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A DOCTRINE ADRIFT: LAND USE REGULATION AND THE SUBSTANTIVE DUE PROCESS OF *LAWTON v. STEELE* IN THE SUPREME COURT OF WASHINGTON

Susan Boyd

Abstract: Although substantive due process theory has lost much of its force as a local policymaking tool in the federal courts, the doctrine has played a significant role in the land use policies of Washington State. Relying on an ancient U.S. Supreme Court case, *Lawton v. Steele*, the Supreme Court of Washington has declared that legislation permitting government to pass the social costs of low-income housing demolition on to individual developers through development impact fees is “unduly oppressive” on those individuals and thus violates substantive due process. This Comment argues that the substantive due process doctrine the Supreme Court of Washington has applied is irrelevant under the Federal Constitution and inconsistent with Washington constitutional jurisprudence. Moreover, the Comment asserts that the substantive due process theory of *Lawton v. Steele* inappropriately permits courts to delve into the policymaking role of legislators.

In the past three decades, the social and environmental costs of rapid growth in Washington State have prompted legislation permitting local governments to shift some of these costs from the public to individual developers.¹ The Supreme Court of Washington, searching for a method to evaluate the constitutionality of such regulations, lighted on the substantive due process test² from a century-old U.S. Supreme Court case, *Lawton v. Steele*.³ As summarized by the Supreme Court of Washington, the *Lawton* test balances the public’s interests against those

1. See Robert D. Tobin, *Mandatory Development Conditions 3-7* (1986) (unpublished manuscript, on file with the *Washington Law Review*). Tobin explains:

In response to heightened public awareness of environmental impacts and of the public cost of land development which occurred in the 1960’s and 1970’s, a new set of land use concepts and laws emerged. A characteristic of these and other modern land use regulations is an emphasis on the effects of development with regard to a specific site, lot or project.

Id. (citations omitted). This Comment refers to several cost-shifting statutes, including the 1971 State Environmental Policy Act (SEPA), Wash. Rev. Code § 43.21C (1998); the 1971 Shoreline Management Act, Wash. Rev. Code § 90.58 (1998); and the 1968 State Subdivision Act, Wash. Rev. Code § 58.17 (1998). More recently, the Washington Legislature enacted the 1990 Growth Management Act, Wash. Rev. Code § 36.70A (1998), authorizing municipalities to assess development impact fees to fund various public facilities.

2. In *Orion Corp. v. State*, the Supreme Court of Washington explained at length its preference for using a substantive due process doctrine over a Fifth Amendment takings doctrine to evaluate land use restrictions. 109 Wash. 2d 621, 645–52, 747 P.2d 1062, 1075–78 (1987).

3. 152 U.S. 133 (1894). See *infra* text accompanying notes 66–75.

of the regulated landowner and lodges wide discretion in the court.⁴ Noting this broad judicial discretion, the Supreme Court of Washington has invoked the *Lawton* substantive due process standard⁵ to invalidate a number of important legislative efforts to manage the impacts of growth.⁶

Although *Lawton* has played a significant role in contemporary Washington State land use law,⁷ the viability of the *Lawton* substantive due process test as a federal or state constitutional standard is at best questionable. Part I of this Comment briefly describes development impact fees, the particular regulatory tool upon which the *Lawton* test has had its most chilling effect. It then describes what has become of federal substantive due process jurisprudence since *Lawton* and analyzes the re-emergence of *Lawton* in the Supreme Court of Washington's constitutional jurisprudence. Part II asserts that the federal roots of *Lawton v. Steele* dried up long ago and that there are no grounds for re-rooting the doctrine in the state constitution. Finally, this Comment maintains that the current Washington substantive due process doctrine, relying on *Lawton*, permits an inappropriate level of judicial intervention into the legislative tasks of social policymaking and planning.⁸

4. *Presbytery of Seattle v. King County*, 114 Wash. 2d 320, 331, 787 P.2d 907, 913 (1990).

5. The Supreme Court of Washington distinguishes between the substantive due process standard applied when plaintiffs seek only to have a regulation invalidated and the standard applied when they seek federal civil rights damages under 42 U.S.C. § 1983 (1994). The *Lawton* standard applies only when the remedy sought is invalidation. When a substantive due process challenge to a regulation is based upon the federal civil rights law, the standard has been articulated as "arbitrary and capricious or irrational, or utterly fails to serve a legitimate purpose." *Robinson v. City of Seattle*, 119 Wash. 2d 34, 61, 830 P.2d 318, 334 (1992). There has been much controversy over the application of the § 1983 "arbitrary and capricious" standard. See Petitioner's Supplemental Brief at 9-14, *Hayes v. City of Seattle*, 131 Wash. 2d 706, 934 P.2d 1179 (1997) (No. 62820-3) (discussing court's inconsistent interpretations of § 1983 "arbitrary and capricious" standard). This Comment does not address this controversy.

6. See *infra* Part I.C.

7. See *infra* Part I.C.

8. Much of this analysis requires a specific contextual perspective, so while it undoubtedly has implications for other applications of substantive due process, the analysis is primarily concerned with the doctrine as applied to development impact fees.

I. THE CONTEXT: DEVELOPMENT IMPACT FEES AND THE
ROLE OF *LAWTON* IN FEDERAL AND STATE LAW

A. *Development Impact Fees*

State and local land use policies often include the use of development impact fees.⁹ Governments impose impact fees on real estate developers in exchange for permission to develop property.¹⁰ Such fees assist governments in mitigating the various financial and social impacts of real estate development. The rationale behind development impact fees, also known simply as “impact fees” or “exactions,” is that certain public needs are attributable to new development; therefore, the government may require that development itself internalize the cost of these needs.¹¹ Used in this way, impact fees become important tools of social policy.¹²

In Washington, as in many other states, state and local governments increasingly rely on development fees to pay the costs of growth management objectives such as maintenance of public facilities and transportation infrastructure, environmental preservation, and affordable housing.¹³ Shifting the cost of these public benefits to individual landowners is controversial; but, subject to certain restrictions, it has been generally accepted in Washington as one means of managing growth.¹⁴ The Washington Legislature and courts control the extent to which governments can shift these costs to individuals through various

9. See Alan A. Altshuler & José A. Gómez-Ibáñez, *Regulation for Revenue: The Political Economy of Land Use Exactions* 35–39 (1993) (describing increased incidence of development impact fees throughout country).

10. *Id.* at 3–4.

11. *Id.*

12. Dedications of land or easements and construction of improvements are other common forms of legislatively-imposed development conditions. Statutes allowing for the imposition of development conditions often leave room for the legislature to determine whether the condition will be a fee or some other kind of dedication. For example, the Washington subdivision statute states that impact fees, dedications of land to a public body, or the provision of public improvements to serve the subdivision may be required as a condition of subdivision approval. Wash. Rev. Code § 58.17.110(2) (1998).

13. See generally *Exactions, Impact Fees and Dedications: Shaping Land-use Development and Funding Infrastructure in the Dolan Era* (Robert H. Freilich & David W. Bushek eds., 1995); King County Comm’n on Impact Fees, *Impact Fees: Recommendations for the Region’s Policy Makers* (1992) [hereinafter *Impact Fees*].

14. Since the late 1960s, Washington law has permitted the imposition of development conditions where the development was expected to result in particular public burdens. See *supra* note 1.

statutory¹⁵ and constitutional¹⁶ rules. The constitutional doctrine of substantive due process has been the most controversial of these rules.

B. *Federal Substantive Due Process Law*

Identifying a cohesive federal substantive due process theory in the particular context of land use regulation, or even in the broader category of economic regulation, is virtually impossible. First, the U.S. Supreme Court has rebuffed assertions of substantive due process rights in land use cases for nearly forty years.¹⁷ Second, recent opinions from the Court defining the role of substantive due process in other contexts foster doubt about the doctrine's continued vitality in the land use context.¹⁸ Finally, the federal circuit courts have filled the doctrinal void with divergent theories, at least two of which explicitly abandon the concept of substantive due process protection of land use rights.¹⁹

More than a century ago, in *Lawton v. Steele*,²⁰ the Court articulated the principles invoked in the Supreme Court of Washington's substantive due process jurisprudence. In *Lawton*, the Court held that an exercise of the state's police power that interferes with land use rights must: (1) be

15. Most development fees in Washington are authorized under Wash. Rev. Code § 82.02.020 (1998). Under this statute, a local government may condition property development upon dedications or fees as long as such conditions are "reasonably necessary as a direct result of the proposed development or plat." Wash. Rev. Code § 82.02.020(3); see, e.g., *Trimen Dev. Co. v. King County*, 124 Wash. 2d 261, 273, 877 P.2d 187, 193-94 (1994) (holding that impact fees to pay for park development were reasonably necessary as direct result of plaintiff's development).

16. Other than substantive due process, the primary constitutional doctrine applied to development fees is the takings doctrine. In *Sparks v. Douglas County*, Washington adopted the U.S. Supreme Court's test for determining when a development exaction becomes a taking. 127 Wash. 2d 901, 904 P.2d 738 (1995). Under this test, a condition placed on development must serve to mitigate the harm directly caused by the development and must be quantifiably related to or "roughly proportionate" to that harm. See *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 836-37 (1987) (holding that condition on development meets takings challenge only if there is "essential nexus" between condition placed on development and impact caused by development); *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994) (holding that in addition to having "essential nexus" to anticipated impact, development exaction must be "roughly proportionate" to anticipated impact of development). Although *Nollan* and *Dolan* dealt with exactions of property as opposed to exactions of money, the Supreme Court has indicated that the *Nollan/Dolan* test applies to exactions in the form of impact fees as well. See *Erllich v. City of Culver City*, 512 U.S. 1231 (1994) (remanding challenge to impact fee to be considered under *Dolan* analysis).

17. See *infra* notes 30-46 and accompanying text.

18. See *infra* notes 43-46 and accompanying text.

19. See *infra* notes 47-53 and accompanying text.

20. 152 U.S. 133 (1894).

required by the public interest, (2) use means reasonably necessary for accomplishing the purpose, and (3) not be unduly oppressive upon individual property owners.²¹

The *Lawton* Court described this three-pronged test as the means for subjecting legislative activities to the supervision of the courts.²² Courts exercised this supervision primarily under the “unduly oppressive” inquiry, in which they balanced the public needs and private interests affected by the challenged legislation.²³ Although the *Lawton* Court upheld the challenged legislation,²⁴ in the years following it used the *Lawton* approach to invalidate a number of laws regulating economic activity. *Lochner v. New York*²⁵ marked the height of this era of judicial activism in economic policymaking. In *Lochner*, typical of other economic regulation cases of its time,²⁶ the Court struck down legislation limiting the working hours of bakers to sixty hours per week as a violation of substantive due process.²⁷ The Court found that although the claimed justification for the legislation was public health, the real purpose was “simply to regulate the hours of labor between the master and his employees . . . in a private business.”²⁸ The Court held that such a purpose was beyond the constitutional bounds of the state’s police power.²⁹

By the 1930s, a series of cases pronounced the end of the now-notorious “*Lochner* Era.” The Court rejected the notion that courts should supervise legislative activity and upheld state legislative attempts to deal with the significant problems of the day by regulating economic behavior.³⁰ These cases specifically repudiate the use of substantive due

21. *Id.* at 136–37.

22. *Id.* at 137.

23. *Id.* at 140–41.

24. *Id.* (holding that state legislation providing for confiscation of fishing equipment used in violation of state’s fish and game law was justified by state interest in regulating human impact on wildlife).

25. 198 U.S. 45 (1905).

26. *See, e.g.*, *Adkins v. Children’s Hosp.*, 261 U.S. 525 (1923) (striking down law prescribing minimum wage for women), *overruled by West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); *Coppage v. Kansas*, 236 U.S. 1 (1915) (invalidating statute prohibiting contracts in which employees agreed not to join labor unions as violation of employer’s due process).

27. *Lochner*, 198 U.S. at 59.

28. *Id.* at 64.

29. *Id.* at 58.

30. *See, e.g.*, *Olsen v. Nebraska*, 313 U.S. 236 (1941) (holding that statute fixing maximum compensation employment agency may collect for services does not deny due process of law); *West*

process as a tool for the courts to use in implementing their own social policies.³¹

More contemporary U.S. Supreme Court opinions regarding state and local regulation of economic activity remain highly deferential to legislative determinations in the face of substantive due process challenges and drop any reference to an “unduly oppressive” inquiry. The Court explains that the burden of substantive due process is met by showing that a rational public purpose justifies a regulation; no balancing of public and private interests is necessary.³² Further, these opinions explicitly decline any policy oversight role,³³ explaining that “courts do not substitute their . . . economic beliefs for the judgment of legislative bodies.”³⁴

The Court has not completely ignored *Lawton* since the 1930s, but its brief and infrequent appearances since that time fail to revive its implicit doctrine. In *Goldblatt v. Hempstead*, the Court, reviewing an ordinance restricting the depth to which sand and gravel pit operators could excavate,³⁵ gave a qualified endorsement of *Lawton*’s three-pronged “classic statement of the [police power] rule.”³⁶ Recognizing a presumption of constitutionality in local land use regulation,³⁷ the Court explained that the *Lawton* test must not be applied with strict precision because “debatable questions as to reasonableness are not for the courts but for the Legislature.”³⁸ The Court upheld the challenged legislation,

Coast Hotel, 300 U.S. 379 (upholding minimum wage legislation and overruling *Adkins*); *Nebbia v. City of New York*, 291 U.S. 502, 537 (1934) (upholding New York’s Milk Price Control Act under substantive due process challenge, reasoning that “a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare”).

31. *Olsen*, 313 U.S. at 246 (stating that it is legislature’s role, not court’s, to evaluate “wisdom, need, or appropriateness” of legislation).

32. *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 728–29 (1984) (explaining that “legislative Acts adjusting the burdens and benefits of economic life” are presumed constitutional, and that complaining party must show that legislature acted in arbitrary and irrational way to establish violation of due process) (quoting *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976)).

33. *North Dakota State Bd. of Pharmacy v. Snyder’s Drug Stores, Inc.*, 414 U.S. 156 (1973) (upholding state law denying plaintiff’s application for pharmacy permit, reasoning that “[w]hether the legislature takes for its textbook Adam Smith, Herbert Spencer, Lord Keynes, or some other is of no concern of ours”).

34. *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963).

35. 369 U.S. 590, 591 (1962).

36. *Id.* at 594.

37. *Id.* at 596.

38. *Id.* at 594 (quoting *Sproles v. Binford*, 289 U.S. 374, 388 (1932)).

stating that although the ordinance prohibited a beneficial use to which the property had previously been devoted, the plaintiff pit operators had not overcome the presumption.³⁹ Despite invoking the long-ignored *Lawton* test, *Goldblatt* appears to advance only the most deferential standard of review.

Since *Goldblatt*, the Court has not applied a substantive due process analysis to a land use regulation,⁴⁰ although it has had the opportunity to do so. In *Penn Central Transportation Co. v. City of New York*, the plaintiff challenged the City's historic site designation of Grand Central Station on substantive due process grounds, but the Court ignored the plaintiff's theory and treated the case as a regulatory takings claim.⁴¹ *Penn Central* reaffirmed the highly deferential standard of review advocated in the economic regulation cases discussed above.⁴²

Recent U.S. Supreme Court opinions suggest that as a matter of constitutional construction, the Fifth Amendment's due process clause is no longer an appropriate source of substantive property rights. In *Graham v. O'Connor*⁴³ and again in *Albright v. Oliver*,⁴⁴ the Court announced that "[w]here a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims."⁴⁵ Although these cases involved complaints made against the government under the Fourth Amendment,⁴⁶ the Court's language invites broader application.

39. *Id.* at 596.

40. In *Moore v. City of East Cleveland*, the Court invalidated a zoning ordinance that, because of its definition of "family," prevented two cousins from living with their grandmother. 431 U.S. 494 (1977). Although the ordinance in question was a land use ordinance, the Court's reasoning appealed not to the family members' land use interests, but to their liberty interest in being able to live together as a family. Despite this reasoning, the Supreme Court of Washington cites this opinion as support for its contention that land use rights should be protected under substantive due process. *See Guimont v. Clarke*, 121 Wash. 2d 586, 609 n.10, 854 P.2d 1, 14 n.10 (1993).

41. 438 U.S. 104, 122 (1978). The New York Court of Appeals had upheld the city's historic landmark preservation ordinance against the plaintiff's substantive due process challenges. *See Penn Cent. Transp. Co. v. City of New York*, 366 N.E.2d 1271 (N.Y. 1977).

42. *See supra* notes 32–34 and accompanying text.

43. 490 U.S. 386 (1989).

44. 510 U.S. 266 (1994).

45. *Id.* at 273 (quoting *Graham*, 490 U.S. at 395).

46. In *Graham*, the Court reviewed a substantive due process claim brought against a law enforcement official for use of excessive force. 490 U.S. at 386. The Court held that the Fourth

At least one federal circuit court interpreted these cases to mean that the Takings Clause of the Fifth Amendment⁴⁷ ought to be the sole source of protection for land-use rights. In *Armandariz v. Penman*, the Ninth Circuit, noting both the lack of interest the Court has taken in substantive due process claims and the *Graham-Albright* reasoning, held that there is no substantive due process protection for land use interests.⁴⁸ The court reasoned that, like the Fourth Amendment in *Albright* and *Graham*, the Takings Clause provides explicit textual protection for property rights and therefore ought to be the exclusive source of property rights protection.⁴⁹

In addition, the Seventh Circuit has struck its blow against substantive due process. In *Gosnell v. City of Troy*, the court described substantive due process as an “oxymoron” that has the “distinct disadvantage, from the plaintiffs’ perspective, of having been abolished in the late 1930’s when the Supreme Court threw over *Lochner v. New York*.”⁵⁰ The

Amendment provided the cause of action because it supplies the explicit textual source of constitutional protections against unreasonable seizures of the person. *Id.* at 395. The *Albright* Court affirmed this reasoning in an action against the state government for initiating a criminal prosecution without probable cause. 510 U.S. at 268. The Court explained that “[t]he Framers considered the matter of pretrial deprivations of liberty and drafted the Fourth Amendment to address it.” *Id.* at 274.

47. U.S. Const. amend. V (“No person shall . . . be deprived of life, liberty, or property, without due process of law . . .”).

48. 75 F.3d 1311, 1320 (9th Cir. 1996).

49. *Id.* The Ninth Circuit has recently applied the reasoning of *Armandariz* in two other land use cases: *Garneau v. City of Seattle*, 147 F.3d 802 (9th Cir. 1998), and *Macri v. King County*, 126 F.3d 1125 (9th Cir. 1997). *Macri* announced again that a substantive due process claim would not be heard in a land use complaint, explaining that the Due Process Clause must be expanded only with the greatest care and its protection should be reserved for those liberties “deeply rooted in this Nation’s history and tradition.” *Id.* at 1128 (quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977)). *Garneau* is of particular interest because the court had the opportunity to apply either state or federal substantive due process law to a Seattle ordinance that the Supreme Court of Washington had declared violative of substantive due process. See *infra* notes 102–10 and accompanying text. The court completely ignored any substantive due process claims and held only that the plaintiffs had not shown sufficient economic injury to constitute a taking. The district court below had briefly addressed the plaintiff’s claim under substantive due process. See *Garneau v. City of Seattle*, 897 F. Supp. 1318 (W.D. Wash. 1995), *aff’d*, 147 F.3d 802 (9th Cir. 1998). It explained that under the then established “arbitrary and irrational” standard, the ordinance is constitutional. *Id.* at 1324.

In addition to reviewing the Seattle Tenant Relocation Assistance Ordinance, Seattle, Wash., Mun. Code § 22.210 (1990), the *Garneau* court also reviewed the constitutionality of a state law enabling local jurisdictions to require property owners to pay a portion of reasonable relocation assistance to low-income tenants upon demolition, substantial rehabilitation, or change of use of low income residential rental property. *Garneau*, 897 F. Supp. at 1321 (quoting Wash. Rev. Code § 59.18.440(1)).

50. 59 F.3d 654, 657 (7th Cir. 1995).

Gosnell court was willing to recognize the doctrine only as one that insulates fundamental rights from any governmental intrusion.⁵¹ The court held that in the case of land use actions, “[a] municipality may bring residential development to a halt for strong reasons or weak reasons,”⁵² and any challenges to such action may only be brought under the Takings Clause or the Equal Protection Clause.⁵³

Federal courts that do recognize substantive due process claims in land use actions remain highly deferential to government policy determinations.⁵⁴ Some federal circuit courts will invalidate zoning actions only if the alleged purpose behind the legislation has no conceivable rational relationship to a legitimate exercise of the state’s power to protect the health, safety, and welfare of its citizens.⁵⁵ Some circuits will not look to the actual motive behind the action if there is any conceivable legitimate motive.⁵⁶ Others will find a violation of substantive due process where invidious political or discriminatory motives prompted a zoning action,⁵⁷ such as where permitting decisions were influenced by personal animosity⁵⁸ or improper financial interest of a zoning board member.⁵⁹ Courts occasionally distinguish between quasi-judicial land use actions, which require a rational relationship to a legitimate state interest,⁶⁰ and legislative actions, which only need some rational reason upon which the decision could have been based.⁶¹ In any case, the most any federal court will require of a legislative land use action is that it be rationally related to a legitimate government interest.

51. *Id.*

52. *Id.*

53. *Id.* at 658.

54. For a general discussion of the various circuit court positions on substantive due process, see *Pearson v. City of Grand Blanc*, 961 F.2d 1211 (6th Cir. 1992); Ronald J. Krotoszynski, *Fundamental Property Rights*, 85 Geo. L.J. 555 (1997).

55. *Norton v. Village of Corrales*, 103 F.3d 928, 933 (10th Cir. 1996) (citing *Sylvia Dev. Corp. v. Calvert County*, 48 F.3d 810, 828 (4th Cir. 1995)).

56. *Smithfield Concerned Citizens for Fair Zoning v. Town of Smithfield*, 907 F.2d 239, 244–45 (1st Cir. 1990).

57. *See, e.g., Midnight Sessions, Ltd. v. City of Philadelphia*, 945 F.2d 667, 683 (3d Cir. 1991).

58. *Brady v. Town of Colchester*, 863 F.2d 205, 216 (2d Cir. 1988); *Bello v. Walker*, 840 F.2d 1124, 1129–30 (3d Cir. 1988).

59. *DeBlasio v. Zoning Bd. of Adjustment*, 53 F.3d 592, 602 (3d Cir. 1995).

60. *Shelton v. City of College Station*, 780 F.2d 475, 486–87 (5th Cir. 1986) (Rubin, Tate, Politz, Johnson & Williams, JJ., dissenting).

61. *RRI Realty, Inc. v. Village of Southampton*, 870 F.2d 911, 914 n.1 (2d Cir. 1989).

While this test reflects the first two parts of the *Lawton* test,⁶² it completely ignores the “unduly oppressive” inquiry that allows courts to balance public against private interests.

C. *Washington Law and the Three-Pronged Lawton Test*

Until 1986, the Supreme Court of Washington had closely aligned itself with the U.S. Supreme Court, rejecting a policy oversight role for the courts in economic regulation. In *Aetna Life Insurance Co. v. Washington Life & Disability Insurance Guaranty Ass’n*, the court quoted the U.S. Supreme Court:

The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought. . . . For protection against abuses by legislatures the people must resort to the polls, not the courts.⁶³

More particularly, the state supreme court explicitly rejected *Lawton*’s “unduly oppressive” prong. In *Salstrom’s Vehicles v. Department of Motor Vehicles*, the court stated that the unduly oppressive nature of a statute does not provide grounds to overturn it under the due process clause,⁶⁴ and that a statute should be upheld if it tends to promote the public welfare and is reasonably related to a public purpose.⁶⁵ Subsequent cases relying on *Lawton v. Steele* and the “unduly oppressive” test make no reference to *Salstrom’s* or *Aetna Life*.

A 1983 article by Professor William B. Stoebuck held out hope for the re-emergence of *Lawton*-based substantive due process in federal courts.⁶⁶ In 1986, the Supreme Court of Washington introduced the *Lawton* test into Washington case law.⁶⁷ Since 1990, Stoebuck’s article

62. The first two parts of the *Lawton* test require that legislation must be essential to the public interest and use means reasonably necessary for accomplishing the purpose. See *supra* note 21 and accompanying text.

63. 83 Wash. 2d 523, 534, 520 P.2d 162, 169 (1974) (upholding state levy assessed on insurance companies to assure performance of contractual insurance obligations of insurers becoming insolvent to Washington residents) (quoting *Williamson v. Lee Optical*, 348 U.S. 483, 488 (1955)) (internal quotations and citations omitted).

64. 87 Wash. 2d 686, 693, 555 P.2d 1361, 1366 (1976).

65. *Id.* at 691, 555 P.2d at 1365.

66. William B. Stoebuck, *San Diego Gas: Problems, Pitfalls, and a Better Way*, 25 Wash. U. J. Urb. & Contemp. L. 23 (1983).

67. *West Main Assocs. v. City of Bellevue*, 106 Wash. 2d 47, 52, 720 P.2d 782, 786 (1986).

and the *Lawton* test have been applied in a number of land use contexts.⁶⁸ Thus, although the *Lawton* test the Supreme Court of Washington adopted no longer reflects federal constitutional law,⁶⁹ the court has earnestly applied the *Lawton* standard to invalidate significant land use regulation.

The *Lawton* test has allowed the Supreme Court of Washington a particularly significant policymaking role in the use of development impact fees. As directed by *Lawton*, this role is largely played out in the “unduly oppressive” prong through a balancing test.⁷⁰ Although courts defer to legislative bodies when assessing the first two prongs of the test—that is, whether a land use regulation is in the public interest and uses reasonable means to achieve its goals⁷¹—“[t]he ‘unduly oppressive’ inquiry lodges wide discretion in the court and implies a balancing of the public’s interest against those of the regulated landowner.”⁷²

This balancing exercise is guided by a set of non-exclusive factors. On the government’s side these factors include “the seriousness of the public problem, the extent to which the owner’s land contributes to it, the degree to which the proposed regulation solves it and the feasibility of less oppressive solutions.”⁷³ On the landowner’s side the factors include the amount and percentage of value loss, the extent of remaining uses, the temporary or permanent nature of the regulation, the extent to which the owner should have anticipated such regulation, and how feasible it is for the owner to alter present or currently planned uses.⁷⁴ The court has

68. In addition to the applications of *Lawton* that are the subject of this Comment, *Lawton* has been applied in other cases. See *Christianson v. Snohomish Health Dist.*, 133 Wash. 2d 647, 667, 946 P.2d 768, 777 (1997) (holding that health district’s denial of construction clearance permit on grounds that septic system was substandard is not violation of substantive due process); *Rivett v. City of Tacoma*, 123 Wash. 2d 573, 583, 870 P.2d 299, 304 (1994) (holding that city ordinance imposing liability on private property owners for conditions of public sidewalks is violation of substantive due process); *Presbytery of Seattle v. King County*, 114 Wash. 2d 320, 330–40, 787 P.2d 907, 913–18 (1990) (holding that *Lawton* is test for substantive due process, but not applying *Lawton* in challenge to wetlands ordinance prohibiting development because plaintiff had not exhausted administrative remedies).

69. See *supra* Part I.B, discussing federal substantive due process law.

70. See *supra* note 23 and accompanying text.

71. *Robinson v. City of Seattle*, 119 Wash. 2d 34, 51, 830 P.2d 318, 329 (1992).

72. *Presbytery*, 114 Wash. 2d at 331, 787 P.2d at 913.

73. *Id.* (citing *Stoebuck*, *supra* note 66, at 33).

74. *Id.*

essentially reduced this balancing to the single issue of whether the regulation places an unfair economic burden on the landowner.⁷⁵

The *Lawton* test has had its biggest impact in the context of development fees associated with the demolition or redevelopment of low-income housing. Invoking *Lawton*, the Supreme Court of Washington has declared categorically that an exaction that forces a developer to pay some of the social costs associated with the demolition of low-income housing is a violation of substantive due process.⁷⁶ The court has reasoned that assessment places a burden on individual landowners that should be borne by the public.⁷⁷

In *Robinson v. City of Seattle*⁷⁸ and *Sintra, Inc. v. City of Seattle*,⁷⁹ the court considered the constitutionality of the Seattle Housing Preservation Ordinance (HPO).⁸⁰ The HPO required low-rent residential apartment building owners applying for demolition permits to pay \$1,000 in relocation fees to assist low-income tenants who would be displaced when the building was demolished.⁸¹ The ordinance had been invalidated three years earlier as a violation of a state law prohibiting fees on development.⁸² In both *Sintra* and *Robinson*, land owners who had been subject to the ordinance prior to its invalidation brought substantive due process claims, primarily seeking damages and attorney's fees under federal civil rights law.⁸³ Although neither case provided the court with facts sufficient to find a violation of substantive due process for the

75. *Christianson v. Snohomish Health Dist.*, 133 Wash. 2d 647, 664, 946 P.2d 768, 776 (1997) ("Thus, the purpose of this prong is to prevent excessive police power regulations that require the landowner 'to shoulder an economic burden, which in justice and fairness, the public should rightfully bear.'") (quoting *Orion Corp. v. State*, 109 Wash. 2d 621, 649, 747 P.2d 1062, 1077 (1987)). The *Christianson* court also cited *Guimont v. Clarke*, 121 Wash. 2d 586, 610-11, 854 P.2d 1, 15 (1993); *Robinson*, 119 Wash. 2d at 55, 830 P.2d at 331; and *Sintra, Inc. v. City of Seattle*, 119 Wash. 2d 1, 22, 829 P.2d 765, 777 (1992)).

76. See *Guimont*, 121 Wash. 2d at 611, 854 P.2d at 15; *Robinson*, 119 Wash. 2d at 55, 830 P.2d at 331; *Sintra*, 119 Wash. 2d at 22, 829 P.2d at 777.

77. See *Guimont*, 121 Wash. 2d at 611, 854 P.2d at 15; *Robinson*, 119 Wash. 2d at 55, 830 P.2d at 331; *Sintra*, 119 Wash. 2d at 22, 829 P.2d at 777.

78. 119 Wash. 2d 34, 830 P.2d 318.

79. 119 Wash. 2d 1, 829 P.2d 765.

80. Seattle, Wash., Mun. Code § 22.210.010 (1996).

81. *Robinson*, 119 Wash. 2d at 42, 830 P.2d at 324.

82. *R/L Assocs. v. City of Seattle*, 113 Wash. 2d 402, 409, 780 P.2d 838, 842 (1989) (invalidating Housing Preservation Ordinance as violation of Wash. Rev. Code § 82.02.020, which prohibits fees on development).

83. 42 U.S.C. § 1983 (1994).

purposes of a federal civil rights violation,⁸⁴ the court concluded that the ordinance on its face violated the *Lawton* standard.⁸⁵ It easily found that the HPO, directed at an important public interest and using reasonable means to meet this public interest,⁸⁶ satisfied the first two prongs of the test; but, the court denounced the ordinance as “unduly oppressive.”⁸⁷ In both opinions the court found that the social problems of homelessness and a lack of affordable housing could not be attributed to an individual land owner but resulted from complex social and economic conditions.⁸⁸ Thus, each opinion reasoned, it is unjust to shift the costs of such problems to the individual landowners.⁸⁹ This burden-shifting was held to be “unduly oppressive,” and therefore a violation of substantive due process.⁹⁰

The court affirmed the substantive due process reasoning in *Sintra* and *Robinson* one year later in *Guimont v. Clarke*.⁹¹ In *Guimont*, the court struck down a state statute requiring mobile home park owners to pay relocation fees when park land was redeveloped and low-income mobile

84. *Robinson*, 119 Wash. 2d at 61, 830 P.2d at 334 (holding that land use decision that denies substantive due process states cause of action under § 1983 only if it is invidious or irrational); *Sintra*, 119 Wash. 2d at 23, 829 P.2d at 777–78 (finding that test for determining whether regulation violates substantive due process for § 1983 purposes is whether ordinance is “invidious or irrational,” “prompted by animus,” or “deliberate flouting of the law that trammels significant personal property rights”).

85. It is not completely clear why the Supreme Court of Washington entered into a constitutional analysis of the Seattle ordinance in *Robinson* and *Sintra*. The ordinance to which the plaintiffs in those cases were subject had been invalidated earlier in *R/L Associates* as a violation of a state law prohibiting fees on development. See *supra* note 82. Because the plaintiffs challenged the city’s action prior to that invalidation, not the ordinance itself, the constitutional holdings on the ordinance appear to be dicta. It is possible that the court was sending a disapproving message to the legislature, which had since authorized tenant relocation assistance fees by statute, rendering the *R/L Associates* decision mute. See Wash. Rev. Code § 59.18.440(1) (1998).

86. *Robinson*, 119 Wash. 2d at 54, 830 P.2d at 330 (holding that HPO satisfied first two prongs of due process test because it was directed toward legitimate public purpose and used reasonable means to achieve that purpose); see also *Sintra*, 119 Wash. 2d at 21, 829 P.2d at 776 (same).

87. *Robinson*, 119 Wash. 2d at 55, 830 P.2d at 330; *Sintra*, 119 Wash. 2d at 22, 829 P.2d at 776.

88. *Robinson*, 119 Wash. 2d at 55, 830 P.2d at 331 (noting that problems of homelessness and lack of affordable housing are function of how all landowners are using their property); *Sintra*, 119 Wash. 2d at 22, 829 P.2d at 777 (citing *San Telmo Assocs. v. City of Seattle*, 108 Wash. 2d 20, 24, 735 P.2d 673, 675 (1987) (finding that ordinance shifts public responsibility of providing such housing to limited segment of population)).

89. *Robinson*, 119 Wash. 2d at 55, 830 P.2d at 331; *Sintra*, 119 Wash. 2d at 22, 829 P.2d at 777.

90. *Robinson*, 119 Wash. 2d at 55, 830 P.2d at 331; *Sintra*, 119 Wash. 2d at 22, 829 P.2d at 777.

91. 121 Wash. 2d 586, 854 P.2d 1 (1993). *Guimont* is particularly significant because it relies on reasoning in *Sintra* and *Robinson* that is arguably dicta. See *supra* note 85.

home owners were forced to move.⁹² Again, the court denied that the individual landowner's action made any unique contribution to the problem the statute was designed to address: namely, a lack of affordable housing options.⁹³ The court reasoned that the government's action resulted in unconstitutional burden-shifting from the general public to private landowners.⁹⁴

II. THE PROBLEM: SUBSTANTIVE DUE PROCESS PROTECTION UNDER THE WASHINGTON CONSTITUTION AND JUDICIAL POLICYMAKING

Washington's continued dependence on the *Lawton* test to evaluate land use regulation is questionable for several reasons. First, as discussed, federal courts have all but eliminated substantive due process as a protection for property rights.⁹⁵ Second, Washington's own constitutional doctrines make it difficult to root a highly protective substantive due process doctrine in the state constitution. Third, the Supreme Court of Washington has demonstrated that the unduly oppressive inquiry of the *Lawton* test permits inappropriate judicial intervention into legislative policy decisions. Given these problems, Washington should abandon its reliance on *Lawton* and reconsider the role of substantive due process in protecting property rights.

Our federalist structure permits state courts to develop independent doctrines based on their own constitutions,⁹⁶ but Washington has not done this for substantive due process. Although the Washington Constitution contains a due process clause virtually identical to that of the Federal Constitution,⁹⁷ the Supreme Court of Washington has

92. *Guimont*, 121 Wash. 2d at 614, 854 P.2d at 16-17 (striking down Mobile Home Relocation Assistance Act, Wash. Rev. Code § 59.21 (1989)).

93. *Id.* at 611, 854 P.2d at 15 (finding that individual park owner who desires to close park is not significantly more responsible for problems of homelessness and lack of affordable housing than rest of population).

94. *Id.* at 610, 854 P.2d at 15 (finding that by placing such high cost on park owners, statute placed "burden of solving housing problems on the shoulders of a few").

95. *See supra* Part I.B.

96. *See PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 82 (1980) (holding that free-speech clause of California Constitution could be applied by California courts to grant broader free-speech protections than parallel clause in U.S. Constitution).

97. *See* Wash. Const. art. 1, § 3 ("No person shall be deprived of life, liberty, or property, without due process of law."); U.S. Const. amend. V ("No person shall . . . be deprived of life, liberty, or

explicitly rooted its substantive due process analysis in the Fourteenth Amendment of the U.S. Constitution.⁹⁸ The Washington Constitution is scarcely mentioned in the Supreme Court of Washington's substantive due process discussions.⁹⁹ Because the *Lawton* test has disappeared from federal law and the supreme court has not integrated the *Lawton* test into the state constitution, the state's doctrine appears to be adrift, unanchored in either document.

Members of the Washington judiciary have recently highlighted this point. Justice Talmadge has described Washington's due process jurisprudence as "hopelessly out of date"¹⁰⁰ and has otherwise criticized the supreme court's analysis of substantive due process claims in land use cases.¹⁰¹ While Justice Talmadge does not discuss whether Washington's substantive due process is a matter of state or federal constitutional law, his opinions, like those of the majority, assume that federal law is the appropriate source.

Federal district court Judge Rothstein addressed the issue more explicitly in *Garneau v. City of Seattle*.¹⁰² In *Garneau*, the court reviewed an amended version of the Seattle Tenant Relocation Assistance Ordinance (TRAO)¹⁰³ and the state law authorizing the city to charge

property, without due process of law . . ."); U.S. Const. amend. XIV ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law.").

98. The Supreme Court of Washington begins almost all discussions of the *Lawton* substantive due process test with a citation to the Fourteenth Amendment. See *Guimont*, 121 Wash. 2d at 608, 854 P.2d at 14 (quoting due process language of Fourteenth Amendment of U.S. Constitution but not referring to Washington Constitution); *Sintra, Inc. v. City of Seattle*, 119 Wash. 2d 1, 12, 829 P.2d 765, 771 (1992) (placing its discussion of *Lawton* test under heading "Federal Rights"); see also *Orion Corp. v. State*, 109 Wash. 2d 621, 649, 747 P.2d 1062, 1077 (1987) (equating substantive due process protection provided by Washington Constitution and U.S. Constitution).

99. The singular exception is *Rivett v. City of Tacoma*, where the court held that an ordinance imposing liability on owners of abutting properties for conditions of public sidewalks was "unduly oppressive," exceeded the city's police powers, and thus violated the Due Process Clause of the Washington Constitution. 123 Wash. 2d 573, 581-82, 870 P.2d 299, 303 (1994). The mention of the Washington Constitution in this case appears to be more accident than doctrine, however. The Washington cases *Rivett* cited as authority for the substantive due process test name the Federal, not the state, Constitution as the source of the test. *Id.* (citing *Presbytery of Seattle v. King County*, 114 Wash. 2d 320, 787 P.2d 907 (1990); *Orion Corp.*, 109 Wash. 2d 621, 747 P.2d 1062).

100. *Sintra, Inc. v. City of Seattle*, 131 Wash. 2d 640, 683, 935 P.2d 555, 577 (1997) [*Sintra II*].

101. *Christianson v. Snohomish Health Dist.*, 133 Wash. 2d 647, 667, 946 P.2d 768, 777 (1997) (citing *Armandariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996)); *Hayes v. City of Seattle*, 131 Wash. 2d 707, 724, 934 P.2d 1179, 1188 (1997); *Sintra II*, 131 Wash. 2d at 677, 935 P.2d at 574.

102. 897 F. Supp. 1318 (W.D. Wash. 1995), *aff'd*, 147 F.3d 802 (9th Cir. 1998).

103. Seattle, Wash., Mun. Code § 22.210.010 (1990). The version of the HPO declared unconstitutional in *Sintra* and *Robinson* required developers seeking permits to demolish low income

relocation fees to property owners.¹⁰⁴ In a footnote, the court explained that because no argument had been made for an independent analysis of the state constitution's due process provisions, the court was left to apply federal law.¹⁰⁵ The court held that the ordinance was constitutional because it was not "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare."¹⁰⁶ The ordinance reviewed in *Garneau* was somewhat different than the ordinances reviewed in *Sintra* and *Robinson*¹⁰⁷ or the statute reviewed in *Guimont*.¹⁰⁸ Nevertheless, the opinion implicitly rejected the idea that development impact fees, such as the tenant relocation assistance fee, are categorically unconstitutional. Moreover, by applying the more deferential federal substantive due process test to an arguably state constitutional question,¹⁰⁹ it implicitly rejected the "unduly oppressive" balancing test applied by the Supreme Court of Washington. The Ninth Circuit recently upheld Judge Rothstein's opinion, deciding the case under takings analysis and giving no mention to the substantive due process doctrine.¹¹⁰

A. *The Gunwall Analysis*

As a constitutional doctrine, the *Lawton* substantive due process test must find its roots in either the state or federal constitutions. Although

housing to give 120 days notice to tenants and replace a percentage of the low cost units that would be lost. Seattle, Wash., Mun. Code § 22.210 (1983). Alternatively, the builder could contribute to a public fund for replacing such units and assist in relocating all low income tenants either by actually relocating them to comparable housing or paying up to \$2,000 in cash or excused rent to each tenant to cover relocation costs. Seattle, Wash., Mun. Code § 22.210 (1983). The revised version, known as the Tenant Relocation Assistance Ordinance (TRAO), did not require the developer to replace a percentage of the lost units or contribute to a replacement housing fund. Seattle, Wash., Mun. Code § 22.210 (1990). Also, the TRAO requires developers to pay only half the standardized relocation costs of each tenant; the City is required to pay the other half. Seattle, Wash., Mun. Code § 22.210 (1990).

104. Wash. Rev. Code § 59.18.440 (1998).

105. See *Garneau*, 897 F. Supp. at 1322 n.5.

106. *Id.* at 1323. (quoting *Kawaoka v. City of Arroyo Grande*, 17 F.3d 1227, 1234 (9th Cir. 1994), *overruled by Armandariz*, 75 F.3d 1311).

107. See *supra* note 103.

108. See *supra* note 92 and accompanying text.

109. *Garneau*, 897 F. Supp. at 1322 n.5 (refusing to perform independent analysis of Washington Constitution because parties had not briefed issue of whether it provides greater protection than U.S. Constitution with respect to substantive due process and land use regulation); see *infra* Part II.A.

110. *Garneau v. City of Seattle*, 147 F.3d 802 (9th Cir. 1998).

the federal courts have largely rejected *Lawton* as the federal constitutional standard, the Supreme Court of Washington is free to place the *Lawton* test under the state constitution, under which broader constitutional protections may be offered. Under Washington law, determining whether a state constitutional provision provides broader protection than a parallel federal provision requires applying a “*Gunwall* analysis.” The Supreme Court of Washington has never addressed the issue of whether the state constitution should provide greater substantive due process protection of land use rights than the Federal Constitution; a *Gunwall* analysis demonstrates that it does not.

In *State v. Gunwall*, the Supreme Court of Washington established a six-factor test to determine whether a provision of the state constitution grants broader protection than a similar provision in the Federal Constitution.¹¹¹ This test asks whether (1) the textual language of the state constitution is paralleled in the Federal Constitution, (2) there are significant differences in the texts between parallel provisions, (3) state constitutional and common law history indicate an intention to grant broader protection under the state constitution, (4) preexisting state law grants greater protection than the Federal Constitution has granted, (5) the inherent structural differences in the Washington and Federal Constitution counsel finding a difference between the two constitutions, and (6) the matter is of a particular state or local concern or a matter in which there is a need for national uniformity.¹¹² The court has consistently required this analysis before adopting an independent state constitutional standard.¹¹³

111. 106 Wash. 2d 54, 61–62, 720 P.2d 808, 812 (1986). At least one commentator has criticized the *Gunwall* test, arguing that states should be free to apply independent analyses of their own constitutional provisions regardless of the *Gunwall* factors. See Linda White Atkins, *Federalism, Uniformity, and the State Constitutions—State v. Gunwall*, 62 Wash. L. Rev. 569 (1987).

112. *Gunwall*, 106 Wash. 2d at 61–62, 720 P.2d at 812–13.

113. See, e.g., *State v. Thomas*, 128 Wash. 2d 553, 562, 910 P.2d 475, 480 (1996) (rejecting defendant’s assertion that Washington Constitution is more protective of defendant’s right to testify than Federal Constitution, reasoning that although defendant “laid out the six *Gunwall* factors,” he failed to provide sufficient support for his assertion); *State v. Fortune*, 128 Wash. 2d 464, 475, 909 P.2d 930, 935 (1996) (affirming defendant’s first-degree murder conviction and rejecting defendant’s claim that Due Process Clause of state constitution requires more than Federal Constitution, noting that “[d]efendant did not make the slightest attempt to address the *Gunwall* criteria”); *State v. Myles*, 127 Wash. 2d 807, 811–12, 903 P.2d 979, 982 (1995) (holding that defendant’s due process claim was to be decided solely under federal constitutional law because defendant failed to brief *Gunwall* factors); *State v. Mierz*, 127 Wash. 2d 460, 473 n.10, 901 P.2d 286, 292 n.10 (1995) (refusing to reach state constitutional issue and reviewing only federal constitutional protections because plaintiff failed to engage in *Gunwall* analysis); *Forbes v. City of*

The nature of the *Gunwall* analysis requires that the inquiry focus on the specific context in which the state constitutional challenge is raised.¹¹⁴ The Supreme Court of Washington has applied a *Gunwall* analysis to the doctrine of substantive due process in at least two criminal cases, *State v. Ortiz*¹¹⁵ and *State v. Manussier*.¹¹⁶ Because the *Gunwall* analysis is specific to context, these cases are not determinative of whether the state constitution should be interpreted differently in the development fee context, but they are helpful in guiding the textual and constitutional history inquiries of the analysis. Given the court's application of this test to the Due Process Clause in other contexts, it is difficult to argue for an independent state substantive due process doctrine for land use interests.

Ortiz and *Manussier* both held that the guarantees of substantive due process in the state constitution were no broader than those in the Federal Constitution. First, *Manussier* noted that the parallel provisions in the Washington and Federal Constitution are nearly identical;¹¹⁷ thus, the first two *Gunwall* factors will always weigh against any independent state analysis. Second, both found no evidence in Washington's constitutional history of treating the two provisions differently.¹¹⁸ Thus, neither the text nor the history indicates that the framers intended the state Due Process Clause to grant broader protection than the federal provision.

Applying the third and fourth *Gunwall* factors, the court must consider whether the protections granted under state statutory and common law show an intent to create a broader protection under the Washington Constitution. The current state of land use policy in Washington indicates that this is not the case. In the last fifteen years, responding to public demands for growth management, environmental protection, and

Seattle, 113 Wash. 2d 929, 940, 785 P.2d 431, 436 (1990) (requiring parties to brief *Gunwall* factors before court can adopt independent state standard).

114. *Ino Ino, Inc. v. City of Bellevue*, 132 Wash. 2d 103, 115, 937 P.2d 154, 162 (1997) (holding that *Gunwall* inquiry is context specific; thus, where provision has been found to be more protective in one context it may not provide greater protection in all contexts) (citing *State v. Russell*, 125 Wash. 2d 24, 58, 882 P.2d 747, 770 (1994)); *see also Ramm v. City of Seattle*, 66 Wash. App. 15, 24–27, 830 P.2d 395, 400–02 (1992) (holding that article 1, section 7 of Washington Constitution offers more protection in search and seizure matters but not other privacy matters).

115. 119 Wash. 2d 294, 831 P.2d 1060 (1992).

116. 129 Wash. 2d 652, 921 P.2d 473 (1996).

117. *Id.* at 679, 921 P.2d at 486.

118. *Ortiz*, 119 Wash. 2d at 303, 831 P.2d at 1065 (citing *Journal of the Washington State Constitutional Convention, 1889* § 3, at 495–96 (B. Rosenow ed., 1962)).

housing affordability,¹¹⁹ the Washington Legislature has gradually increased the power of government regulators to impose development fees. Although the earliest development impact fees were invalidated as unauthorized taxes,¹²⁰ the legislature has since authorized impact fees to pay for public roads, parks, open space, recreation facilities, schools, and fire protection facilities.¹²¹ Additionally, shortly after the Supreme Court of Washington's ruling in *R/L Associates v. City of Seattle*, in which relocation assistance fees were held to be an impermissible tax on development,¹²² the legislature explicitly authorized tenant relocation assistance fees.¹²³ These statutes apply somewhat vague standards,¹²⁴ but reflect standards applied in federal development exaction takings cases.¹²⁵ There is no evidence that the legislature has attempted to set a more protective standard for development fees than that established in federal law.

Whether the courts have intended to provide broader substantive due process protection in common law is a more difficult question. As described above, twenty years ago the Supreme Court of Washington rejected outright the unduly oppressive test and strict judicial oversight of economic policies.¹²⁶ One might argue that the court's recent use of the *Lawton* test, despite its abandonment by the federal courts, shows an intent to grant broader protection to land use interests than is granted in the U.S. Constitution. But the Supreme Court of Washington has already rejected this reasoning. In *Ortiz*, the defendant argued that the Due Process Clause in the state constitution afforded a defendant greater protection than the Federal Constitution when the State, in good faith, fails to preserve exculpatory evidence.¹²⁷ The Washington test on which

119. See Growth Management Act, Wash. Rev. Code § 36.70A.010 (1998).

120. See *San Telmo Assocs. v. City of Seattle*, 108 Wash. 2d 20, 735 P.2d 673 (1987); *Hillis Homes v. Snohomish County*, 97 Wash. 2d 804, 650 P.2d 193 (1982).

121. Wash. Rev. Code §§ 82.02.050–.090 (1998).

122. *R/L Assocs. v. City of Seattle*, 113 Wash. 2d 402, 409, 780 P.2d 838, 842 (1989).

123. Wash. Rev. Code § 59.18.440 (1998).

124. See, e.g., Wash. Rev. Code § 82.02.020(3) (1998) (permitting development conditions “reasonably necessary as a direct result of the proposed development”).

125. Development fees have not been reviewed under the federal substantive Due Process Clause in federal courts, but the “reasonably necessary” standard of the state statute is embodied in the “essential nexus” standard the U.S. Supreme Court endorsed in *Nollan v. California Coastal Commission*, which held that a condition placed on development must advance the ends that would justify a prohibition of the development. 483 U.S. 825, 837 (1987).

126. See *supra* notes 63–65 and accompanying text.

127. *State v. Ortiz*, 119 Wash. 2d 294, 302, 831 P.2d 1060, 1065 (1992).

he relied had been adopted from federal decisions that were subsequently overruled.¹²⁸ The court held that because the Washington decisions were not based on independent state law reasoning, they could not support an argument that the state constitutional protection was broader than the federal.¹²⁹ Similarly, the *Lawton* test was adopted from federal opinions that, while not explicitly overruled, no longer reflect federal law.¹³⁰ The fact that Washington has relied on outdated federal law therefore does not support an independent state due process doctrine.

Two *Gunwall* factors weigh in favor of an independent state analysis, but these two factors do not tip the scale. First, the Supreme Court of Washington has concluded that the structural distinctions between the Washington and Federal Constitution always weigh in favor of an independent state analysis.¹³¹ Second, courts have consistently recognized land use issues as inherently local.¹³² These factors have not been decisive in the *Gunwall* case law, however, and have been explicitly marginalized in several opinions.¹³³ Because the factors typically determinative in *Gunwall* analyses weigh against an independent state analysis, and the only factors in favor of an independent analysis tend to be dismissed by the court, there is little support for a separate, more protective, state substantive due process doctrine.

128. *Id.* at 303–04, 831 P.2d at 1065–66.

129. *Id.*

130. *See supra* Part I.B.

131. *See, e.g.,* Seeley v. State, 132 Wash. 2d 776, 789–90, 940 P.2d 604, 611 (1997) (explaining that federal constitution is grant of limited power to federal government, and state constitution imposes limits on states' otherwise plenary power); State v. Manussier, 129 Wash. 2d 652, 680, 921 P.2d 473, 486 (1996) (same); First Covenant Church v. City of Seattle, 120 Wash. 2d 203, 225, 840 P.2d 174, 186 (1992) (same).

132. *See, e.g.,* Chez Sez III Corp. v. Township of Union, 945 F.2d 628, 633 (3d Cir. 1991); C-Y Dev. Co. v. City of Redlands, 703 F.2d 375, 378 (9th Cir. 1983).

133. *See* Gossett v. Farmers Ins. Co., 133 Wash. 2d 954, 978, 948 P.2d 1264, 1276 (1997) (holding that question of whether to award attorney fees in insurance litigation is matter of local concern yet deciding against independent state analysis); Ino Ino, Inc. v. City of Bellevue, 132 Wash. 2d 103, 121–22, 937 P.2d 154, 165–66 (1997) (holding that structural distinctions and local nature of issue, only two factors weighing in favor of granting independent state analysis, are not sufficient to find broader protection under state constitution); State v. Reece, 110 Wash. 2d 766, 780, 757 P.2d 947, 955 (1988) (holding that obscenity not granted broader protection under state free-speech clause even though issue is largely local concern, and that structural distinctions between two constitutions reinforces responsibility of Supreme Court of Washington to engage in independent state analysis when necessary, but does not by itself justify such analysis).

B. Substantive Due Process and Social Policy Decisions

A clever jurist could certainly massage a different result from a *Gunwall* analysis of the Due Process Clause. Such is the nature of any multifactored test. The sanctity of separation of powers provides a more fundamental reason to reject the current Washington substantive due process doctrine. Justice Holmes's dissent in *Lochner* articulated a sentiment that has since carried the day in state and federal courts:¹³⁴

[A] constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of *laissez faire*. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.¹³⁵

By facially rejecting the tenant relocation assistance provisions in *Robinson*, *Sintra*, and *Guimont*, the court engaged in precisely the kind of policy judgment of which Justice Holmes warned. For this reason, any doubt remaining after the preceding analysis should be resolved in favor of a revised approach to substantive due process and development fees.

The court's invalidations of development impact fees in *Robinson*, *Sintra*, and *Guimont* focus on the lack of causal connection between the problem of homelessness and the developers' actions.¹³⁶ Upon closer examination, this reasoning falls flat. For example, in *Robinson* the court distinguished unconstitutional tenant relocation assistance fees from permissible environmental mitigation fees authorized under the State Environmental Policy Act (SEPA).¹³⁷ The court reasoned that in the case

134. State and federal courts have recognized that subsequent Supreme Court opinions have vindicated Holmes's dissent. *See, e.g.,* *Roe v. Wade*, 410 U.S. 113, 117 (1973); *Eastern Enters. v. Chater*, 110 F.3d 150, 159 (1st Cir. 1997); *Anderson v. Wagner*, 378 N.E.2d 805, 810 (Ill. 1978); *People v. Bullock*, 485 N.W.2d 866, 888 (Mich. 1992) (Riley, J., concurring in part and dissenting in part); *Byrn v. New York City Health & Hosps. Corp.*, 289 N.E. 2d 887, 891 (N.Y. 1972) (Jasen, J., concurring).

135. *Lochner v. City of New York*, 198 U.S. 45, 75–76 (1905) (Holmes, J., dissenting).

136. *See supra* note 88.

137. *Robinson v. City of Seattle*, 119 Wash. 2d 34, 53, 830 P.2d 318, 330 (1992) (distinguishing demolition of low cost housing from result when land use would cause direct harm to environment). SEPA states that government action such as granting a permit for development may be conditioned upon a landowner's payment of a fee as long as that fee will serve to mitigate specific environmental impacts and is reasonable. Wash. Rev. Code § 43.21C.060 (1998).

of environmental mitigations, the landowner's action causes a direct impact, while in the case of tenant relocation assistance, the landowner does not.¹³⁸ The court explained that in the latter case, the landowner's use of property does not contribute to the problems of homelessness in any unique way because the lack of low-income housing results from a number of economic and social causes independent of one particular landowner.¹³⁹ But, the court's contrast of the environmental impacts of development and the impacts on low cost housing supply amount to a distinction without a difference.

Compare low-income housing demolition to a typical scenario involving environmental impact mitigation fees. Landowner (O) owns several acres of woodland that happen to support significant wildlife habitat. O decides to develop the land, but the local government conditions approval of a development permit upon O's payment of a fee to mitigate the anticipated adverse environmental impacts. O is not uniquely responsible for the vulnerable condition of the protected wildlife, nor is O uniquely responsible for overall diminishing habitat. Indeed, environmental problems such as habitat loss are undeniably—to borrow the court's reasoning in *Sintra*—"brought about by a great number of economic and social causes which cannot be attributed to an individual parcel of property."¹⁴⁰ Yet, the court would evidently recognize the direct impact of the developer's action on the parcel's valued habitat while it is unwilling to recognize a "unique" or direct impact on the supply of low-income housing when a developer demolishes low-income housing.

When the court examines environmental mitigation fees or traffic impact fees,¹⁴¹ it is not concerned with whether the landowner caused the underlying state of the world, for example, scarce habitat in the case of environmental mitigation or urban sprawl and auto dependence in the

138. The *Robinson* court stated:

The extent to which an owner's land or property particularly contributes to a public problem may in certain instances be determinative, such as in some environmental protection cases. . . . The problems of homelessness and a lack of low income housing in Seattle are in part a function of how all Seattle landowners are using their property.

Robinson, 119 Wash. 2d at 55, 830 P.2d at 331.

139. *Sintra, Inc. v. City of Seattle*, 119 Wash. 2d 1, 22, 829 P.2d 765, 777 (1992).

140. *Id.*

141. Traffic impact fees in Washington are authorized under Wash. Rev. Code. § 58.17.110 (1998) and §§ 82.02.050–.090 (1998). *Sparks v. Douglas County* provides an example of how such fees are analyzed for constitutionality. 127 Wash. 2d 901, 904 P.2d 738 (1995); see *infra* note 156.

case of traffic impact fees. It more reasonably asks whether the developer's actions will impact his or her property in a way that compromises the public interest and whether the fee charged the developer is reasonable compensation for that compromise.¹⁴² In contrast, *Sintra*, *Robinson*, and *Guimont* each ask whether the landowner is responsible for the root problems of homelessness and a lack of affordable housing,¹⁴³ in other words, for the underlying state of the world. Tenant relocation assistance fees, then, are distinguished from environmental impact fees only by the court's opinion that it is bad policy for developers to pay for the impacts of demolishing low-income housing.

The court reveals its bias again in its application of the unduly oppressive balancing test.¹⁴⁴ It emphasizes factors that weigh in favor of the landowner (against regulation) and almost ignores those that weigh in favor of the government (in favor of regulation). For example, in *Robinson*, although the court agreed that the problems of homelessness and a lack of affordable housing at which the TRA0 is targeted are "certainly serious,"¹⁴⁵ it stated that another factor—the extent to which the owner's use of the land contributes to the problem—is "not particularly crucial."¹⁴⁶ Instead, in both *Guimont* and *Robinson* the court emphasized that distributing the cost of the fees to the community at large would be less oppressive on the landowner than the development fee.¹⁴⁷ Because any burden is less oppressive if spread among more people, this point is nothing more than a truism. Further, with the exception of the opinion in *Sintra*, the court has similarly ignored the actual financial impact of the legislation on the owner.¹⁴⁸ The court

142. See *supra* note 137 for the SEPA standard and note 15 for the traffic impact fee standards.

143. See *supra* note 88 and accompanying text.

144. See *supra* text accompanying notes 73–74.

145. *Robinson v. City of Seattle*, 119 Wash. 2d 34, 55, 830 P.2d 318, 331 (1992).

146. *Id.*

147. *Guimont v. Clarke*, 121 Wash. 2d 586, 611, 854 P.2d 1, 15 (1993); *Robinson*, 119 Wash. 2d at 55, 830 P.2d at 331.

148. In *Robinson*, the court made no mention of the financial impact. In *Guimont*, the court, having no actual application of the Mobile Home Relocation Statute before it, envisioned a "worst case scenario" that would leave the land owner with a "staggering" financial obligation. 121 Wash. 2d at 611–12, 854 P.2d at 15. The court apparently concluded that the potential, as opposed to the actual, impact on the landowner was sufficient to show that the statute was unduly oppressive, despite the court's own admission that the amount any owner would have to pay under the statute would vary from owner to owner. *Id.*

appears to choose only those factors for critical analysis that will serve its ends of invalidating the legislation.¹⁴⁹

As applied in these cases, the court's balancing of the public interest against the private comes down to a fundamental policy question: Should developers shoulder any unique responsibility for the loss of low-income housing resulting from their actions? By posing this question, the court decides that it, not the legislature, is responsible for "adjusting the burdens and benefits of economic life."¹⁵⁰ As discussed, this task was flatly rejected by both the U.S. Supreme Court¹⁵¹ and the Supreme Court of Washington itself.¹⁵²

There are of course situations in which it is the court's job to prevent the will of the many from trampling the rights of the few. Again, Justice Holmes's words have set the standard:

I think that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law.¹⁵³

Federal courts have struggled with determining what is included among our fundamental rights,¹⁵⁴ but unconditioned land development has not been among the candidates in either federal or Washington courts. Since the late 1960s, the Washington Legislature has given state and local governments the ability to condition development upon fee payment or land dedications as a means of controlling the impacts of growth.¹⁵⁵ In such a regulated environment, it is unreasonable to argue that unregulated land use is a fundamental right like the rights to freedom of religion, speech, and liberty.

149. Patrick Schneider, *Substantive Due Process and Judicial Legislation* 15 (1993) (unpublished manuscript, on file with the *Washington Law Review*).

150. *See supra* note 32.

151. *See supra* note 32 and accompanying text.

152. *See supra* notes 63–65 and accompanying text.

153. *Lochner v. City of New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

154. Ronald J. Krotoszynski, Jr., *Fundamental Property Rights*, 85 *Geo. L.J.* 555, 583–90 (1997) (arguing that Supreme Court ought to include property rights among "fundamental rights" protected by substantive due process, although contemporary Court has not extended such protection to property rights).

155. Tobin, *supra* note 1, at 3-7 to 3-8.

Furthermore, a landowner unjustly burdened by an impact fee is not dependent on substantive due process for relief. In 1995, the Supreme Court of Washington adopted the U.S. Supreme Court's analysis for determining when a development exaction constitutes a taking under the Fifth Amendment of the U.S. Constitution.¹⁵⁶ Under this standard, the regulator must provide empirical evidence that the exaction it has levied on the developer will serve to mitigate the harm directly caused by the development and that it is quantitatively roughly proportionate to the anticipated impact.¹⁵⁷ This is an as-applied analysis¹⁵⁸ and thus prevents a court from speculating worst case scenarios and ignoring the legislation's actual impact on landowners and the public. It is not clear how the tenant relocation assistance provisions would have fared under this standard. The parties provided little empirical information regarding either the extent of the problem attributable to the developer's activity or the extent of the financial impact of the legislation on the developers. While the test protects the same interests as the substantive due process test, it provides more guidance to both policy makers and jurists in evaluating development fees and guards against the policy discretion demonstrated by the Supreme Court of Washington.

III. CONCLUSION

The Supreme Court of Washington's substantive due process analysis under *Lawton v. Steele* raises important theoretical problems. As a constitutional doctrine, it must rest in either the state or federal constitutions. The federal courts have abandoned the *Lawton* approach; some have even abandoned the concept of substantive due process rights in property all together. The *Gunwall* analysis provides the framework in Washington for determining whether a state constitutional provision provides broader rights than the federal document. Although the Supreme Court of Washington has not applied this analysis in a property rights context, existing *Gunwall* case law counsels rejecting an

156. *Sparks v. Douglas County*, 127 Wash. 2d 901, 910–16, 904 P.2d 738, 743–46 (1995) (finding that “essential nexus” standard in *Nollan* and “rough proportionality” standard in *Dolan* are standards to be applied when assessing development exactions under Takings Clause in Washington); see also *supra* note 16.

157. See *Sparks*, 127 Wash. 2d at 910–16, 904 P.2d at 743–46; see also *supra* note 16.

158. *Garneau* interpreted *Nollan* and *Dolan* as inapplicable to facial takings challenges and found that the *Nollan/Dolan* as-applied analysis cannot be invoked without specific factual evidence of the economic impacts on the landowner. *Garneau v. City of Seattle*, 147 F.3d 802, 811 (9th Cir. 1998).

independent state analysis of the provision. If the *Lawton* test cannot be rooted in either the Washington or Federal Constitution, its vitality in Washington is unfounded. In addition to these theoretical problems, the court's treatment of tenant relocation assistance provisions illustrates the extent to which the *Lawton* test can be used to invade the social policymaking role of the legislature. The court must confront these problems and reconcile its own jurisprudence with its own theoretical framework, the doctrines adopted by the federal courts, and its proper role in reviewing legislative policy. Disgruntled landowners and the courts to which they turn for relief ought not forget the powerful tool for relief to which Justice Holmes referred them: the polls.