ARTICLE

Regulatory Taking Doctrine in Washington: Now You See It, Now You Don’t

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I. INTRODUCTION

Regulatory taking doctrine is the most perplexing area of American land use law. Despite scholarly obsession and frequent litigation, the most fundamental questions about regulatory takings remain unresolved. Are the taking clauses of federal and state constitutions even applicable to police power regulation of land use and development? If so, what limitations

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1. This theme is developed in the first two parts of the Article. The elusiveness of definitive regulatory taking standards is not surprising given the infinite range of public purposes and private effects of police power regulation. Of course, the matter could be simplified somewhat by holding that the taking limitation and its compensation remedy do not apply to otherwise proper police power regulation. But that would leave the essentially similar, if remedially different, question of when regulation violates substantive due process because of its deprecating and disappointing effect on private property ownership. These fundamental questions of social policy, whether stated in terms of the taking or substantive due process limitations, are not amenable to clear and simple answers. The quest for doctrine to resolve the issue has been characterized as the “lawyer’s equivalent to the physicist’s hunt for the quark.” C. HAAR, LAND USE PLANNING 766 (3d ed. 1976).

Among the most recent scholarly attempts to describe, untie, or cut this Gordian Knot are articles contained in a Columbia Law Review symposium, The Jurisprudence of Takings, 88 COLUM. L. REV. 1581 (1988): Fischel, Introduction: Utilitarian Balancing and Formalism in Takings, 1581; Michelman, Takings, 1987, 1600; Kmiec, The Original Understanding of the Taking Clause is Neither Weak Nor Obtain, 1630; Radin, The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings, 1687; Rose-Ackerman, Against Ad Hockery: A Comment on Michelman, 1697; Michelman, A Reply to Susan Rose-Ackerman, 1712; Tideman, Takings, Moral Evolution, and Justice, 1714; Sterk, Nollan, Henry George, and Exactions, 1731; Alexander, Takings, Narratives, and Power, 1752; Fisher, The Significance of Public Perceptions of the Takings Doctrine, 1774. See also Callies, Property Rights: Are There Any Left?, 20 URBAN LAW. 597 (1988) [hereinafter Callies].

2. See infra text accompanying notes 22, 26.
on police power regulation do the taking clauses impose? And what are the legal consequences of transgressions? To call the collective judicial responses to these questions doctrine is an exaggeration. *Ad hocery* is a more accurate characterization.\(^3\)

There is nothing even approaching a clearly articulated system of principles governing the resolution of regulatory taking claims,\(^4\) as the United States Supreme Court routinely concedes.\(^5\)

[T]his Court, quite simply, has been unable to develop any "set formula" for determining when "justice and fairness" require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons. . . . Indeed, we have frequently observed that whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely "upon the particular circumstances [in that] case."\(^6\)

Until its decision in *First English Evangelical Lutheran Church v. Los Angeles County*,\(^7\) the Supreme Court had refrained from explicitly deciding the threshold question of whether the burdens imposed on private property by police power measures were constitutionally limited by the federal taking clause, itself, in addition to substantive due process.\(^8\) Having decided that both limitations apply, the Court, however, has offered no explanation of their relationship and

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4. Judicial efforts to chart a usable test for determining when police power measures impair constitutionally compensable losses have, on the whole, been notably unsuccessful. With some exceptions, the decisional law is largely characterized by confusing and incompatible results, often explained in conclusionary terminology, circular reasoning, and empty rhetoric. Even the modicum of predictability, which might otherwise inhere in the pattern of judicial precedents, is impaired by the frequently reiterated judicial declaration that each case must be decided on its own facts.


respective requirements.\textsuperscript{9}

Within a recent two-month period, the Washington Supreme Court issued decisions in two major regulatory taking cases, \textit{Orion Corporation v. State},\textsuperscript{10} and \textit{Allingham v. City of Seattle}.\textsuperscript{11} In both cases, land use regulations were challenged on the basis of the taking clauses of the federal and state constitutions. In the \textit{Orion} litigation, the owners of a large tract of Puget Sound tidelands asserted a constitutional right to compensation for a taking of property by state and local regulations restricting use and development of the tidelands. In \textit{Allingham}, a group of Seattle landowners sought invalidation of a city ordinance restricting development of land within designated \textquote{greenbelt preserves."

In the \textit{Orion} decision, the Washington Supreme Court, venturing where other courts had feared to go, began the painful process of developing coherent legal doctrine to supplant vague or nonexistent principles and intuitive determinations.\textsuperscript{12} The purpose of the court\textquotesingle s elaborate exposition of the law and policy of regulatory takings seemed clear—to establish a mode of analysis and decisional principles that would provide significant guidance in an area of legendary uncertainty. Of course, \textit{Orion} was not expected to be the last word. Its principles would be refined, explained, and perhaps revised by future decisions. But it was regarded as a major initiative that clearly implied a judicial commitment to continue the process of developing cogent doctrine and a promise that resolution of regulatory taking claims would become increasingly predictable.\textsuperscript{13} Landowners and regulatory policymakers would sleep

\textsuperscript{12} See \textit{supra} notes 4-6 and accompanying text.
\textsuperscript{13} The court stated:

By clearly delineating when an excessive regulation violates substantive due process, as opposed to accomplishing a de facto eminent domain taking, we can best protect the property owner from shouldering the cost of a burden the public should bear, without unnecessarily creating the specter of unanticipated financial damages for all excessive regulations. Thus, our approach enables us to meet our most important consideration of reconciling \textquote{property rights and social needs."

better.

Orion's ink was scarcely dry when the prospect of coherent doctrine was dashed by Allingham. Allingham was as cryptic as Orion was enlightening. Allingham ignored Orion and the elaborate analytical framework the court had so painstakingly established. The only decisional principle clearly articulated in Allingham was directly contrary to well-established state and federal law. As shockingly disappointing as Allingham was, the land use law community assumed that its shortcomings, no doubt, resulted from a mechanical glitch in the court's mysterious opinion writing and review processes or from a breakdown in communication among the justices; reconsideration would eliminate the dissonance and restore Orion's promise of coherent regulatory taking doctrine. Briefs in support of a motion for reconsideration were filed, arguing primarily for doctrinal consistency rather than a different result. Surprisingly, the court denied the City's motion for reconsideration and issued a terse "Order Changing Opinion," adding a three-sentence explanatory footnote that, while citing and apparently reaffirming Orion, raised more questions than it resolved.

14. Orion II was not even cited in Allingham as originally issued. The court, however, added a footnote to Allingham citing Orion II by an Order Changing Opinion, Allingham v. City of Seattle, No. 52871-2 (July 15, 1988) [hereinafter Order Changing Opinion]. See Allingham, 109 Wash. 2d at 953 n.1, 749 P.2d 160, modified, 757 P.2d at 533 n.1. See infra note 18 and accompanying text.

15. See infra text accompanying notes 370-78.


17. In addition to briefing by the parties on the motion for reconsideration, amicus briefs in support of reconsideration were submitted by the following:

1. City Attorneys Richard Andrews, (Bellevue), Ralph Thomas (Kirkland), Lawrence Warren (Renton), Sandra Driscoll (Kent), Marguerite Schellentrager (Auburn).

2. The Association of Washington Cities. By separate order, the Washington Association of Prosecuting Attorneys and Washington State Association of Counties were allowed to join this Amicus brief.

3. William Stoebuck, Professor of Law, University of Washington.

These briefs are available from the Washington Supreme Court Clerk under Docket No. 52877-2.

18. The Order Changing Opinion, stated:

The remedy we grant of invalidation of the ordinance is a remedy consistent with the denial of substantive due process. Orion Corp. v. State, 109 Wash. 2d 621, 747 P.2d 1062 (1987). Overly severe landowner regulations have previously resulted in our labeling those actions as "takings." Granat v. Keasler, 99 Wash. 2d 564, 663 P.2d 830 (1983).
After setting the scene with a summary of federal and Washington State regulatory taking law, this Article analyzes and critically assesses Orion’s ambitious doctrinal initiative in light of the Allingham enigma and charts a tentative course toward more coherent regulatory taking doctrine. A pervasive and hopeful theme of the Article is that a latent, largely unarticulated or misstated doctrine exists, just waiting for explicit judicial recognition, that would consistently explain, and even predict, most of the regulatory taking decisions.

II. AN HISTORICAL SYNOPSIS OF REGULATORY TAKING LAW

The starting point in the exploration of regulatory taking jurisprudence is the fifth amendment to the United States Constitution, which provides in part: “nor shall private property be taken for a public use without just compensation.” Although the fifth amendment applies only to the federal government, the taking limitation long has been held applicable to state and local governments through the due process conduit of the fourteenth amendment. In addition, all of the state constitutions contain identical or functionally equivalent provisions. The federal taking clause, as interpreted by the Supreme Court, establishes mandatory minimum limitations on state and local governments that state constitutions, as interpreted by the state courts, may exceed. Some state taking provisions have been held to restrict state action more than their federal counterpart. The Washington State taking clause provides that “[n]o private property shall be taken or

19. See infra notes 22-193 and accompanying text.
20. See infra notes 355-400 and accompanying text.
21. See infra notes 324-54 and accompanying text.
22. U.S. CONST. amend. V.
Speciﬁc constitutional guarantees held to be incorporated into the due process clause of the fourteenth amendment retain their specific identity. See, e.g., Mapp v. Ohio, 367 U.S. 943 (1961).
damaged for public or private use without just compensation having first been made."26 Although the words "or damaged" arguably make Washington's provision more restrictive than the federal taking clause, no Washington decision has attached significance to the difference in language in the context of police power regulation.27

As the words of the taking clause plainly indicate, and as constitutional history confirms, the limitation was aimed at government expropriation of property.28 The taking clause, while acknowledging the inherent governmental power of eminent domain, limits its exercise through the requirements of "public use" and "just compensation."29 Judicial interpretations of these constitutional requirements, in the context of government acquisition of property interests for various public and quasi-public enterprises, constitute a well-established and generally uncontroversial body of doctrine—the law of "eminent domain" or "condemnation."30

A branch of this doctrine, commonly called "inverse condemnation," recognizes the applicability of the constitutional requirements to situations in which government actions, usually physically invasive, inadvertently or presumptuously usurp property interests that should have been properly acquired.31 Public flooding of privately owned land32 and unreasonably disruptive government-sponsored aircraft overflights33 are examples. The condemnation is "inverse" because


27. See R. SETTLE, WASHINGTON LAND USE AND ENVIRONMENTAL LAW AND PRACTICE § 7.1 (1983) [hereinafter SETTLE]. One credible explanation of Allingham is that the Washington Supreme Court, sub silentio, held the state taking clause to be more restrictive than the federal taking clause. See infra text accompanying notes 351-52.


judicial determination of public use and just compensation follows rather than precedes the government invasion.

Late in the nineteenth century, landowners chafing under burdensome state or local regulation began to argue that severe limitations on their use of land were takings and, hence, not constitutionally permissible without just compensation. Even though such cases involved no government acquisition or invasions of property, the courts were urged to focus on effect rather than cause, and to characterize severe restrictions on use, coupled with drastic reductions in property value, as takings. Thus, in the 1887 case of Mugler v. Kansas, brewery owners used a regulatory taking theory to challenge a Kansas statute prohibiting the manufacture of intoxicating liquors and thereby greatly diminishing the value of their property. The Supreme Court categorically rejected the theory as inapplicable to police power regulation. According to the Court, constitutional limitations on takings of property pertained only to government acquisition or physical invasion of property under the power of eminent domain:

[T]he present case must be governed by principles that do not involve the power of eminent domain, in the exercise of which property may not be taken for public use without compensation. A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the State that its use by anyone, for certain forbidden purposes, is prejudicial to the public interests.

As police power regulation, the Kansas statute was subject to the substantive due process requirement that it substantially advance legitimate public interests, but not to the taking limitation. For the next three decades the Supreme Court adhered to this principle, deciding all regulatory taking challenges under vague standards of substantive due process.

34. 123 U.S. 623 (1887).
35. Id. at 668-69.
36. Id.
37. See, e.g., Hadacheck v. Sebastian, 239 U.S. 394 (1915); Reinman v. City of Little
It is important at this point to distinguish between function and form in assessing judicial reaction to the argument that police power regulation may violate the Constitution by excessively burdening private property. In all of the early cases, the argument was asserted as a ground for invalidation of the regulation rather than compensation.\(^3\) If the argument succeeded, it was practically inconsequential to the property owner whether the formal constitutional basis for invalidation was the taking or due process clause. During the four decades spanning the turn of the century, while formally rejecting the applicability of the taking clause to police power regulation, the Court functionally vacillated as to the existence of any constitutional limitation on the extent to which government regulation burdened property and redistributed wealth.\(^3\) According to most cases of this era, the Constitution required only that regulatory means be rationally designed to serve legitimate social ends, perhaps a rough measure of social efficiency, clearly not a limit on wealth redistribution. Police power measures that plausibly advanced public interests satisfied substantive due process regardless of individual burdens imposed.\(^4\) As the Court noted in Hadacheck v. Sebastian: \(^4\)

It is to be remembered that we are dealing with one of the most essential powers of government, one that is the least limitable. It may, indeed, seem harsh in its exercise, usually is on some individual, but the imperative necessity for its existence precludes any limitation upon it when not exerted arbitrarily. . . . There must be progress, and if in its march private interests are in the way they must yield to the good of the community.\(^4\)

Only in the 1894 case of Lawton v. Steele\(^4\) did the Court

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41. 239 U.S. 394 (1915).

42. Id. at 410.

43. 152 U.S. 133 (1894).
recognize a constitutional limitation on the redistributive consequences of police power regulation. The Court acknowledged, in dicta, that even a regulation which substantially served society would violate due process if "unduly oppressive upon individuals." 44

The modern era of regulatory taking law began in 1922 with the landmark decision of Pennsylvania Coal Co. v. Mahon. 45 In a terse opinion by Justice Holmes, without overruling or explicitly discrediting any prior decisions, 46 the Court invalidated a state statute, as applied, and, perhaps facially as well, 47 because of the unfair burden it imposed upon the holders of property rights to extract coal. Acknowledging that the socially indispensable mission of the police power must not be frustrated by solicitude for individual loss, the Court held that there were ultimate constitutional limits on the extent of private burden to be endured for the public good. 48 When the limits were exceeded, regulation became a taking.

Government hardly could go on if, to some extent, values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation, and must yield to the police power. But obviously the implied limitation must have its limits or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act. So the question depends upon the particular facts. The greatest weight is given to the judgment of the legislature but it always is open to interested

44. Id. at 137.
45. 260 U.S. 393 (1922).
46. Justice Holmes stated: "But we regard this as going beyond any of the cases decided by this court." Id. at 416.
47. Whether Pennsylvania Coal invalidated only a specific application of the Kohler Act or the statute, on its face, was hotly contested by the majority and dissenting opinions in Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987), in which the Court rejected a regulatory taking challenge of a statute very similar to the Kohler Act. Id. at 493. Justice Stevens' characterization of the Pennsylvania Coal holding has been called an "amazing reconstruction," Michelman, Takings, 1987, 88 COLUM. L. REV. 1600 (1988), and "revisionist," Kmiec, The Original Understanding Of The Taking Clause Is Neither Weak Nor Obtuse, 88 COLUM. L. REV. 1630, 1631 (1988) [hereinafter Kmiec].
parties to contend that the legislature has gone beyond its constitutional power. . . .

. . . .

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.49

Whether Justice Holmes was merely using the word "taking" metaphorically in adopting the theory that police power regulation is subject to substantive due process limits on the permissible extent of private burden imposed,50 or was formally embracing the theory that police power regulation could effect a taking subject to the compensation requirement of the taking clause, itself, was unclear and has been debated ever since.51 Holmes cited no authority for the proposition that excessively burdensome regulation was a taking. Mugler v. Kansas,52 which had formally rejected the applicability of the taking clause to police power regulation, was ignored, as was Lawton v. Steele,53 which had recognized the "unduly oppressive" limitation of substantive due process. Holmes may have meant that unfairly burdensome regulation that violates substantive due process is invalid, and may only be constitutionally effected through the power of eminent domain. Or he may have meant that the regulation, since it had "very nearly the same effect for constitutional purposes as appropriating or destroying [the coal],"54 actually effected a taking within the meaning of the taking clause, and hence, was invalid without compensation.

Pennsylvania Coal was unclear about both the formal constitutional basis and the operative standard by which the statute was held to have gone "too far." The extent of diminution in property value caused by the regulation was deemed important but not determinative.55 The Court variously suggested an absolute standard of permissible diminution in property value56

49. Id., 260 U.S. at 413, 415.
50. See Lawton v. Steele, 152 U.S. 133 (1894).
52. 123 U.S. 623 (1887).
53. 152 U.S. 133 (1894).
54. Pennsylvania Coal, 260 U.S. at 414.
55. Justice Holmes noted that "[w]hen [diminution in property value] reaches a certain magnitude, in most if not all cases there must be an exercise of eminent domain and compensation to sustain the act." Id. at 413.
56. Id. If the standard was meant to be absolute, the permissible quantum of
and a relative standard that called for balancing private loss against the value of the public interest served.\(^{57}\) Moreover, in determining the permissibility of the private burden, offsetting private benefits were to be taken into account.\(^{58}\)

The chaotic jumble of conflicting uses left in the wake of rapid urbanization induced New York City to adopt the nation's first comprehensive zoning ordinance in 1916.\(^{59}\) Within a decade, all but 5 states had enacted zoning enabling acts and 420 municipalities had adopted zoning ordinances.\(^{60}\) Landowners mounted numerous constitutional challenges of the new regulatory regimes. Inspired by *Pennsylvania Coal*, the regulatory taking argument was vigorously asserted. The state courts were divided on the constitutional question when *Village of Euclid v. Ambler Realty Co.*\(^{61}\) reached the Supreme Court.\(^{62}\) The federal district court had invalidated the zoning ordinance as a violation of substantive due process for the taking of plaintiff's property without compensation.\(^{63}\) But the Supreme Court ignored *Pennsylvania Coal* even though plaintiff alleged great diminution in land value.\(^{64}\) The Court

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\(^{57}\) Justice Holmes wrote:

No doubt there is a public interest even in this, as there is in every purchase and sale and in all that happens within the commonwealth. Some existing rights may be modified even in such a case. *Rideout v. Knox*, 148 Mass. 368, 19 N.E. 390, 2 A.L.R. 81, 12 Am. St. Rep. 560. But usually, in ordinary private affairs, the public interest does not warrant much of this kind of interference.

*Pennsylvania Coal*, 260 U.S. at 413.

\(^{58}\) It is true that in *Plymouth Coal Co. v. Pennsylvania*, 232 U. S. 531, it was held competent for the legislature to require a pillar of coal to be left along the line of adjoining property, that, with the pillar on the other side of the line, would be a barrier sufficient for the safety of the employees of either mine in case the other should be abandoned and allowed to fill with water. But that was a requirement for the safety of employees invited into the mine, and it secured an average reciprocity of advantage that has been recognized as a justification of various laws.

*Pennsylvania Coal*, 260 U.S. at 415.

\(^{59}\) See *Settle*, supra note 27, at 26; see generally S. TOLL, ZONED AMERICAN (1969) [hereinafter TOLL].

\(^{60}\) *Settle*, supra note 27, at 26.

\(^{61}\) 272 U.S. 365 (1926).

\(^{62}\) For a detailed and provocative history of this litigation, see Tarlock, *Euclid Revisited*, 34 LAND USE L. & ZONING DIG. 4, 6-8 (1982).


\(^{64}\) As the Court noted in *Euclid*:

The [plaintiff's] bill alleges that the tract of land in question is vacant and has
vaguely characterized plaintiff’s challenge of zoning as “attempted regulations under the guise of the police power, which are unreasonable and confiscatory,” and upheld the facial constitutionality of zoning since it was reasonably related to proper public purposes. Two years later, in *Nectow v. City of Cambridge*, the Court, without casting any doubt on the general validity of zoning, held that a zoning ordinance, as applied to plaintiff’s land, violated substantive due process. The Court simply reasoned that restricting to residential use a lot utterly unsuited to that use seriously burdened plaintiff without advancing any public interest.

Thus, the foundation of modern regulatory taking law was flimsy. *Pennsylvania Coal* had recognized that police power regulation may be invalidated if it caused excessive depreciation of private property. But the formal constitutional basis for this conclusion was unclear and controversial. Was such regulation invalid because it violated the substantive due process "unduly burdensome" limitation, leaving the government free to pursue its regulatory objective through the power

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been held for years for the purpose of selling and developing it for industrial uses, for which it is especially adapted, being immediately in the path of progressive industrial development; that for such uses it has a market value of about $10,000 per acre, but if the use be limited to residential purposes the market value is not in excess of $2,500 per acre; that the first 200 feet of the parcel back from Euclid Avenue, if unrestricted in respect of use, has a value of $150 per front foot, but if limited to residential uses, and ordinary mercantile business be excluded therefrom, its value is not in excess of $50 per front foot.

*Euclid*, 272 U.S. at 384. (emphasis added).

65. *Id.* at 386-87.

66. During the next year, the Supreme Court in *Miller v. Schoene*, 276 U.S. 272 (1928), on the basis of similar reasoning, upheld a Virginia statute compelling the removal of ornamental red cedar trees because they harbored cedar-rust, a disease fatal to apple trees, which were of great commercial importance in Virginia. Although the statute provided for recovery of any expense incurred in removing the cedars and allowed the owner to use the fallen trees, it did not compensate the owners for the standing value of the trees or the reduction in land value caused by their removal. The Court held that the state’s choice to preserve one class of property at the expense of another was a permissible exercise of the police power. *Id.* at 279-81.

67. 277 U.S. 183 (1928).


69. *Id.* at 188.

70. 260 U.S. 393 (1922).


of eminent domain in compliance with the taking clause?\textsuperscript{73} Or was such regulation in itself a taking, temporary at least and permanent if maintained, subject to inverse condemnation remedies?\textsuperscript{74} \textit{Pennsylvania Coal} did not explicitly disturb the leading \textit{Mugler} case,\textsuperscript{75} which had categorically rejected the propositions that police power regulation could effect a taking subject to the taking clause and that the extent of private property loss inflicted by a regulation that substantially served a legitimate public interest was relevant to substantive due process.\textsuperscript{76} Moreover, the cases immediately following \textit{Pennsylvania Coal} used the language and principles of \textit{Mugler} and its progeny without explicitly questioning or qualifying the intervening \textit{Pennsylvania Coal} opinion.\textsuperscript{77}

Perhaps sensing the doctrine's shaky support, the Supreme Court largely ignored the regulatory taking issue for the next half century, leaving doctrinal development to the state and lower federal courts.\textsuperscript{78}

The Court's abstinence ended in 1978\textsuperscript{79} in response to a flood of litigation challenging a host of new land use and environmental laws spawned by the environmental movement. Landowners and developers generally have been reluctant to sue government regulators. The delay and direct costs of litigation seldom have been worth enduring even when legal success was likely. Victories tended to be pyrrhic since the traditional legal remedy merely invalidated the offending regulation, consigning the victorious challenger to run a slightly

\textsuperscript{73} See \textit{Hamilton Bank}, 473 U.S. at 186, 197-98.
\textsuperscript{74} Id.
\textsuperscript{75} Mugler v. Kansas, 123 U.S. 623 (1887).
\textsuperscript{76} Id. at 664, 668-69. Nor did \textit{Pennsylvania Coal} express any doubts about other decisions that had followed \textit{Mugler}: Reinman v. City of Little Rock, 237 U.S. 171 (1915) and Hadacheck v. Sebastian, 239 U.S. 394 (1915).
\textsuperscript{78} The silence was briefly broken in \textit{Goldblatt v. Town of Hempstead}, 369 U.S. 590 (1962). In \textit{Goldblatt}, the Court perpetuated the doctrinal uncertainty by relying on \textit{Mugler}, 123 U.S. 623, \textit{Lawton v. Steele}, 152 U.S. 133 (1894), \textit{Hadacheck}, 239 U.S. 394, and \textit{Pennsylvania Coal Co. v. Mahon}, 260 U.S. 393 (1922), without acknowledging their inconsistencies. The Court used the language of both the taking and due process clauses, without addressing their relative relationships to the police power, in upholding the constitutionality of a local "safety" regulation of gravel mining because the challenger had utterly failed to satisfy the burden of proof.
modified, sometimes less hospitable, regulatory gauntlet. But in the 1970s and 1980s, chafing under immensely intensified regulatory burdens, landowners have turned more frequently to the courts, and they have advocated more effective remedies. Recent regulatory taking claimants often have sought damages rather than mere invalidation. In response, an increasingly sympathetic United States Supreme Court has decided more regulatory taking cases in the last decade than in the previous century. However, by the time the Supreme

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The famous Brennan dissent in San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 636-61 (1981), sympathized with the plight of a landowner limited to the remedy of invalidation:

The instant litigation is a good case in point. The trial court, on April 9, 1976, found that the city's actions effected a "taking" of appellant's property on June 19, 1973. If true, then appellant has been deprived of all beneficial use of its property in violation of the Just Compensation Clause for the past seven years.

Invalidation hardly prevents enactment of subsequent unconstitutional regulations by the government entity. At the 1974 annual conference of the National Institute of Municipal Law Officers in California, a California City Attorney gave fellow City Attorneys the following advice:

"IF ALL ELSE FAILS, MERELY AMEND THE REGULATION AND START OVER AGAIN.

"If legal preventive maintenance does not work, and you still receive a claim attacking the land use regulation, or if you try the case and lose, don't worry about it. All is not lost. One of the extra 'goodies' contained in the recent [California] Supreme Court case of Selby v. City of San Buenaventura, 10 C. 3d 110 [109 Cal. Rptr. 799, 514 P.2d 111 (1973)] appears to allow the City to change the regulation in question, even after trial and judgment, make it more reasonable, more restrictive, or whatever, and everybody starts over again.

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"See how easy it is to be a City Attorney. Sometimes you can lose the battle and still win the war. Good luck." Longtin, Avoiding and Defending Constitutional Attacks on Land Use Regulations (Including Inverse Condemnation), in 38B NIMLO Municipal Law Review 192-93 (1975) (emphasis in original).

San Diego Gas, 450 U.S. at 655-56 n.22 (Brennan, J., dissenting).

82. Kmiec, supra note 47, at 1661.


Awards cannot takings, regulatory power has been compounded. The state and lower federal courts had taken widely divergent courses as they autonomously interpreted the federal constitution.85

A. The Recent Cases

The Supreme Court’s decade of unprecedented devotion to regulatory taking claims has been tantalizing but hardly productive of definitive doctrine. Some questions have been resolved, but fundamental issues have been largely avoided. We now know that the taking clause does apply to police power regulation.86 Thus, a landowner who has suffered a regulatory taking is entitled to compensation for property value reduction during the period of the taking.87 But the Court has not provided significant guidance about—and, indeed, has greatly oversimplified—the measure of compensation.88


See generally, BOSSELMAN, CALLIES & BANTA, supra note 28.

86. First English, 107 S. Ct. at 2386.

87. Id.

88. See Herrington v. Sonoma County, 834 F.2d 1488, 1504 (9th Cir. 1987) (Setting aside a $2,500,000 damage award, the Ninth Circuit Court of Appeals stated “[w]e cannot allow the Herringtons to keep their property and be compensated in an amount almost double the sale value of the property.”); Wheeler v. City of Pleasant Grove, 833 F.2d 267 (11th Cir. 1987) (Setting aside a $1 award, the Eleventh Circuit Court of Appeals held that the correct formula is loss in income-producing potential suffered during the regulatory taking,); Yuba National Resources, Inc. v. United States, 821 F.2d 638, 640-42 (Fed. Cir. 1987) (Damages for a temporary taking measured by principles normally governing the taking of a right to use property.); R. ELLICKSON & A. TARLOCK, LAND-USE CONTROLS 168-72 (1981); Hagman, Temporary or Interim Damage Awards in Land Use Control Cases, 4 ZONING & PLAN. L. REP. 129, 130-34 (1981);
The recent cases, while acknowledging the potential applicability of both substantive due process and taking theory, have not clarified their relative applicability or specific requirements. The Court continues to recite vague standards, muddling due process and taking terminology. There has been no explanation of the substantive due process "unduly oppressive" limitation. What constitutes a regulatory taking continues to be "essentially [an] ad hoc, factual inquir[y]." The relevant factors of economic impact, interference with distinct investment-backed expectations, and character of the governmental action, which can be traced to Pennsylvania Coal, are routinely mentioned but never significantly explained. Sometimes the Court seems to employ the so-called "balancing test" of whether the regulation's public good outweighs its private harm, perhaps with the qualification that preventing serious harm to the public interest (especially nuisances) is much weightier, perhaps conclusively so, than merely providing a public amenity. Sometimes the Court suggests a more absolute test, which depends only upon whether the regulation serves a legitimate public interest and some minimum private property value remains, regardless of the relative weight of the public good and private harm.

In some of the recent regulatory taking cases, what the Court actually does makes more sense than what it says it's doing. That is, doctrine may be inferable from some of the decisions even though it has not been fully articulated. This seems to so in the cases the Court has decided involving regulations that effect a physical invasion of land or otherwise

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93. See Keystone, 480 U.S. at 495; Yolo County, 477 U.S. at 349; Hamilton Bank, 473 U.S. at 191.

94. Keystone, 480 U.S. at 491 n.20; Agins v. City of Tiburon, 447 U.S. 255, 261 (1980) (the question of whether a taking has occurred "necessarily requires a weighing of private and public interests").

95. See Agins, 447 U.S. at 262; Penn Central, 438 U.S. at 124.

effectively destroy one or more fundamental attributes of property—the rights to possess, to exclude, and to dispose. Such regulations are far more likely to be takings than regulations that only restrict use. Moreover, these regulatory taking claims seem to be determined on the basis of implicit principles that are quite different and more predictive than the vague considerations applicable to other regulatory taking claims. Of the eight recent Supreme Court cases involving regulation of use, but not physical invasion or other deprivation of fundamental attributes of property ownership, none was deemed a taking even though the restrictions on use were often severe. In sharp contrast, of the eight recent cases

Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982); Webb's Fabulous Pharmacies Inc. v. Beckwith, 449 U.S. 155 (1980); Prune Yard Shopping Center v. Robbins, 447 U.S. 74 (1980); Kaiser Aetna v. United States, 444 U.S. 164 (1979). These cases did not involve government acts that directly and affirmatively effected a physical invasion as by building a dam that floods private land; such cases are resolved by well-established inverse condemnation doctrines. Rather, these cases involve police power regulation that indirectly brings about tangible interference with the right to exclusive possession or other attributes of private property ownership as by compelling a landowner to admit the public.

97. In Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982), the court stated:

Although this Court's most recent cases have not addressed the precise issue before us, they have emphasized that physical invasion cases are special and have not repudiated the rule that any permanent physical occupation is a taking.

The opinion does not repudiate the rule that a permanent physical occupation is a government action of such a unique character that it is a taking without regard to other factors that a court might ordinarily examine.

Loretto, 458 U.S. at 432 (emphasis added).

involving regulations interfering with fundamental property rights to possess, exclude, and dispose, six were held to be takings even though the regulations caused only trivial reductions in property value.  

Regulations that bar a landowner from excluding strangers or the general public seem to be presumptive takings. Thus, a New York State statute that compelled landlords to allow the installation of minor cable television facilities on their buildings was a taking, as was a federal regulatory requirement that a formerly nonnavigable, privately owned, Hawaiian pond be opened to public navigation after it was connected to navigable waters. However, the per se rule of Loretto v. Teleprompter Manhattan CATV Corp., that regulations effecting permanent physical occupations, no matter how trivial, are takings, is subject to an important qualification, unstated in Loretto, then recognized and applied in Nollan v. California Coastal Commission. As a prerequisite for development permission, a regulation may require a landowner to dedicate property rights for public use if the regulatory exaction is reasonably calculated to prevent, or compensate for, adverse public impacts of the proposed development. Since the regulatory exaction of a lateral beach access easement in Nollan was deemed not reasonably related to mitigating the negative effects of development, it was a taking. The Loretto rule is also subject to a vaguely explained exception whereby a state law permitting the public to enter shopping centers to

decided on the basis of the implicit principles applicable to the deprivation of fundamental attributes of ownership cases or restriction of use cases. Justice Scalia (dissenting) advocated resolution on the basis of the Nollan principle proscribing imposition of regulatory burdens disproportionate to the adverse impacts causally related to the regulated activity. See Pennell, 108 S.Ct. at 862-63. For full exposition and advocacy of this principle, see generally Kmiec, supra note 47. See also FCC v. Florida Power Corp., 480 U.S. 245 (1987); Callies, supra note 1, at 606-07.


100. Loretto, 458 U.S. 419.


102. 458 U.S. at 426.


105. Id. at 3148-49.
engage in "publicly expressive activity" was not a taking.  

While the Loretto per se rule also applies to regulatory dispossession of personal property, it may not extend to lesser attributes of personal property ownership, such as the right of an owner to sell chattels.

The recent cases also provide significant guidance on the threshold procedural issue of the justiciability of regulatory takings. When the challenged regulation restricts the use of land, all opportunities for administrative relief or compensation, including available inverse condemnation actions in state courts, must be pursued before a regulatory taking claim is ripe for adjudication. This ripeness requirement flows directly from the vague, fact-intensive, regulatory taking standards applicable to police power regulations that merely restrict use and do not effectively appropriate a fundamental attribute of ownership. Although the ripeness requirement is sometimes stated in absolute terms, the requirement generally is limited to "as applied" challenges and generally

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108. See Andrus v. Allard, 444 U.S. 51 (1979). Andrus recently was qualified and may have been discredited by Hodel, 481 U.S. at 718-19 (Brennan, J., concurring and Scalia, J., concurring.).


110. See supra note 109.

111. See supra notes 92-95 and accompanying text and infra notes 355-57 and accompanying text.

112. See Hamilton Bank, 473 U.S. at 186 ("[A] claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue.").

113. In Yolo County, the Court observed:

It follows from the nature of a regulatory takings claim that an essential prerequisite to its assertion is a final and authoritative determination of the type and intensity of development legally permitted on the subject property. A court cannot determine whether a regulation has gone "too far" unless it knows how far the regulation goes. As Justice Holmes emphasized throughout his opinion for the Court in Pennsylvania Coal Co. v. Mahon, 260 U.S. at 416, "this is a question of degree—and therefore cannot be disposed of by general propositions." Accord, id., at 413. To this day we have no "set formula to determine where regulation ends and taking begins." Goldblatt v. Hempstead, 369 U.S. 590, 594 (1962). Instead, we rely "as much [on] the exercise of judgment as [on] the application of logic." Andrus v. Allard, 444 U.S. 51, 65 (1979). Our cases have accordingly "examined the 'taking' question
does not extend to "facial" regulatory taking claims.\textsuperscript{114}

B. **Pre-Onion Regulatory Taking Doctrine in Washington**

Until \textit{Orion}, Washington regulatory taking law was unexceptional and consistent with the foregoing generalizations.\textsuperscript{115} Substantive due process and taking limitations were routinely muddled.\textsuperscript{116} In the absence of any meaningful rules and principles governing claims of unduly oppressive regulations or regulatory takings, ad hoc fact-based judgments guided by relevant factors and vague tests have tended to prevail.\textsuperscript{117} Regardless of the doctrine articulated, regulations of use were never held to be takings\textsuperscript{118} until \textit{Allingham},\textsuperscript{119} while regulations that effectively usurped a landowner's fundamental property right to possess, exclude others, and the like, often were considered

\begin{footnotesize}
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\item by engaging in essential ad hoc, factual inquiries that have identified several factors—such as the economic impact of the regulation, its interference with reasonable investment-backed expectations, and the character of the governmental action—that have particular significance." Kaiser Aetna v. United States, 444 U.S. at 175.
\item \textit{Yolo County}, 477 U.S. at 348-49.
\item \textit{See, e.g., Buttnick v. City of Seattle, 105 Wash. 2d 857, 719 P.2d 93 (1986); See also SETTLE, supra} note 27, at 225-35.
\item \textit{Allingham v. City of Seattle}, 109 Wash. 2d 947, 749 P.2d 160 (1988).
\end{itemize}
\end{footnotesize}
takings subject to qualifications\textsuperscript{120} similar to those recognized in the federal cases.\textsuperscript{121} Until \textit{Orion} and \textit{Allingham}, the Washington Supreme Court had not had occasion to apply the federal ripeness requirements. However, prior Washington case law paralleled federal development of the ripeness principle.\textsuperscript{122}

III. THE ORION DOCTRINE

A. Factual and Procedural Background

Between 1963 and 1971 the Orion Corporation and Padilla Bay Associates acquired outright or acquired options to purchase most of the tidelands of 11,000-acre Padilla Bay, a Puget Sound estuary of unsurpassed ecological significance. Orion's plan was, by dredging and filling, to transform the tidelands into dry land fronting a network of navigable canals which eventually would become a Venice-like community.\textsuperscript{123} But Orion's dreams were soon shattered by a series of legal events. In 1969, the Washington Supreme Court decided \textit{Wilbour v. Gallagher},\textsuperscript{124} raising serious doubts about the legality of filling or other development of periodically submerged lands that would interfere with public navigation and recreation.\textsuperscript{125} The \textit{Wilbour} case induced Governor Evans to impose a moratorium on all tideland fill projects\textsuperscript{126} until the Shoreline Management Act (SMA) was adopted in 1971.\textsuperscript{127} Convinced


\textsuperscript{121} See supra text accompanying notes 96-108.

\textsuperscript{122} For example, \textit{Department of Natural Resources v. Thurston County}, 92 Wash. 2d 656, 601 P.2d 494 (1979), is the Washington State equivalent of Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978), and \textit{Agins v. City of Tiburon}, 447 U.S. 255 (1980). These cases established the principle that assertions that regulations effected takings as applied to claimants would be deferentially reviewed as facial challenges. See infra notes 299-311 and accompanying text.

\textsuperscript{123} The aptness of a Venice analogy, used throughout the protracted \textit{Orion} litigation, is unknown since no actual development proposal was ever made. See \textit{Orion II}, 109 Wash. 2d at 626, 747 P.2d at 1065; \textit{Orion Corp. v. State}, 103 Wash. 2d 441, 444, 693 P.2d 1369, 1372 (1985) [hereinafter \textit{Orion I}].


\textsuperscript{125} See \textit{Wilbour}, 77 Wash. 2d at 316, 462 P.2d at 238-39.

\textsuperscript{126} \textit{Orion II}, 109 Wash. 2d at 627, 747 P.2d at 1066.

that the SMA precluded the contemplated development, Orion considered and rejected several aquaculture ventures and a state offer to purchase the tidelands. By 1976 the State Department of Ecology (DOE) had formally approved the Skagit County Shoreline Management Master Program (SCSMMP)\textsuperscript{128} as a state regulation pursuant to the SMA.\textsuperscript{129} The SCSMMP, like its parent SMA and the SMA regulations, precluded dredging and filling of Orion’s tidelands.\textsuperscript{130} As potentially permissible aquaculture seemed economically unattractive,\textsuperscript{131} Orion further explored possible sale of its tidelands but ultimately rejected purchase offers by the State and the Nature Conservancy.\textsuperscript{132} In 1980, the State enacted legislation creating the Padilla Bay Estuarine Sanctuary (Sanctuary),\textsuperscript{133} which authorized State purchase, but did not attempt to regulate the use of privately owned Padilla Bay tidelands.\textsuperscript{134} Orion never applied for any permits to use or develop its tideland

\textsuperscript{128} Pursuant to WASH. REV. CODE § 90.58.090 (1987), local “master programs,” which implement the policies and requirements of the SMA, must be approved, or adopted in cases of local default, by the State Department of Ecology. When approved or adopted, local master programs become state regulations.

\textsuperscript{129} The State’s formal approval of the Skagit County Shoreline Management Master Program on October 5, 1976, was codified at WASH. ADMIN. CODE § 173-19-370 (1986).

\textsuperscript{130} See SCSMMP §§ 7.03(2)(A)(6), (B)(1), 7.13(2)(A)(6); Orion \textit{II}, 109 Wash. 2d at 628-29, 747 P.2d at 1066-67; Orion \textit{I}, 103 Wash. 2d at 447-49, 693 P.2d at 1373-74.

\textsuperscript{131} Orion \textit{II}, 109 Wash. 2d at 629, 747 P.2d at 1067; Orion \textit{I}, 103 Wash. 2d at 450, 693 P.2d at 1375.

\textsuperscript{132} Orion \textit{II}, 109 Wash. 2d at 629-630, 747 P.2d at 1067-68.

\textsuperscript{133} Act of April 4, 1980, ch. 180, § 1, 1980 Wash. Laws 610.

\textsuperscript{134} Id. The legislation authorized State purchase of Padilla Bay tidelands to establish an “estuarine sanctuary.” The only reference to regulation of tidal land use in the enactment pertained to the regulation of private use of publicly owned tidelands after they had been acquired:

For the purpose of establishing an estuarine sanctuary in Padilla Bay, Skagit county [sic], there is appropriated from the general fund to the department of ecology [sic] for the biennium ending June 30, 1981, the sum of seventy thousand dollars, or so much thereof as may be necessary. The department of ecology may use such funds for the acquisition of tidelands within Padilla Bay, Skagit county [sic], either through direct expenditures or through grants to a federal, state, or local agency and for administering the establishment of an estuarine sanctuary in Padilla Bay, Skagit County.

No moneys appropriated under this section may be used by the department of ecology [sic] for acquisition of tidelands unless made in combination with an equal match of moneys from other public or private sources.

Prior to acquiring any tidelands, the department of ecology [sic] shall determine that the use of the property to be acquired will be consistent with
In 1982, Orion sued the State and Skagit County seeking damages for inverse condemnation; Orion contended that State and County SMA regulations had unconstitutionally taken its tidelands without just compensation. Orion also claimed a taking by physical invasion, a taking by oppressive preacquisition conduct, and a violation of its federal civil rights under section 1983 of the Civil Rights Act. The State and County challenged Orion's right to assert these claims because Orion had not exhausted its administrative remedies by seeking regulatory permission to use or develop its tidelands. This issue ultimately was decided in favor of Orion in the 1985 decision, Orion Corp. v. State, wherein the court held that Orion was not required to seek permits under the futility exception to the exhaustion of remedies rule.

On remand, the superior court resolved numerous issues by summary judgment, the appeals of which were decided in the 1988 landmark case of Orion Corp. v. State. In Orion, chapter 90.58 RCW, the shoreline management act, [sic] and the guidelines and master programs adopted thereunder.

Hunting, fishing, boating and noncommercial taking of shellfish shall be authorized but shall be regulated on properties acquired under this section or as a result of the passage of this section.

Id.

135. Orion II, 109 Wash. 2d at 631-33, 747 P.2d at 1068-69; Orion I, 103 Wash. 2d at 455-60, 693 P.2d at 1377-80.

136. Orion sought the remedy of inverse condemnation damages to compensate for the alleged regulatory taking. Orion II, 109 Wash. 2d at 630, 747 P.2d at 1067.

137. Id.


140. Orion II, 109 Wash. 2d 621, 747 P.2d 1062 (1987), cert. denied, 108 S. Ct. 1996 (1988). The court decided a number of significant procedural and preliminary substantive issues related to the taking claim, which may be summarized as follows:

(1) The trial court's rejection of the contention that the regulatory taking claim was not ripe for judicial determination was affirmed by the supreme court. Id. at 633-34, 747 P.2d at 1069. The ripeness prerequisite, as articulated by the United States Supreme Court in two cases decided after Orion I, MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340 (1986) and Williamson County Regional Planning Comm'n. v. Hamilton Bank, 473 U.S. 172 (1985), is a difficult hurdle to overcome and is to be distinguished from the exhaustion of remedies requirement. In Orion I, the court held exhaustion unnecessary as futile, reasoning that the only plausibly permissible profitable use under SMA regulation was aquaculture but that a conditional use permit for aquaculture would be unobtainable because it would be incompatible with the adjacent sanctuary. Orion I, 103 Wash. 2d at 458-60, 693 P.2d at 1379-80. In Orion II, notwithstanding new evidence and argument that aquaculture would be permitted, the court held the regulatory taking sufficiently ripe for review. Orion II, 109 Wash. 2d at 633, 747 P.2d at 1069.

(2) Once it had been determined that compensatory damages are a remedy for
the trial court’s dismissal of all but the regulatory taking claim was affirmed. The supreme court briefly explained that there was no basis for the claims of taking by physical invasion and oppressive preacquisition conduct and that the federal civil rights claim was not ripe for adjudication until Orion had fully pursued recovery of compensation for a regulatory taking. 141

regulatory takings, see First English Evangelical Lutheran Church v. Los Angeles County, 107 S. Ct. 2378 (1987), the courts have had to address the issue of what limitation period, if any, applies. The trial court’s refusal to dismiss for untimeliness was affirmed. The court acknowledged that a limitation should apply, but avoided a determination of the applicable period because the action was brought within the shortest period (three years) asserted. Orion II, 109 Wash. 2d at 634-35, 747 P.2d at 1069-70.

(3) The trial court’s refusal to dismiss the regulatory taking claim for Orion’s failure to join the federal government as an indispensable party also was affirmed. Id. at 635, 747 P.2d at 1070. Assuming, arguendo, that federal regulatory requirements would have precluded any profitable use of the tidelands even if state and local regulation had not, making the federal government an indispensable party, the court held that joinder was not required. Id. The court reasoned that since there was no court in which federal, state, and local government could be joined, mandatory joinder would deprive Orion of a forum. Id.

(4) Padilla Bay Associates (PBA) was an entity to which Orion had transferred its options. Id. at 636-37, 747 P.2d at 1070-71. The trial court’s dismissal of PBA’s taking claim was affirmed. Id. at 637, 747 P.2d at 1071. Under the circumstances, PBA’s unexercised options were an insufficient interest in the tidelands to confer standing. Id.

(5) The court upheld the admission of expert testimony of a law professor on the history of shoreline regulation in Washington. Id. at 637-38, 747 P.2d at 1071. The testimony was offered in relation to Orion’s reasonable development expectations as it was acquiring the tidelands and the regulatory relationship of the state and county. Id.

(6) Since only private property may be “taken,” and the public trust doctrine limits private property rights to use submerged land, the doctrine’s applicability to Orion’s tidelands was critical to resolution of the taking claim. Id. at 638-42, 747 P.2d at 1071-73. The court held that tidelands were subject to the doctrine and, even after conveyance into private ownership, remained subject to public rights which go beyond navigation to fishing and recreation and perhaps further. Id. at 640-41, 747 P.2d at 1073. The court held that dredging and filling the tidelands were precluded by the doctrine and remanded for determination of whether any possible, reasonably profitable private use was permissible. Id. at 641-42, 747 P.2d at 1073. See infra note 197 and accompanying text.

(7) The trial court had rejected the county’s motion to dismiss the County as a party on the ground that its regulatory role was subordinate to the State’s. The supreme court reversed, dismissing the County, reasoning that the County shorelines master program was mandated by the SMA, prepared under the direction and control of The Department of Ecology (DOE), and formally adopted as a state administrative regulation. Id. at 643, 747 P.2d at 1074. The court characterized the County as a mere agent of the State and hence not legally responsible for any taking. Id. at 643-44, 747 P.2d at 1074.

(8) The court, without explanation, rejected the State’s argument that it could not have effected a regulatory taking because DOE had no power of eminent domain under the SMA. Id. at 644, 747 P.2d at 1074-75.

141. Orion II, 109 Wash. 2d at 670-73, 747 P.2d at 1088-89.
The trial court's summary judgment ruling that state and county regulation effected a permanent taking entitling Orion to compensation was reversed on several grounds and remanded for trial of factual issues necessary to ultimately resolve the regulatory taking claim.\(^{142}\)

The Washington Supreme Court, while pondering the arguments on the taking issue in *Orion*, lamented the haphazard state of the law.\(^{143}\) Rather than taking refuge in the traditional question-begging rationalization that doctrine is unnecessary because each case must be decided on its own facts,\(^{144}\) the court eschewed the time-honored practice of ignoring the doctrinal chasms and contradictions\(^ {145}\) and set out to rebuild regulatory taking law from the ground up. This ambitious enterprise was complicated by the fact that federal regulatory taking doctrine, binding upon the states, is not a snapshot but a motion picture. During the period between oral argument and the ultimate decision in the *Orion* case, the United States Supreme Court had issued three major regulatory taking decisions.\(^{146}\)

The process the court employed in its reassessment and reconstruction of regulatory taking doctrine was unusual.\(^ {147}\) It began with an exegesis of state and federal case law on the relative applicability, requirements, and remedial consequences of the substantive due process and taking limitations on police power regulation.\(^{148}\) Concluding that the significant remedial differences of substantive due process violations and regulatory takings necessitated doctrinal clarification of their respective applicability and requirements, the court set forth a proposal. Relying on a revisionist interpretation of Washington case law,\(^ {149}\) and striving for an optimal policy reconciliation of com-

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142. *Id.* at 668-70, 747 P.2d at 1087.
143. *Id.* at 645-49, 747 P.2d at 1075-77; see *supra* text accompanying notes 1-85 and 104-07.
144. See *supra* notes 4-5, 117 and accompanying text.
145. The most obvious of which are the product of the unexplained coexistence of Mugler v. Kansas, 123 U.S. 723 (1887) and Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922). See *supra* notes 39-50.
147. Apparently the court's unusual analytical sequence resulted from the intervention of *Nollan*, *First English*, and *Keystone*, after the opinion had been substantially formulated. See *Orion II*, 109 Wash. 2d at 653-58, 747 P.2d at 1079-82.
149. See *id.* at 650-51, 747 P.2d at 1078. My search through the cited cases has
peting claims of land development and environmental quality interests, the court stated what it apparently regarded as ideal rules. The court specified the proper division of labor between the substantive due process and regulatory taking limitations and highlighted their respective requirements. But since the federal constitution establishes minimum limitations on the police power, which states may not reduce, the court acknowledged that its prerogative was limited. And, after reflection, the court concluded that several elements of the proposed ideal doctrine did seem less restrictive than the United States Supreme Court's preemptive pronouncements. So these differences, which were characterized as more linguistic than substantive, were eliminated by revisions of the ideal doctrine,150 and the revised doctrine was applied to the regulatory taking issues of Orion.151

B. Doctrinal Overview of Orion

The Washington Supreme Court's elaborate regulatory taking doctrine and decision in Orion,152 determined through the reasoning process just described, can be paraphrased as follows: The extent to which government may burden private property owners economically is potentially governed by both the substantive due process and compensation for taking requirements of federal and state constitutions. Under both federal and state case law, however, there is unresolved conflicting authority on whether police power regulation is subject only to the substantive due process requirement or to the taking limitation as well. But, while vague, the two constitutional requirements are essentially the same. They both require reg-

produced no support for the court's characterization of prior Washington case law as having "harmoniz[ed] Pennsylvania Coal and Mugler" and as having "implicitly recognized a dividing line between land-use regulations that deprive property rights without due process and land-use regulations that go one step further to effect a compensable taking." Id. at 651, 747 P.2d at 1078.

150. Id. at 652-62, 747 P.2d at 1079-84.
151. Id. at 662-70, 747 P.2d at 1084-88.

152. Other procedural and substantive issues decided are beyond the scope of this Article except to the extent that they are intertwined with the applicability of the taking limitation to state regulation of Orion's tidelands and the standards governing resolution of the regulatory taking claim for inverse condemnation damages. See supra note 129. See also Settle, Regulatory Takings, Shoreline Management, and The Public Trust Doctrine, ENVTL. & LAND USE L. NEWSL., Apr. 1988, at 1; Settle, Regulatory Takings, the Public Trust Doctrine, Odds and Ends, 1988 ENVTL. & LAND USE L. SEM. 3A-18.
ulatory reasonableness.\textsuperscript{153} So does it really matter whether the taking clause limits the police power? Yes, because the remedy for a due process violation is merely invalidation, while the remedy for a taking is compensatory damages.\textsuperscript{154} This difference in remedy is immensely important to both private property owners and government regulators. The compensation remedy more effectively protects private property rights but sacrifices public interests by its chilling effect on government regulation.

Ideally, if we (the Washington Supreme Court) were writing on a clean slate and had the last word, competing private property and public social and environmental interests would be reconciled by the rule that the taking clause and its compensation remedy would apply only to police power regulation that goes “beyond preventing harm to actually enhance a publicly owned right in land”;\textsuperscript{155} other police power regulation would be subject only to substantive due process and its invalidation remedy.\textsuperscript{156} However, we are not writing on a clean slate and do not have the last word. The United States Supreme Court’s regulatory taking doctrine is binding upon the states\textsuperscript{157} and, taken literally, is inconsistent with our ideal regulatory taking doctrine.\textsuperscript{158} But the federal differences—(1) taking clause applicability is not limited to police power measures that go “beyond preventing harm to actually enhance a publicly owned right in land,”\textsuperscript{159} and, (2) substantive due process and taking standards of reasonableness are not identical\textsuperscript{160}—are quite readily reconcilable with our ideal doctrine. While federal doctrine does not explicitly limit applicability of the taking clause, effectively it does the same thing by “insulating” from the taking limitation regulations preventing harm to important public interests.\textsuperscript{161} Such regulations are subject only

\textsuperscript{153} Orion \textit{II}, 109 Wash. 2d at 648, 747 P.2d at 1077.
\textsuperscript{154} Id.
\textsuperscript{155} Id. at 651, 747 P.2d at 1078. The cases cited by the court in support of this principle do not explicitly rely on it. Rather, they employ vague, multi-factor reasoning.
\textsuperscript{156} Id.
\textsuperscript{158} Orion \textit{II}, 109 Wash. 2d at 657, 747 P.2d at 1081.
\textsuperscript{159} Id. at 653-55, 747 P.2d at 1079-80.
\textsuperscript{160} Id. at 654, 747 P.2d at 1080; see Nollan v. California Coastal Comm’n, 107 S. Ct. 3141, 3147 n.3 (1987).
\textsuperscript{161} See, e.g., Keystone Bituminous Coal Ass’n v. DeBenedictis, 480 U.S. 470, 485-
to invalidation under substantive due process.\textsuperscript{162} The reconciled regulatory taking doctrine involves a two-step test\textsuperscript{163} and a heavy burden of overcoming the presumption of constitutionality.\textsuperscript{164}

First, is the regulation "insulated" from the taking limitation as a public harm prevention measure? If so, it remains subject to substantive due process limitations.\textsuperscript{165} Second, if not, (a) does the regulation fail to substantially advance legitimate state interests, or (b) is the regulation's adverse economic impact on the property owner excessive?\textsuperscript{166} Since Orion's proposed tideland development by dredging and filling was precluded by the public trust doctrine, and hence was not within Orion's private property rights, this restriction was subject to neither substantive due process nor taking limitations.\textsuperscript{167}

\textsuperscript{502} (1987) (statute intended to safeguard public interest in health, the environment and the fiscal integrity of the area—held not to constitute a taking).

165. See infra notes 222-23 and accompanying text.
167. Orion II, 109 Wash. 2d at 638-43, 747 P.2d at 1071-74. Since only private property may be "taken," and the public trust doctrine limits private property rights to use land submerged by navigable waters, the doctrine's applicability to Orion's tidelands was critically important to resolution of the taking claim. The court held that tidelands were subject to public rights, which go beyond navigation to fishing and recreation, and perhaps further. Id. at 641, 747 P.2d at 1073. The court held that dredging and filling the tidelands were precluded by the doctrine and remanded to the trial court for determination of whether any possible, reasonably profitable private use not dependent on dredging and filling was permissible under the public trust doctrine. Id. at 673, 747 P.2d at 1089. The court categorically rejected Orion's arguments that Wilbour v. Gallagher, 77 Wash. 2d 306, 462 P.2d 232 (1969), cert. denied, 400 U.S. 878 (1970), was not based on the public trust doctrine and that the doctrine did not even exist in Washington. See Orion II, 109 Wash. 2d at 641, 747 P.2d at 1073. There could be no doubt about its existence after the court's recent sweeping exposition of the doctrine in Caminiti v. Boyle, 107 Wash. 2d 662, 732 P.2d 989 (1987). And while in Wilbour the court did not use the words "public trust doctrine," we now know that is what it meant. See Orion II, 109 Wash. 2d at 641, 747 P.2d at 1073. In Caminiti, the court explained the two effects of the doctrine. First, it is a legal limitation on the disposition of lands underlying navigable waters by state government. Caminiti, 107 Wash. 2d at 672, 732 P.2d at 995. Second, it is a legal servitude, for the benefit of the public, upon such lands after they have been conveyed into private ownership unless the servitude has been consciously and legally extinguished by the State. Id. at 674, 732 P.2d at 996. Caminiti involved the former effect. Id. at 677, 732 P.2d at 998. Orion II involved the latter. Orion II, 109 Wash. 2d at 663-65, 747 P.2d at 1084-85. The Orion II court analogized the public trust servitude to a covenant running with the land. Id. at 640, 747 P.2d at 1073-74. Thus Orion, in purchasing privately owned tidelands previously conveyed by the State, could obtain no more than Orion's grantor held;
SMA and SCSMMP, as “public health and safety regulations” were insulated from the taking limitation and subject only to substantive due process limitations. But the sanctuary designation, which (according to the Court’s highly questionable assumptions) precluded the permissibility of aquaculture under the SMA and SCSMMP, was not insulated from the taking clause because its purpose was not to prevent harm to important public interests but “to protect the preexisting [public] uses in the area.”

Thus, applicability of the taking limitation depends upon whether aquaculture was precluded by (a) the public trust doctrine, (b) the SMA and SCSMMP alone (and thus insulated), or (c) the SMA and SCSMMP in combination with the sanctuary designation (and thus not insulated), which must be determined by the trial court upon remand. Only if it is determined that the uninsulated sanctuary designation was a *sine qua non* of aquaculture preclusion does the taking limitation apply, necessitating the second step of the test. The sanctuary does satisfy the first element of the regulatory taking test. It does substantially advance a legitimate public interest. But the excessive economic deprivation element of the test depends upon factual issues that must be determined upon remand. The economic burden would not constitute a taking if the trial court were to determine that either some reasonably profitable use remained or a nongovernmental buyer (e.g., the tidelands subject to the public trust servitude. *Id.* The court acknowledged that early this century the State extensively conveyed and encouraged the filling and diking of tidelands and that such conveyances in some cases may have extinguished public trust:

> We do not mean to suggest that once the state conveys to a private party property subject to trust the property will always be burdened by trust requirements. For example, the California Supreme Court has held that although the trust originally applied to all tidelands in the San Francisco Bay, properties already dredged and filled under earlier grants were no longer subject to the trust. *Berkeley v. Superior Court*, 26 Cal. 3d 515, 606 P.2d 362, 162 Cal. Rptr. 327, *cert. denied, Santa Fe Land Improvement Co. v. Berkeley*, 449 U.S. 840, 66 L. Ed. 2d 48, 101 S. Ct. 119 (1980). In reaching its decision, the California court stated that “the principle we apply is that the interests of the public are paramount in property that is still physically adaptable for trust uses, whereas the interests of the grantees and their successors should prevail insofar as the tidelands have been rendered substantially valueless for those purposes. *Berkeley*, 26 Cal. 3d at 534, 606 P.2d 362, 162 Cal. Rptr. 327.

*Orion II*, 109 Wash. 2d at 640 n.9, 747 P.2d at 1072-73 n.9.

Thus, it appears that the public trust may be extinguished in either of two ways: first, if such lands have been physically irreversibly altered in good faith pursuant to early conveyances so that they no longer could serve public trust purposes; and second, if the State deliberately makes a legislative choice to extinguish public rights and this choice satisfied the test of Caminiti.

Nature Conservancy) was willing to pay a price that assumed a reasonably profitable use. Even if a taking occurred, there was no violation of the compensation for taking requirement if the amount of the State's offer to purchase constituted just compensation; this was to be determined on remand.169

C. The Respective Realms of Substantive Due Process and Regulatory Takings

The major doctrinal initiative of the Washington Supreme Court in Orion was to reject emphatically the virtually universal American judicial practice of ignoring, or vaguely acknowledging and muddling, the relative applicability of substantive due process and taking limitations as constitutional measures of the permissible extent of private burden imposed by police power regulation. As long as the two limitations were amorphously similar and claimants sought only the remedy of invalidation, the lack of doctrinal precision was disappointing but tolerable. But in the last decade, as a result of the unprecedented intensification of land use regulation in the 1970s,170 landowners and public regulators have pressed the courts for clearer guidance regarding the constitutional limits. Landowners' claims of excessively burdensome regulation often have sought inverse condemnation damages.171 Consequently, explicit demarcation of the respective realms, requirements, and remedies of the due process and taking limitations has become not merely a matter of legal tidiness but indispensable to principled constitutional adjudication.

In Orion, it was the "crucial difference . . . in the remedy to be applied—invalidation or the payment of just compensa-
tion"172—that motivated the court to make a precise determination of the relative applicability of due process and taking limitations.173 Regulatory takings are retrospective only. The constitutionally required compensation is for a temporary tak-

169. Id. at 669-70, 747 P.2d at 1087-88.
170. See supra notes 79-84.
171. Although the court did not actually say so at this point in the opinion, it correctly indicated elsewhere that the remedy of compensation for a regulatory taking is not in conflict with the remedy of invalidation for violation of substantive due process. So a regulation might be held to violate both the taking and due process requirements without incompatible remedial consequence. See supra text accompanying notes 75-76.
173. Id. at 654 n.22, 747 P.2d at 1080 n.22.
ing, for the period the regulation was in effect.\textsuperscript{174} If, upon the adjudication of a taking, the government chooses to repeal or amend the regulation or eliminate the features that effect a taking, the taking terminates.\textsuperscript{175} Only if government elects to maintain the regulation do the taking and the compensation requirement become prospective.\textsuperscript{176} In short, judicial determination that a regulation is a taking effectively concedes that the regulation has temporarily inversely condemned property, which may not be accomplished through the police power unless accompanied by just compensation; compensation is required retrospectively, at least, and prospectively if the regulation is retained.\textsuperscript{177} So, in effect, a regulatory taking determination prospectively invalidates the regulation subject to the contingency that the invalidity may be avoided by compensation.\textsuperscript{178} If the regulatory authority has no power of eminent domain or otherwise would be precluded from exercising the power of eminent domain to perpetuate the regulatory taking, then the contingency could not occur and the prospective invalidation would be absolute.\textsuperscript{179}

Judicial invalidation of a police power measure for violation of substantive due process rights would have the same pro-

\textsuperscript{174} Id. at 668-70, 747 P.2d at 1087-88.
\textsuperscript{175} Id.; see also First English Evangelical Luthern Church v. Los Angeles County, 107 S. Ct. 2378 (1987), in which the Court stated:

"Nothing we say today is intended to abrogate the principle that the decision to exercise the power of eminent domain is a legislative function, "for Congress and Congress alone to determine."" Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 240, 104 S. Ct. 2321, 2329, 81 L. Ed. 2d 186 (1984), quoting Berman v. Parker, 348 U.S. 26, 33, 75 S. Ct. 98, 103, 99 L. Ed. 2d 27 (1954). Once a court determines that a taking has occurred, the government retains the whole range of options already available—amendment of the regulation, withdrawal of the invalidated regulation, or exercise of eminent domain. Thus we do not, as the Solicitor General suggests, "permit a court, at the behest of a private person, to require the . . . Government to exercise the power of eminent domain . . . ." Brief for United States as Amicus Curiae 22. We merely hold that where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective.

First English, 107 S.Ct. at 2389.

\textsuperscript{176} Orion II, 109 Wash. 2d at 668-70, 747 P.2d 1062, 1087-88.
\textsuperscript{177} Id.
\textsuperscript{178} Id.

\textsuperscript{179} Although the precise issue apparently has not been decided, this rule would seem inevitable. Otherwise, a government agency lacking the power of eminent domain might effectively abrogate the power by adopting and maintaining regulations held to be regulatory takings.
specitive effect as a regulatory taking determination.\textsuperscript{180} Due process invalidation is effectively subject to the qualification that the invalidation may be avoided if the regulatory government elects to compensate for the otherwise impermissible burden through proper exercise of the power of eminent domain.\textsuperscript{181} Retrospectively, the due process and taking remedies differ, but not as much as Orion suggests.\textsuperscript{182} Although invalidation for violation of substantive due process does not directly require compensation for the period the regulation was in effect, compensation may be indirectly compelled through a section 1983\textsuperscript{183} federal civil rights action.\textsuperscript{184}

Since the availability and amount of retrospective compensation for due process violations (through section 1983 civil rights actions) and regulatory takings may vary significantly,\textsuperscript{185} their remedial similarity does not obviate the need to clearly identify their respective applicability. However, it is important to recognize that although the remedies may differ, they are not incompatible. An adjudication that a regulation was both a taking and a violation of substantive due process would not have contradictory consequences. Prospectively, the effect would be the same.\textsuperscript{186} Retrospectively, the recovery of compensation for the taking would simply preempt a section 1983

\textsuperscript{180} This proposition assumes that the police power measure, whether or not it satisfied the substantive due process legitimate public purpose limitation on police power measures, would satisfy the public use prerequisite for exercise of the power of eminent domain. The United States Supreme Court recently has virtually equated the police power "public purpose" and eminent domain "public use" requirements and has rendered both limitations of little consequence. Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 240-41 (1984) ("The 'public use' requirement is thus coterminous with the scope of a sovereign's police powers . . . . [W]here the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause.")

However, the Washington State Constitution imposes a more restrictive "public use" limitation on the exercise of eminent domain. See, e.g., In re Petition of City of Seattle, 96 Wash. 2d 616, 638 P.2d 549 (1981).

\textsuperscript{181} See, e.g., In re Petition of City of Seattle, 96 Wash. 2d 616, 638 P.2d 549.

\textsuperscript{182} See Orion II, 109 Wash. 2d 621, 649, 747 P.2d 1062, 1077.


\textsuperscript{186} See supra text accompanying notes 176-80.
cause of action. 187

All police power regulation is subject to the substantive due process limitation and to the remedy of invalidation for violation. But the remedy of retrospective compensation is directly available only for regulatory takings and not for substantive due process violations. Since the Orion claimants sought compensation rather than invalidation, the court properly deemed it necessary to determine whether all, or only some, police power regulation was subject to the taking limitation, and, if only some, whether the challenged regulations were included. 188

In its statement of what it considered to be ideal doctrine, the court preliminarily concluded that the taking limitation should apply only to police power regulation going "beyond preventing harm to actually enhance a publicly owned right in land." 189 The court justified its conclusion on the basis of both Washington case law 190 and the policy concern that the public interest in environmental quality would suffer excessively if potential liability for inverse condemnation damages loomed over every regulatory act. 191 Then, after considering the consistency of this rule with preemptive United States Supreme Court decisions, the court made appropriate revisions. 192 The revised rule insulated regulations from the taking limitation if they substantially advanced legitimate public interests in health, safety, environment, or fiscal integrity of the community. 193

The court's goal of clarifying when regulation may be subject to the remedy of inverse condemnation damages is commendable. 194 However, the rule and reasoning adopted in

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188. Orion II, 109 Wash. 2d at 649, 659-61, 747 P.2d at 1077, 1082-83.
189. Id. at 651, 747 P.2d at 1078.
190. See supra note 149.
192. Id. at 652-57, 747 P.2d at 1079-82.
193. Id. at 657, 747 P.2d at 1081.
194. As Justice Stevens suggested in his dissent in First English Evangelical Lutheran Church v. Los Angeles County, 107 S. Ct. 2378 (1987), clarification is sorely needed in this area:

It is no answer to say that "[a]fter all, if a policeman must know the Constitution, then why not a planner?" San Diego Gas & Electric Co. v. San Diego, 450 U.S. 621, 661, n.26, 101 S. Ct. 1287, 1309, n. 26, 67 L.Ed.2d 551 (1981) (Brennan, J., dissenting). To begin with, the Court has repeatedly recognized that it itself cannot establish any objective rules to assess when a regulation
Orion fall short of attaining this goal. The court expressed a strong preference for its ideal rule because it clearly signalled to land use regulators the point at which compensation would be required. But neither the ideal nor the revised rule are sufficiently clear to provide significant guidance to government officials.

The ideal rule is stated in several different ways but never explained or illustrated. It would preclude the possibility of a taking and the inverse condemnation remedy for regulations with the purpose and effect of preventing public harm or safeguarding the public. The taking limitation would pertain only to regulations that, in various versions, "accomplish a de facto exercise of the eminent domain power," "actually enhance a publicly owned right in land," or "provide the public with some use of the land." Under this rule, regulatory measures to control nuisances clearly would not be subject to the taking limitation, while a regulation requiring a land-

becomes a taking. See Hodel v. Irving, 481 U.S. [704], 107 S. Ct. 2076, 95 L.Ed.2d — (1987); Andrus v. Allard, 444 U.S. 51, 65, 100 S. Ct. 318, 326, 62 L.Ed.2d 210 (1979); Penn Central, 438 U.S. at 123-124, 98 S. Ct. at 2658-2659. How then can it demand that land planners do any better? However confusing some of our criminal procedure cases may be, I do not believe they have been as open-ended and standardless as our regulatory takings cases are. As one commentator concluded: "The chaotic state of taking law makes it especially likely that availability of the damages remedy will induce land-use planning officials to stay well back of the invisible line that they dare not cross." Johnson, Compensation for Invalid Land-Use Regulations, 15 GA. L. REV. 559, 594 (1981); see also Sallet, The Problem of Municipal Liability for Zoning and Land-Use Regulation, 31 CATH. U. L. REV. 465, 478 (1982); Charles v. Diamond, 41 N.Y.2d 518, 331-333, 392 N.Y.S.2d 594, 604, 360 N.E.2d 1295, 1305 (1977); Allen v. City and County of Honolulu, 58 Haw. 432, 439, 571 P.2d 328, 331 (1977).

Another critical distinction between police activity and land-use planning is that not every missed call by a policeman gives rise to civil liability; police officers enjoy individual immunity for actions taken in good faith. See Harlow v. Fitzgerald, 457 U.S. 800, 102 S. Ct. 2727, 73 L.Ed.2d 396 (1982); Davis v. Scherer, 468 U.S. 183, 104 S. Ct. 3012, 82 L.Ed.2d 139 (1984). Moreover, municipalities are not subject to civil liability for police officers' routine judgment errors. See Monell v. New York City Dept. of Social Services, 436 U.S. 658, 98 S. Ct. 2018, 56 L.Ed.2d 611 (1978). In the land regulation context, however, I am afraid that any decision by a competent regulatory body may establish a "policy or custom" and give rise to liability after today.

First English, 107 S.Ct. at 2399 n.17 (Stevens, J., dissenting).

196. Id. at 651, 747 P.2d at 1078.
197. Id.
198. Id.
199. Id.
200. Id. at 653, 747 P.2d at 1079.
owner to establish a public park clearly would. But the ideal rule would have no significant predictive value in major areas of land use regulation—historic district, landmark, billboard, landscaping, and architectural controls, to name a few. The harm prevention/benefit conferral distinction generally has been proposed as a test for the validity of regulation (without distinguishing between the due process and taking limitations) rather than for the potential availability of damages. \(^{201}\)

While in that context, the test has had some abstract appeal, \(^{202}\) scholarly support, \(^{203}\) and judicial recognition. \(^{204}\) It frequently has been criticized as unworkable because the purpose and effect of virtually any regulation can be characterized in terms of either public harm prevention or public benefit conferral. \(^{205}\) However, it is not even clear that this is the distinction the ideal rule employs. Given the qualifying phrases the court used— "to actually enhance a publicly owned right in land" \(^{206}\) and "[to] provide the public with some use of the land" \(^{207}\)—the applicability of the taking limitation may be narrower than under the harm prevention/benefit conferral test. \(^{208}\) The court

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\(^{201}\) The theory first was propounded by Professor Freund. See E. Freund, The Police Power: Public Policy and Constitutional Rights 546-47 (1904) [hereinafter Freund]. It was further developed by Professor Dunham in a classic article, A. Dunham, A Legal and Economic Basis for City Planning, 58 Colum. L. Rev. 650 (1958) [hereinafter Dunham]. Under this theory, police power measures regulating land use were constitutionally permissible exercises only if their purpose and effect was to prevent harm rather than to confer a public benefit. See Mandelker, Land Use Law 18-21 (1982) [hereinafter Mandelker].

\(^{202}\) See supra note 201.

\(^{203}\) See Freund, supra note 201, at 546-47; see also Sax, Takings, Private Property and Public Rights, 81 Yale L.J. 149 (1971).


\(^{205}\) Which of the following are the purposes of regulations restricting billboards: controlling architectural design; preserving historical landmarks and districts, wetlands, open space, and wildlife habitat? Are these purposes preventing harm or conferring benefits? See Mandelker, supra note 201, at 18-20; Settle, supra note 27, at 231-32. In Penn Central, historic landmark preservation was characterized as harm prevention and benefit conferral, respectively, by the majority and dissenting opinions. Penn Central, 438 U.S. at 138, 146. In Westwood Forest Estates, Inc. v. Village of South Nyark, 23 N.Y.2d 424, 427, 244 N.E.2d 700, 702, 297 N.Y.S.2d 129, 132 (1969), regulation based on inadequate sewage treatment capacity was invalidated as benefit conferring, while in Smoke Rise, Inc. v. Washington Suburban Sanitary Comm'n, 400 F. Supp. 1369, 1382 (D.Md. 1975), a sewer hookup moratorium was characterized as preventing harm and was upheld.


\(^{207}\) Id. at 653, 747 P.2d at 1079.

\(^{208}\) Such language suggests that the court may, without saying, be basing its ideal rule on the distinction between government regulation that burdens private property
may have meant that the taking limitation applies only to regulations designed to benefit adjacent public land.

To satisfy perceived minimum federal standards, the court adopted a revised rule that precluded the applicability of the taking clause and its inverse condemnation remedy to regulations that substantially serve important public interests—health, safety, environment, and fiscal integrity of the community.209 The revised rule seems to extend the taking limitation's applicability further than the ideal rule would. By its terms, some public harm prevention measures that do not serve the subsets of health, safety, environmental quality, or fiscal integrity interests would be subject to the taking limitation.210 And such regulation apparently would be subject to the taking limitation even if it did not “actually enhance a publicly owned right in land.”211

The precise meaning of the revised rule is less clear than the ideal rule, as the court lamented212 but declined to ameliorate by explanation or illustration. It is difficult to imagine a regulation that does not arguably serve the public interest in health, safety, environment, or fiscal integrity of the community. Unfortunately, the court's application of the rule to State and local SMA regulations and the State sanctuary designation did not illuminate the meaning of the rule except as to the facts at hand. Without explanatory reasoning, the SMA regulations were summarily characterized as health and safety meas-

210. The court's emphasis upon several specific police power purposes that were insulated from the taking limitation necessarily implied that other police power purposes were not. Thus, police measures designed to protect such “other” legitimate public interests from harm apparently would be subject to the taking limitation under the revised rule but not under the ideal rule. Orion II, 109 Wash. 2d at 653-57, 747 P.2d at 1079-81.
211. Id.
212. Id. at 657, 747 P.2d at 1081 (“Even under the Supreme Court's approach, however, land-use decisionmakers have a guidepost, albeit a vague one, by which to gauge their actions.”)
ures immune from the taking limitation, while the sanctuary designation—because its purpose was not "to safeguard the public health or safety, but rather to protect the preexisting uses in the area"—was subject to the taking clause.

The most serious difficulty with the revised rule is its inconsistency with the very minimum standards of federal regulatory taking law it was revised to meet. This is true not only of the revised rule itself, but also of the premise underlying both the ideal rule and the revised rule—that some police power regulation, probably most police power regulation, is not even subject to the taking limitation. The purpose of this premise certainly is defensible as a matter of policy. Indeed, for many years, commentators have persuasively argued, and some courts have decided, that Justice Holmes' use of the word "taking" in Pennsylvania Coal was but a metaphor for deprivation of property without due process, that the taking clause was never intended to and does not apply to police power regulation, and that the the inverse condemnation remedy of compensation is never applicable to regulatory measures. Regardless of its merits, this line of argument was explicitly rejected recently by the United States Supreme Court in First English Evangelical Lutheran Church v. Los Angeles County. The Court clearly held that police power regulation is subject to the taking clause and its remedy of inverse condemnation damages. Moreover, the holding was not limited to regulation that does not substantially serve public interests in health, safety, environment, and the fiscal integrity of the community. The Washington Supreme Court understandably was misled by a passage in First English:

We accordingly have no occasion to decide whether the ordinance at issue actually denied appellant all use of its property or whether the county might avoid the conclusion

213. Id. at 660-61, 747 P.2d at 1083. Of course, the state and local SMA regulations would have remained subject to the substantive due process limitation and invalidation remedy if it had been sought. See supra text accompanying note 166.


215. E.g., Boselman, Callies & Banta, supra note 28.


217. See supra note 216. See also Orion II, 109 Wash. 2d at 651, 747 P.2d at 1078.


219. Id. at 2386-87.

220. Id. at 2389.
that a compensable taking had occurred by establishing that the denial of all use was insulated as a part of the State's authority to enact safety regulations.221

On the basis of the word "insulated," which does not appear in this context in any other relevant Supreme Court opinion, the Washington Supreme Court concluded that police power measures serving certain important public interests are insulated from, that is, are categorically exempt from, the taking limitation and its compensation requirement.222 This is a plausible interpretation of the Supreme Court's literal language.223 However, in light of the history of the debate arising out of the never resolved Mugler-Pennsylvania Coal conflict,224 it is highly unlikely that the Court would decide the issue in a single, offhand phrase. The history of Supreme Court regulatory taking case law suggests a much more credible interpretation of the ambiguous First English language. The question of whether the ordinance effected a regulatory taking was clearly not before the Court. That issue was to be decided by the state court upon remand. In deciding that issue, the state court, applying the relevant factors prior case law has established, may decide that the ordinance is not a taking even if it denies all beneficial use because of the important public interests it serves.225

The Washington Supreme Court also relied on Keystone Bituminous Coal Association v. DeBenedictis for its conclusion that some police power measures are categorically excluded

221. Id. at 2384-85.
222. Orion II, 109 Wash. 2d at 654 n.23, 747 P.2d at 1080 n.23.
223. The word "insulated" is not a term of art in regulatory taking law. Given the word’s plain meaning, "to set apart, detach . . . separate," WEBSTER’S NEW TWENTIETH CENTURY DICTIONARY 952 (2d ed. 1983), the United States Supreme Court may have meant regulations were not subject to the taking limitation at all. However, the Court said such insulation would avoid not the applicability of the taking clause, itself, but the "conclusion that a compensable taking had occurred." First English, 107 S. Ct. at 2384-85. Such language indicates that the preferred purpose of the regulation would be weighed along with other relevant considerations to reach a conclusion.
224. See supra text accompanying notes 34-95.
225. See supra note 223. If the Court meant that any category of regulation was exempt from the taking limitation, that category probably was limited to regulations restricting uses equivalent to common law nuisances. See, e.g., Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 491 n.20 (1987). But in Keystone, which had been decided less than three months prior to First English, the Court did not even characterize regulations extinguishing public nuisances as categorically exempt from the taking limitation. Rather, the Court said that such an important public purpose weighed heavily in the regulatory taking calculus. Id. at 491-92.
from taking clause accountability.\textsuperscript{226} But if Keystone had adopted this premise, the Supreme Court's regulatory taking analysis would have ended once the Court concluded that the statute served important public interests in health, safety, and fiscal integrity of the area.\textsuperscript{227} Rather, the Court considered the relative importance of the public interests served as one of the critical factors in determining whether a taking had occurred.\textsuperscript{228}

If these and other Supreme Court cases recognized any regulations to be categorically immune from the taking limitation, it would be those regulatory measures abating common law nuisances or their equivalent.\textsuperscript{229} It is often said that there is no property right to maintain a nuisance and, hence, regulatory abatement cannot be a taking of property.\textsuperscript{230} But in Keystone, the Court nevertheless stopped short of even this limited categorical insulation from the taking limitation.\textsuperscript{231} The federal taking cases certainly indicate that the nature and extent of the public interests served by regulatory measures are often regarded as important determinants of whether a regulatory taking occurred. But these cases do not support the Orion conclusion that major categories of police power regulation are categorically immune from the taking limitation.\textsuperscript{232} However, this Orion rule may endure, whether consistent with minimum federal constitutional standards or not, given the infrequency of United States Supreme Court review.\textsuperscript{233}

\textsuperscript{226} Orion II, 109 Wash. 2d at 654, 747 P.2d at 1080. See supra note 225.
\textsuperscript{227} Keystone, 480 U.S. at 485-88.
\textsuperscript{228} Id.
\textsuperscript{229} Id. at 491 n.20.
\textsuperscript{230} Id.
\textsuperscript{231} As the Supreme Court noted in Keystone:

The Court’s hesitance to find a taking when the State merely restrains uses of property that are tantamount to public nuisances is consistent with the notion of “reciprocity of advantage” . . . .

. . . As the cases discussed above demonstrate, the public interest in preventing activities similar to public nuisances is a substantial one.


\textsuperscript{232} See supra text accompanying notes 209-29.

\textsuperscript{233} The rarity of Supreme Court review of state regulatory taking decisions effectively delegates to the state courts extensive leeway in constructing the federal taking limitation. The Supreme Court denied certiorari in Orion II, 108 S. Ct. 1996 (1988).
D. Standards for Regulatory Takings

In Orion, the court devoted far more attention to the threshold issue of taking clause applicability than to standards for regulatory takings. Orion does not explicitly discredit or question the regulatory taking standards of prior Washington or federal cases. Once the court had determined that the State sanctuary designation was potentially subject to the taking limitation, the court proceeded hypothetically to apply regulatory taking doctrine to the State’s action. Whether the sanctuary designation affected a regulatory tak-

234. See supra text accompanying notes 170-233.
235. The preclusion of dredging, filling, diking, and farming by the public trust doctrine was not subject to the taking limitation because these restrictions were a consequence of the State’s power to define private property rights. Orion II, 109 Wash. 2d at 641, 659-60, 747 P.2d at 1073, 1082-83. Since Orion and its predecessors in ownership had no private property right to make uses of the tidelands that would interfere with public rights to navigate and recreate in overflowing waters, the public trust doctrine restrictions could not affect a taking of private property. Id. See also supra note 146.

If State and local regulation under the SMA, prior to the State sanctuary legislation, had precluded uses that were permissible under the public trust doctrine (i.e., practically feasible and reasonably profitable) such regulation could not be a taking because it was insulated from the taking limitation by virtue of its public health and environmental protection purposes. See Orion II, 109 Wash. 2d at 657, 659-62, 747 P.2d at 1082-84. So limitations on use effected by the SMA and SCSMMP alone (independent of the State sanctuary legislation) were subject only to the substantive due process limitation and its invalidation remedy which Orion had not sought. Id. at 654-55, 747 P.2d 1078-80.

The court held that only the State sanctuary legislation potentially affected a regulatory taking. Id. at 663, 747 P.2d at 1085. The court had determined that the SMA and SCSMMP alone would not have precluded aquaculture, which was allowable as a conditional use if compatible with adjacent shoreline uses; that before the sanctuary legislation, aquaculture would have been compatible with such uses; but that after the sanctuary legislation, aquaculture on Orion’s private tidelands would be incompatible with sanctuary uses of adjacent tidelands acquired by the State. See id. at 631-33, 747 P.2d at 1068-69. This was an astonishing conclusion as a matter of summary judgment since the Director of Ecology stated in affidavits that aquaculture on private tidelands adjacent to publicly owned sanctuary tidelands would be compatible with sanctuary purposes. Id. So although the sanctuary legislation itself did not regulate tideland use at all, it authorized public acquisition of tidelands for a sanctuary whose purpose might be a proximate cause of denial of a SMA conditional use permit for aquaculture on Orion’s adjacent tidelands. Id. at 659-62, 747 P.2d at 1082-84. It was this indirect regulatory effect of the sanctuary legislation that was potentially a regulatory taking, but only if aquaculture (or some other unknown use which would have been permissible but for the sanctuary legislation) was practically feasible and reasonably profitable, to be determined on remand. Id. at 662, 747 P.2d at 1084. Ironically, Orion had been arguing throughout the litigation in support of its taking claim that even if aquaculture were permissible, there nevertheless would be a taking because of practical infeasibility and economic insufficiency of such a use. Now, under the court’s reasoning, Orion must return to the trial court and successfully argue that aquaculture would have been feasible and reasonably rewarding so that its preclusion was a taking.
ing depended upon two inquiries. First, did the regulation substantially advance a legitimate public interest; and second, did the regulation impose excessive economic burden upon the property owner? The two standards stated were in the vague mainstream of state and federal regulatory taking case law, but did not advance the cause of more coherent doctrine without significant elaboration.

1. Substantial advancement of public interest

The first standard—did the regulation substantially advance a legitimate public interest—presented fewer difficulties than the second, although understanding would have been fostered by exploration of its nature and purpose. Since the court’s reason for distinguishing regulatory takings from mere substantive due process violations was the availability of the compensation remedy, the substantial public interest advancement standard must have been derived from the public use requirement of the taking clause. That this standard may differ from its substantive due process counterpart was acknowledged but not resolved. However, this requirement, whether characterized in due process terms of “reasonable” or “substantial” advancement of a public interest or in eminent domain terms of public use, generally has been permissively and quite predictably applied. In Orion, the court summa-

Of course, the court’s decision has so reduced the stake that a return to the trial court seems extremely unlikely.

236. Variously stated in Orion II, 109 Wash. 2d at 655, 658, 663, 747 P.2d at 1080, 1082, 1084.

237. Id. Note that the court’s first articulation of the standard is that the private economic burden must “outweigh” the public interest served. Id. at 655, 747 P.2d at 1080. Subsequent statements of the standard refer only to the extent of the private economic burden.


239. Orion II, 109 Wash. 2d at 649, 749 P.2d at 1077.

240. Once the court had clearly distinguished between the substantive due process and taking limitations and recognized that some police power measures are subject to the taking limitation, both the just compensation and public use requirements of the taking clause became applicable.


rily concluded that the sanctuary designation did substantially advance legitimate public interests in ecosystem research and education and in nonintensive recreation.243

2. Excessive economic burden

The task of the second standard is far more difficult—determining whether an individual property owner or the public at large should shoulder the economic burden of serving the public interest.244 It is hardly surprising that definitive principles drawing the line between permissible and impermissible

Callies, supra note 1 at 611-613; but see In re Petition of City of Seattle, 96 Wash. 2d 616, 627, 638 P.2d 549, 556 (1981) ("The fact that the public interest may require [a condemnation] is insufficient if the use is not really public.")

243. Orion II, 109 Wash. 2d at 662-64, 747 P.2d at 1084-85. The court's discussion of this standard in terms of a required "nexus" between the challenged regulatory requirements and the public purpose they serve, id. at 663-66, 747 P.2d at 1084-86, is not required by Nollan. While Nollan employs unnecessarily broad language, the "nexus" requirement is applicable only to regulatory exactions—regulations that require a landowner to concede a fundamental attribute of property ownership as a prerequisite to obtaining government approval of a development proposal. Such regulation is effectively subject to much stricter regulatory taking standards than regulation that merely restricts use. See supra text accompanying notes 31-69, and infra notes 221-56. Nollan, 107 S. Ct. at 3145-48. Such regulation is a taking unless the regulatory appropriation of a property right is reasonably designed to protect a legitimate public purpose by offsetting or preventing adverse impacts of the proposed development on the public interest. To avoid a taking, it is not enough that the regulatory exaction of property fosters some legitimate public interest. Rather, the regulatory exaction must reasonably (that is, quite specifically and proportionately) counter adverse public impact of the proposed development. Nollan, 107 S. Ct. at 3148. Thus, in Nollan, the regulatory exaction of a public easement along a privately owned portion of the beach in front of the proposed house was held to be a taking. Id. at 3150. It was a taking not because the exaction failed to advance a public interest, but because it was unfair to appropriate a private property interest from the Nollans to repair harm to a public interest that the Nollans had not adversely affected. Id. at 3147-48. The Court hypothesically acknowledged that it would have been proper to have exacted a public easement to a viewpoint in front of the house to compensate for the view-blocking impact of the proposed house. Id. at 3147. See, e.g., Unlimited v. Kitsap County, 50 Wash. App. 723, 750 P.2d 651 (1988), where Division of the Washington Court of Appeals noted that "[p]olice power is properly exercised . . . where the problem to be remedied by the exaction arises from the development under construction. . . ." Id. at 727, 750 P.2d at 653.

Since Orion II did not involve a regulatory exaction of a property right, but merely a limitation of use, the Nollan nexus requirement was irrelevant. Although citing Nollan and using the term "nexus," the court seemed to require only that the challenged regulation plausibly foster a legitimate public interest, as was proper. See Orion II, 109 Wash. 2d at 654, 747 P.2d at 1080. See also Keystone Bituminous Coal Ass'n v. DeBenedictis, 107 S. Ct. 1232, 1245-46 (1987); Penn Central Transp. Co. v. New York City, 438 U.S. 104, 129-30 (1978); Callies, Taking Clause—Take Three, A.B.A J., at 48-53 November 1, 1987.

244. See, e.g., Keystone, 480 U.S. at 491-93; Penn Central, 438 U.S. at 125; Orion II, 109 Wash. 2d at 648, 747 P.2d at 1076-77.
regulatory redistributions of wealth have been elusive. Routinely conceding that there is no “precise formula” or “single, simple test” and, hence, each case must be decided on its own facts, the courts are in general agreement on the pertinence of “several factors.” These considerations are variously and quite indiscriminately said to include the following: the “character of the governmental action,” that is, the purpose and effect of the police power measure; the “economic impact of the regulation on the claimant”; the diminution in private property value; the extent to which such depreciation disappointed “distinct investment-backed expectations”; the extent to which the regulatory burdens were offset by reciprocal benefits; balancing of private loss and public gain; and whether any reasonably beneficial use remains. These considerations are virtually never explained, and their interrelationships are generally ignored even though some seem to be mutually exclusive and some seem to be components or determinants of others.


246. See Penn Central, 438 U.S. at 124.

247. Id.

248. Keystone, 480 U.S. at 497; Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922); Agins, 447 U.S. at 261; Penn Central, 438 U.S. at 124.

249. See supra note 248.


251. See supra note 248; Department of Natural Resources v. Thurston County, 92 Wash. 2d 656, 668, 601 P.2d 494, 500 (1979); Pacesetter Constr., 89 Wash. 2d at 207-211, 571 P.2d at 198-200; Maple Leaf Investors, Inc. 88 Wash. 2d 726, 731, 565 P.2d 1162, 1164 (1977).


253. Once the character of the government action is determined, the applicability of the remaining considerations differs. For example, a regulation that effectively appropriates or deprives the property owner of a fundamental attribute of ownership generally is a taking regardless of the other factors. See Keystone, 480 U.S. at 488-89 n.18. On the other hand, a regulation that merely regulates the use of property is generally analyzed on the basis of some or all of the remaining considerations. In such cases, “economic impact” may mean how much value was lost or how much was retained (diminution in value or reasonably beneficial use?). To the extent that value lost is deemed relevant, its importance may depend upon whether the lost value was distinctly supported by reasonable investment-backed expectations and whether the lost value was offset by benefits conferred upon the landowner by the challenged regulation. When courts attempt to determine whether the private loss of property value is outweighed by public gain (“balancing”), courts often recognize that some public purposes are more important than others. Compare Keystone, 480 U.S. at 485-93.
This doctrinal uncertainty about when police regulation goes "too far"²⁵⁴ has not been reduced by Orion. The court stated without qualification that whether a regulation's economic impact is excessive is determined by comparing private loss and public gain.²⁵⁵ Under this so-called "balancing test," if the former outweighs the latter, there is a taking.²⁵⁶ But having said this, the court made no further mention of balancing and, in fact, never purported to compare the public gain and private loss of the sanctuary designation.

3. Economic impact tests for "facial" and "as applied" challenges

The court did explain that the test for constitutionally excessive economic impact differed for "facial" and "as applied" regulatory taking claims.²⁵⁷ Since Orion challenged the estuary designation as applied, the court said the "significance of the economic deprivation" would depend on (1) "the challenged regulation's economic impact," and (2) the "extent of its interference with reasonable, investment-backed expectations."²⁵⁸ A more demanding test would apply to facial challenges—whether the mere enactment of the regulation precluded all economically viable use of the property.

a. Measuring Economic Impact

To say that economic impact will be considered offers no guidance absent a qualitative and quantitative explanation of the standards by which economic impacts would constitute takings. The court, without elaboration, acknowledged the qualitative norm that economic impact might be excessive because a fundamental attribute of ownership had been extinguished,²⁵⁹ regardless of quantitative economic impact. Since Orion's rights to possess, exclude others from, and transfer ownership in its tidelands were unaffected by the challenged regulations,

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²⁵⁴ Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413, 415 (1922).
²⁵⁵ Orion II, 109 Wash. 2d at 655, 747 P.2d at 1080.
²⁵⁷ Orion II, 109 Wash. 2d at 655-56, 747 P.2d at 1081. See also Keystone, 480 U.S. at 494-95.
²⁵⁸ Orion II, 109 Wash. 2d at 656, 747 P.2d at 1081.
²⁵⁹ Id. at 664, 747 P.2d at 1085.
there was no taking on the basis of this qualitative standard. Absent regulatory deprivation of a fundamental attribute of property ownership, excessive economic impact was to be determined by a quantitative standard—whether the claimant’s property retained reasonable market value. The court stressed that reasonable market value did not mean reasonable use as that term has been understood. Even if the challenged regulation precluded a reasonable use by Orion, it would not be a taking if another private person or corporation would sufficiently value passive ownership of the tidelands to pay a price equivalent to their reasonable use value. Since Orion had not been deprived of a fundamental attribute of property ownership but may have been deprived of all reasonably valuable use, the legal excessiveness of economic impact might ultimately depend on whether the tidelands retained a "reasonable fair market value" because it could possibly be sold to a nongovernmental buyer (e.g., The Nature Conservancy), to be determined on remand.

b. Interference With Investment-Backed Expectations

The extent of interference with reasonable investment-backed expectations was the court's second consideration in determining the significance of the economic deprivation. This variable, while often mentioned, never has been adequately explained. Orion, without any explicit elaboration, offered some guidance by implication. The court held that Orion had no reasonable investment-backed investment worthy of consideration because its investment was induced by expectations that it could dredge and fill the tidelands which the public trust doctrine precluded. The court does not say, but one can plausibly infer, that Orion's investment-backed expectations were deemed either unreasonable or legally irrelevant since Orion's private property rights were limited by the public trust when the investments were made.

260. Id. at 665, 747 P.2d at 1085.
261. Id.
262. Id.
263. Id.
264. Id. at 664, 747 P.2d at 1085.
266. Orion II, 109 Wash. 2d at 656-66, 747 P.2d at 1086.
267. Orion II, 109 Wash. 2d at 665-66, 747 P.2d at 1085-86. See Rose-Ackerman, supra note 3, at 1700 n.1, 1702-05.
4. Balancing test

Whether the balancing test for excessive economic impact was retained, abandoned, or qualified by Orion or, perhaps, relegated to substantive due process service is anybody's guess. The balancing test is generally traced to Pennsylvania Coal in which Justice Holmes, in characterizing the challenged statute's modest contribution to the public interest as inadequate to justify the private burden imposed, suggested that more socially beneficial regulation would have justified greater diminution of property value. Most subsequent state and federal decisions have acknowledged the general relevance of the balancing test without explaining what it actually means, how it would operate, how it relates to other relevant considerations, and whether it is conclusive. Obviously, the test does not pertain to the power of eminent domain. If compensation for government expropriation of property for public projects were required only when private loss outweighed public gain, dispossessed landowners would seldom receive payment. Such balancing measures efficiency rather than redistribution of wealth. Since the taking limitation is designed to preclude unfair wealth redistribution rather than inefficiency, it has been persuasively argued that the balancing test is irrelevant to the taking issue and should be considered only as a standard of substantive due process. This argument was explicitly

268. See supra note 251.
270. As long as a regulation produces aggregate benefits that exceed aggregate costs, that is, as long as it efficiently allocates resources according to the Kaldor-Hicks test, see Fischel, Introduction: Utilitarian Balancing and Formalism in Takings, 88 Colum. L. Rev. 1581, 1584 (1988), the balancing test is satisfied regardless of extreme wealth redistribution consequences.
271. The fundamental mission of the regulatory taking limitation is virtually always stated in terms of wealth redistribution rather than efficiency. See, e.g., Orion II, 109 Wash. 2d at 648, 747 P.2d at 1077. ("Basically, the primary problem caused by an excessive police power regulation is that it requires the landowner to shoulder an economic burden, which in justice and fairness the public should rightfully bear."); Agins v. City of Tiburon, 447 U.S. 255, 260 (1980) ("The determination that governmental action constitutes a taking is, in essence, a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest."); Armstrong v. United States, 364 U.S. 40, 49 (1960). ("The Fifth Amendment's guarantee...[is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.") See Kmiec, supra note 47, at 1638-44.
272. The balancing test is simply irrelevant to a constitutional limitation on regulatory redistribution of wealth. See, e.g., D. Mandelker, Land Use Law 20-21 (1982).
rejected by the Washington Court in *Department of Ecology v. Pacesetter Construction Co.*273 In an ambiguous footnote,274 *Orion* may have meant to say that the balancing test really pertains only to substantive due process and not to the taking limitation. The rest of the opinion offers no guidance regarding whether balancing has been banished from the realm of the taking limitation and its compensation remedy. On the one hand, the court clearly incorporates balancing into its first enunciation of regulatory taking standards.275 On the other hand, having done so, the court does not incorporate balancing into its subsequent statements of standards, and never considers the balance of private harm and public gain in its application of the standards.276

5. Value diminution tests—value remaining and value lost

Aside from ambiguous language concerning the relevance of the balancing test, the *Orion* quantitative standard for constitutionally excessive economic impact,277 as applied by the court,278 seems exclusively concerned with diminution of property value. The standard has two parts that focus respectively on the two aspects of property value depreciation; the amount of value lost and the amount of value retained. The first part of the standard addresses the extent of value retained. While this standard is not new, *Orion* provides helpful explanation that even if no reasonable use (in the traditional sense of an active use)279 remains, there is no taking if the property has a reasonable market value for passive conservation use. The second part of the standard is concerned with the extent of value

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274. The Orion Court stated the following:
   In *Pacesetter Constr.*, we rejected a challenge to the balancing approach based on the distinction between the police power and the eminent domain power. See *Department of Ecology v. Pacesetter Constr. Co.*, 89 Wash. 2d 203, 210, 571 P.2d 196 (1977). There, the challenger argued that an exercise of the police power could never trigger the just compensation requirement. We concluded, however, that a mere verbal distinction did not reconcile property rights and social needs. *Pacesetter Constr.*, at 210. By recognizing the distinction between a police power limitation, the validity of which continues to depend on the balancing test, and a de facto eminent domain taking, we can better reconcile those competing interests.

*Orion II*, 109 Wash. 2d at 652 n.20, 747 P.2d at 1078 n.20.
275. *Id.* at 655, 747 P.2d at 1080.
277. *See supra* note 258 and accompanying text.
279. *Id.* at 665, 747 P.2d at 1085-86.
lost. Losses that are supported by reasonable investments are more worthy of compensation than those that are not. However, Orion provides little enlightenment on the meaning of the terms "reasonable" and "investment" and how much value supported by reasonable investment-backed expectations may be reduced without effecting a taking.280

IV. TOWARD CLEARLY ARTICULATED REGULATORY TAKING DOCTRINE

The regulatory taking principle with the most predictive value was implicitly recognized but apparently not fully appreciated by the court in Orion.281 This principle, which should be the first applied once it is determined that a police power measure is subject to the taking limitation,282 relates to the "character of the government action"283 or, more precisely, to the character of the consequences of the regulatory action. This threshold principle, consistently implied but never clearly articulated by the courts,284 effectively recognizes that there are two categories of police power regulation that are subject to quite different taking standards.285 These categories divide regulations, on the basis of their purpose and effect, into those that effectively deprive a property owner of a fundamental

280. Id. at 665-66, 747 P.2d at 1085-86.
281. See supra notes 96-108 and accompanying text.
282. See supra note 253.
284. See supra notes 96-108 and accompanying text.
285. See Keystone, 480 U.S. at 488-89 n.18:

Of course, the type of taking alleged is also an often critical factor. It is well settled that a "'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government, see, e.g., United States v. Causby, 328 U.S. 256 (1946), than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124 (1978). While the Court has almost invariably found that the permanent physical occupation of property constitutes a taking, see Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435-38 (1982), the Court has repeatedly upheld regulations that destroy or adversely affect real property interests. See, e.g., Connolly v. Pension Benefit Guaranty Corp., 475 U.S. 211 (1986); Penn Central Transportation Co. v. New York City, 438 U.S. at 125; Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668, 674, n.8 (1976); Goldblatt v. Hempstead, 369 U.S. 590, 592-93 (1962); Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); Gorieb v. Fox, 274 U.S. 603, 608 (1927); Welch v. Swasey, 214 U.S. 91 (1909). This case, of course, involves land use regulation, not a physical appropriation of petitioners' property.
attribute of property and those that do not. In the first category are regulations that prevent the owner from possessing, excluding invaders, or perhaps, transferring property rights to another. In the second category are regulations that do not have any of these consequences but, instead, restrict the use and development of the property.

A. Deprivation of a Fundamental Attribute of Property Ownership Cases

Regulations that deprive an owner of a fundamental attribute of ownership generally are held to be takings without applying the ripeness requirement or distinguishing between facial and as applied challenges; without balancing public gain and private loss; and without considering diminution in property value, disappointment of investment-backed expectations, whether value lost is offset by reciprocal benefits, and whether reasonable value remains. In short, such regulations are subject to essentially the same doctrine as that applicable to government exercises of eminent domain and government physical invasions traditionally characterized as inverse condemnations. Thus, the Supreme Court has held that regulations, regardless of their public and private economic impact,

286. See Orion II, 109 Wash. 2d at 664-65, 747 P.2d at 1085. See supra note 96.


289. See, e.g. Hodel, 481 U.S. 704; Loretto, 458 U.S. 419.
have effected takings by compelling a waterfront landowner to grant a public easement;\(^{290}\) forcing landlords to allow third parties to install cable television devices on their buildings;\(^{291}\) allowing public navigation of a formerly nonnavigable private pond;\(^{292}\) requiring the owner of business secrets to publicly disclose them;\(^{293}\) denying owners the interest income earned on their money, which was deposited in a court account;\(^{294}\) and barring the inheritance of certain interests in land held by individual members of an Indian tribe.\(^{295}\) Similarly, the Washington courts, without considering the extent of the economic burden imposed, have characterized the following as takings regulations: precluding houseboat moorage owners from terminating leases to regain possession;\(^{296}\) compelling a landowner to dedicate a strip of property to widen a public road;\(^ {297}\) and barring a landowner from exercising an easement.\(^ {298}\)

To say that this category of regulation is subject to mainstream eminent domain doctrine may be misleading. While the results quite clearly support that statement, judicial pronouncements often do not. For example, in the two Washington decisions invalidating city ordinances precluding owners of leased houseboat moorages from regaining possession,\(^ {299}\) the Washington Supreme Court employed vague reasonableness standards.\(^ {300}\) Straightforward recognition that the takings were based on deprivation of a fundamental property entitlement would have had more predictive value. In \emph{Orion}, the court's recognition that deprivation of a fundamental attribute of ownership is one of two general ways of effecting a regulatory taking by causing excessive economic impact\(^ {301}\) misstates the nature of this principle. Regulatory takings by deprivation of

\(^{290}\) \textit{Nollan}, 107 S. Ct. at 3145.
\(^{291}\) \textit{Loretto}, 458 U.S. at 421.
\(^{299}\) \textit{Granat}, 99 Wash. 2d 564, 663 P.2d 830; \textit{Kennedy}, 94 Wash. 2d 376, 617 P.2d 713.
\(^{300}\) In \textit{Orion II}, the court stated that the ordinance invalidations in \textit{Granat} and \textit{Kennedy} were based on substantive due process. \textit{Orion II}, 109 Wash. 2d at 648 n.18, 747 P.2d at 1077 n.18.
\(^{301}\) \textit{Id.} at 664-65, 747 P.2d at 1085.
fundamental property entitlements are not based on economic impact any more than takings by government trespasses are. If government exercises its power of eminent domain to acquire a very small part of a holding, government must pay.\textsuperscript{302} Similarly, if government exercises its police power to preclude a landowner from exclusively possessing a very small part of a holding, government must pay retrospectively and repeal the regulation or pay prospectively.\textsuperscript{303} In both cases triviality of economic impact is irrelevant. So the qualitative standard of fundamental property right deprivation should be applied at the beginning of the taking inquiry. A regulation that denies a fundamental attribute of ownership is a taking, subject to narrow qualifications,\textsuperscript{304} regardless of the extent of economic loss. Since the practical and legal effects of such regulation so closely resemble traditional eminent domain takings, it is unfortunate that Orion characterized the basis for invalidation of the houseboat moorage regulations in Kennedy\textsuperscript{305} and Granat\textsuperscript{306} as substantive due process rather than the taking limitation.

The principle that deprivation of fundamental attributes of property ownership are takings is not limited to regulations that secure the benefit of the appropriated property right for government itself, but applies with equal force to regulations that effectively reallocate property rights to other people, as in the houseboat moorage regulation cases.\textsuperscript{307} The principle is not absolute, but its qualifications generally are coherent and have substantial predictive value.\textsuperscript{308} The most significant qualification pertains to regulatory exactions that effectively appropriate fundamental property rights by forcing the landowner to grant public access or dedicate land to public facilities.\textsuperscript{309} If the property right exaction is reasonably and quite specifically calculated to prevent or compensate for adverse impacts of the

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\textsuperscript{303} This would seem to be the clear message of Loretto and First English, combined.
\textsuperscript{304} See infra notes 308-11 and accompanying text.
\textsuperscript{305} Kennedy v. City of Seattle, 94 Wash. 2d 376, 617 P.2d 713 (1980).
\textsuperscript{307} Id.; Kennedy, 94 Wash. 2d 376, 617 P.2d 713.
\textsuperscript{308} Neither the rule nor its qualifications have been clearly or fully articulated by the courts. However, to the extent that the doctrine is unarticulated and intuitive, coherent principles explaining outcomes are inferable.
\textsuperscript{309} See supra note 243.
proposed development on public interests worthy of government protection, there is no taking. 310

Another qualification recognizes that what might seem to be a regulatory appropriation of a fundamental attribute of ownership may be more properly characterized as a limitation of property ownership itself under the state's acknowledged power to define property. 311 Obviously this qualification, unless effectively limited, could swallow the rule. While the limits that the taking clause imposes on state power to define property rights are not defined with precision, they do exist. 312 Radical redefinitions of property have not and will not preclude takings. This is especially so where the revisions seem opportunistic or subversive. 313

A regulatory taking analysis that makes a threshold distinction between regulations effectively appropriating fundamental property rights and regulations restricting use would be desirable for several reasons. The realm of the vague principles applicable to regulatory restrictions of use would be effectively reduced. The potentially coherent doctrine applicable to regulatory appropriations of property rights could be more fully developed. The separate analysis of these two categories of regulation might even induce the Supreme Court to restrict the applicability of the taking limitation to the regulatory appropriation of property rights category, which would be similar to the Washington Supreme Court's ideal rule. 314

As suggested earlier in this Article, 315 there are strong arguments, based upon policy and legal symmetry, that there should be no second category of regulatory takings, that regulations that restrict only use and development without effectively appropriating a fundamental property right should not even be subject to the taking limitation and its compensation remedy. Conceivably, the United States Supreme Court could produce this outcome gracefully by explaining that First English decided only whether the remedy of inverse condemnation

313. See supra note 312; Michelman, supra note 1, at 1611.
315. See supra notes 215-17 and accompanying text.
damages was available for a regulatory taking and not whether
the case involved a regulation even subject to the taking limi-
tation.\footnote{316} The Court might go on to explain that Pennsylvania
Coal was subject to the taking limitation because the chal-
 lenged regulation effectively appropriated the support estate in
land, a fundamental attribute of property ownership in Penn-
sylvania.\footnote{317} Loose ends might be wrapped up by systemati-
cally accounting for the fundamental property right depriva-
tion\footnote{318} and use restriction\footnote{319} cases decided in the last decade. The
Court might explain that, in the latter cases, it never had
found a taking, had expressed serious doubts about the applica-
\footnote{316. In First English, the Court made quite clear the narrow limits of its holding:
We accordingly have no occasion to decide whether the ordinance at issue
actually denied appellant all use of its property or whether the county might
avoid the conclusion that a compensable taking had occurred by establishing
that the denial of all use was insulated as a part of the State's authority to
enact safety regulations. See e.g., Goldblatt v. Hempstead, 369 U.S. 590 (1962);
Hadacheck v. Sebastian, 239 U.S. 394 (1915); Mugler v. Kansas, 123 U.S. 623
(1887). These questions, of course, remain open for decision on the remand we
direct today. We now turn to the question of whether the Just Compensation
Clause requires the government to pay for "temporary" regulatory takings.
First English Evangelical Lutheran Church v. Los Angeles County, 107 S. Ct. 2378,
\footnote{318. See, e.g., Hodel v. Irving, 481 U.S. 704 (1987); Nollan v. California Coastal
Comm'n, 107 S. Ct. 3141 (1987); Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984);
Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982); Webb's Fabulous
Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980); Kaiser Aetna v. United States, 444
\footnote{319. See, e.g., First English, 107 S. Ct. 2378 (1987); Keystone, 480 U.S. 470;
MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340 (1986); Hodel v. Virginia
Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981); Agins v. City of Tiburon, 447
\footnote{320. See Williamson County Regional Planning Comm'n v. Hamilton Bank, 473
\footnote{321. See, e.g., First English, 107 S. Ct. 2378, Keystone, 480 U.S. 470; Yolo County,
477 U.S. 340; Hamilton Bank, 473 U.S. 172; Virginia Surface Mining, 452 U.S. 264;
Agins, 447 U.S. 255.}}
remains. But lacking elaboration and systematic application, these considerations or factors have virtually no predictive value. Unless or until the Supreme Court holds that the taking clause is no longer applicable to use regulation cases, much can be done to reduce confusion about the governing principles. Even if the Court believes that more precise standards are not desirable, the relationships among the stated principles and standards might be explained in ways that the case results support.

B. Ripeness

A first step toward doctrinal coherence in the field of use regulation would be to clarify the ripeness requirement and its relationship to facial and as applied challenges. Some of the cases have held that a taking challenge will not be entertained until all possibilities of obtaining permission for reasonable property use have been exhausted. In other cases, taking challenges were deemed justiciable without evidence of exactly how the claimant was burdened. Until the very recent decision of Pennell v. City of San Jose, it seemed clear that the ripeness requirement pertained only to as applied and not to facial challenges, even though the Court had not clearly said so. In Hodel v. Virginia Surface Mining & Reclamation Ass'n and Keystone Bituminous Coal Ass'n v. DeBenedictis, the Court reviewed two regulations based on facial challenges and held that the mere enactment of regulatory statutes violated the taking limitation even though there had been no determination of actual and specific regulatory burdens. The Court emphasized that the challengers faced an "uphill battle," but allowed the battle to be fought, albeit unsuccessfully. Then, inexplicably, in Pennell, the Court rejected, as

322. See supra note 321.
323. See infra text following note 346.
324. See supra notes 109-114 and accompanying text.
329. See supra note 328.
332. Id. at 495-96; Virginia Surface Mining, 452 U.S. at 295-97.
premature, a facial regulatory taking challenge of a rent control ordinance that required that the economic hardship of a landlord's tenants be considered by a regulatory official in determining permissible rents. The facial challenge was held to be nonjusticiable without a concrete determination of the regulatory burdens imposed. While Pennell might have been supportable by reasons that would have distinguished the facial challenges entertained in Keystone and Virginia Surface Mining, no such reasons were given. Indeed, to the consternation of dissenting Justice Scalia, Justice Rehnquist, writing for the majority, relied primarily on a blatantly erroneous interpretation of Virginia Surface Mining. The majority did not even mention Keystone, which less than a year earlier had decided such a facial challenge and had relied on Virginia Surface Mining for doing so. Confusion about the meaning of the ripeness requirement in the as applied cases was generated by Hamilton Bank's characterization of Penn Central and Agins as decisions that refused to consider taking challenges for lack of ripeness. Both Penn Central and Agins did decide as applied taking issues. Both considered ripeness, not as a prerequisite to the justiciability of regulatory takings, but as a determinant of the facts or factual assumptions to which taking doctrine would be applied. Since the Agins had not sought regulatory permission to build, and since Penn Central had not sought permission to build anything less grand than its proposed skyscraper, the Court made essentially best case assumptions as to what use the challenged regulations would allow. The unresolved inconsistency between Hamilton Bank, on the one hand, and Agins and Penn Central, on the other, has left the precise meaning of the ripeness requirement in doubt.

334. Id.
335. Id. at 860-61
336. Id. at 849.
338. The Court never has defined the terms "facial" and "as applied" in the context of regulatory taking challenges. While Penn Central and Agins generally are characterized as facial challenges, they were not. Keystone characterizes facial challenges as tests of the constitutionality of an enactment without reference to any specific application. See Keystone, 480 U.S. at 493-94. Yet both Penn Central and Agins considered and relied to some extent on specific applications of the challenged regulation to the challengers' property. See Agins, 447 U.S. at 262; Penn Central, 438 U.S. at 131.
339. Keystone and Virginia Surface Mining have addressed the standards applied
C. Regulation of Nuisance-Like Uses

A second constructive step toward reducing the range of uncertainty in the use regulation cases would be the explicit recognition and clear articulation of special principles governing the constitutionality of police power measures barring nuisance or nuisance-like uses. Once a frustrated use has been judicially characterized in terms of nuisance, little if any heed is given to: The extent of value diminution and its relation to public gain; whether the value lost was backed by reasonable investment; the existence or nonexistence of offsetting reciprocal benefits; and whether any reasonable use or value remains.340 The case results support, and the Court has come close to explicitly recognizing, a rule that such regulations are not takings regardless of the variables pertinent to other use restrictions.341 As the recent Keystone case illustrates, this de facto rule is justified on the basis of several distinct principles:342 Since one has no property right to maintain a nuisance, no property has been taken;343 since such regulation merely involves governmental arbitration of private conflict, rather than enhancement of a public enterprise, the taking limitation is inapplicable;344 and, carrying the balancing test to its logical conclusion, since the public gain in protecting society from serious threats is virtually infinite, so too may be the private loss.345 Explicit recognition of this rule and articulation of its underlying principle would serve the cause of greater doctrinal coherence in the use regulation cases.346

341. See supra note 340.
342. Keystone, 480 U.S. at 491 n.20, 492 n.22.
343. See id.; Hadacheck, 239 U.S. at 410-11.
345. Penn Central, 438 U.S. at 140. Explicit recognition that regulatory abatement or preclusion of "nuisance" land uses cannot be a taking would still leave difficult definitional questions for resolution. Given the amorphous state of common law, nuisance doctrine and its tendency to delegate wide discretion to trial court judges, little predictability would be gained without definitional refinement.
346. There is general agreement on the existence of the nuisance exception, but there is sharp controversy about its nature and extent. Compare the majority and dissenting opinions in Keystone, 480 U.S. at 491-93, 511-15 (Rehnquist, C.J., dissenting). See R. Epstein, Private Property and the Power of Eminent Domain 112-125
D. Beyond Ad Hocery

A third, very long step toward the development of regulatory taking principles to govern use regulations would abandon the rhetoric that cases are decided on their facts and get on with the difficult work of explaining, perhaps modifying, and elaborating upon ambiguous, disjointed doctrine. Cases cannot be decided on their facts alone. There must be some normative basis, intuitive or cognitive, for evaluating facts and determining consequences. The challenge is to bring these determinants into the realm of consciousness, that is, to ascertain and articulate the intuitive legal norms that fill the gaps in regulatory taking doctrine.

For example, what does diminution in value really mean and how is it determined? How are offsetting reciprocal regulatory benefits measured and applied? When is an increment of value backed by reasonable investment and to what extent are the resulting economic expectations protected from disappointment by the taking limitation? May diminutions of value, which otherwise would be takings, be balanced, that is, legally neutralized, by public gain? If so, how are public gains measured? Are some public interests deemed weightier than others? Is public harm prevention more justifiable than public benefit conferral and, if so, how are these variables defined? Is the taking issue, in this area of property use restrictions, really concerned with the extent of value diminution or the extent of reasonable value remaining, or both? If both, what is the relative role of each? Coherent doctrine may be inferable from state and federal regulatory taking decisions, but it will not be ascertained and articulated as long as the rhetoric of "deciding each case on its facts" prevails.

(1885); Kmiec, supra note 47, at 1638-1640; Radin, The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings, 88 Colum. L. Rev. 1668-1670 (1988); Rose-Ackerman, supra note 2, at 1711 n.66.

347. See supra notes 277-79 and accompanying text.


349. See supra notes 264-67 and accompanying text.

350. See supra notes 268-76 and accompanying text.

351. See supra notes 201-05 and accompanying text.

352. See supra notes 253-55 and accompanying text.

353. Are they independent or interdependent?

354. See supra notes 1-8 and accompanying text.
V. THE ALLINGHAM ENIGMA

Less than two months after the *Orion magnum opus* on regulatory takings, the Washington Supreme Court issued its baffling opinion in *Allingham v. City of Seattle*.\(^\text{355}\) *Allingham* is as simplistic as *Orion* is complex. While the result in *Allingham* might have been supported by reasoning consistent with the analytical framework painstakingly set forth in *Orion*, it was not. The *Allingham* reasoning ignores, contradicts, and bears no resemblance to the *Orion* regulatory taking doctrine. Indeed, *Orion* was not even cited,\(^\text{356}\) which was ironic since the court, in that case, chastised the United States Supreme Court for failing to adequately interrelate its three recent regulatory taking decisions.\(^\text{357}\) It was widely assumed that a breakdown of communication within the court must have been to blame and the glaring inconsistencies would be resolved after reconsideration.\(^\text{358}\) But the expected reconciliation never occurred, as the court denied the motion for reconsideration and entered an "Order Changing Opinion" adding a single cryptic footnote to the opinion.\(^\text{359}\) Perhaps, by endorsing *Orion*, the footnote implied that all inconsistencies should be resolved in favor of the prior decision.\(^\text{360}\)

In *Allingham*, a group of landowners sought invalidation of Seattle's Greenbelt Ordinance arguing, *inter alia*, that it effected an unconstitutional taking of property without compensation. The ordinance superimposed an overlay zone on existing zoning designations. The additional restrictions, which varied with underlying zone designation and lot size, required affected landowners to maintain thirty to fifty percent of their land in its natural "greenbelt" state and to restore from disturbed to greenbelt status an additional ten to twenty percent of their land. Narrowly limited dispensing provisions of the ordinance authorized reduction of greenbelt and restored greenbelt requirements by ten percent of the total lot.\(^\text{361}\)


\(^{356}\) *Orion II* was not cited in the decision as originally issued and published. Nearly eight months after the decision the court added footnote one to its decision, citing *Orion II* by an Order Changing Opinion. *Allingham*, 109 Wash. 2d at 953 n.1, 749 P.2d 160, modified, 757 P.2d at 533 n.1. For the text of footnote 1, see infra text accompanying note 385.

\(^{357}\) *Orion II*, 109 Wash. 2d at 653 n.21, 747 P.2d at 1079 n.21.

\(^{358}\) See supra note 16.

\(^{359}\) See supra note 18 and infra note 385 and accompanying text.

\(^{360}\) See infra notes 385-98 and accompanying text.

\(^{361}\) *Allingham*, 109 Wash. 2d at 949, 749 P.2d at 162.
The court unanimously held that the ordinance, by precluding profitable use of fifty to seventy percent of the land, effected a taking without compensation in violation of the state and federal constitutions. The court's sparse reasoning, occupying less than one and a half pages of the short opinion, is logically sound, but its legal foundation is faulty. The court started with the premise that facially challenged police power regulation constitutes a taking of private property if it "(1) does not substantially promote legitimate public interests, or (2) deprives the owner of any profitable use of the land." The ordinance clearly passed the first test. The greenbelt regulations served several legitimate public interests. But the ordinance failed the second standard, as that standard was amended by the court. The fatal flaw in the court's reasoning was this modification of the second test, which was unsupported by precedent and, indeed, directly contrary to a line of United States Supreme Court decisions culminating in the recent Keystone case. The court held that the test of deprivation "of any profitable use of the land" meant deprivation of any profitable use of "a substantial portion of" the land. The court went on to reason that the ordinance deprived owners of any profitable use of fifty to seventy percent of their land and, therefore, was a taking.

In holding a land use regulation precluding profitable use of any portion of the land to be a taking regardless of how profitably the remainder of a site may be used, the court relied on well-established physical taking (eminent domain) doctrine.

If the City were to take a portion of certain properties for the purpose of building a road, clearly we would hold that the City must pay for the land so taken. Likewise where, as here, the City takes a portion of certain properties for the purpose of preserving greenbelts, the City must pay for the

362. Id. at 952-53, 749 P.2d at 163.
363. Id. at 952-53, 749 P.2d at 163-64.
364. Id. at 952, 749 P.2d at 163.
365. The greenbelts were intended to provide buffers between incompatible land uses, to mitigate the effects of noise and air pollution, to limit development of environmentally sensitive areas unsuitable for building, to maintain habitat for wildlife, and to relieve the monotony of continuous urban development.
367. Allingham, 109 Wash. 2d at 952, 749 P.2d at 163 (emphasis added).
368. Id.
land taken.\textsuperscript{369}

The court's mistake was its equation of regulatory taking and eminent domain doctrine in a use regulation case.\textsuperscript{370} A physical acquisition by government deprives a landowner not merely of profitable use but of the fundamental attributes of property ownership—to possess, to exclude, to alienate. Police power regulation that merely restricts use does not effectively appropriate fundamental attributes of property ownership.\textsuperscript{371} Here, the greenbelt ordinance did not affect the rights of owners to possess, to use in compatible ways, and to exclude others from entering the portions of lots upon which development was restricted. This fundamental difference in effect of government acquisition and land-use regulation is the most likely basis for the longstanding principle of regulatory taking doctrine that challenged police power regulation of land use is evaluated on the basis of its detrimental effect on a landowner's use of the parcel \textit{as a whole}.\textsuperscript{372} Thus, the earliest United States Supreme Court regulatory taking decisions upheld building height and setback restrictions against claims that landowners were unconstitutionally deprived of a portion of their property.\textsuperscript{373} The principle that a taking should be determined by evaluating the parcel as a whole recently was reaffirmed in \textit{Penn Central}\textsuperscript{374} and very recently was definitively explained in \textit{Keystone}.\textsuperscript{375} Washington regulatory taking decisions, including \textit{Orion}, have consistently honored this principle.\textsuperscript{376}

\textsuperscript{369} \textit{Id.} at 953, 749 P.2d at 163-64.

\textsuperscript{370} The distinction between the two has been recognized since Pennsylvania Coal v. Mahon, 260 U.S. 393 (1922): "Government hardly could go on if, to some extent, values incident to property could not be diminished without paying for every change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power." \textit{Id.} at 413.

\textsuperscript{371} \textit{Orion II}, 109 Wash. 2d at 664-65, 747 P.2d at 1085 ("Where an owner possesses a full bundle of property rights, the regulatory scheme's economic impact is determined by viewing the bundle in its entirety.") (relying on \textit{Keystone}, 480 U.S. at 498-99).

\textsuperscript{372} See supra note 371; see also Department of Natural Resources v. Thurston County, 92 Wash. 2d 656, 669-69, 601 P.2d 494, 500-01 (1979).

\textsuperscript{373} Gorieb v. Fox, 274 U.S. 603, 608 (1927); Welch v. Swasey, 214 U.S. 91, 105-08 (1909).

\textsuperscript{374} \textit{Penn Central Transp. Co. v. New York City}, 438 U.S. 104, 130 (1978) ("Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated.")


\textsuperscript{376} \textit{Orion II}, 109 Wash. 2d at 664, 747 P.2d at 1085.
Because the Allingham opinion indicates no awareness of the directly contrary federal constitutional doctrine, it is impossible to tell whether the court consciously rejected that doctrine. Since evaluating a taking based on a substantial portion of the property is less restrictive than evaluating the parcel as a whole, the court could have gone beyond federal constitutional requirements on state constitutional grounds,\(^{377}\) although it did not expressly do so, apparently relying on both federal and state taking limitations.\(^{378}\)

The Allingham regulatory taking analysis also is deviant in that it bypasses the threshold analytical step stressed in Orion. If the court had followed its Orion regulatory taking doctrine, it first would have determined whether the challenged regulation was even subject to the taking limitation and its compensation remedy. Orion had explicitly held that police power measures that substantially serve the public interest in safeguarding health, safety, environment, or the fiscal integrity of the community were not subject to the taking limitation and the remedy of compensation; rather, such measures were subject to the substantive due process limitation and the remedy of invalidation.\(^{379}\) Moreover, in dicta, the court in Orion seemed to say that the taking limitation applied only when the challenger sought the remedy of compensation.\(^{380}\) Under both of these propositions, which arguably deviate from minimum federal constitutional standards, and hence, may be invalid,\(^{381}\) the Allingham Greenbelt Ordinance challenge would have been subject only to substantive due process and not the taking limitation. The Greenbelt Ordinance was explicitly found to substantially advance favored public interests,\(^{382}\) and it was absolutely clear that the challengers sought only the remedy of invalidation.\(^{383}\)

Apparently, the court was attempting to correct this departure from Orion doctrine by qualifying the Allingham

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377. See id. at 652, 747 P.2d at 1079.
378. Allingham, 109 Wash. 2d at 950, 749 P.2d at 162 ("The trial court found that the effect of . . . the ordinance was to take the property of the greenbelt owners without compensation and that therefore . . . the ordinance [was an] invalid use of the police power under the Washington State Constitution.").
380. Id. at 649, 747 P.2d at 1077 ("The crucial difference lies in the remedy to be applied: invalidation or the payment of just compensation.").
381. See supra notes 215 to 233 and accompanying text.
382. Allingham, 109 Wash. 2d at 952, 749 P.2d at 163.
383. Id. at 948, 749 P.2d at 161.
conclusion that "the Greenbelt Ordinance is invalid" with the recently added footnote one:384

The remedy we grant of invalidation of the ordinance is the remedy consistent with the denial of substantive due process. Orion Corp. v. State, 109 Wash. 2d 621, 747 P.2d 1062 (1987). Overly severe landowner regulations have previously resulted in our labeling those actions as "takings." Granat v. Keasler, 99 Wash. 2d 564, 663 P.2d 830 (1983).385

The footnote to Allingham seemed to be an indirect way of saying "We did not really mean that the ordinance constituted an unconstitutional taking of private property without just compensation; rather, we meant that the ordinance, on its face, constituted an unconstitutional deprivation of property without due process; so please delete all reference to state and federal taking clauses and replace them with due process provisions;386 and remember that the word 'taking' was but a metaphor387 for 'overly severe regulation' in violation of substantive due process for which the remedy of compensation is not available".388

Whether the new footnote one was also meant to imply that some unarticulated substantive due process standard should be substituted for Allingham's taking standard is unknown. If so, does footnote one negate the Allingham standard, which, by isolating any substantial portion of the regulated land, is clearly at odds with black letter federal law?389 Or does it mean that the Allingham taking standard is really the substantive due process standard for unduly oppressive regulation?

In Orion, the court acknowledged that the third prong of substantive due process, which precludes unduly oppressive police power regulation, is vague, apparently governed by a largely unexplained unreasonableness criterion.390 Unfortu-

384. See supra note 18.
386. See Orion II, 109 Wash. 2d at 654-64, 747 P.2d at 1079-85.
387. See supra note 321.
388. Orion II, 109 Wash. 2d at 648, 747 P.2d at 1076-77; see supra notes 151-65 and accompanying text.
389. See supra note 366-78 and accompanying text.
390. Orion II, 109 Wash. 2d at 655 n.24, 747 P.2d at 1080 n.24. ("We also assume that whether the regulation is overly oppressive on the individual property owner depends on such factors as the nature of the harm sought to be avoided, the availability and effectiveness of less drastic protective measures, and the economic loss
nately, with its footnote modification of Allingham, the court rejected an opportunity to explain the due process standard of overly severe regulation, which presumably was applied. What made the greenbelt ordinance unreasonable? The landowners were not deprived of a "fundamental attribute of property ownership" as they were in Granat v. Keasler,391 the only case besides Orion cited in footnote one. As in Orion,392 the owners were free to possess, use, exclude others from, and transfer ownership in the restricted area. Was the ordinance unreasonable because it denied all profitable use of a substantial portion (i.e., about fifty percent) of their land? If so, how did the court distinguish this restriction from flood control regulation in Maple Leaf Investors, Inc. v. Department of Ecology,393 which precluded structural development of seventy percent of the plaintiff's land; and SEPA-infused subdivision regulation in Department of Natural Resources v. Thurston County,394 which required that a major area of the proposed plat be preserved in its natural state as eagle habitat? Was the ordinance unreasonable because it imposed an affirmative obligation that certain cleared areas be replanted? If so, why was the Seattle historic district regulation requiring a building owner to replace a parapet not unreasonable in Buttnick v. City of Seattle?395 Was the ordinance unreasonable because it failed to meet the substantive due process requirement (with some equal protection overtones) that the various classes established within the legislation be reasonably related to the legitimate object of the legislation?396 If so, how did the special and severe restrictions of Buttnick's historic district ordinance survive?397 Was the greenbelt regulation unreasonable because private loss outbalanced public gain? If so, how were private loss and public gain calculated and how did this calculus compare with the court's balancing in Maple Leaf Investors and Pacesetter Construction?398

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Footnotes:
392. See Orion II, 109 Wash. 2d at 664, 747 P.2d at 1085.
397. See Buttnick v. City of Seattle, 105 Wash. 2d 857, 858, 719 P.2d 93, 94 (1986).
398. Maple Leaf Investors, Inc., v. Department of Ecology, 88 Wash. 2d 726, 731-33,
If, under the Orion doctrine, most police power regulations will be constitutionally evaluated by the standards of substantive due process rather than regulatory takings, the tedious judicial task of explaining the meaning of unreasonableness becomes especially important. Systematic explanation of the meaning of this due process standard each time it is applied and the relationship between each new application and prior case law is essential if Orion's promise of coherent constitutional doctrine on the permissible extent of land use regulatory burdens is to be fulfilled.

VI. Conclusion

This Article has focused on what is and, by logical inference and extrapolation, what might be the law of regulatory takings. It largely has ignored what ought to be the law and what substantive values ought to be reflected and promoted. This orientation was predicated upon the conviction that courts do not construct doctrinal edifices on shifting sands. Scholarly prescriptions of every ideological and jurisprudential stripe abound. But these prescriptions will not significantly influence the course of the law absent judicial resolve to develop coherent regulatory taking doctrine. The virtually universal inclination of American courts has been to avoid the difficult, fundamental questions. What are the relative roles of the taking and substantive due process clauses as limitations on the permissible extent of regulatory burdens? What purposes were these two constitutional limitations designed to serve? Are they concerned with wealth redistribution, allocative efficiency, or some absolute ecological or self-actualization through property ethic? Do the purposes of the substantive due process and taking limitation differ? If designed to serve multiple purposes, what is their order of relative priority?

Without a solid foundation of guiding principles, largely intuitive judicial responses and vague, somewhat aimless doctrine seem inevitable. In Orion, the court began to address these fundamental questions. In Allingham, the court returned to intuition. Whether Orion's rare promise of doctrinal development will be fulfilled remains to be seen.

399. See Orion II, 109 Wash. 2d at 644-54, 747 P.2d at 1074-79.
400. See supra note 390.
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