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Taking Issue with Takings: Has the Washington State Supreme Court Gone Too Far?

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TAKING ISSUE WITH TAKINGS: HAS THE WASHINGTON STATE SUPREME COURT GONE TOO FAR?

Abstract: The Washington State Supreme Court has expressed concern for local governments' potential financial liability under the taking clauses of the federal and state constitutions. Accordingly, the court adopted a comprehensive framework to analyze regulatory challenges and mitigate the chilling effect of potential financial liability. The court, however, went too far in its zeal to promote innovative land-use measures. Its broadly inclusive insulation doctrine allows little room for any regulatory takings. Because the insulation doctrine fails to meet a federal minimum of constitutionality, the doctrine must be relaxed to comport with precedent. To prevent the return of the chilling effect, the court must make substantive and procedural changes to state taking law to provide for an identification of the interests protected by the taking clause and an expedited review process for taking claims.

The United States Supreme Court has limited the regulatory authority of land-use planners under the taking clause to the United States Constitution.[1] The Court has indicated in two of its opinions that excessive use of the police power to curtail landowners' use of their land must end.[2] One case heightened the standard for judicial review of regulations on land use.[3] The second case offered a most effective limitation on regulations, however, adopting a self-executing compensation remedy for all regulations deemed takings.[4] This threat of financial liability discourages regulatory authorities from innovatively addressing the most pressing land-use problems.

Intensifying the threat of liability is the uncertainty surrounding the application of the taking clause. Two divergent lines of authority govern the application of the taking clause to regulations: one exempts all

1. The taking clause of the United States Constitution provides: "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. Similarly, the taking clause of the Washington State Constitution provides: "No private property shall be taken or damaged for public or private use without just compensation having been first made . . . ." WA. CONST. art. I, § 16. In the context of police power regulation, Washington case law has attached no significance to the inclusion of the words "or damaged" to the clause in the Washington State Constitution. Settle, *Regulatory Taking Doctrine in Washington: Now You See It, Now You Don't,* 12 U. PUGET SOUND L. REV. 339, 344 (1989). This Comment assumes the federal and the state taking clauses are coterminous for purposes of regulatory taking analysis.

2. Berger, *The Supreme Court Lays Down the Law (Land Use Style),* in 1989 ZONING AND PLANNING LAW HANDBOOK 200–01 (M. Dennison ed.) (discussing First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987) and Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987)).

3. *Nollan,* 483 U.S. at 834 n.3; *see* Berger, *supra* note 2, at 202.

4. *First English,* 482 U.S. at 315.

exercises of police power from taking challenges; the other recognizes that some exercises of police power go too far and constitute takings.[5]

The Washington Supreme Court recognized the problem created by the threat of financial liability and the uncertain applicability of the taking clause. In *Presbytery of Seattle v. King County,*[6] the court announced a comprehensive framework to analyze land-use regulations under the due process clause and the taking clause.[7] The court identified the critical inquiry as determining when the taking clause applies.[8] By severely restricting the applicability of the taking clause to regulatory challenges, the court substantially removed the threat of financial liability and the uncertainty of application.

The *Presbytery* court insulated a broad category of regulations from taking analysis, and thus signalled the end of regulatory takings in Washington. Although the court's goal of encouraging novel approaches to sensitive land-use problems is commendable, the court's analysis fails to comport with federal precedent. The court claims its comprehensive framework reconciles divergent lines of federal authority, but it merely exalts one at the expense of the other. The court's failure to incorporate both lines of federal authority into its framework makes the required analysis constitutionally suspect. Until the Supreme Court of the United States adopts one line of authority, the Washington Supreme Court must moderate its insulation doctrine and consider substantive and procedural changes to its regulatory taking analysis.

I. INSULATION FROM THE CHILL: WASHINGTON'S SOLUTION TO THE CONFUSION IN FEDERAL TAKING DOCTRINE

A. Presbytery of Seattle v. King County

In *Presbytery of Seattle v. King County,* approximately one-third of the Presbytery's land contained a wetland subject to a restrictive wetland ordinance.[9] The ordinance prohibited construction within wet-

5. Much confusion surrounds the grammatical use of "takings." This Comment uses "takings" to refer to the general concept, and "taking" as a specific incident or as an adjective in a phrase, e.g., federal taking doctrine.

6. 114 Wash. 2d 320, 787 P.2d 907, *cert. denied,* 111 S. Ct. 284 (1990).

7. The due process clause of the United States Constitution applies to the states through the fourteenth amendment, which provides in part: "No person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV.

8. *Presbytery,* 114 Wash. 2d at 329, 787 P.2d at 912.

9. *Id.* at 325, 787 P.2d at 910.

land boundaries and created a buffer zone surrounding the wetland.[10] The Presbytery challenged the ordinance as a taking after its consultant concluded that the ordinance restricted the use of three or four of its five lots to open space.[11] Although the court ultimately denied the Presbytery's claim for failure to exhaust administrative remedies, the court set forth a framework for evaluating constitutional challenges to land-use regulations.[12]

The framework begins with a two-step threshold inquiry to determine whether the taking clause or the due process clause is the proper medium of analysis.[13] As a first step, courts must ascertain the predominant goal of the regulations.[14] If the predominant goal is to protect "the public interest in health, safety, the environment or the fiscal integrity of an area," then analysis proceeds to the second step of the threshold inquiry.[15] If, however, the predominant goal goes "beyond preventing a public *harm*" and enhances "a publicly owned right in property,"[16] taking analysis applies.[17]

In the second step, courts must determine whether the regulations "destroy[ ] one or more of the fundamental attributes of ownership—the right to possess, to exclude others and to dispose of property."[18] If the regulations predominantly protect a public interest in health, safety, the environment, or fiscal integrity and do not destroy a fundamental attribute of ownership, taking analysis does not apply. Instead, courts will evaluate the regulations under the strictures of due process.[19] Regulations that destroy a fundamental attribute of ownership, however, are subject to taking analysis.[20]

The Washington Supreme Court's taking analysis involves a multilayered inquiry. Regulations that fail to "substantially advance legitimate state interests" are takings.[21] Challenges to regulations that fur-

10. *Id.*

11. *Id.*

12. *Id.* at 326–27, 787 P.2d at 910–11.

13. *Id.* at 329, 787 P.2d at 912.

14. *Id.* at 329 n.13, 787 P.2d at 912 n.13.

15. *Id.* at 329, 787 P.2d at 912. This evaluation is referred to as the prevention of harm factor throughout this Comment.

16. *Id.* Enhancement of a publicly owned right in property and conferral of benefit are used interchangeably throughout this Comment.

17. *Id.* at 333, 787 P.2d at 914.

18. *Id.* at 329–30, 787 P.2d at 912.

19. The court utilizes a three prong due process test: (1) whether the regulation aims at achieving a legitimate public purpose; (2) whether the regulation uses means reasonably necessary to achieve its purpose; and (3) whether the regulation is unduly oppressive on the landowner. *Id.* at 330, 787 P.2d at 913.

20. *Id.* at 333, 787 P.2d at 914.

21. *Id.*

ther a legitimate state interest are then divided into facial challenges and challenges of regulations as applied to a specific parcel of land.[22] Under a facial challenge, a regulation constitutes a taking if the landowner shows that it denies all economically viable use of any parcel of regulated property.[23] Under a challenge to a regulation as applied, the court must balance the economic impact of the regulation on the property, the regulation's interference with investment-backed expectation, and the character of the government action.[24]

B. The Threshold Inquiry: Removing the Chilling Effect

The *Presbytery* court narrowly tailored the application of taking analysis to assist local governments in addressing sensitive land-use problems.[25] By favoring due process analysis, the court removed the intimidating presence of possible financial liability from regulations protective of health, safety, the environment, and fiscal integrity. The threshold inquiry and the class of regulations it insulates define the maneuvering room of the legislative body for sensitive land-use decisions.[26]

C. The Federal Taking Context

1. The Specter of Financial Liability

In defining when taking analysis applies, the threshold inquiry responds to a federal taking doctrine that has become increasingly onerous for regulators. In *First English Evangelical Lutheran Church v. Los Angeles,*[27] the Supreme Court not only held that the taking clause requires a self-executing compensation remedy,[28] but also lengthened the period for which compensation is awarded.[29] Rather than requiring compensation from the day a court finds a regulation a taking, the *First English* Court required that compensation be calcu-

22. *Id.*

23. *Id.* at 333–34, 787 P.2d at 914.

24. *Id.* at 335–36, 787 P.2d at 915.

25. *Id.* at 332–33, 787 P.2d at 913–14.

26. This Comment addresses only the threshold inquiry of the analytical framework developed by the Washington Supreme Court.

27. 482 U.S. 304 (1987). Justice Rehnquist, writing for the majority, recognized the effect of the decision on regulating authorities: "We realize that even our present holding will undoubtedly lessen to some extent the freedom and flexibility of land-use planners and governing bodies of municipal corporations when enacting land-use regulations. But such consequences necessarily flow from any decision upholding a claim of constitutional right . . . ." *Id.* at 321.

28. *Id.* at 315–16.

29. *Id.* at 320.

lated from the day the regulation effected a taking.[30] In addition, the Court created the possibility of a "temporary taking" requiring compensation for the period between enactment and invalidation.[31]

The threat of financial liability for regulations later deemed takings encourages regulating authorities to adopt tried and true regulations, rather than to create innovative solutions to pressing land-use needs. Contributing to the threat of financial liability is the uncertain applicability of the federal taking doctrine. Unless regulators know what constitutes a taking, they will be unable to adopt regulations that pass constitutional muster. Federal taking doctrine provides little guidance, so regulators are unable to protect constitutional interests of landowners and cannot avoid financial liability.

2. *The Ambiguity in Federal Taking Doctrine: When Does the Police Power Go Too Far?*

By determining when the taking clause applies to a regulatory challenge, the threshold inquiry addresses the ambiguity in federal taking doctrine. Federal case law presents divergent lines of authority for the analysis of regulatory takings.

a. Physical Takings: The Mainstay of Taking Doctrine

At one time, the government's permanent physical invasion of an individual's land was the only basis for a taking.[32] Although courts have broadened takings' categories, physical takings remain a stable part of taking law. Courts have consistently recognized a taking when the government permanently occupies a person's property.[33]

Loretto v. Teleprompter Manhattan CATV Corp.[34] illustrates the physical taking doctrine. In this case, the State of New York enacted legislation prohibiting a landlord from interfering with cable television installation.[35] In effect, the legislation permitted installation of cable boxes and lines over a landlord's objections. The Supreme Court held that the law constituted a taking of the landlord's property, basing the analysis on a permanent physical occupation theory.[36]

30. *Id.* at 320–21. Most often this will be the day of enactment. The period for which compensation is calculated, however, does not include normal delays for building permits, variances and similar administrative proceedings. *Id.* at 321.

31. *Id.* at 318.

32. *See* Northern Transp. Co. v. Chicago, 99 U.S. 635, 642 (1879).

33. *See, e.g.*, Nollan v. California Coastal Comm'n, 483 U.S. 825, 831–32 (1987); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 434–35 (1982).

34. 458 U.S. 419 (1982).

35. *Id.* at 423.

36. *Id.* at 441.

The permanent physical occupation theory requires compensation when the government occupies part or all of an individual's land, effectively destroying the fundamental ownership right of exclusive possession.[37] According to the Court, proof of such a taking simply requires evidence that the government allowed placement of a fixture on the land.[38] The extent of the occupation was relevant only to determine the required compensation.[39] Because the statute allowed the cable company to go upon the landlord's land and permanently install cable fixtures, an action amounting to a permanent physical occupation, the action constituted a taking.[40]

b. Mugler v. Kansas: *The Police Power Exclusion*

By limiting takings to physical occupations, courts traditionally focused on the kind of government action subject to a taking claim.[41] Restrictions on the use of land required analysis only under the due process clause, which governs the bounds of valid exercises of police power.[42] These cases suggested a state's exercise of police power could never amount to a taking, unless it involved physical appropriations of private property by the government.[43]

The Supreme Court in *Mugler v. Kansas* refused to deem a government regulation a taking.[44] In this case, a brewery owner challenged the constitutionality of a prohibition on the manufacture and sale of alcoholic beverages.[45] Because the regulation essentially rendered his property valueless, the brewery owner asserted the regulation was a taking of his property without just compensation.[46] The Court rejected his contention, holding taking clause principles inapplicable to police power actions.[47] The Court reasoned that citizens hold property with an implicit condition that any use of the property may not injure the community.[48] Thus, restrictions on uses violating this implied condition do not represent takings.[49] The legislature had

37. *Id.* at 435.
38. *Id.* at 437.
39. *Id.* at 437–38.
40. *Id.* at 438. The Court explicitly restricted its holding to physical occupations, refusing to extend any application of its opinion to restrictions on the use of property. *Id.* at 441.
41. *See, e.g., id.* at 427–30.
42. *See, e.g.,* Mugler v. Kansas, 123 U.S. 623 (1887).
43. *See supra* notes 34–40 and accompanying text (discussing physical takings).
44. *Mugler,* 123 U.S. at 668–69.
45. *Id.* at 664.
46. *Id.*
47. *Id.*
48. *Id.* at 665.
49. *Id.* at 668–69.

found that alcoholic beverages injured the health and morals of the community and had not physically appropriated the brewery.[50] The state could deny Mugler use of his brewery without payment.[51]

c. The Too Far Test Extends Takings to Regulations

Pennsylvania Coal Co. v. Mahon[52] created the regulatory taking doctrine, limiting, but not overruling, *Mugler's* outright exclusion of police power actions from the taking clause. Justice Holmes' analysis in *Mahon* changed the focus of taking analysis from the type of government action to the degree of governmental interference with private property.

In *Mahon,* the Pennsylvania Coal Company challenged a legislative act, which prohibited mining that caused subsidence, as a taking.[53] The statute effectively destroyed the company's property right to extract coal, because mining without subsidence was virtually impossible.[54] In analyzing the statute, the Court recognized that certain legislative acts were proper exercises of police power.[55] The government could justify some infringements on a private property right because of an "average reciprocity of advantage"—as a member of society, the owner benefited from valid regulations on land.[56]

The Court did not, however, suggest that exercises of police power are exempt from taking analysis. Instead, it suggested the taking clause as a necessary counter to the natural tendency of government to acquire private property.[57] In perhaps the most famous phrase in taking law, Justice Holmes proclaimed, "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[58] Finding only a limited public interest represented in the legislative act and great interference with a private property right, the

50. *Id.* at 668.

51. Several subsequent cases upheld the *Mugler* Court's distinction between police power actions and physical appropriations. *E.g.,* Miller v. Schoene, 276 U.S. 272 (1928) (upholding an ordinance that required the plaintiff to cut down ornamental cedar trees carrying a parasite dangerous to surrounding apple orchards as a valid exercise of police power and not a taking); Hadacheck v. Sebastian, 239 U.S. 394 (1915) (upholding a regulation that prohibited a brickyard in a residential area as a valid exercise of police power and not a taking).

52. 260 U.S. 393 (1922).

53. *Id.* at 412–13.

54. *Id.* at 413.

55. *Id.* at 415.

56. *Id.*

57. *Id.* ("When this seemingly absolute protection [of the fifth amendment] is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears.").

58. *Id.*

Court held the statute a taking of private property without just compensation.[59]

d. Modern Accommodation of Mugler *and* Mahon: *The Public Nuisance Exception*

The *Mugler* police power exemption and the *Mahon* too far test have coexisted uneasily. At times, the Court has based its holdings on a *Mugler* exclusion.[60] In other cases, the *Mahon* too far test has prevailed.[61] Discussions in several recent opinions suggest a precarious compromise of the two fundamentally conflicting lines of analysis in a nuisance exception to the taking clause.

The nuisance exception suggests that exercises of police power to abate a nuisance-like activity never amount to a taking.[62] Two theories underlie the nuisance exception. First, property ownership in society is subject to restrictions on use. Second, the social benefit landowners enjoy from restrictions placed on others enable them to overcome the burden of the nuisance regulation.[63]

The first theory excludes nuisance regulations from the taking clause because the property owner suffers no unbearable harm, but rather enjoys an average reciprocity of advantage.[64] The second theory finds the taking clause inapplicable because nothing is taken. The owner's property rights never included a right to nuisance-like activity, thus the government took away no rights by its abatement of the activity.[65]

Although alluded to in *Mahon,* the nuisance exception was first mentioned in Justice Rehnquist's dissenting opinion in *Penn Central Transportation Co. v. City of New York.*[66] Justice Rehnquist suggested that the government need not compensate a landowner for a diminution in value when it prevents the owner from using property to injure others.[67] Although the exception does not exclude all exercises of

59. Interestingly, the remedy in this case was not just compensation, but reversal of an injunction granted to the surface owners under the legislative act prohibiting mining. *Id.* at 412.

60. *See* Goldblatt v. Hempstead, 369 U.S. 590 (1962); Miller v. Schoene, 276 U.S. 272 (1928); Hadacheck v. Sebastian, 239 U.S. 394 (1915).

61. *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978); San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 636 & n.61 (1981) (Brennan, J., dissenting).

62. *See* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 491 (1987). For a full discussion of the nuisance exception, see Connors, *Back to the Future: The "Nuisance Exception" to the Just Compensation Clause,* 19 CAP. U.L. REV. 139 (1990).

63. *See Keystone,* 480 U.S. at 491.

64. *Id.* (citing Pennsylvania Coal Ass'n v. Mahon, 260 U.S. 393 (1922)).

65. *Id.* at 491 n.20.

66. 438 U.S. 104, 145 (1978).

67. *Id.* at 144.

police power from the taking clause, it excludes regulations that forbid uses "dangerous to the safety, health, or welfare of others."[68]

In *Keystone Bituminous Coal Association v. DeBenedictis,*[69] the Court again discussed a nuisance exception, flatly rejecting the contention that the *Mahon* too far test overruled the *Mugler* police power exception.[70] The opinion suggests a niche for *Mugler*'s exemption of the police power from a taking claim. The Court adopts the *Mugler* reasoning to support a nuisance exception, while using *Mahon*'s emphasis on the state interest and the extent of the infringement to evaluate the taking claim.

At issue in *Keystone* was a Pennsylvania statute (Subsidence Act) prohibiting mining that caused subsidence to public buildings, residential dwellings, and cemeteries.[71] The petitioner, an association of coal mine operators and affiliates, relied on *Mahon* to challenge the statute as a taking of its property right to the mineral estate.[72] Initially, the Court discussed a nuisance exception to the taking clause to validate the Subsidence Act. The Court found the Subsidence Act protective of "the public interest in health, the environment, and the fiscal integrity of the area."[73] Citing *Mugler* and its progeny, the Court noted its hesitancy to find a taking because the statute restrained a use tantamount to a nuisance.[74] The Court discounted *Mahon*'s evaluation of the statute as an advisory opinion,[75] preferring the reasoning of *Mugler.*[76] Yet, its holding did not rely on a nuisance exception to exempt nuisance-abating regulations from the taking clause. Instead, the Court factored the nuisance-like aspects of the case into a balancing of the interests involved. It held that the taking claim necessarily

68. *Id.* at 145. Justice Rehnquist found the statute at issue did not abate a nuisance and, therefore, the exception did not apply.

69. 480 U.S. 470 (1987).

70. *Id.* at 490.

71. *Id.* at 476.

72. *Id.* at 474. The mineral estate is an estate in land recognized in Pennsylvania. The mineral estate is severed from the surface estate. The holder of the mineral estate has the right to mine the coal and additional rights necessary to extract and remove the coal. Additionally, the holder acquires a waiver of any claims for damages arising from the removal of the coal. *Id.* at 478.

73. *Id.* at 488.

74. *Id.* at 491.

75. *Id.* at 484. Although the critical "too far" language falls in the portion of the opinion the *Keystone* Court labels "advisory," similar language occurs in the critical portion of the opinion: "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." Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922).

76. *Keystone,* 470 U.S. at 488–92.

failed because the public interest in preventing uses "similar to public nuisances" was substantial and the association did not show a significant enough deprivation.[77]

In *First English Evangelical Lutheran Church v. County of Los Angeles,*[78] the Court again implied the validity of a nuisance exception. At issue was an ordinance prohibiting construction in a flood plain area.[79] Although it remanded the case to resolve another issue, the Court suggested that the state's authority to enact safety regulations could "insulate" the ordinance from a taking claim on remand, even if it denied the owner all use.[80] In no case, however, has the Supreme Court explicitly defined and applied the nuisance exception. The nuisance exception, the *Mugler* police power exclusion, and the *Mahon* too far test all remain valid tests for takings. Their applicability depends on the facts of each individual case.

D. *Assembling the Pieces: The Doctrinal Bases for the Threshold Inquiry*

Drawing upon commentary, federal doctrine, and Washington case law, the Washington Supreme Court in *Presbytery* responded to the lack of predictability by forging a new framework of analysis that seeks to reconcile the divergent lines of federal authority.

1. Orion II's *Insulation Doctrine and Its Roots in the Nuisance Exception*

The prevention of harm factor in the first step of *Presbytery*'s threshold inquiry is a refinement of the "insulation doctrine" adopted by the Washington Supreme Court in *Orion Corp. v. Washington.*[81] Finding support in *Keystone* and *First English* for a nuisance exception to the taking clause, the *Orion II* court insulated from takings any regulation

77. *Id.* at 492–93.

78. 482 U.S. 304 (1987).

79. *Id.* at 307.

80. *Id.* at 313:

> 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 denial of all use was insulated as a part of the State's authority to enact safety regulations.

81. 109 Wash. 2d 621, 747 P.2d 1062 (1987), *cert. denied,* 486 U.S. 1022 (1988) (*Orion II*) (*Orion II* was preceeded by a 1985 decision in which the court held that requiring the Orion Corporation to seek permits under the exhaustion of remedies rule would be futile. Orion Corp. v. Washington, 103 Wash. 2d 441, 693 P.2d 1369 (1985) (*Orion I*)).

that safeguarded "the *public* interest in health, the environment, and the fiscal integrity of the area."[82]

In *Orion II,* a tideland property owner challenged the Shoreline Management Act (SMA) and Skagit County shoreline regulations as regulatory takings.[83] The Skagit County Shoreline Management Master Plan (SCSMMP) was the principal land use plan applicable to the property, limiting allowable uses to non-intensive recreation and aquaculture by permit.[84]

The court's application of its insulation doctrine appears in the analysis of the issues for decision upon remand.[85] The first step in the court's taking analysis determined whether the challenged regulation was insulated from the taking clause.[86] The court found any denial of use attributed to the SMA and the SCSMMP insulated from takings because the regulations safeguarded the environment, and the safety and fiscal integrity of the community.[87] The regulated uses were not deemed nuisances; rather, the court interpreted their effect as harmful to the environment and safety, thus warranting insulation from takings.[88] By considering the insulation doctrine at the beginning of the taking analysis and applying the doctrine to general environmental regulations, the court moved the doctrine a step beyond the federal doctrine. Unlike the nuisance exception, the insulation doctrine precludes a broader class of regulations from takings.

2. *Limiting the Insulation Doctrine*

Presbytery's threshold inquiry accounts for other categories of takings and limits the insulation doctrine to regulations that do not destroy a fundamental attribute of ownership and do not confer a benefit. The first step requires taking analysis for regulations that confer a benefit and "actually enhance[ ] a publicly owned right in property."[89] Federal courts have not explicitly adopted a conferral of benefit stan-

82. *Id.* at 654, 747 P.2d at 1080.

83. *Id.* at 630, 747 P.2d at 1067.

84. *Id.* at 628, 747 P.2d at 1066.

85. *See id.* at 659–70, 747 P.2d at 1082–88. The court adopted the federal taking analysis, after explicating the two-prong approach, but left the insulation doctrine intact.

86. *Id.* at 659, 747 P.2d at 1082.

87. *Id.* at 661, 747 P.2d at 1083.

88. *Id.* at 660, 747 P.2d at 1083.

89. Presbytery of Seattle v. King County, 114 Wash. 2d 320, 329, 787 P.2d 907, 912, *cert. denied,* 111 S. Ct. 284 (1990).

dard, but support comes from Washington case law and commentary.[90]

In Washington case law, the regulatory taking analysis included an evaluation of benefits conferred by regulations.[91] Regulations enhancing the value of adjacent government land, directly benefiting a government project, requiring access for public use, or resulting in government acquisition of an interest in land would amount to takings for conferring public benefits.[92] Washington cases used the absence of these factors to negate taking claims.[93]

Several commentators have espoused similar theoretical bases for taking analysis. Generally, they argue for a taking test that limits permissible exercises of police power to prevention of harm; regulations that go beyond the prevention of harm and benefit the state amount to takings.[94] Although critics believe the theoretical bases for such a test are sound, they note problems applying the standard to the bulk of regulations that to some degree both confer a benefit and prevent harm.[95]

One commentator argues for a narrow construction of the conferral of benefit standard.[96] This view limits taking analysis to regulations that directly benefit a use of land in which the government holds incidents of ownership.[97] Requiring a direct relationship to a governmental ownership interest restricts the conferral of benefit question to benefits of government property that do not benefit society as a whole.[98] This effectively narrows the class of regulations that benefits a publicly owned right in property. The test would not encompass regulations that confer widespread benefits throughout the community.

The second step requires taking analysis if the regulation destroys a fundamental attribute of ownership—the right to possess, exclude, or

90. Justice Rehnquist implied support for a conferral of benefit standard in his *Penn Central* dissent. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 146 (1978) (Rehnquist, J., dissenting).

91. *See, e.g.,* Maple Leaf Investors, Inc. v. Department of Ecology, 88 Wash. 2d 726, 733, 565 P.2d 1162, 1165 (1977).

92. *See id.*

93. *See, e.g.,* Rains v. Fisheries, 89 Wash. 2d 740, 746, 575 P.2d 1057, 1060 (1978).

94. *See* Settle, *supra* note 1, at 373 & nn.201 & 203 (citing E. FREUND, THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS 546–47 (1904); Sax, *Takings, Private Property and Public Rights,* 81 YALE L.J. 149 (1971)).

95. *Id.* at 373.

96. Stoebuck, *Police Power, Takings and Due Process,* 37 WASH. & LEE L. REV. 1057, 1093 (1980).

97. *Id.*

98. *Id.*

dispose.[99] Although the United States Supreme Court has not explicitly adopted this standard for physical takings, the Washington Supreme Court draws from commentary that derives this standard from recent United States Supreme Court decisions.[100] This step thus excludes from the insulation doctrine regulations that effect physical invasions upon the land.

II. THE HEAT IS ON: WASHINGTON GOES TOO FAR

In *Presbytery,* the Washington Supreme Court built upon notions suggested by the United States Supreme Court in *Keystone* and *First English,* but went far beyond the Court's suggestions in the development of its threshold inquiry. Striving to eliminate the compensation remedy's chilling effect on innovative land-use regulation and preferring substantive due process analysis for land-use regulations, the Washington Supreme Court effectively foreclosed regulatory takings. Federal precedent does not support an outright rejection of regulatory takings. To comport with precedent, the threshold inquiry must restrict the class of regulations it insulates from the taking clause. Procedural and substantive changes to taking law, however, will help prevent the return of the chilling effect.

A. Insulation Doctrine Effectively Forecloses Regulatory Takings

The key factors of the insulation doctrine—health, safety, the environment, and fiscal integrity—encompass a wide range of regulations. Although the Washington Supreme Court provides no specific guidance for construing these factors, the general tone of the *Presbytery* opinion makes clear the court's intention to limit severely the number of regulations subject to taking analysis.[101] Few regulations fall outside the scope of these factors. In *Penn Central,* for example, the United States Supreme Court characterized an historical landmark law's purpose as preservation of the historical environment.[102] Similarly, the Washington Supreme Court characterized a shoreline management act as a safety and health regulation.[103]

99. Presbytery of Seattle v. King County, 114 Wash. 2d 320, 330, 787 P.2d 907, 913, *cert. denied,* 111 S. Ct. 284 (1990) (citing Settle, *supra* note 1, at 356).

100. Settle, *supra* note 1, at 354–55 & n.96.

101. *Presbytery,* 114 Wash. 2d at 332–33, 787 P.2d at 913–14.

102. Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 129 (1978).

103. *See* Orion Corp. v. Washington, 109 Wash. 2d 621, 661, 747 P.2d 1062, 1083 (1987) (*Orion II*), *cert. denied,* 486 U.S. 1022 (1988).

B. Stretching Precedent

The United States Supreme Court's interpretation of the fifth amendment, which is binding on the states through the fourteenth amendment, assumes a minimum level of protection.[104] The Washington Supreme Court's analysis must comply with minimum federal standards to withstand federal review. The present formulation of the threshold inquiry fails to address previously noted conflicts between Washington and federal precedents. Moreover, the analysis is based on questionable interpretations of federal case law.

1. Threshold Inquiry's Conflict With Federal Doctrine

In *Orion II,* the Washington Supreme Court noted the conflict between federal case law and the analysis developed in the Washington courts.[105] Regulatory land use challenges conflicted with federal doctrine, so the court utilized federal doctrine to analyze Orion's claim.[106] Whereas Washington's taking analysis could hinge a taking on a conferral of benefit, federal doctrine would require analysis of the economic burden the regulation places on the property owner.[107] In refining its *Orion II* analysis, however, the *Presbytery* court failed to reconcile this conflict with federal doctrine.

Under the analysis developed in *Presbytery,* consideration of the economic burden comes only after a regulation passes the threshold inquiry.[108] Although a regulation deemed to confer a benefit on publicly owned land must pass through taking analysis and cannot in itself constitute a taking,[109] the lack of economic considerations in the threshold inquiry prevents a severe economic burden from constituting a taking in itself. The threshold inquiry thus fails to consider the Washington court's previous interpretation of federal doctrine.

2. The Insulation Doctrine's Basis: Questionable Interpretations of Case Law

Although the Washington Supreme Court claims that the insulation doctrine harmonizes the *Mugler* police power exception and the

104. *Id.* at 652, 747 P.2d at 1079.

105. *Id.* at 657, 747 P.2d at 1081–82.

106. *Id.*, 747 P.2d at 1082.

107. *Id.*

108. Presbytery of Seattle v. King County, 114 Wash. 2d 320, 333, 787 P.2d 907, 914, *cert. denied,* 111 S. Ct. 284 (1990); *see supra* notes 13–20 and accompanying text for a discussion of the threshold inquiry.

109. *See Orion II,* 109 Wash. 2d at 653, 747 P.2d at 1079 (citing First English Evangelical Lutheran Church v. County of Los Angeles, 107 S. Ct. 237, 2386–88 (1987)).

Mahon too far test,[110] the doctrine actually exalts *Mugler* while limiting *Mahon*'s too far analysis to due process considerations. By insulating most regulations from taking analysis, the court approaches *Mugler*'s exclusion of police power actions from the taking clause, without incorporating *Mahon*'s too far limitations.

The Washington Supreme Court found authority for the insulation doctrine in the attempted reconciliation of *Mugler* and *Mahon* in *Keystone* and *First English*,[111] but stretched the authority too far. The court read *Keystone* as supporting insulation of regulations that protect health, the environment, and fiscal integrity.[112] Although the *Keystone* Court recognized a substantial public interest in preventing activities that endanger these interests, it did not call for an outright exclusion of such regulations from taking analysis.[113] Rather, the Court suggested that these interests would carry substantial weight in a *Mahon*-style balancing of the public and private interests at stake.[114]

The *Keystone* opinion fostered much confusion by classifying the interests at stake as "similar to public nuisances,"[115] but nowhere does the opinion call for the insulation of all regulations. Further, the United States Supreme Court did not base its denial of the taking challenge on the nuisance exception. Instead, the Court found insufficient evidence of a diminution in value to establish a taking.[116]

The Washington Supreme Court also looked to *First English* for support of the insulation doctrine. The court relied on *First English* as authority that a regulation that denies all economic use of property may nevertheless be insulated.[117] The *First English* Court neither decided the taking issue nor found the regulation insulated from a taking challenge. It merely hinted that insulation was a possible basis for a lower court decision on remand.[118]

The author of the majority opinion in *First English,* Justice Rehnquist, argued against preclusion of all regulations from taking analysis several months earlier in his *Keystone* dissent. He emphasized that a

110. *Id.* at 651, 747 P.2d at 1078 (the extent of economic deprivation as a measure of whether the regulation goes too far is a metaphor for determining the regulation's validity under substantive due process).

111. *Id.* at 654, 747 P.2d at 1080.

112. *Id.* (citing Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 488 (1987)).

113. *See supra* notes 69–77 and accompanying text (discussing *Keystone*).

114. *See Keystone,* 480 U.S. at 492.

115. *Id.*

116. *Id.* at 493.

117. Orion Corp. v. Washington, 109 Wash. 2d 621, 654, 747 P.2d 1062, 1080 (1987) (*Orion II*), *cert. denied,* 486 U.S. 1022 (1988).

118. First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 313 (1987).

nuisance exception never applied if the regulation denied all use of the property.[119] Justice Rehnquist's statement in *First English* only provides equivocal support for the insulation doctrine, and his previous writing on the issue casts doubt on the existence of federal support.[120]

C. *Do the Limitations Save the Insulation Doctrine?*

Despite the tone of the *Presbytery* opinion, two limitations prevent the insulation doctrine from precluding all regulations from taking analysis. Regulations that confer a benefit on a publicly owned property right and those that destroy a fundamental attribute of ownership must undergo taking analysis. But these limitations remain ambiguous and fail to make the insulation doctrine comport with precedent. Further, the ambiguity undermines the insulation doctrine's removal of the chilling effect.

1. *Enhancement of a Publicly Owned Property Right: An Ambiguous Standard*

The threshold inquiry will not insulate a regulation that enhances a publicly owned right in property, but the court does not explain the proper interpretation of this factor.[121] The court suggests that this question encompasses benefits conferred on the public at the cost of an individual, where the cost rightly should be spread among society.[122] This formulation merely restates the taking issue, rather than defining the necessary guidelines to determine when regulations unjustly confer a benefit. Regulations almost always confer a benefit on the public at the individual's expense. The taking clause, however, governs only those transfers that unjustly burden landowners.

The court provides little additional guidance as to the proper definition of conferral of benefit. The court explains an enhancement of a publicly owned property right as providing the public with use of the land.[123] This explanation does not clarify the meaning. "Providing public use" could equate the conferral of benefit with requiring public

119. *Keystone,* 480 U.S. at 513 (Rehnquist, C.J., dissenting).

120. *See id.*

121. This is the second factor in the first step of the threshold inquiry. Presbytery of Seattle v. King County, 114 Wash. 2d 320, 329, 787 P.2d 907, 912, *cert. denied,* 111 S. Ct. 284 (1990); *see supra* notes 13–20 and accompanying text for a discussion of the threshold inquiry.

122. *Presbytery,* 114 Wash. 2d at 329 n.13, 787 P.2d at 912 n.13.

123. After explaining the conferral of benefit test as the eminent domain half of a two step constitutional review, the court noted the test's inconsistency with federal precedent, stating, "federal takings doctrine precludes us from expressly hinging occurrence of a taking on whether the invalidated regulation actually provided the public with some use of the land." By inference, the court equated actual use of land with the conferral of benefit standard. Orion Corp. v

access. This interpretation, however, would make the first step of the threshold inquiry redundant with the second step, destruction of a fundamental attribute of ownership. Requiring public access infringes on a fundamental attribute of property: the right to exclude others.[124] The purpose of the two steps of the threshold inquiry is to analyze two separate factors in a taking challenge. The interpretation of the conferral of benefit factor thus remains ambiguous and fails to limit the insulation doctrine effectively.

2. *Fundamental Attributes of Ownership Add to the Ambiguity*

The second step limiting the insulation doctrine from excluding regulations that destroy a fundamental attribute of ownership also remains ambiguous. The court indicated that such attributes are the rights to possess, dispose, and deny access.[125] The court adopted these criteria as a summary of the cases in which the United States Supreme Court held a taking had occurred.[126] But the Washington Supreme Court did not explain how to apply these standards to the analysis of a challenged regulation. The lack of guidance, along with the court's emphasis on substantive due process analysis, suggests that the court adopted these standards to reconcile the insulation doctrine with federal precedent and to provide a means by which the court could retain some control over regulators.

In *Presbytery,* however, these standards are not limiting factors. At most they account for physical takings, a long recognized exception to the police power rule. The cases cited in support of the conferral of benefit and destruction of a fundamental attribute of ownership standards base takings on a physical invasion theory.[127] Furthermore, the limiting factors do not constitute a per se taking test. Unlike federal analysis, which concludes that a taking occurs along with a physical invasion, the threshold inquiry requires that these regulations proceed to a taking analysis.[128]

Washington, 109 Wash. 2d 621, 653, 747 P.2d 1062, 1079 (1987) (*Orion II*), *cert. denied,* 486 U.S. 1022 (1988).

124. Nollan v. California Coastal Comm'n, 483 U.S. 825, 831 (1987); *see Presbytery,* 114 Wash. 2d at 329–30, 787 P.2d at 912; *see also* Kaiser Aetna v. United States, 444 U.S. 164, 179–80 (1979).

125. *Presbytery,* 114 Wash. 2d at 330 & n.14, 787 P.2d at 912 & n.14 (citing Settle, *supra* note 1, at 356).

126. Settle, *supra* note 1, at 354–56.

127. *Id.* at 355–56 (citing, among other cases, Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982); Kaiser Aetna v. United States, 444 U.S. 164 (1979)).

128. *Presbytery,* 114 Wash. 2d at 333, 787 P.2d at 914; *see supra* notes 21–24 and accompanying text for a discussion of the *Presbytery* taking analysis.

3. *Ambiguity Retains Chilling Effect*

By failing to define the limitations on the insulation doctrine but seeking to remove the chilling effect of an uncertain compensation remedy, the Washington Supreme Court has placed itself in a precarious position. The court must define the content of the limiting factors on a case-by-case basis. Once a regulation is deemed a taking because of either a conferral of benefit or a destruction of a fundamental attribute of ownership, the chilling effect could return. Regulators could be left wondering whether an innovative land-use measure under consideration will meet a similar fate under the court's analysis. Analytically, the threshold inquiry then could resemble the troubling too far test. Without guidance, predictability disappears and the chilling effect of financial liability returns.

D. Limiting the Insulation Doctrine: Hard Choices

Both *Mahon* and *Presbytery* suffer from the same weakness: they fail to ascertain what property interests, if any, beyond a right to hold property free from physical invasion by the government, are protected by the taking clause. The United States Supreme Court has avoided this dilemma by preferring a case-by-case, fact-intensive determination of which interests to protect. Washington mirrored this approach by citing these cases in support of the factors limiting the insulation doctrine.[129] Until the courts define these interests, taking doctrine will continue to be unpredictable and onerous for regulators.

The Washington Supreme Court's attempt to define these interests went beyond precedent. Rather than define the interests protected by the taking clause, the court suggested few regulations would reach taking analysis.[130] The court never defined the limiting factors that would place the remaining few regulations into taking analysis. The United States Supreme Court has set the boundaries for making this determination. The interests protected by the taking clause include holding property free from physical invasion, but fall short of a right to use property for a nuisance-like activity.[131] State courts must now establish more specifically which interests are included.[132]

129. *See Presbytery,* 114 Wash. 2d at 330 & n.14, 787 P.2d at 912 & n.14.

130. *Id.* at 332–33, 787 P.2d at 914.

131. *See* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987); *see also supra* notes 62–80 and accompanying text for a discussion of the nuisance exception to the taking clause.

132. Justice Brennan has suggested that this determination is best left to the state courts.

> The States should be free to experiment in the implementation of [the taking clause] provided that their chosen procedures and remedies comport with the fundamental

This determination will entail hard choices. The court must look to the values underlying the taking clause, while keeping in mind the goal of creating a legal environment in which regulators can innovatively address pressing land-use needs. The taking clause protects the individual from singly bearing burdens that should be borne by the public as a whole.[133] A New Jersey state court adopted standards similar to the nuisance exception: the taking clause protects the landowner's interest against general regulations that promote aesthetics or broad environmental concerns, while safety and health regulations protecting the public against an imminent danger fall outside its scope.[134]

This approach fails to address adequately the Washington Supreme Court's concern with favoring innovative land-use regulations, because few environmental regulations protect imminent dangers to public health and safety. But the New Jersey decision illustrates the process the Washington Supreme Court must undergo to clarify the application of the taking analysis.

Until the Washington Supreme Court identifies the protected interests within the bounds drawn by the United States Supreme Court, it must limit the insulation doctrine to nuisance-like activities. The United States Supreme Court has offered support for insulating regulations only to the extent of those abating nuisance-like activities. A nuisance-like standard, however, will not remove the specter of financial liability overshadowing many innovative responses to pressing land-use needs. Few environmental or growth-management controls address the imminent dangers such a standard requires.

E. Expedited Adjudication to Limit Liability

Procedural changes to judicial review of taking claims could lessen the impact of the uncertainties of substantive taking law.[135] A speedier, more efficient review process would benefit both regulating author-

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constitutional command. The only constitutional requirement is that the landowner must be able meaningfully to challenge a regulation that allegedly effects a "taking," and recover just compensation if it does so. He may not be forced to resort to piecemeal litigation or otherwise unfair procedures in order to receive his due.

San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 660 (1981) (Brennan, J., dissenting) (citations omitted).

133. First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 319 (1987).

134. *See* Laurjo Constr. Co. v. New Jersey, 228 N.J. Super. 552, 554, 550 A.2d 518, 520 (App. Div. 1988).

135. For a full proposal of procedural changes to regulatory analysis, see Mixon, *Compensation Claims Against Local Governments for Excessive Land-Use Regulations: A Proposal for More Efficient State Level Adjudication,* 20 URB. LAW. 675 (1988).

ities and landowners. Expedited review of regulatory taking claims would limit the chilling effect created by the uncertain application of taking analysis. Because the size of the compensation remedy is directly related to the length of the period during which the land is subject to the regulation, limiting the time spent in court would greatly reduce a local government's liability.[136] Similarly, landowners with time sensitive development plans and financing would benefit from a shortened period during which their land is subject to the burdensome regulation.

Expediting review could be accomplished either through changes to the judicial review process or creation of an administrative authority to decide validity and compensation issues.[137] The existing judicial framework could expedite review through prioritization of land-use claims, appointment of a special panel of judges to hear regulatory challenges, or the creation of a boutique land-use court.[138] Alternatively, the legislature could create an administrative agency to decide land-use claims.[139] Any adjudicative body would operate under a time limit for hearing and deciding claims.[140] Additionally, a restrictive statute of limitations would limit the time in which claimants could challenge regulations. Although procedural changes do not address the substantive issues central to taking law, they could provide a means around the problems caused by the confusion in the substantive law.

III. CONCLUSION

State courts have struggled with the opposing forces of landowners' interests and the need for innovative solutions to current land-use problems. In 1979, the California Supreme Court adopted a well-reasoned compromise, limiting the remedy available to landowners in taking claims to invalidation of the violating regulation.[141] The United Supreme Court in *First English,* however, struck down this approach, requiring compensation for all takings, including temporary takings.[142]

136. Under the current process, litigation often lasts four to ten years. *Id.* at 685.

137. *Id.* at 690–700.

138. *Id.* at 691–92.

139. *Id.* at 694–95.

140. *Id.* at 688 (recommending a 90-day limit).

141. Agins v. Tiburon, 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979), *aff'd,* 447 U.S. 255 (1980).

142. First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987).

The Washington Supreme Court confronted the issue in *Presbytery,* working in the confining milieu created by the *First English* decision. The *Presbytery* court showed that the most effective means for eliminating the chilling effect of the compensation remedy on regulators is to eliminate regulatory takings. But this solution is too effective. While the aims of the court are valid, they cannot be pursued at the expense of the constitutional rights of landowners.

A deteriorating environment, rapid growth, and other pressures on our limited space point to a need for effective land-use measures. The current fact-intensive judicial review of regulatory challenges is an inefficient means of implementing such measures. The courts must provide both landowners and regulating bodies with guidance as to the scope of their rights and authority. Defining the interests protected by the taking clause while providing expedited review of challenges will solve the problems created by the current process. Adoption of these means will create room for innovative solutions in the political process and end regulating the use of land by judicial fiat.

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