, in State ex rel. Webster v. Superior Court of King County, Justice Chadwick opined, "[f]ormerly applied strictly and directly, [the police power] has now, because of changed economic conditions, come to be more favored, and is frequently relied upon to sustain laws which but indirectly affect the common good."

Justice Chadwick revisited his theory of the changing and expanding scope of state police power in State v. Mountain Timber Co., a case

111. See id. at 375, 109 P.2d at 1071.
112. See id. ("[E]very citizen holds his property subject to a reasonable exercise of the police power of the state.").
113. See City of Tacoma v. Boutelle, 61 Wash. 434, 112 P. 661 (1911).
114. Id. at 444, 112 P. at 664 (citing Karasek v. Peier, 22 Wash. 419, 61 P. 33 (1900)).
115. Id. at 445, 112 P. at 665.
116. 67 Wash. 37, 120 P. 861 (1912).
117. Id. at 40, 112 P. at 862.
118. 75 Wash. 581, 135 P. 645 (1913). The dissent in Weden v. San Juan County, 135 Wash. 2d 678, 958 P.2d 273 (1998), cited both Mountain Timber and Boutelle for the proposition that the scope of the police power has been expanded beyond its original meaning. See Weden at 727–28, 958 P.2d at 298 (Sanders, J., dissenting). Attempts to confine the police power to original meaning are inherently flawed because they do not take into account the progress of civilization. Washington’s constitutional framers in 1889 could not have possibly conceived of something like
Police Power and Property Rights

upholding Washington's Industrial Insurance Act. The court noted the scope of police power "is not a rule; it is an evolution."\(^{119}\)

The scope of the police power is to be measured by the legislative will of the people upon questions of public concern, not in acts passed in response to sporadic impulses or exuberant displays of emotion, but in those enacted in affirmation of established usage or of such standards of morality and expediency as have by gradual processes and accepted reason become so fixed as to fairly indicate the better will of the people in their social, industrial and political development.\(^{120}\)

The court indicated Washington law on the police power evidenced a "growth in [its] liberal interpretation."\(^ {121}\) The court's interpretation of the police power as a flexible and evolving concept raises the question of whether the historical understanding of the police power is even relevant to a determination of the proper scope of the police power today.\(^ {122}\)

Even at the beginning of this century, however, the Supreme Court of Washington did not give the state free reign to do whatever it pleased under the guise of its police power. It seemed to be particularly important to the court that the exercise of police power serve some public purpose. For example, in *Conger v. Pierce County*,\(^ {123}\) the court ordered a jury trial on the issue of requiring the state to pay for damages caused by state-authorized changes and improvements to the Puyallup River.\(^ {124}\) The improvements allegedly eroded the plaintiff's property.\(^ {125}\) The court rejected the state's argument that its exercise of the police power exempted it from paying damages\(^ {126}\) and criticized the lack of a public purpose.\(^ {127}\)

pornography on the Internet. Does that mean there is today no police power in a library district to control children's access to the Internet on library computers?

120. *Id.* at 588–89, 135 P. at 648–49.
121. *Id.* at 585, 135 P.2d at 647.
122. *But see Weden*, 135 Wash. 2d at 724, 958 P. at 296 (1998) (Sanders, J., dissenting) (stating that original understanding of police power "relevant subject of inquiry").
123. 116 Wash. 27, 198 P. 377 (1921).
124. *See id.* at 42, 198 P.2d at 382.
125. *See id.* at 30, 198 P.2d at 378.
126. *See id.* at 40, 198 P. at 381.
127. *See id.* at 38, 198 P. at 381; *see also* Maple Leaf Investors, Inc. v. Dep't of Ecology, 88 Wash. 2d 726, 733, 565 P.2d 1162, 1165 (1977) (finding regulation prohibiting construction of...
The Washington court attempted to define the outer limits of the State's police power in *City of Seattle v. Ford*,128 a case in which the court struck down an ordinance prohibiting "hawking."129 While the ordinance was a valid exercise of police power as to streets and public places, the court held that prohibiting hawking on private property exceeded the state's power.130 "The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business or impose unusual and unnecessary restrictions upon lawful occupations."131 The court articulated a two-part test for determining whether the state was justified in interposing its authority on behalf of the public: (1) "that the interests of the public generally, as distinguished from those of a particular class, require such interference"; and (2) "that the means are reasonably necessary for the accomplishment of the purpose and not unduly oppressive upon individuals."132

In evaluating statutes passed under the rubric of the state's police power, the Washington court has consistently demonstrated great deference to the legislature's judgment.133 This deference extends both to the determination of interests justifying the regulation, and the means used to serve these interests.134 For example, the Washington court has held it need not find that facts justifying a law passed under the police power actually exist.135 If the court can reasonably conceive of a set of facts justifying the legislation, the court "must presume" those facts exist

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128. 144 Wash. 107, 257 P. 243 (1927).
129. *Id.* at 115, 257 P.2d at 245. "Hawking" was defined as selling anything (except newspapers) by public outcry, musical or other entertainment, ringing bells, whistles, or horns. *Id.* at 108, 257 P. at 243.
130. *See id.* at 115, 257 P. at 245.
131. *Id.* at 112, 257 P. at 244–45.
132. *Id.* at 112, 257 P. at 244. The Supreme Court of Washington in 1936 articulated a slightly different test for evaluating laws passed under the state's police power. The court held the only limitation upon the police power was that "it must reasonably tend to correct some evil or promote some interest of the state, and not violate any direct or positive mandate of the constitution." *Shea v. Olson*, 185 Wash. 143, 153, 53 P.2d 615, 619 (1936). This expression succinctly states the plenary nature of the police power. *See CLEAN v. State*, 130 Wash. 2d 782, 805, 928 P.2d 1054, 1065 (1996); *Markham Adver. Co. v. State*, 73 Wash. 2d 405, 421–22, 439 P.2d 248, 258 (1968).
134. *See Weden*, 135 Wash. 2d at 691, 958 P.2d at 279–80; *McDermott*, 197 Wash. at 83, 84 P.2d at 374.
Police Power and Property Rights

and the law was passed for that purpose. The court’s inquiry focuses only on any subversion of constitutionally guaranteed rights. If the regulation serves a legitimate public purpose, “its wisdom or necessity is a matter left exclusively to the legislative body.” In fact, the enactment is valid unless challengers can show it to be arbitrary and capricious beyond a reasonable doubt.

When examining state regulations passed under its police power, the Washington court currently applies a test similar to that articulated in Ford and in other cases from the early part of this century. A valid exercise of the police power must promote the health, safety, morals, welfare, education, or peace of the general public. Additionally, the


138. Montana, 129 Wash. 2d at 592, 919 P.2d at 1223. As the court stated in Homes Unlimited, Inc. v. City of Seattle, 90 Wash. 2d 154, 159, 579 P.2d 1331, 1333 (1978), “the wisdom, necessity and expediency of the law are not for judicial determination,” and an enactment may not be struck down as beyond the police power unless it “is shown to be clearly unreasonable, arbitrary or capricious.” Id.


A listing of the types of government action held to be within the police power by Washington courts is instructive. See generally, e.g., Development Servs. of Am., Inc. v. City of Seattle, 138 Wash. 2d 107, 979 P.2d 387 (1999) (restricting business use of helipads); Weden, 135 Wash. 2d 678, 958 P.2d 273 (banning jetskis); Kennedy v. City of Seattle, 94 Wash. 2d 376, 617 P.2d 713 (1980) (establishing rent controls for floating homes); Hass v. City of Kirkland, 78 Wash. 2d 929, 481 P.2d 9 (1971) (involving fire protection ordinance); Markham Adver. Co. v. State, 73 Wash. 2d 405, 439 P.2d 248 (1968) (regulating outdoor advertising signs); Lenci v. City of Seattle, 63 Wash. 2d 664, 388 P.2d 926 (1964) (requiring fencing around vehicle wrecking yards); City of Bellingham v. Schampera, 57 Wash. 2d 106, 356 P.2d 292 (1960) (considering driving while intoxicated law); Brown v. City of Seattle, 150 Wash. 203, 272 P. 517 (1928) (regulating meat markets); City of Seattle v. Ford, 144 Wash. 107, 257 P. 243 (1927) (regulating street hawking); Detamore v. Hindley, 83 Wash. 322, 145 P. 462 (1915) (involving ordinance setting bridge- viaduct construction standards); State v. Mountain Timber Co., 75 Wash. 581, 135 P. 645 (1913) (considering worker compensation law); City of Tacoma v. Boutelle, 61 Wash. 434, 112 P. 661 (1911) (regulating frequency of street car service); Bowes v. City of Aberdeen, 58 Wash. 535, 109 P. 369 (1910)
police power measure must serve its purpose by means that are reasonably necessary for the accomplishment of that purpose. Courts broadly construe the police power and place on the party challenging the validity of a statute the burden of proving a regulation exceeds the proper scope of the power.

As to the first question, whether the police power regulation promotes the interests of the general public, the Washington court has recognized a wide variety of interests as justifying the exercise of the police power. Interest in protecting and conserving natural resources is one example. In *Duckworth v. City of Bonney Lake*, the court also held considerations of attractiveness and beauty in surrounding conventional architecture are appropriate concerns when planning for the general welfare. The court therefore upheld, as a valid exercise of police power, a zoning ordinance prohibiting the placement of mobile homes in a single-family residence zone. Similarly, promoting the convenience and enjoyment of public travel, protecting the public investment in highways, attracting visitors to the state, and conserving the natural beauty of the area are valid public purposes justifying regulations on outdoor advertising. Matters of economic justice are interests within the police power as well.

(filling of low-lying marsh land against owner’s will at owner’s expense); State v. Buchanan, 29 Wash. 602, 70 P. 52 (1902) (limiting work day for women to ten hours); State v. Nichols, 28 Wash. 628, 69 P. 372 (1902) (forbidding business on Sundays); Hathaway v. McDonald, 27 Wash. 659, 68 P. 376 (1902) (involving regulation of renovated butter).

141. See Weden, 135 Wash. 2d at 691, 700, 958 P.2d at 279–80, 284.

142. See CSG Job Ctr., 117 Wash. 2d at 503, 816 P.2d at 731.

143. See State v. Dexter, 32 Wash. 2d 551, 556, 202 P.2d 906, 907 (1949). This power has been described as “plenary” in the protection of wildlife. See State v. Satiacum, 50 Wash. 2d 513, 520, 314 P.2d 400, 404 (1957).

Under the common law of England, all property in animals ferae naturae was in the sovereign for the use and benefit of the people. This law was carried to the colonies and ultimately to this state. We have cases which rest the state’s authority to regulate fish and game upon the state’s proprietary right therein, as well as upon the police power.


144. 91 Wash. 2d 19, 586 P.2d 860 (1978).

145. See *id.* at 34–35, 586 P.2d at 870–71.


147. In the landmark case *Parrish v. West Coast Hotel Co.*, the Washington court quoted with approval the language Chief Justice William Howard Taft used in an earlier dissent: Legislatures in limiting freedom of contract between employee and employer by a minimum wage proceed on the assumption that employees, in the class receiving least pay, are not upon a full level
Police Power and Property Rights

The second prong of the court’s police power analysis looks at whether the means used bear a reasonable and substantial relation to the public interest or general welfare. To uphold an act as a valid exercise of police power, the court must conclude there is a rational connection between the statute’s purpose and the method used to achieve that purpose. A valid exercise of the police power will be upheld even if it causes economic hardship to individuals.

As early as 1921, the Supreme Court of Washington understood the police power was designed to regulate use of property. Recently, in Christianson v. Snohomish Health District, the court noted, “since the

of equality of choice with their employer and in their necessitous circumstances are prone to accept pretty much anything that is offered. They are peculiarly subject to the overreaching of the harsh and greedy employer. The evils of the sweating system and of the long hours and low wages which are characteristic of it are well known.


150. See, e.g., Bitts, Inc. v. City of Seattle, 86 Wash. 2d 395, 400, 544 P.2d 1242, 1245 (1976) (“Economic hardship cannot usually be urged as a reason for the invalidity of an otherwise valid statute or ordinance enacted under the police power.”); Wiegardt v. Brennan, 192 Wash. 529, 537, 73 P.2d 1330, 1333 (1937) (“It frequently happens that regulatory laws, enacted under the police power in furtherance of some appropriate purpose, impose hardship in individual cases, due to special and peculiar circumstances; but this fact will not subject the law to constitutional objection.”).


It is easy to understand the principles upon which the police power doctrine is based, but difficult to define in language its limitations. It is not inconsistent with nor antagonistic to the rules of law concerning the taking of private property for a public use. Because of its elasticity and the inability to define or fix its exact limitations, there is sometimes a natural tendency on the part of the courts to stretch this power in order to bridge over otherwise difficult situations, and for like reasons it is a power most likely to be abused. It has been defined as an inherent power in the state which permits it to prevent all things harmful to the comfort, welfare and safety of society. It is based on necessity. It is exercised for the benefit of the public health, peace and welfare. Regulating and restricting the use of private property in the interest of the public is its chief business. It is the basis of the idea that the private individual must suffer without other compensation than the benefit to be received by the general public. It does not authorize the taking or damaging of private property in the sense used in the constitution with reference to taking such property for a public use. Eminent domain takes private property for a public use, while the police power regulates its use and enjoyment, or if it takes or damages it, it is not a taking or damaging for the public use, but to conserve the safety, morals, health and general welfare of the public.

Id. at 35–36, 198 P. at 380.

152. 133 Wash. 2d 647, 946 P.2d 768 (1997).
police power is inherent in the effective conduct and maintenance of
government, it is to be upheld even though it adversely effects [sic] the
property rights of some individuals."

Washington case law belies the assertion that the early conception of
the power to regulate land was limited to the state’s power to suppress
nuisances. Nor was the state’s power to act under the police power
limited to those acts taken to protect the general public from harm.
Washington case law in this area rests upon the basic understanding that
the state can legitimately regulate the lives of its citizens through the
exercise of its police power. “While there are limits to the police power,
the use of police power by government allows the Legislature to enact
laws in the interest of the people." The Washington court continues to
show considerable deference to the legislative body’s definition of
public interest and to its choice of means by which to serve that interest.

III. LIMITATIONS ON THE EXERCISE OF POLICE POWER

As noted, the exercise of police power under the U.S. and Washington
Constitutions is expansive and largely co-extensive with the power of
government itself. This is not to say, however, this power is unlimited.
Both constitutions contain significant limitations on the exercise of
police power by state government in their eminent-domain and Due
Process Clauses. Further, state and federal case law expanded those
limits to encompass inverse condemnation and regulatory takings, as
well as substantive due process. Washington case law on substantive due
process is especially broad in scope.

A. Takings as a Limitation on Police Power

The Takings Clause of the U.S. Constitution and its Washington State
counterpart traditionally constituted a limitation on police power where
the government regulation deprived the owner of the property or its
essential value. Yet these provisions are traditionally compensation

153. Id. at 664, 946 P.2d at 776 (1997).
154. See Weden v. San Juan County, 135 Wash. 2d at 728, 958 P.2d at 298 (Sanders, J.,
dissenting).
155. Id. at 691, 958 P.2d at 279.
156. The Fifth Amendment to the U.S. Constitution states: “nor shall private property be taken for
public use, without just compensation.” U.S. Const. Amend. V. The Washington Constitution
contains a more expansive eminent-domain clause:
Police Power and Property Rights

directives—government must pay property owners if government takes property. More extreme property-rights advocates argue for a new concept of the Takings Clause as a means to invalidate government enactments.\textsuperscript{157}

In its purest form, the Takings Clause prevents the State from expropriating private property without paying compensation to the property owner. "A per se taking occurs whenever government causes its agents or the public to regularly use or permanently occupy property known to be in private ownership."\textsuperscript{158} While recognizing the government's inherent power of eminent domain,\textsuperscript{159} the Takings Clause conditions the exercise of the power upon the payment of just compensation.

Over the course of this century, the Takings Clause expanded to protect private-property owners not only from the state's physical occupation of their land, but also from excessive state regulations operating to reduce its value.\textsuperscript{160} Courts concluded that takings could be in

\begin{enumerate}
\item Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes, or ditches on or across the lands of others for agricultural, domestic, or sanitary purposes. No private property shall be taken or damaged for public or private use without just compensation having been first made, or paid into court for the owner, and no right-of-way shall be appropriated to the use of any corporation other than municipal until full compensation therefor be first made in money, or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in courts of record, in the manner prescribed by law. Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such, without regard to any legislative assertion that the use is public: Provided, that the taking of private property by the state for land reclamation and settlement purposes is hereby declared to be for public use.


157. See generally Epstein, supra note 2.


160. See, e.g., Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) (holding regulation that goes too far will be recognized as taking). The U.S. Supreme Court originally rejected the theory that the Takings Clause required just compensation to be paid to landowners when the state's exercise of police power diminished the value of their property. See Mugler v. Kansas, 123 U.S. 623, 668–69 (1887); see generally Richard L. Settle, Regulatory Takings Doctrine in Washington: Now You See it, Now You Don't, 12 U. Puget Sound L. Rev. 359 (1989).

A regulatory taking is evaluated in light of several factors: (1) the character of the government action; (2) the extent to which the regulation interferes with distinct, investment-backed expectations; and (3) the economic impact of the regulation. See Penn Cent. Transp. Co. v. New
the form of not only physical appropriation, but also overregulation.\textsuperscript{161} The relevant question then became whether the regulation decreased the value of the land. If the regulation was so oppressive it deprived the landowner of all economically viable use of the land, the land had been "taken" and just compensation was due.\textsuperscript{162}

The Supreme Court of Washington recognized that "[p]olice power actions limiting the use of private property can constitute a de facto exercise of eminent domain requiring just compensation."\textsuperscript{163} For example, \textit{Martin v. Port of Seattle}\textsuperscript{164} involved landowners complaining about the noise and vibrations from aircraft.\textsuperscript{165} The trial court ordered just compensation for one group of plaintiffs because the low overhead flights amounted to a taking of an easement and the noise amounted to a damaging of the property.\textsuperscript{166} The Supreme Court of Washington specifically rejected the argument that there was no just compensation due to those plaintiffs whose land was not damaged by flights passing directly over their property.\textsuperscript{167} In doing so, the court moved away from notions of physical trespass, ouster of possession, and what the court called "the overly strict interpretation of 'taking.'"\textsuperscript{168}

\[T\]his court will not . . . stress any of the proposed distinctions between the "taking" and the "damaging" of a property right respecting the use and enjoyment of the land. As the Washington Constitution affords or provides a basis for compensation in either instance, subtle efforts at legal refinement to characterize and describe a particular interference can be expected to be more difficult and treacherous than convincing or utilitarian.\textsuperscript{169}

\begin{enumerate}
  \item York City, 438 U.S. 104, 124 (1978). The second factor may be decisive and inhibit recovery where a person purchases property with knowledge of the restraint, because the market has likely discounted the value of the property for the restraint. This factor is still valid after \textit{Lucas v. South Carolina Coastal Council}, 505 U.S. 133 (1992). \textit{See Good v. United States}, 189 F.3d 1355, 1361 (Fed. Cir. 1999).
  \item \textit{See Presbytery of Seattle v. King County}, 114 Wash. 2d 320, 335, 787 P.2d 907, 915 (1990).
  \item \textit{Orion Corp.}, 109 Wash. 2d at 645, 747 P.2d at 1074.
  \item 64 Wash. 2d 309, 391 P.2d 540 (1964).
  \item \textit{See id.} at 310–11, 391 P.2d at 542.
  \item \textit{See id.} at 319–20, 391 P.2d at 547.
  \item \textit{See id.} at 316, 391 P.2d at 545.
  \item \textit{Id.} at 317, 391 P.2d at 546.
  \item \textit{Id.} at 313, 391 P.2d at 543; \textit{see also Cummins v. King County}, 72 Wash. 2d 624, 628, 434 P.2d 588, 590–91 (1967).
\end{enumerate}
When the state usurps private-property interests without exercising its eminent-domain powers, landowners can seek redress through inverse-condemnation actions. "Inverse condemnation is the popular description of an action brought against a governmental entity having the power of eminent domain to recover the value of property which has been appropriated in fact, but with no formal exercise of the power."170 "A party alleging inverse condemnation must establish the following elements: (1) a taking or damaging (2) of private property (3) for public use (4) without just compensation being paid (5) by a governmental entity that has not instituted formal proceedings."171 The judicial determination of whether the taking has occurred for a public use and whether compensation is due thus follows, rather than precedes, the government action.

Before analyzing whether a government regulation constitutes a taking, Washington courts engage in a threshold inquiry to determine whether takings analysis applies.172 The first step in this process is to determine whether the regulation "destroys or derogates any fundamental attribute of property ownership; including the right to possess; to exclude others: or to dispose of property."173 Where a landowner alleges physical invasion or the denial of all economically viable use of the property, the court need not consider the second part of the threshold inquiry.174 Instead, the burden shifts to the State to prove common law principles of property and nuisance prohibit the landowner’s proposed uses.175 If the State cannot demonstrate the economically viable use denied by the

170. Martin, 64 Wash. 2d at 310 n.1, 391 P.2d at 542 n.1 (citing Thornburg v. Port of Portland, 376 P.2d 100 (Or. 1962)).
172. See Guimont v. Clarke, 121 Wash. 2d 586, 594–95, 854 P.2d 1, 5 (1993). This threshold inquiry is especially important when, as is often the case, a regulation is challenged as both a taking and a due process violation.
173. Id. at 602, 854 P.2d at 10; see also Robinson v. City of Seattle, 119 Wash. 2d 34, 49, 830 P.2d 318, 328 (1992).
174. See Guimont, 121 Wash. 2d at 601, 854 P.2d at 9.
regulation was already barred by existing common-law principles of property and nuisance, the landowner is entitled to just compensation.\textsuperscript{176}

When a landowner alleges less than physical invasion or a total taking, courts must continue with the second step of the threshold inquiry in order to determine whether takings analysis applies. The second question considers "whether the challenged regulation protects the public interest in health, safety, the environment or fiscal integrity."\textsuperscript{177} This question focuses on whether the regulation prevents public harm, as opposed to requiring the landowner to provide an affirmative public benefit. If a regulation provides a public benefit rather than preventing public harm, or if it infringes upon a fundamental attribute of ownership, courts proceed with the takings analysis.\textsuperscript{178} The purpose behind this threshold inquiry is "to prevent undue chilling on legislative bodies' attempts to properly and carefully structure land use regulations which prevent public harm."\textsuperscript{179}

In determining whether a state's exercise of police power constitutes a taking, Washington courts first consider whether the regulation substantially advances legitimate state interests.\textsuperscript{180} If a regulation destroys a fundamental aspect of ownership \textit{without} serving a legitimate public interest, the regulation is a per se taking.\textsuperscript{181} On the other hand, if the regulation does serve a legitimate public purpose, the court balances the state's interests against the impact of the regulation on the landowner, specifically considering the economic impact of the regulation, the extent of the property owner's investment-backed expectations, and the character of the government action.\textsuperscript{182}

The remedy for a taking is just compensation—the government must pay the property owner for the state's interference with the owner's rights.\textsuperscript{183} The measure of recovery is the injury to the market value of the

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\item\textsuperscript{176} See Guimont, 121 Wash. 2d at 600, 602–03, 854 P.2d at 10.
\item\textsuperscript{177} Robinson, 119 Wash. 2d at 49, 830 P.2d at 318.
\item\textsuperscript{178} See Guimont, 121 Wash. 2d at 603–04, 854 P.2d at 11.
\item\textsuperscript{179} Sintra, Inc. v. City of Seattle, 119 Wash. 2d 1, 15, 829 P.2d 765, 772 (1992).
\item\textsuperscript{180} See, e.g., Guimont, 121 Wash. 2d at 595, 854 P.2d at 6; Robinson, 119 Wash. 2d at 50, 830 P.2d at 318; Orion Corp. v. State, 109 Wash. 2d 621, 663, 747 P.2d 1062, 1084–85 (1987).
\item\textsuperscript{181} See Robinson, 119 Wash. 2d at 50, 830 P.2d at 328.
\item\textsuperscript{182} See Guimont, 121 Wash. 2d at 604, 854 P.2d at 9 (citing Presbytery of Seattle v. King County, 114 Wash. 2d 320, 335–36, 787 P.2d 907, 915(1990)).
\item\textsuperscript{183} See Orion Corp., 109 Wash. 2d at 648 n.18, 747 P.2d at 1077 n.18 (noting that remedy for taking is just compensation while remedy for due process violation may be invalidation of statute).
\end{itemize}
\end{footnotesize}
property. A new cause of action may accrue "with each measurable or provable decline in market value." In addition, even if the regulation is eventually invalidated, courts can require just compensation be paid for the time the public had use of the land while the regulation remained in effect. Relevant considerations in determining the extent of the economic harm caused by the government's action include the economic deprivation caused by the denial of any profitable use and the extent to which the denial of profitable use interfered with reasonable, investment-backed expectations.

Because the remedy for a taking is just compensation, the Takings Clause operates only as an indirect limitation on the exercise of the police power. That is, the Takings Clause merely imposes a financial burden upon the state when its exercise of police power deprives a landowner of the value of his land. "The basic understanding of the [Fifth] Amendment makes clear that it is designed not to limit the governmental interference with property rights per se, but rather to secure compensation in the event of otherwise proper interference amounting to a taking." A valid exercise of the police power may, however, place restrictions on a landowner's property rights without paying just compensation. Requiring just compensation where a taking occurs simply prevents the government from forcing individuals to bear burdens that should, in fairness, be borne by the public as a whole.

The takings extremists, however, would utilize the federal and state takings clauses as weapons to invalidate social legislation. Rather than view the total effect of a government action on property, these advocates would sift through the "bundle of sticks," contending any government

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187. See Orion Corp., 109 Wash. 2d at 664, 747 P.2d at 1085.


189. First English, 482 U.S. at 315.


192. See generally Epstein, supra note 2.
action impacting a use of property was not only compensable, but invalidated the government action in its entirety.\textsuperscript{193}

In recent cases, the U.S. Supreme Court has employed the Takings Clause to overturn social legislation, signaling a shift in its jurisprudence and evidencing a return to the \textit{Lochner} era. The ultimate effect of this new trend remains to be seen. In the words of Professor Philip Weinberg of St. John University School of Law,

The United States Supreme Court has launched an assault on state and local land use controls in recent years, using the regulatory takings doctrine of the Constitution as its battering ram . . . . This unwarranted inflation of the venerable takings rules is a reprise of the . . . same judicial strong-arming of legislation designed to curb economic abuses that damaged the Nation in past decades. As with the straining of due process to invalidate legislation regulating working conditions and prices, the current abuse of takings doctrine appears to be similarly driven by a determination to infuse the Constitution with economic doctrines that should be irrelevant to constitutional law.\textsuperscript{194}

In sum, the Takings Clauses have expanded as a limitation on the exercise of police power. From indirect limitations on police power—requirements that government pay property owners for property taken—they have transformed into mechanisms for overturning legislation.

\textbf{B. Substantive Due Process as a Limitation on Police Power}

The substantive due process doctrine has limited the exercise of police power in both federal and Washington law.\textsuperscript{195} The concept of substantive

\textsuperscript{193} See generally Epstein, supra note 2.


\textsuperscript{195} The U.S. Constitution provides: “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law.” U.S. const. amend. XVI. Similarly, the Washington Constitution states: “No person shall be deprived of life, liberty, or property, without due process of law.” Wash. Const. art. I, § 3.

At first blush, the notion of substantive due process appears to be an oxymoron that confuses procedure and substance. See United States v. Carlton, 512 U.S. 26, 39 (1994) (Scalia, J., concurring); see also Gosnell v. City of Troy, 59 F.3d 654, 657 (7th Cir. 1995) (asserting that substantive due process is oxymoron and procedural due process is redundancy); Newell v. Brown, 981 F.2d 880, 885 (6th Cir. 1992) (noting substantive due process is “durable oxymoron”); Brower v. Inyo County, 817 F.2d 540, 544 n.4 (9th Cir. 1987) (asserting “[i]t is probably too late to express
Police Power and Property Rights

due process finds its origin in the belief that certain liberty and property interests are beyond the power of the government to affect. The doctrine finds its most extreme expression in Washington land-use cases, involving a formulation that virtually encourages the judiciary to legislate without restraint any time it disagrees with a legislative enactment.

The early federal cases employing substantive due process to analyze government actions applied a test very similar to the police power test. In *Mugler v. Kansas*, the U.S. Supreme Court examined the constitutionality of a state statute in light of due process principles, finding the prohibition on manufacturing alcohol to be constitutional. In so doing, the Court announced a two-part test to evaluate the substance of a regulation. The action must have a "real or substantial relation" to an appropriate public purpose and the action cannot be a "palpable invasion of rights secured by the fundamental law."[

Federal courts have employed substantive due process as a limitation on the exercise of the police power. Substantive due process protects those rights that are "so rooted in the traditions and conscience of our people as to be ranked as fundamental." The concept of substantive due process is inexorably tied to this nation’s history and traditions, and serves to safeguard those rights "'implicit in the concept of ordered liberty,' such that ‘neither liberty nor justice would exist if they were


197. 123 U.S. 623 (1887).

198. See id. at 674.

199. *Id.* at 661; see generally Lawton v. Steele, 152 U.S. 133 (1894) (discussing police power and substantive due process). The Court employed this formulation of substantive due process in upholding local land-use regulation. See, e.g., Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (upholding local zoning law); Hadacheck v. Sebastian, 239 U.S. 394 (1915) (upholding Los Angeles ordinance banning brick manufacture).


However, the burden on the plaintiff in federal substantive due process cases is extraordinarily heavy. As the Court of Appeals for the Ninth Circuit stated:

In order to survive the County’s summary judgment motion, the plaintiffs must demonstrate the irrational nature of the County’s actions by showing that the County “could have had no legitimate reason for its decision.” . . . If it is “at least fairly debatable” that the County’s conduct is rationally related to a legitimate governmental interest, there has been no violation of substantive due process.\(^203\)

In effect, if an enactment meets the traditional police-power test, it cannot be said to violate substantive due process in a federal case.

Washington extended the substantive due process doctrine to land-use cases. The concept of substantive due process as a constitutional theory upon which to base challenges to governmental actions first appeared in Washington case law with little fanfare and even less authority in *Norco Construction, Inc. v. King County*,\(^204\) where the court suggested due process was a limiting principle for zoning ordinances.\(^205\) Later, in *West Main Associates v. City of Bellevue*,\(^206\) the Washington court stated


The U.S. Supreme Court has recognized several fundamental rights guaranteed by the Due Process Clause, including the right to marry and have children, the right to direct the education and upbringing of one’s children, the right to use contraception, the right to bodily integrity, and the right to abortion. *See Glucksberg, 521 U.S. at 720; see also Albright v. Oliver, 510 U.S. 266 (1994).* The Court has not been particularly precise in enunciating whether fundamental rights emanate from the Constitution, or predate the Constitution and receive protection through the Due Process Clause. For instance, in the famous case *Griswold v. Connecticut*, 381 U.S. 479 (1965), the Court said, “[t]he present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees,” indicating the privacy right at issue stemmed from the Constitution. *Id.* at 485. A few sentences later, however, the Court said, “[w]e deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system.” *Id.* at 486.

\(^{203}\) Halverson v. Skagit County, 42 F.3d 1257, 1262 (9th Cir. 1994) (quoting Kawaoka v. City of Arroyo Grande, 17 F.3d 1227, 1238 (1994)); *see also* Sinaloa Lake Owners Ass’n v. City of Simi Valley, 882 F.2d 1398, 1407 (9th Cir. 1989) (“To establish a violation of substantive due process, the plaintiffs must prove that the government’s action was ‘clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.’” (quoting *Village of Euclid*, 272 U.S. at 395)).

\(^{204}\) 97 Wash. 2d 680, 649 P.2d 103 (1982).

\(^{205}\) *See id.* at 685, 649 P.2d at 106.

\(^{206}\) 106 Wash. 2d 47, 720 P.2d 782 (1986).
Police Power and Property Rights

categorically that "a land use ordinance satisfies due process standards only if it (1) is aimed at achieving a legitimate public purpose, and (2) uses means to achieve that purpose that are reasonably necessary and not unduly oppressive upon individuals." In Orion Corp. v. State, the court attempted to harmonize the conflicting Washington case law on takings, the police power, and the balancing of interests by adopting the three-part test for police-power excess stated in Goldblatt for substantive due process violations in land-use cases. Ultimately, in Washington, "a land-use regulation which too drastically curtails owners' use of their property . . . can constitute a denial of substantive due process."

In this context, substantive due process offers a more powerful means of invalidating the State's exercise of the police power than the Takings Clause. Unlike takings claims, substantive due process claims do not require proof that the regulation has denied all use of one's property. Substantive due process rights protect property owners from any irrational or arbitrary interference with their property rights. Thus, arbitrary or irrational interference with processing a land-use permit also

207. Id. at 52, 720 P.2d at 786; see also Goldblatt v. Town of Hempstead 369 U.S. 590, 594–95 (1962); Lawton v. Steele, 152 U.S. 133, 137 (1894). This test for excessive land-use regulation overruled sub silentio strongly-worded prior opinions to the contrary on the question of substantive due process. In Aetna Life Ins. Co. v. Washington Life & Disability Ins. Guar. Ass'n, 83 Wash. 2d 523, 520 P.2d 162 (1974), after reviewing the history of substantive due process cases in the U.S. Supreme Court, the Washington court stated:

This unfortunate history of the due process clause in the United States Supreme Court presents this court a sobering lesson in the necessity for judicial deference to the legislature in the exercise of its police power to accomplish economic regulation. Were we to accept appellants' invitation to void the act here on substantive due process grounds, we would set a precedent for embarking upon a course already traveled and finally rejected by the United States Supreme Court.

Id. at 534, 520 P.2d at 169 (rejecting challenge to constitutionality of Washington Life and Disability Insurance Guaranty Association Act); see also Farrell v. City of Seattle, 75 Wash. 2d 540, 543, 452 P.2d 965, 967 (1969) (holding courts will not review zoning decisions except for manifest abuse of discretion involving arbitrary and capricious conduct).


209. See id. at 647–48, 747 P.2d at 1076.

210. Presbytery of Seattle v. King County, 114 Wash. 2d 320, 329, 787 P.2d 907, 912 (1990). This expression echoes Holmes's famous declaration from Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922): "The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."


212. See Sintra, Inc. v. City of Seattle, 119 Wash. 2d 1, 21, 829 P.2d 765, 776 (1992) (finding governmental regulations violate property owner's right to substantive due process if interference resulting from regulation is arbitrary or irrational).
violates substantive due process. Unfortunately for the development of a predictable jurisprudence, what constitutes arbitrary or irrational interference is often in the eye of the beholder. Too often, the validity of a land-use determination becomes, in court, subject to the measure of the Chancellor's foot.

In determining whether a regulation violates a property owner's right to substantive due process, the court engages in a balancing test considering the purpose, means, and effect of the regulation. A court considers three questions:

1. whether the regulation is aimed at achieving a legitimate public purpose;
2. whether it uses means that are reasonably necessary to achieve that purpose; and
3. whether it is unduly oppressive on the landowner.

The party challenging the legislation has the burden of proving a violation of substantive due process. In this context, the Washington court has emphasized the need for judicial deference to the legislature's exercise of the police power to accomplish economic regulation.

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For law we have a measure, and know what to trust to—Equity is according to the conscience of him, that is Chancellor; and as that is larger, or narrower, so is Equity. Tis all one, as if they should make the standard for the measure the Chancellor's foot. What an uncertain measure would this be? One Chancellor has a long foot; another a short foot; a third an indifferent foot. It is the same thing with the Chancellor's conscience.

Id. (quoting Joseph Story, 1 Commentaries on Equity Jurisprudence § 19, at 21).

215. See Simrak, 119 Wash. 2d at 21, 829 P.2d at 776 (quoting Presbytery of Seattle, 114 Wash. 2d at 330, 707 P.2d at 913); see also Christianson v. Snohomish Health Dist., 133 Wash. 2d 647, 661, 946 P.2d 768, 774 (1997); Rivett v. City of Tacoma, 123 Wash. 2d 573, 581, 870 P.2d 299, 303 (1994).

216. See Christianson, 133 Wash. 2d at 661, 946 P.2d at 773.

remedy for a substantive due process violation is the invalidation of the state law.\textsuperscript{218}

As noted in \textit{Christianson v. Snohomish Health District}, the third prong of the substantive due process analysis is normally "difficult and determinative."\textsuperscript{219} The purpose of this prong is to prevent landowners from shouldering economic burdens more properly borne by the public as a whole.\textsuperscript{220} To ascertain whether the regulation is unduly oppressive, the court must balance the interests of the public against those of the landowner.\textsuperscript{221} In \textit{Presbytery of Seattle v. King County}, the Washington court set out a number of factors to consider when making this determination, including the nature of the harm sought to be avoided, the availability of less drastic measures, and the economic harm suffered by the property owner.\textsuperscript{222}

Washington's formulation of substantive due process in the land-use context, however, goes far beyond any federal case law, effectively elevating any erroneous decision by a local government to the status of a federal constitutional tort. In \textit{Hayes v. City of Seattle},\textsuperscript{223} for example, the Washington court declined to reach the question of whether an erroneous land-use decision by the city allowed the developer to state a claim against the city under 42 U.S.C. § 1983.\textsuperscript{224} Instead, the court allowed recovery under state law.\textsuperscript{225} However, in \textit{Sintra, Inc. v. City of Seattle},\textsuperscript{226} the Washington court squarely permitted a developer aggrieved by an erroneous local land-use decision to state a claim under 42 U.S.C. § 1983.\textsuperscript{227}

By contrast, federal courts have been careful to note not every "arbitrary and capricious" local land-use decision establishes a constitutional tort.\textsuperscript{228} Moreover, the federal courts have delineated an

\footnotesize{\textsuperscript{218} See Robinson v. City of Seattle, 119 Wash. 2d 34, 49, 830 P.2d 318, 327 (1992).
\textsuperscript{219} Christianson, 133 Wash. 2d at 664, 946 P.2d at 776; see also Robinson, 119 Wash. 2d at 51, 830 P.2d at 329.
\textsuperscript{220} See Christianson, 133 Wash. 2d at 664, 946 P.2d at 780.
\textsuperscript{221} See Robinson, 119 Wash. 2d at 51–52, 830 P.2d at 329.
\textsuperscript{222} See Presbytery of Seattle v. King County, 114 Wash. 2d 320, 329, 787 P.2d 907, 912 (1990).
\textsuperscript{223} 131 Wash. 2d 706, 934 P.2d 1179 (1997).
\textsuperscript{224} See id. at 718, 934 P.2d at 1185.
\textsuperscript{225} See id. at 714–18, 934 P.2d at 1185.
\textsuperscript{226} 131 Wash. 2d 640, 935 P.2d 555 (1997).
\textsuperscript{227} See id. at 654, 935 P.2d at 563.
\textsuperscript{228} See, e.g., Sylvia Dev. Corp. v. Calvert County, 48 F.3d 810, 829 n.7 (4th Cir. 1995):}
exceedingly narrow ambit for substantive due process challenges to local land-use decisions. In Armendariz v. Penman, the Court of Appeals for the Ninth Circuit, in an en banc decision, held substantive due process does not extend to areas addressed by more specific provisions of the Constitution, rejecting its use to invalidate routine land-use decisions. The court concluded the plaintiffs’ substantive due process

But to conclude that every agency decision reversed as “arbitrary and capricious” under state or federal administrative law rises to the level of a constitutional claim would distort the substantive due process doctrine. As the courts have consistently recognized, the inquiry into “arbitrariness” under the Due Process Clause is completely distinct from and far narrower than the inquiry into “arbitrariness” under state or federal administrative law . . . While administrative law focuses on whether an agency’s decision was supported by record evidence and abided by statutory criteria, substantive due process inquiries into the conceivable outer limits of legitimate government power.

Id. (footnotes omitted).

229. See, e.g., Sintra, 131 Wash. 2d at 684–85 (Talmadge, J., concurring and dissenting):

[S]omething more than a mere violation of state land-use law must be present before a cause of action is stated under 42 U.S.C. § 1983 for a violation of substantive due process. “A violation of state law is not a denial of due process of law.” Coniston Corp. v. Village of Hoffman Estates, 844 F.2d 461, 467 (7th Cir. 1988); “It is bedrock law in this circuit, however, that violations of state law—even where arbitrary, capricious, or undertaken in bad faith—do not, without more, give rise to a denial of substantive due process under the U.S. Constitution.” Coyne v. City of Somerville, 972 F.2d 440, 444 (1st Cir. 1992); Midnight Sessions, Ltd. v. City of Philadelphia, 945 F.2d 667, 684 (3d Cir. 1991), cert. denied, 503 U.S. 984 (1992); Steuart v. Suskie, 867 F.2d 1148, 1150 (8th Cir. 1989); Chesterfield Dev. Corp. v. City of Chesterfield, 963 F.2d 1102, 1104 (8th Cir. 1992);

[1] In zoning and land-use disputes with local governments, the plaintiff must allege something more than that the government decision was arbitrary, capricious, or in violation of state law. Such claims, if asserted, are better addressed to state courts and administrative bodies. Otherwise, every violation of state law could be turned into a federal constitutional tort.

See also Sintra, 131 Wash. 2d at 684 n.30 (Talmadge, J., concurring and dissenting):

The federal circuit courts of appeal employ various exceedingly restrictive tests for finding substantive due process, thereby reflecting their oft-stated aversion to sitting as federal zoning boards of appeal. See Zahra v. Town of Southold, 48 F.3d 674, 680 (2d Cir. 1995) (Due Process Clause does not function as general overseer of arbitrariness in state and local land-use decisions). Some courts look only for a “rational basis” behind the decision, a very relaxed standard of review. See Hoffman v. City of Warwick, 909 F.2d 608, 618 (1st Cir. 1990). Others hold only decisions that “shock the conscience” are worthy of constitutional protection. See Committee of U.S. Citizens Living in Nicaragua v. Reagan, 859 F.2d 929, 944 (D.C. Cir. 1988). Others look for decisions animated by bad faith, bias, or improper motive. See Midnight Sessions, Ltd. v. City of Philadelphia, 945 F.2d 667, 683 (3d Cir. 1991). The Court of Appeals for the Fifth Circuit treats all land-use decisions, even those Washington would characterize as quasi-judicial, as legislative acts, requiring only the least judicial scrutiny. See Shelton v. City of College Station, 780 F.2d 475, 479–83 (5th Cir. 1986). Other courts hold that substantive due process protection applies only to fundamental rights, such as marriage and family privacy, and not to land-use decisions. See, e.g., Halverson v. Skagit County, 42 F.3d 1257 (9th Cir. 1994).

230. 75 F.3d 1311, 1326 (9th Cir. 1996) (en banc).
claims were preempted by other constitutional claims, and noted using substantive due process to extend constitutional protections to economic and property rights had been largely discredited. The court cautioned that invoking substantive due process in areas "not grounded in explicit [constitutional] protections" left courts to make decisions without limitations or guidance. When an explicit constitutional provision specifically protects against government behavior, that provision, rather than the more general notion of substantive due process, should serve as the proper method of analysis. Accordingly, in the Ninth Circuit's view, the Takings Clause provides the appropriate framework for analyzing land-use claims.

The concept of substantive due process represents the worst-case scenario for judicial subversion of legislative decision making. Absent clear articulation of decisional guidelines, the judiciary substitutes its judgment for that of elected officials who are closer to the issue and better able to broker the interests at stake in the public-policy setting. The Supreme Court of Washington's extreme interpretation of the role of substantive due process finds no authority in federal case law.

IV. OBSERVATIONS ON THE PROPER ROLE OF POLICE POWER AND PROPERTY

It is readily apparent that the exercise of police power has been seen as a fundamental aspect of government by political philosophers, constitutional framers, and judges. This power, however, is not unlimited in its scope, particularly as to citizens' interests in property. The constitutional limitations on the exercise of the police power inherent in takings law and Washington's expansive treatment of substantive due process are significant.

Yet these limitations do not satisfy those who would elevate property interests over the need to exercise police power to ensure the coexistence of citizens in civil society. These advocates raise the individual or atomistic interest in property above the societal interest in every

231. See id. at 1318–19.
232. Id. at 1319.
233. See id.; see also South County Sand & Gravel Co. v. Town of South Kingstown, 160 F.3d 834, 835 (1st Cir. 1998); Patel v. Penman, 103 F.3d 868, 874–75 (9th Cir. 1996); Tinney v. Shores, 77 F.3d 378, 381 (11th Cir. 1996) (per curiam); Kernats v. O'Sullivan, 35 F.3d 1171, 1182 (7th Cir. 1994).
circumstance. Their belief flows from a flawed conception of property as a natural right distinct from its context in civil society.

Property cannot be understood outside its societal context. The yeoman farmer with land on the outskirts of the Roman empire in the fifth century A.D. could hardly articulate a natural right to his land in the face of disagreement by Attila and the Huns. That farmer's property

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234. See supra note 22. Rights to property, of course, change with society's advancement. Justice Dunbar, one of the drafters of the Washington State Constitution, recognized as early as 1902 how the changing needs of society result in new laws and new concepts of law. In a case holding constitutional an act limiting the number of hours women could be required to work in one day in mechanical and mercantile establishments, he said for a unanimous court:

Law is, or ought to be, a progressive science . . . . Blackstone [wrote] that when man enters into society, as a compensation for the protection which society gives to him, he must yield up some of his natural rights, and, as the responsibilities of the government increase, and a greater degree of protection is afforded to the citizen, the recompense is the yielding of more individual rights . . . . The changing conditions of society have made an imperative call upon the state for the exercise of these additional powers, and the welfare of society demands that the state should assume these powers, and it is the duty of the court to sustain them whenever it is found that they are based upon the idea of the promotion and protection of society.


As an illustration of how property rights change as society progresses, consider the following facially unobjectionable statement:

[A]n act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offense against the laws, could hardly be dignified with the name of due process of law.

Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 450 (1856). The "property" Chief Justice Taney referred to in this case was the slave Dred Scott. The Court there held "a negro of the African race [is] ...an article of property, and held, and bought and sold as such." Id. at 408. The citizens of the United States changed that abhorrent definition of property by the Thirteenth and Fourteenth Amendments, of course, but not without opposition from those who thought freeing the slaves was a taking of property without just compensation. See, e.g., Cong. Globe, 38th Cong. 1st Sess. 2941 (1864) (remarks of Representative Wood); Lea S. Vandervelde, The Labor Vision of the Thirteenth Amendment, 138 U. Pa. L. Rev. 437, 444 n.41 (1989) (citing Representative Wood). Indeed, when Congress abolished slavery in the District of Columbia on April 16, 1862, it provided for payments of up to $300 per slave to the former slave owners as remuneration for their loss of "property." 12 Stat. LIV (1862). Although one may read such facts today with repugnance and horror, the former treatment of slaves as property illustrates how concepts of property evolve and change as American society evolves and changes.

However, even without considering societal evolution, "neither property rights nor contract rights are absolute; for government cannot exist if the citizen may at will use his property to the detriment of his fellows, or exercise his freedom of contract to work them harm." Nebbia v. New York, 291 U.S. 502, 523 (1934) (upholding constitutionality of statute setting minimum price for milk).
interest was only valuable to the extent the Emperor could maintain the pax Romana or the Germanic hordes suffered him and his family to remain on the land. Without the institutions of civil society to recognize property ownership, including rights of conveyance, purchase, and enjoyment, and the authority sufficient to enforce that recognition, property can be owned and used only by the strong and powerful, or only at their sufferance. As Jeremy Bentham stated,

I cannot count upon the enjoyment of that which I regard as mine, except through the promise of the law which guarantees it to me . . . . It is only through the protection of law that I am able to inclose a field, and to give myself up to its cultivation with the sure though distant hope of harvest.

To contend either philosophically or in constitutional terms that there is a “zone of absolute property” outside of any governmental reach is

235. Society generally confirms the conveyance and transmission of property interests by titling and inheritance laws. As Blackstone said:
The origin of private property is probably founded in nature . . . but certainly the modifications under which we at present find it, the method of conserving it in the present owner, and of translating it from man to man, are entirely derived from society: as are some of those civil advantages, in exchange for which, every individual has resigned a part of his natural liberty.

2 Blackstone’s Commentaries 138 (St. George Tucker ed., Rothman Reprints, Inc. 1969) (1803). To illustrate the necessity for a societal framework in order for property rights to exist, consider Wash. Rev. Code § 59.23.030, a statute granting mobile-home tenants a chance to bid on a potential sale of the mobile-home park and setting forth sanctions for park owners’ failure to comply: “If the court determines that the notice provisions of this chapter have been violated, the court shall issue an order setting aside the improper sale.”

Surely, as an order affecting real property, someone would record the order with the county auditor, where it would appear with the description of the relevant parcel. The order setting aside the improper sale would effectively reconvey the land to the park owner because the improper conveyance would no longer be of record. The purported purchaser would thus be unable to enforce any rights to the property. He could not seek assistance from the sheriff to “exclude others” because he could not establish the land belonged to him in the absence of society’s recognition of the conveyance. He could not sell the land because he would find no buyers for land to which he could not show clear title. He could not enforce collection of rents from the mobile-home tenants because to do so, he would have to set forth in a complaint that he is the landlord entitled to the rents, and while he may allege as much, he can never prove he is the landlord because there is no record of his ownership the law recognizes as valid. In such a case, while there may have been a valid contract for the sale of land between a willing seller and a willing buyer, without society’s imprimatur, no cognizable conveyance of title occurred.


237. Professor Glendon refers to this as the “illusion of absoluteness.” See Glendon, supra note 16, at 18. She notes:
simply wrong. Property is an important social interest with particular types of constitutional guarantees to the individual, but it is *not* an absolute interest and cannot be understood outside its societal context. Communitarian principles, as well as concepts of social responsibility, dictate the need for a mechanism to adjust individual interests in conflict.

The police power touches upon the core functions of government. Its exercise is designed to preserve the public peace, safety, health, and welfare—the exact reasons for the creation of civil government. To a very real extent, the police power coincides with the power of government itself. Certainly the power of government ought not to be diminished in the face of property use adversely affecting the public order. For example, one cannot seriously argue for a property right to dispose of raw sewage on one's land in the middle of a city or an unfettered right to play a stereo at maximum volume in the wee hours of the morning in a residential neighborhood. The exercise of the police power is necessary to adjust interpersonal relationships in such a way as to facilitate the general ability to live together in society.\(^{238}\)

Absoluteness is an illusion, and hardly a harmless one. When we assert our rights to life, liberty, and property, we are expressing the reasonable hope that such things can be made more secure by law and politics. When we assert these rights in an absolute form, however, we are expressing infinite and impossible desires—to be completely free, to possess things totally, to be captains of our fate, and masters of our souls. There is pathos as well as bravado in these attempts to deny the fragility and contingency of human existence, personal freedom, and the possession of worldly goods. As John Updike recently observed, a certain unreflective Utopianism has undeniably been an important part of the American experience—Utopianism that, as it crumbles in our own time, gives way to "a naive, unending surprise and indignation that life is as it is. We cannot, unlike the Europeans, quite get over it."

The exaggerated absoluteness of our American rights rhetoric is closely bound up with its other distinctive traits—a near-silence concerning responsibility, and a tendency to envision the rights-holder as a lone autonomous individual. Thus, for example, those who contest the legitimacy of mandatory automobile seat-belt or motorcycle-helmet laws frequently say: "It's my body and I have the right to do as I please with it." In this shibboleth, the old horse of property is harnessed to the service of an unlimited liberty. The implication is that no one else is affected by my exercise of the individual right in question. This way of thinking and speaking ignores the fact that it is a rare driver, passenger, or biker who does not have a child, or a spouse, or a parent. It glosses over the likelihood that if the rights-bearer comes to grief, the cost of his medical treatment, or rehabilitation, or long-term care will be spread among many others. The independent individualist, helmetless and free on the open road, becomes the most dependent of individuals in the spinal injury ward. In the face of such facts, why does our rhetoric of rights so often shut out relationship and responsibility, along with reality?

\(^{238}\) Id. at 45–46.

Many have argued the greatest governmental success story of twentieth-century America is a relatively obscure governmental program—public health. The massive national commitment to the construction of sanitary sewers, safe drinking-water systems, and solid-waste facilities probably has
Of course, exercise of the police power can go too far. The courts reserve the right to determine if an ordinance, statute, or regulation reasonably addresses a public safety, health, morals, or welfare issue. Moreover, there are constitutional limits to the scope of the police power. The traditional takings analysis—physical invasion of property interests by government or regulations effectively depriving property of all viable economic uses—and substantive due process doctrine constitute very effective brakes on excessive use of the police power.

The debate on the exercise of police power with regard to property should take a new form. While substantive due process is a limitation on the state’s exercise of police power, the doctrines of regulatory takings and substantive due process appear “analytically identical.”239 The substantive due process test closely approximates the test to determine whether a regulation is a valid exercise of the police power. Police-power analysis requires a court to determine whether a regulation promotes the general interests of the public through reasonably necessary means.240 This is only slightly different from substantive due process analysis. Both analyses look closely at the purpose of the regulation to ensure that it serves a legitimate public purpose.241 Similarly, both substantive due process analysis and analysis of a state’s exercise of police power look at the means employed by the regulation and the effect the regulation has on the landowner.242 Despite the differences in the articulated tests, resolution under both tests hinges on the reasonableness of the regulation.243

Given the similarities between the two tests, the question of what function the doctrine of substantive due process should serve in property-rights cases remains. This question is especially relevant because land-use regulations violating substantive due process in Washington are likely to be found invalid exercises of the state’s police power. Because

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240. See supra notes 140–41 and accompanying text.
241. See Orion Corp., at 647, 747 P.2d at 1076.
242. See id.
243. See id. at 648, 747 P.2d at 1076.
the notion of substantive due process adds nothing to the analysis of property-rights cases, courts should limit the use of the substantive due process doctrine to cases involving those fundamental rights enumerated by the U.S. Supreme Court. Indeed, Washington courts should eschew the vague principles of substantive due process and adhere to explicit constitutional provisions.244

Washington has gone astray by extending the substantive due process doctrine to land-use regulations. Substantive due process analysis has no place in cases involving the regulation of property.245 Property rights cases can be adequately resolved using either a takings or police-power analysis.246

In effect, the focus should rest on traditional police-power concerns rather than the concept of substantive due process. There are certain fundamental rights, described by the U.S. Supreme Court in its substantive due process jurisprudence, that are properly beyond the reach of government’s police power. Lest the courts arrogate to themselves the right to legislate, courts should be extraordinarily cautious about making all interests “fundamental.” For the remainder of non-fundamental matters, courts should determine whether the government’s exercise of police power meets the traditional test of a nexus between a governmental interest and reasonableness in means employed.

Finally, the exercise of police power is a political issue. In a recent book, Philip Howard notes circumstances in which government has adopted foolish, excessive, or simply unnecessary laws and regulations.247 Politicians revel in decrying such governmental abuses.248

244. See Graham v. Connor, 490 U.S. 386, 395 (1989) (finding excessive-force claim improperly analyzed on substantive due process principles where explicit constitutional provision applies); Armendariz v. Penman, 75 F.3d 1311, 1326 (9th Cir. 1996).

245. Although the U.S. Supreme Court has enumerated a class of rights it calls fundamental, see, e.g., Planned Parenthood v. Casey, 505 U.S. 833 (1992) (procreation); Moore v. City of East Cleveland, 431 U.S. 495 (1977) (family); Shapiro v. Thompson, 394 U.S. 618 (1969) (travel); Reynolds v. Sims, 377 U.S. 533 (1964) (vote), it has never accorded property rights the same status.

246. See, e.g., South County Sand & Gravel Co. v. Town of South Kingstown, 160 F.3d 834, 836 (1st Cir. 1998) (“Although the substantive limits of the Takings Clause may not necessarily coincide with the substantive limits of the Due Process Clause in every imaginable context . . . the limits are congruent in this instance.”).


248. See generally, e.g., William Michael Treanor, The Armstrong Principle, the Narratives of Takings, and Compensation Statutes, 38 Wm. & Mary L. Rev. 1151 (1997) (detailing several politicians’ recitations of horribles in land-use regulation).
Regulatory reform measures are frequently introduced by legislators to "control" bureaucracy and excessive rules.249

The lesson to be gleaned from all this is that, apart from the doctrinal limits on the police power, there is a major limit on the police power in the American system of government: the democratic electoral process. If government goes too far in enacting stupid or ineffective laws, or if otherwise salutary laws are administered carelessly, U.S. history shows a political opposition will arise. The self-corrective feature of democratic government is a significant check on governmental abuse, and is often overlooked by advocates of greater constitutional limits on the police power. Indeed, local elections for city and county legislative bodies often turn on issues of regulation, land-use intensity, and growth and sprawl. Moreover, legislative bodies can provide, and have provided, recourse for citizens adversely affected by arbitrary governmental actions respecting land use.250

249. See, e.g., Regulatory Reform, ch. 403, 1995 Wash. Laws 2160-213; Regulatory Reform Act, ch. 249, 1994 Wash. Laws 1378-405. Both Regulatory Reform Acts were the subject of extensive gubernatorial vetoes. As to the 1995 version of regulatory reform, the governor’s veto message noted: “Over the last few years, the issue of regulatory reform has generated spirited discussion and debate. I have come to the conclusion that, like beauty, regulatory reform is really in the eye of the beholder. While there is widespread agreement about the problems, there is less clarity regarding solutions.” Regulatory Reform, ch. 403, 1995 Wash. Laws at 2210.

250. The Washington legislature enacted Revised Code of Washington section 64.40 in 1982. In its key provision, the statute provides:

(1) Owners of a property interest who have filed an application for a permit have an action for damages to obtain relief from acts of an agency which are arbitrary, capricious, unlawful, or exceed lawful authority, or relief from a failure to act within time limits established by law: Provided, That the action is unlawful or in excess of lawful authority only if the final decision of the agency was made with knowledge of its unlawfulness or that it was in excess of lawful authority, or it should reasonably have been known to have been unlawful or in excess of lawful authority.

(2) The prevailing party in an action brought pursuant to this chapter may be entitled to reasonable costs and attorney’s fees.


Washington’s extraordinarily expansive conception of vested rights also reflects legislative deference to concerns about government activities intruding upon the right to develop property. Under this doctrine, an application for a government permit “vests” the applicant in the law then prevailing. See Wash. Rev. Code § 19.27.095 (1998); see also Noble Manor Co. v. Pierce County, 133 Wash. 2d 269, 943 P.2d 1378 (1997); Erickson & Assocs., Inc. v. McLerran, 123 Wash. 2d 864, 872 P.2d 1090 (1994).
Courts should not elevate every dispute about the scope of the police power to a constitutional level where the political mechanism is functioning, largely because the police power is so essential to effective governance in modern society. In their constitutional role, courts should afford the political process the maximum opportunity to decide issues regarding the scope of government's police power. Certainly, questions like those of food safety, zoning density, or on-site sanitary systems should be decided by legislative or executive branch agencies closer to the will of the people and the interests involved. The judiciary should not attempt to co-opt such political debates by elevating them to constitutional status.\footnote{See Philip A. Talmadge, \textit{Understanding the Limits of Power: Judicial Restraint in General Jurisdiction Court Systems}, 22 Seattle U. L. Rev. 695 (1999).}

V. CONCLUSION

Dean Acheson, a law clerk to Justice Louis Brandeis during the heyday of the \textit{Lochner} era, wrote of that dolorous period in American constitutional law, "Today it seems very odd indeed that until this century was more than four decades old the U.S. Supreme Court was of the opinion that the Founding Fathers had put it beyond the power of any government in the land to protect those historic wards of the law, women and children, from exploitation by the owners of machines."\footnote{Dean Acheson, \textit{Morning and Noon} 112–13 (1965).} Perhaps a much shorter time will pass in the twenty-first century before the U.S. Supreme Court realizes—and reads the Constitution as Jefferson, Marshall, Franklin, and Chase, among others, understood it—that community interests in property must triumph over the possessive, individualistic approach to property the property-rights absolutists advocate. As for the Supreme Court of Washington, given its Progressive, anti-\textit{Lochner} approach to the plight of working people one hundred years ago, one can reasonably hope it will be even swifter than the U.S. Supreme Court to acknowledge and uphold community values in its land-use decisions.

In the end, the exercise of police power in a modern society is essential to its continued existence. That such power extends to property interests is not new, and should not be diminished. However, "\textit{n}either property nor police power is an absolute right; each evolves contextually
Opponents of the exercise of police power, whose purpose may be to hobble government generally, should not invariably look to constitutional restraints as a safeguard against excessively intrusive government action. Instead, they should avoid the notion that government is inherently ill-willed and should invoke the democratic process to curtail government if the police power is misused.
