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MUNICIPAL POLICE POWER IN WASHINGTON STATE

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Abstract: Local governments in Washington State have enjoyed strong regulatory powers since the state's constitution was adopted in 1889. Those "police powers" initially focused on the protection of public health and safety, but broadened in the early twentieth century to encompass the protection of consumers and employees and the promotion of the general welfare. The Supreme Court of Washington sparingly applied "substantive due process" as a brake on the police power and promptly dropped that doctrine when the U.S. Supreme Court ceased its use in the 1930s. However, the vocabulary of substantive due process lived on in state court opinions defining the inherent nature and scope of the police power. Furthermore, substantive due process has been resurrected as a constitutional doctrine in a narrow group of land use cases—an unnecessary revival given the built-in limits on local regulatory activities.

This Article reviews municipal "police power" cases in Washington State over the past century. The purpose is to help solve confusion about the nature and extent of municipal powers and, specifically, the nature and extent of police power—or regulatory power—as exercised by general purpose governments such as cities and counties.[1] This Article also traces the transformation of "substantive due process" vocabulary into the fabric of police power doctrine, with concepts of "reasonableness" and a "rational connection" between governmental ends and means defining the proper scope of regulatory activities. In Washington, those parameters continue to define which actions are inherently within a municipality's authority and which are *ultra vires*; even while the substantive due process doctrine has died out nationwide, it lives on in a narrow set of Washington land use cases involving egregious governmental overreaching.

The need for a comprehensive examination of police power is underscored by contradictory statements from the Supreme Court of

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1. Special purpose governments also have limited regulatory authority when authorized by the legislature. *See, e.g.*, Wash. Rev. Code § 57.08.005(7) (1998) (authorizing water-sewer districts "[t]o compel all property owners within the district . . . to connect their private drain and sewer systems with the district's system under such penalty as the commissioners shall prescribe").

Washington concerning the scope of municipal authority in general. Washington judges and lawyers often speak of municipal powers as though they are a single body of authority.[2] At other times, courts distinguish between "governmental" and "proprietary" activities, suggesting that proprietary powers should be construed more broadly than governmental authority.[3] Some well-known Washington court pronouncements on municipal powers failed to address adequately the differences between distinct types of municipal authority and as a result, are very much at odds. For example, in *Winkenwerder v. City of Yakima*,[4] the court noted the "extensive powers" of first class cities as self-governing bodies, limited only by constitutional provisions and legislative enactments.[5] In contrast, in *Chemical Bank v. WPPSS*,[6] the court referred to the narrow interpretation given a municipal corporation's powers, limited to those expressly conferred or necessarily implied.[7] The failure to focus on the source of power under consideration and a misunderstanding of the mode under which a local government is operating in any given circumstance results in this confusion.

Forcing all municipal powers into a simple analytical rubric is often misleading. In fact, there are four distinct modes of municipal governmental authority in Washington—three substantive, and one relating to government procedures for carrying out the other three:

1. Police powers;

2. Authority to provide general governmental services, such as schools, parks, and fire protection;

3. Authority to act in a proprietary capacity, usually in connection with the sale of services or commodities through a utility; and

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2. *See, e.g.*, Chemical Bank v. WPPSS, 99 Wash. 2d 772, 792, 666 P.2d 329, 339 (1983).

3. *See, e.g.*, Municipality of Metro. Seattle v. Division 587, Amalgamated Transit Union, 118 Wash. 2d 639, 645, 826 P.2d 167, 170 (1992); Hite v. PUD No. 2, 112 Wash. 2d 456, 459, 772 P.2d 481, 483 (1989); City of Tacoma v. Taxpayers, 108 Wash. 2d 679, 698–99, 743 P.2d 793, 802–03 (1987).

4. 52 Wash. 2d 617, 328 P.2d 873 (1958). In *Winkenwerder*, the court upheld Yakima's decision to allow advertising on municipality-owned parking meters. *See id.* at 626–27, 328 P.2d at 879–80.

5. *Id.* at 622, 328 P.2d at 878.

6. 99 Wash. 2d 772, 666 P.2d 329 (1983). In *Chemical Bank*, the court voided intergovernmental contracts that had provided the underpinning of financing for two nuclear power plants. *See id.* at 798–99, 666 P.2d at 342–43.

7. *See id.* at 792, 666 P.2d at 339.

4. Corporate powers.

Consequently, one must be aware of the mode of municipal authority being exercised to understand the scope of the relevant powers and the constraints on those powers. This Article focuses on local government police powers, which upon examination appear quite broad in scope and flexibility. By reviewing the evolution and the sometimes vacillating history of judicial approaches to police power in Washington, this Article is meant to contribute to a better understanding of the various kinds of municipal authority and to help bring them into clearer focus.

Part I of this Article describes how Washington's founders entrenched strong local government regulatory powers in the state constitution, powers focused on the protection of public health and safety. Part II depicts how, in the twentieth century's first four decades, federal substantive due process doctrine temporarily delayed the expansion of the police power, preventing governments from using this power to protect workers and consumers. As discussed in Part III, that power ultimately broadened, subject to constraints echoing the vocabulary of substantive due process despite that doctrine's formal disappearance from American constitutional theory. In Part IV, this Article reviews the unique rebirth of substantive due process in Washington's land use law and suggests that built-in constraints on the police power render it unnecessary to resort to this constitutional doctrine to protect individuals from overreaching regulatory action.

I. FROM THE BEGINNING: REMARKABLY STRONG POLICE POWERS

The police power of local government is, at root, the inherent power of the community to regulate activities for the protection of public health and safety. This is probably the oldest type of local government power. As early as 451 B.C., Rome's Twelve Tables (an early code) contained fire safety regulations such as set-back requirements, and water and wastewater regulations intended to protect public health.[8] Blackstone and others equated police power with the core of governmental activity: the regulation of domestic order and the general governance of the community.[9] With the 1889 adoption of Washington's constitution came an entrenched municipal police power provision in Article XI,

8. *See* Table VII, *reprinted in Ancient Roman Statutes* 11 (Johnson et al. eds., 1961).

9. *See* Ernst Freund, *The Police Power: Public Policy and Constitutional Rights* § 2, at 2 (1904).

Section 11, providing that "[a]ny county, city, town or township may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws."[10] Nationally, late nineteenth century municipal powers were constrained by the "Dillon Rule," limiting local governmental powers to those expressly granted or necessarily implied.[11] However, even Judge Dillon noted the particular strength of local government police, or regulatory, authority.[12] In Washington, the police power had been *expressly* granted to counties and cities, fitting neatly under the Dillon Rule if applicable.

Early Supreme Court of Washington decisions reflected a strong-police-power approach to Article XI, Section 11, of the Washington Constitution. In *City of Seattle v. Hurst*,[13] the City had prohibited the solicitation of business from railway passengers as they disembarked from trains.[14] Soliciting for taxi services anywhere within a railroad station constituted a misdemeanor.[15] Nevertheless, the Great Northern Railway Co. contracted with a private firm to help disembarking passengers swiftly find cabs.[16] Great Northern asserted a right to provide services to its customers, particularly on its own property, maintaining that the City's action impaired its right to contract.[17] The Supreme Court of Washington rejected Great Northern's arguments, finding the regulation reasonable and possibly necessary to protect passengers from annoyance and confusion.[18] Given its facially legitimate purpose and

10. This section of Washington's Constitution was copied almost verbatim from Article XI, Section 11, of California's 1879 Constitution. *See* Arthur S. Beardsley, *Notes on the Sources of the Washington State Constitution, 1889–1939*, at 27 (1939). The provision now appears at Cal. Const. art. XI, § 7.

11. *See* John F. Dillon, *The Law of Municipal Corporations* § 237 (5th ed. 1911). The other leading turn-of-the-century treatise on police power was Freund's *The Police Power: Public Policy and Constitutional Rights*. *See supra* note 9. Influential contemporary works on the nature and extent of the police power included W.G. Hastings, *The Development of Law as Illustrated by the Decisions Relating to the Police Power of the State* (1900), and Alfred Russell, *The Police Power of the State* (1900). *See also* Ruth Locke Roettinger, *The Supreme Court and State Police Power* (1957).

12. Dillon defined police power as the "authority to suppress nuisances, preserve health, prevent fires, to regulate the use and storing of dangerous articles, to establish and control markets, and the like." Dillon, *supra* note 11, § 301.

13. 50 Wash. 424, 97 P. 454 (1908).

14. *See id.* at 425, 97 P. at 454.

15. *See id.*

16. *See id.* at 426–29, 97 P. at 455–56.

17. *See id.* at 429–30, 97 P. at 456.

18. *See id.* at 432, 97 P. at 457.

reasonable connection to protecting the public, the court held that the ordinance was a valid exercise of police power.[19] The court further held that the railroad could not enter into a contract nullifying the provisions of a legitimate ordinance.[20] The City's goal of protecting individual travelers from harassment was deemed an appropriate public safety matter for regulation.[21] Therefore, in holding that an exercise of regulatory authority was legitimate so long as it was meant to protect the public health and safety and reasonably related to the sought-after goal, *Hurst* was a classic statement of local government police power.

Similarly, in *Smith v. City of Spokane*,[22] the court in 1909 upheld the broad powers of a city to regulate garbage-collecting, even if doing so had the effect of putting an existing enterprise out of business.[23] The court noted that "[i]n all matters pertaining to the public health, nearly if not the entire police power of the state is vested in municipal corporations of the first class."[24] Indeed, the court deemed city authority over the garbage business strong enough to permit overt racism against Japanese-American garbage haulers in *Cornelius v. City of Seattle*,[25] and later to block a construction debris company's operations in *City of Spokane v. Carlson*.[26]

Two other early cases elucidate the doctrine of strong local police powers in the interest of public health and safety. *Shepard v. City of Seattle*,[27] in 1910, involved an unsuccessful challenge to Seattle's requirement that all private hospitals and sanitariums connect to the public sewers.[28] The ordinance also required such facilities, prior to operation, to gain the permission of adjacent property owners.[29] The court found that a prohibition on establishing private hospitals in localities that might exacerbate the spread of contagious disease was a

19. *See id.* at 432–33, 97 P. at 457.

20. *See id.* at 433, 97 P. at 457.

21. *See id.* at 432, 97 P. at 457; *see also* City of Seattle v. McConahy, 86 Wash. App. 557, 565–67, 937 P.2d 1133, 1138–39 (1997) (upholding Seattle's authority under Article XI, Section 11, to ban sitting on sidewalks in the interest of pedestrian safety).

22. 55 Wash. 219, 104 P. 249 (1909).

23. *See id.* at 220–21, 104 P. at 250.

24. *Id.* at 220, 104 P. at 250.

25. 123 Wash. 550, 213 P. 17 (1923).

26. 73 Wash. 2d 76, 436 P.2d 454 (1968).

27. 59 Wash. 363, 109 P. 1067 (1910).

28. *See id.* at 373, 109 P. at 1070.

29. *See id.* at 367, 109 P. at 1068.

proper exercise of the police power.[30] The court reasoned that because mentally disabled inmates might annoy neighbors, the approval requirement was legitimate.[31] When opponents of the ordinance argued that the measure was merely to placate those known today as "NIMBYs,"[32] the court replied:

> If the ordinance is valid on its face, the reasons or arguments that may have moved the city council to act are not pertinent here.
>
> There are many unpleasant and annoying things that must be borne by those living in a state of organized society, in order that others may enjoy their equal rights under the law, but the preservation of the public health and public safety is one of the chief objects of local government, and every citizen holds his property subject to a reasonable exercise of the police power of the state.[33]

In *Detamore v. Hindley*,[34] the court, in 1915, upheld Spokane's authority to require and prescribe the method of grade separation when streets and railways crossed.[35] The court found this power an integral aspect of a city's police power and held that the City had full authority to control the method and location of railway construction.[36] Importantly, *Detamore* cited Article XI, Section 11, explaining the City's action as an appropriate delegation of its police power "requir[ing] no legislative sanction for its exercise so long as the subject-matter is local, the regulation reasonable and consistent with the general laws."[37]

II. POLICE POWER RETRENCHES, THEN BROADENS AGAIN

The Supreme Court of Washington had little difficulty upholding ordinances protecting the physical health and safety of citizens or the control of public rights of way. Yet, for a time, the court vacillated in its approach to the regulation of workplace safety, consumer protection, and business operations in circumstances not implicating the physical health

30. *See id.* at 373, 109 P. at 1070.

31. *See id.*

32. "Not In My Back Yard!"

33. *Shepard*, 59 Wash. at 375, 109 P. at 1071.

34. 83 Wash. 322, 145 P. 462 (1915).

35. *See id.* at 327, 145 P. at 463–64.

36. *See id.* at 331, 145 P. at 465.

37. *Id.* at 326–27, 145 P. at 463.

and safety of the general public. The court, like other state benches around the country, was faced with a series of so-called "*Lochner* Era"[38] cases restricting state and local regulation of business under the "substantive due process" doctrine.[39] These cases were foreshadowed by the U.S. Supreme Court's opinion in *Lawton v. Steele*,[40] which in dicta wrote that a "legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations."[41] The *Lawton* Court stated that the U.S. Constitution's due process clause, applicable to the states through the Fourteenth Amendment, prohibited the exercise of the police power except to the extent that exercise was required by the public interest, used reasonably necessary means to accomplish a proper purpose, and was not unduly oppressive.[42]

A decade later, in *Lochner v. New York*,[43] the U.S. Supreme Court used substantive due process theory to nullify a statute limiting the number of hours that employees could be forced to work.[44] Reflecting the traditional view that regulatory powers were to be focused on public health and safety concerns, Justice Pecham wrote: "Clean and wholesome bread does not depend upon whether the baker works but ten hours per day or only sixty hours a week. The limitation of the hours of labor does not come within the police power on that ground."[45] While state courts might have nullified wage-hour laws as not falling within the definition or the inherent nature of police power, the U.S. Supreme Court had no authority to make rulings on the quality or extent of state and local powers. Accordingly, the national court was forced to base its rejection on constitutional grounds, using due process as the convenient doctrinal tool.

The Washington high court responded to *Lochner*. In 1906, in *State ex rel. Richey v. Smith*,[46] the court cited *Lochner* in overturning a statute

38. *See infra* notes 43–45 and accompanying text.

39. *See infra* notes 46–54 and accompanying text.

40. 152 U.S. 133 (1894).

41. *Id.* at 137.

42. *See id.* at 136–37.

43. 198 U.S. 45 (1905).

44. *See id.* at 53.

45. *Id.* at 57.

46. 42 Wash. 237, 84 P. 851 (1906).

requiring journeyman plumbers to obtain licenses.[47] The opinion emphasized the individual's right to work and the "vicious" and "pernicious" nature of unnecessary regulations that did not protect public health and safety, but instead fostered monopolistic practices.[48] The court found no relation between the statute and the public health and determined that it interfered with the liberty of citizens in direct conflict with the Constitution.[49] The court also overturned laws regulating the horseshoeing business,[50] imposing closing hours on meatpacking plants,[51] requiring permits for street hawkers on private property,[52] and restricting barbershop operating hours,[53] and the court also limited the scope of a false-advertising ordinance.[54]

Nevertheless, in the early twentieth century, Washington State applied *Lawton* and *Lochner* to restrict labor and economic regulation in a limited fashion and only when constrained to do so by similar facts. Just eight years after *Lochner*, in *State v. Somerville*,[55] the state supreme court upheld an eight-hour-day requirement for female workers.[56] The court shifted the burden to those challenging the statute, stating a presumption of validity for statutes unless they "unquestionably and palpably" violated a right secured by law.[57] Significantly, the majority opinion pointed to the rapidly changing social and economic conditions in the state:

> Circumstances and occasions calling for [the police power's] exercise have multiplied with marvelous rapidity in recent years, by reason of the well-recognized fact that modern, social and economic conditions have called into existence agencies previously unknown; many of which so vitally affect the health and physical condition of laborers, and especially female laborers, that legislation of the character here involved has been sustained with

47. *See id.* at 247–49, 84 P. at 854.
48. *Id.* at 245, 84 P. at 853.
49. *See id.* at 248–49, 84 P. at 854.
50. *See In re* Aubrey, 36 Wash. 308, 317, 78 P. 900, 903 (1904).
51. *See* Brown v. City of Seattle, 150 Wash. 203, 216, 272 P. 517, 521–22 (1928).
52. *See* City of Seattle v. Ford, 144 Wash. 107, 114–15, 257 P. 243, 245 (1927).
53. *See* Patton v. City of Bellingham, 179 Wash. 566, 572–73, 38 P.2d 364, 366 (1934).
54. *See* City of Seattle v. Proctor, 183 Wash. 293, 296–98, 48 P.2d 238, 240 (1935).
55. 67 Wash. 638, 122 P. 324 (1912).
56. *See id.* at 646–48, 122 P. at 328–29.
57. *Id.* at 642, 122 P. at 326.

> greater liberality than was formerly evinced under less exacting conditions.[58]

The opinion first noted that *Lochner* had been approved by "a bare majority of the judges" of the U.S. Supreme Court.[59] Then the court emphasized that the greater need to protect female workers than male workers supported the work-hour limits for women.[60]

The Supreme Court of Washington took an even more aggressive approach a year later in *State v. Mountain Timber Co.*,[61] upholding a state industrial-insurance law covering workers in hazardous industries.[62] Writing for a unanimous court, Justice Chadwick wrote a virtual treatise on the evolution of the police power from Blackstone through Kent on through the *Slaughter-House Cases*[63] and into the twentieth century.[64] Chadwick noted that while the "germ of police power . . . is to be found in the power of the state to suppress nuisances," that power was "not confined to matters relating to the public health, morals and peace," and government may interfere with private activities "whenever the public interest demands it."[65] He cited a number of Washington cases showing a "growth in liberal interpretation," and quoted *City of Tacoma v. Boutelle*[66] in noting a shift of the police power from the protection of public health and safety toward the protection and promotion of the

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58. *Id.* at 643, 122 P. at 326.

59. *Id.* at 643–46, 122 P. at 326–28.

60. *See id.* The Washington Court noted that the U.S. Supreme Court, in *Muller v. Oregon*, 208 U.S. 412 (1908), had diverged from *Lochner* when female employees were involved. *See Somerville*, 67 Wash. at 643–46, 122 P. at 326–28. *See generally* Stephen A. Siegel, Lochner *Era Jurisprudence and the American Constitutional Tradition*, 70 N.C. L. Rev. 1 (1991). Siegel carefully demonstrates that these cases were by no means lock-step and that the U.S. Supreme Court was itself divided in various ways on the application of substantive due process theory to emerging social and economic regulations. *See id.*

61. 75 Wash. 581, 135 P. 645 (1913).

62. *See id.* at 589–90, 135 P. at 649; *see also* State *ex rel.* Davis-Smith Co. v. Clausen, 65 Wash. 156, 178, 117 P. 1101, 1106 (1911) (upholding workers' compensation legislation and noting "when reduced to its ultimate and final analysis, the police power is the power to govern" and states may interfere with personal and property rights "when [a law] tends reasonably to correct some existing evil or promote some interest of the state").

63. *See* Butchers' Union Slaughter-House & Live-Stock Landing Co. v. Crescent City Live-Stock Landing & Slaughter-House Co., 111 U.S. 746 (1884).

64. *See Mountain Timber*, 75 Wash. at 584–85, 135 P. at 647.

65. *Id.*

66. 61 Wash. 434, 112 P. 661 (1911).

general welfare.[67] Summarizing the doctrine synthesized in *Mountain Timber*, the opinion stated:

> It will be seen that what was originally a rule of inclusion and of exclusion and incapable of exact definition, has developed into a rule of most frequent inclusion. From the peace of the community and the suppression of nuisances, we have undertaken to regulate things hitherto considered private.
>
> . . . .
>
> The power has always been as broad as the public welfare and as strong as the arm of the state.[68]

Mountain Timber is a reflection of Progressive Era concerns for the public welfare, and a philosophy of community improvement and protection that overwhelmed the residual nineteenth century *laissez faire* theories built into the *Lochner*-era cases.[69] In the years following, the Supreme Court of Washington upheld weights-and-measures regulation,[70] prohibitions on trading stamps,[71] closure of theaters and stores on Sundays,[72] regulation of gas station sites,[73] and controls on cigarette vending machines.[74] In the 1930s, slightly ahead of the U.S. Supreme Court, the Washington Court faced the *Lochner*-type cases head on, first upholding plumbers' license requirements[75] and then sustaining regulation of the baking industry.[76] Finally, in *Parrish v. West Coast Hotel Co.*,[77] the Supreme Court of Washington upheld a state law governing wages and working conditions for women and minors, despite a challenge based on directly adverse U.S. Supreme Court substantive

67. *Mountain Timber*, 75 Wash. at 585–86, 135 P. at 647–48.

68. *Id.* at 587–88, 135 P. at 647.

69. *See* Richard Hofstadter, *The Age of Reform* 130–48, 174–78 (1955).

70. *See* City of Seattle v. Goldsmith, 73 Wash. 54, 56–58, 131 P. 456, 457 (1913).

71. *See* State v. Pitney, 79 Wash. 608, 615–16, 140 P. 918, 921 (1914).

72. *See* City of Seattle v. Gervasi, 144 Wash. 429, 432, 258 P. 328, 329–30 (1927); *In re* Ferguson, 80 Wash. 102, 106, 141 P. 322, 323 (1914).

73. *See* State *ex rel.* Lane v. Fleming, 129 Wash. 646, 648–50, 225 P. 647, 648 (1924).

74. *See* Brennan v. City of Seattle, 151 Wash. 665, 668–70, 276 P. 886, 887–88 (1929).

75. *See* City of Tacoma v. Fox, 158 Wash. 325, 332–34, 290 P. 1010, 1013 (1930).

76. *See* Continental Baking Co. v. City of Mount Vernon, 182 Wash. 68, 72–73, 44 P.2d 821, 823 (1935).

77. 185 Wash. 581, 55 P.2d 1083 (1936), *aff'd*, 300 U.S. 379 (1937).

due process rulings.[78] On appeal, the nation's high court reversed course and upheld the Washington decision, in part because of pressure from the Roosevelt administration's court-packing scheme.[79]

Since the 1930s, the Supreme Court of Washington has generally continued the strong-police-power approach that it had begun in the late nineteenth century and had attempted to maintain despite the *Lochner* cases. The court's opinions reflect the preexisting doctrinal support for community self-regulation, the "decline of due process limitations and consequent expansion of the police power,"[80] a "more permissive view of the due process clause,"[81] and a reappraisal of the extent of the public interest subject to police power protections.[82] Courts have upheld a wide variety of local regulations, including laws governing the operations of private bus companies,[83] fluoridation of public water supplies,[84] condemnation of private property for urban-renewal purposes,[85] emissions of particulate matter into the air,[86] necessary screening around auto wrecking yards,[87] employment agency activities and fees,[88] and the operation of jet skis.[89] While cases have sustained a range of government enforcement activities in the interest of the general welfare, a recent Supreme Court of Washington case seemed to stretch the scope of the police power well beyond the regulatory field and into the provision of a

78. *See id.* at 584–97, 55 P.2d at 1085–93.

79. *See* West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937); *see also* Michael Ariens, *A Thrice-Told Tale, or Felix the Cat*, 107 Harv. L. Rev. 620, 628–29 (1994). The U.S. Supreme Court's retreat from substantive due process is evidenced three years earlier in *Nebbia v. New York*, 291 U.S. 502 (1934), which upheld controls on milk prices. A concise history of the rise and fall of *Lochner* jurisprudence in Washington and the nation can be found in *Petstel, Inc. v. King County*, 77 Wash. 2d 144, 147–51, 459 P.2d 937, 938–41 (1969). *See generally* Roettinger, *supra* note 11; Thomas Reed Powell, *The Supreme Court and State Police Power, 1922–1930* (reprint from *Virginia Law Review* vols. 27 and 28) (1932)).

80. *Petstel*, 77 Wash. 2d at 148, 459 P.2d at 939.

81. *Id.*

82. *See id.* at 149, 459 P.2d at 939–40.

83. *See* Evergreen Trailways, Inc. v. City of Renton, 38 Wash. 2d 82, 85–86, 228 P.2d 119, 121 (1951).

84. *See* Kaul v. City of Chehalis, 45 Wash. 2d 616, 620, 277 P.2d 352, 354 (1954).

85. *See* Miller v. City of Tacoma, 61 Wash. 2d 374, 382–84, 378 P.2d 464, 469–70 (1963).

86. *See* Sittner v. City of Seattle, 62 Wash. 2d 834, 839, 384 P.2d 859, 862 (1963).

87. *See* Lenci v. City of Seattle, 63 Wash. 2d 664, 672, 388 P.2d 926, 935–36 (1964).

88. *See* State *ex rel.* Faulk v. CSG Job Ctr., 117 Wash. 2d 493, 508, 816 P.2d 725, 733 (1991); Petstel, Inc. v. King County, 77 Wash. 2d 144, 156, 459 P.2d 937, 943 (1969).

89. *See* Weden v. San Juan County, 135 Wash. 2d 678, 693–94, 958 P.2d 273, 280–81 (1998).

major public amenity. In *CLEAN v. State*,[90] to block a referendum on legislation financing a publicly owned major league baseball stadium, the court had to find an emergency that justified action for "the immediate preservation of the public peace, health or safety."[91] The opinion asserted that the Legislature was justified in concluding that the construction of a publicly owned stadium was within the state's general police power.[92] This broad definition of the police power appears overinclusive and thus not analytically useful.[93] It remains to be seen whether an entirely nonregulatory activity, such as baseball stadium construction, will be viewed as an exercise of the police power over the long term.

III. ONGOING CONSTRAINTS UPON THE EXERCISE OF THE POLICE POWER

Despite the strong nature and expanding scope of the police power, the Supreme Court of Washington has consistently limited the power's exercise by its definition of the police power and by the inherent limits of regulatory authority—not on an explicitly constitutional basis. At the same time, the approach and vocabulary of these limits clearly reflect their origins in a substantive due process doctrine that had, with one notable exception, disappeared from the scene.

For example, in *Patton v. City of Bellingham*,[94] the court in 1934 held that the police power permitted inspection of barber shops, but could not restrict the hours that tonsorial enterprises remained open.[95] The court rejected the notion that shops should close early so that inspectors would not have to work in the evenings.[96] However, the opinion pointed out that both parties to the dispute had agreed that it was unnecessary to consider the statute's constitutionality, given that the city was operating under its police powers as conferred by Article XI, Section 11, of the Washington Constitution.[97] The opinion stressed that "[t]he grant of police power to a city carries with it the necessary implication that its exercise must be

90. 130 Wash. 2d 782, 804–06, 928 P.2d 1054, 1064–66 (1996), *as amended* Jan. 13, 1997.

91. *Id.* at 804, 807–13, 928 P.2d at 1064, 1066–69.

92. *See id.* at 806, 928 P.2d at 1066.

93. *See infra* note 123.

94. 179 Wash. 566, 38 P.2d 364 (1934).

95. *See id.* at 571, 575, 38 P.2d at 365–67.

96. *See id.* at 575–76, 38 P.2d at 367.

97. *See id.* at 570, 576, 38 P.2d at 365, 367–68.

reasonable," and concluded that controls on operating hours bore no reasonable relationship to the protection of the community's health and general welfare.[98] Although the court rejected a constitutional basis for the decision, it had silently incorporated the substantive due process standard of reasonableness into the conceptual boundaries of police power.

After the move away from explicit substantive due process in the late 1930s, the Supreme Court of Washington coupled ongoing support for most police power measures with the doctrine that, by definition, those measures must reasonably tend to correct some evil or promote some interest of the state. *Spokane County v. Valu-Mart, Inc.*[99] concerned "blue laws" prohibiting the sale of major, but not smaller, household appliances on Sundays.[100] The court found that while Sunday closure laws were a legitimate exercise of the police power if meant to provide a mandatory day of rest for all employees, the distinction between large and small appliances was not related to any legitimate governmental activity to protect public health and safety.[101] The court's opinion provided a succinct explanation of the built-in limits to police power:

> The police power is not plenary, but, rather, circumscribed with sensible limitations. To be valid, a police measure must be reasonably suitable for and appropriate to the attainment of such ends as legitimately fall within the police power. Wide and comprehensive as this power may be in promoting the public peace, health, safety, morals, education, good order and welfare, the law fastens upon it a salutary limitation that it must reasonably tend to correct some evil or promote some interest of the state. If it be invoked to achieve a legitimate end by reasonable means, it will be sustained.[102]

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98. *Id.* at 572, 38 P.2d at 366. The opinion's author, Justice Steinert, was fairly conservative, pro-business, and inclined to support *Lochner*-style bans on commercial regulation. *See* Charles H. Sheldon, *The Washington High Bench: A Biographical History of the State Supreme Court 1889–1991*, at 324 (1992). Accordingly, having stated that the court was not basing its decision on constitutional grounds, he may have found it hard to resist slipping in language about the need for local governments to respect constitutional rights of the individual in exercising the police power. *See Patton*, 179 Wash. at 573–74, 38 P.2d at 366–67.

99. 69 Wash. 2d 712, 419 P.2d 993 (1966).

100. *See id.* at 713–14, 419 P.2d at 994–95.

101. *See id.* at 717, 720–21, 419 P.2d at 997–99.

102. *Id.* at 719, 419 P.2d at 998 (citing Shea v. Olsen, 185 Wash. 143, 53 P.2d 615 (1936)) (other citation omitted).

The classic "teaching case" on the limits to police power regulation is *Petstel, Inc. v. King County*.[103] In 1969, *Petstel* upheld a King County resolution fixing maximum rates charged by employment agencies.[104] The plaintiff had asserted that the regulations violated the due process clauses of the U.S. and Washington Constitutions.[105] The court's opinion, by the respected Justice Marshall Neill, first reviewed the history and decline of due process limits on state regulation.[106] Justice Neill then reiterated the traditional rule that where facts justifying the legislation were reasonably conceivable, courts would presume the existence of those facts and the presume that the legislation passed for that purpose.[107] Finally, the opinion outlined the following four tests that a regulatory measure must meet to pass the judicial test of reasonableness:

> First, any legislation under the police power must be reasonably necessary in the interest of the public health, safety, morals, and the general welfare. . . .
>
> [S]econd, . . . the legislation must be substantially related to the evil sought to be cured. . . .
>
> [T]hird, . . . classes of businesses, products or persons regulated, or the various classes established within the legislation [must] be reasonably related to the legitimate object of the legislation. . . .
>
> [F]ourth, . . . the rates set [must] be reasonable, and not unnecessarily prohibitory and confiscatory.[108]

While Justice Neill consciously recognized the due process and equal protection overtones to these tests,[109] his language suggested that these

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103. 77 Wash. 2d 144, 459 P.2d 937 (1969).

104. *See id.* at 146–47, 152, 459 P.2d at 938, 941.

105. *See id.* at 147, 459 P.2d at 938.

106. *See id.* at 147–51, 459 P.2d at 938–41. The opinion also stressed "at the outset that any ordinance regularly enacted is presumed constitutional." *Id.* at 156, 459 P.2d at 943.

107. *See id.* at 154–55, 459 P.2d at 942–43.

108. *Id.*

109. *See id.* at 153–54, 459 P.2d at 942. The equal protection overtones of Justice Neill's opinion can be traced to several earlier cases in which the Supreme Court of Washington relied either on the Fourteenth Amendment or the no-special-privileges provision of Article I, Section 12, to restrict local government regulatory authority. *See, e.g.*, Ralph v. City of Wenatchee, 34 Wash. 2d 638, 641, 209 P.2d 270, 272 (1949) (holding that restricting nonresident, but not local, photographers violated both provisions); State *ex rel.* Bacich v. Huse, 187 Wash. 75, 78, 83–84, 59 P.2d 1101, 1103, 1105–06 (1936) (holding that restricting fishing licenses to persons who previously held them violated both Fourteenth Amendment and Article I, Section 12), *overruled on other grounds by* Puget Sound

restrictions were themselves inherent in the *scope* of the authority of the police power under Article XI, Section 11. He noted that under Washington's Constitution, cities and counties had been delegated as extensive a range of police powers as the state legislature, so long as the subject matter is local, the regulation is reasonable, and the exercise of authority does not conflict with general laws.[110]

While the *Petstel* tests have been followed with a fair degree of consistency in subsequent Washington police power cases,[111] those rules do not provide the only constraints on municipal police power. Generally, municipalities may exercise that authority only within their boundaries.[112] Municipal police power may not be exercised for a government's institutional self-interest, for example, solely to augment the public treasury.[113] Most important, and as explicitly stated in Article XI, Section 11, a local government may not enact an ordinance that conflicts with a state law intended to be exclusive on its face.[114] Yet, in the field of police power, in contrast with governmental services activities,[115] the court has consistently held that a statute will not be

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Gillnetters Ass'n v. Moos, 92 Wash. 2d 939, 947–48, 603 P.2d 819, 824 (1979); *Ex parte* Camp, 38 Wash. 393, 397–98, 80 P. 547, 548–49 (1905) (holding that permitting local farmers, but not itinerant peddlers, to sell fresh food granted special privileges or immunities in violation of Article I, Section 12).

110. *Petstel*, 77 Wash. 2d at 159, 459 P.2d at 945.

111. *See, e.g.*, State *ex rel.* Fault v. CSG Job Ctr., 117 Wash. 2d 493, 504 n.25, 816 P.2d 725, 731 n.25 (1991); Granat v. Keasler, 99 Wash. 2d 564, 568, 663 P.2d 830, 832–33 (1983); Cougar Bus. Owners Ass'n v. State, 97 Wash. 2d 466, 477, 647 P.2d 481, 487 (1982).

112. *See* Brown v. City of Cle Elum, 145 Wash. 588, 589, 261 P. 112, 112 (1927). *But see* Wilson v. City of Mountlake Terrace, 69 Wash. 2d 148, 152–53, 417 P.2d 632, 634–35 (1966) (regarding city's ability to deliver fluoridated water outside its limits).

113. *See* City of Tukwila v. City of Seattle, 68 Wash. 2d 611, 614, 414 P.2d 597, 599 (1966).

114. *See* City of Bellingham v. Schampera, 57 Wash. 2d 106, 109–12, 356 P.2d 292, 294–97 (1960) (barring city law suspending drivers' licenses for drunk driving when preemption language in state law was quite explicit); *see also* Snohomish County v. State, 97 Wash. 2d 646, 651, 648 P.2d 430, 433 (1982) (finding state construction of prison preempted local zoning); State v. City of Seattle, 94 Wash. 2d 162, 167, 615 P.2d 461, 463–64 (1980) (determining that city was not permitted to apply local historic-preservation laws against state university property); City of Yakima v. Gorham, 200 Wash. 564, 571, 94 P.2d 180, 183 (1939) (holding enforcement of antiloitering law against strikers conflicted with state laws protecting labor organizing); State *ex rel.* Webster v. Superior Court, 67 Wash. 37, 41–47, 120 P. 861, 863–65 (1912) (finding that city was not permitted to interfere with state regulation of local telephone rates); City of Tacoma v. Franciscan Found., 94 Wash. App. 663, 665, 972 P.2d 566, 567 (1999) (holding city antidiscrimination law invalid to extent it conflicted with exemptions provided in parallel state law). *See generally* Philip A. Trautman, *Legislative Control of Municipal Corporations in Washington*, 38 Wash. L. Rev. 743 (1963).

115. *See, e.g.*, Chemical Bank v. WPPSS, 99 Wash. 2d 772, 666 P.2d 329 (1983).

construed as taking away a municipality's power to legislate unless that intent is expressly stated.[116] At the same time, when the Legislature has not preempted municipal police powers but rather has prescribed how they are to be exercised, the failure to observe statutory requirements can be the basis for invalidating a local government's actions.[117]

Although municipal police powers are established in the Washington Constitution,[118] the exercise of those powers is balanced by countervailing values entrenched in other constitutional provisions. For example, in *First Covenant Church v. City of Seattle*,[119] an overriding concern for the protection of the free exercise of religion trumped a city's power to regulate land use.[120] Interestingly, the court seemed to split police powers into two classes, those that are "compelling" in nature (concerning a clear and present danger to public health, peace, and welfare) and those that are appropriate regulatory concerns, but more likely to be outweighed by other concerns such as the protection of individual rights.[121] Although police powers expanded far beyond their limited public health and safety roots during the past century,[122] the original

116. *See* State *ex rel.* Schillberg v. Everett Dist. Court, 92 Wash. 2d 106, 108, 594 P.2d 448, 449–50 (1979); *see also* Kennedy v. City of Seattle, 94 Wash. 2d 376, 384, 617 P.2d 713, 719–20 (1980); City of Seattle v. Wright, 72 Wash. 2d 556, 559–60, 433 P.2d 906, 908–09 (1967); Lenci v. City of Seattle, 63 Wash. 2d 664, 669–71, 388 P.2d 926, 930–31 (1964); City of Seattle v. Long, 61 Wash. 2d 737, 740, 380 P.2d 472, 474 (1963); State v. Lundquist, 60 Wash. 2d 397, 400, 374 P.2d 246, 247–48 (1962); State *ex rel.* Isham v. City of Spokane, 2 Wash. 2d 392, 398, 98 P.2d 306, 308–09 (1940); Second Amendment Found. v. City of Renton, 35 Wash. App. 583, 587–88, 668 P.2d 596, 597–99 (1983).

117. *See* Lauterbach v. City of Centralia, 49 Wash. 2d 550, 556, 304 P.2d 656, 660 (1956).

118. *See supra* notes 10–12 and accompanying text.

119. 120 Wash. 2d 203, 840 P.2d 174 (1992).

120. *See id.* at 226–27, 840 P.2d at 187–88. *But see* Open Door Baptist Church v. Clark County, 140 Wash. 2d 143, 995 P.2d 33 (2000). *See generally* Katie Hosford, Comment, *The Search for a Distinct Religious-Liberty Jurisprudence Under the Washington State Constitution*, 75 Wash. L. Rev. 643 (2000).

121. *See First* Covenant, 120 Wash. 2d at 226–27, 840 P.2d 187–88; *see also* Munns v. Martin, 131 Wash. 2d 192, 209–10, 930 P.2d 318, 326 (1997) (holding that free exercise of religion enabled church to demolish building city desired to preserve for historic preservation); Miller v. City of Tacoma, 61 Wash. 2d 374, 385–86, 378 P.2d 464, 471–72 (1963) (upholding exercise of eminent domain in urban-renewal area for protection of health and safety, but hinting that condemnation for less urgent reasons might be rejected). *But see* Scott Paper Co. v. City of Anacortes, 90 Wash. 2d 19, 36–37, 578 P.2d 1292, 1301–02 (1978) (finding that exercise of police power outweighed argument based on non-impairment of contracts).

122. *See supra* notes 55–79 and accompanying text.

group of regulations, for the immediate protection of the community, may continue to enjoy a stronger status.[123]

IV. LAND USE: THE PECULIAR PERSISTENCE OF SUBSTANTIVE DUE PROCESS

The exercise of police powers in the land use area has been longstanding and similarly subject to built-in constraints, but is supplemented by a recent substantive due process overlay peculiar to Washington State. *Karasek v. Peier*[124] provides an early example of land use regulations. In 1900, the Supreme Court of Washington upheld a statute permitting the restraint of structures intended to injure a neighbor's property.[125] If protection of public health and safety was the key to late-nineteenth-century police power theory, *Karasek* relied on what might be seen as one of the foundations of the police power: the prevention of nuisances. The court prominently quoted the maxim "*sic utere tuo, ut alienum non laedas*"—"use your property so as not to injure the rights of others."[126] Several years later, in *Bowes v. City of Aberdeen*,[127] a property owner challenged a city's program of filling in *private* property to eliminate low, swampy conditions found dangerous to public health.[128] Rejecting the landowner's takings challenge, the court stated:

> [I]t would be manifestly destructive to the advancement or development of organized communities to put the public to the burden of rendering compensation to one, or to many, when the individual use is, or might be, a menace to the health, morals, or peace of the whole community. These are the principal grounds upon which the right to exercise the police power rests, and the only question confronting us is whether the present attempt comes within these recognized principles.[129]

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123. *See Miller*, 61 Wash. 2d at 386, 378 P. 2d at 471–72 (making clear distinction, in eminent domain context, between governmental powers to eradicate disease and crime and powers to effect aesthetic improvements unrelated to public health and safety). *But see supra* notes 90–93 and accompanying text.

124. 22 Wash. 419, 61 P. 33 (1900).

125. *See id.* at 425, 432, 61 P. at 35, 37.

126. *Id.* at 426, 61 P. at 35.

127. 58 Wash. 535, 109 P. 369 (1910).

128. *See id.* at 536–39, 109 P. at 369–71.

129. *Id.* at 542, 109 P. at 372.

The court went on to uphold numerous exercises of municipal police power to regulate the use of private property for public-safety reasons, including controls over the siting of hospitals,[130] an ordinance requiring changes to existing buildings to eliminate fire hazards,[131] city control over location of gasoline sales,[132] prohibition and regulation of dancehalls,[133] and the siting of helicopter pads.[134] In *Hass v. City of Kirkland*,[135] the court found that even when a developer had a vested right to a building permit, that right could be extinguished by the exercise of the police power in the furtherance of public safety.[136]

The Supreme Court of Washington has also upheld zoning as an acceptable exercise of the police power in the interest of public safety and the general welfare.[137] In *Duckworth v. City of Bonney Lake*,[138] the court upheld city zoning restrictions on mobile homes, repeating the standard formula of upholding the police power when there is a substantial relation to the public health, safety, morals, or general welfare, and when the legislation bears a reasonable relation to accomplishing the municipality's purpose.[139] The court gave great deference to legislative determinations of appropriate health, safety, and welfare purposes.[140] The court then stated that the purpose of zoning is not to increase or decrease the value of any particular parcel, but to benefit the community generally through intelligent planning of land uses without unreasonable discrimination.[141] The general purpose of

130. *See* Shepard v. City of Seattle, 59 Wash. 363, 375, 109 P. 1067, 1070 (1910); *supra* notes 27–33 and accompanying text.

131. *See* Coffin v. Blackwell, 116 Wash. 281, 287–88, 199 P. 239, 241–42 (1921).

132. *See* Chief Petroleum Corp. v. City of Walla Walla, 10 Wash. 2d 297, 299–300, 116 P.2d 560, 561 (1941).

133. *See* Bungalow Amusement Co. v. City of Seattle, 148 Wash. 485, 488–89, 269 P. 1043, 1044–45 (1928).

134. *See* Development Serv. of Am., Inc. v. City of Seattle, 138 Wash. 2d 107, 119–20, 979 P.2d 387, 393–94 (1999).

135. 78 Wash. 2d 929, 481 P.2d 9 (1971).

136. *See id.* at 931–33, 481 P.2d at 10–12; *see also supra* Part II and relevant cases in last paragraph of that Part.

137. *See, e.g.*, Lutz v. City of Longview, 83 Wash. 2d 566, 574–75, 520 P.2d 1374, 1379 (1974); McNaughton v. Boeing, 68 Wash. 2d 659, 662, 414 P.2d 778, 780 (1966). The U.S. Supreme Court upheld zoning against an earlier federal constitutional challenge in *Village of Euclid v. Amber Realty Co.*, 272 U.S. 365, 387–89, 394–97 (1926).

138. 91 Wash. 2d 19, 586 P.2d 860 (1978).

139. *See id.* at 26–27, 32, 586 P.2d at 865–66, 868.

140. *See id.* at 27, 586 P.2d at 866.

141. *See id.* at 27–28, 586 P.2d at 866.

zoning, wrote the court, is to "stabilize uses, conserve property values, preserve neighborhood characters, and promote orderly growth and development."[142]

As noted above, the Supreme Court of Washington has not referenced due process in most police power cases since the late 1930s. Instead, it has prevented governments from overreaching in the use of that authority by finding that certain actions are beyond the police power's inherent scope. Although the conceptual boundaries of the police power set forth in *Valu-Mart*[143] and *Petstel*,[144] and repeated in *Duckworth*,[145] clearly echo the *Lawton* tests,[146] Washington's high court has generally steered away from explicit constitutional bases for its decisions. However, a group of important land use cases is a notable exception to this general rule. In those cases, the court has applied, to a limited extent, a federally driven "takings" analysis restricting certain local government regulatory actions. More importantly, in response to the U.S. Supreme Court's approach to land use takings cases, the Washington court has resurrected a distinctive substantive due process theory, catching the eye of commentators both pro and con.[147]

The Supreme Court of Washington's reintroduction of substantive due process as a constraint on local land use regulations was driven by decisions of the nation's high court. In 1987, the U.S. Supreme Court shook the then-prevailing assumption, existing since the late 1930s, that the exercise of municipal police power would be relatively unhindered by federal constitutional doctrines. In *First English Evangelical Lutheran*

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142. *Id.* at 28, 586 P.2d at 866.

143. 69 Wash. 2d 712, 419 P.2d 993 (1966); *see also supra* notes 99–102 and accompanying text.

144. 77 Wash. 2d 144, 459 P.2d 937 (1969); *see also supra* notes 103–10 and accompanying text.

145. 91 Wash. 2d 19, 586 P.2d 860 (1978); *see also supra* notes 138–42 and accompanying text.

146. 152 U.S. 133 (1894); *see also supra* notes 40–42 and accompanying text.

147. A short but comprehensive description of Washington's idiosyncratic resurrection of substantive due process in the land use area is presented in Norman Williams, Jr., *How to Get Around the Requirement for Compensation in Cases of Invalid Zoning—The Washington Solution*, 17 Zoning & Plan. L. Rep., May 1994, at 33. Williams' article is generally laudatory, but other commentators have been critical of the Washington Court's approach to substantive due process. *See, e.g.*, Richard Settle, *Regulatory Taking Doctrine in Washington: Now You See It, Now You Don't*, 12 U. Puget Sound L. Rev. 339 (1989); Patrick Schneider, *Substantive Due Process Versus the Legislative Role of Local Government, in* 1994 Envtl. & Land Use L. Sec. Midyear Seminar, ch. 12; Richard Settle, *Exploring Regulatory Taking Doctrine, in* 1998 Land Use & Envtl. L. Midyear Seminar, ch. 9; Susan Boyd, Comment, *A Doctrine Adrift: Land Use Regulation and the Substantive Due Process of* Lawton v. Steele *in the Supreme Court of Washington*, 74 Wash. L. Rev. 69 (1999).

Church v. Los Angeles County,[148] the Court held that a county ordinance prohibiting construction or rebuilding in a flooded area was overreaching, destroyed any potential use of the subject property, and, therefore, constituted a compensable "taking" under the *Lochner*-era case of *Pennsylvania Coal Co. v. Mahon*.[149] In *Nollan v. California Coastal Commission*,[150] the Court held that a state's attempt to force a land owner to grant a public beach easement before obtaining a building permit was a "permanent physical occupation" of private property by government, and, in essence, an exercise of eminent domain requiring compensation.[151] Yet, in the same year, the Court strongly sustained the exercise of the police power against a takings challenge in a case involving Pennsylvania's regulation of subsurface mining. That case, *Keystone Bituminous Coal Ass'n v. DeBenedictis*,[152] was distinguished from *Pennsylvania Coal*,[153] but could be seen as a rejection of that *Lochner*-period case in the modern context of environmental protection. Nevertheless, *First English* and *Nollan* commenced a new era of takings cases in which the U.S. Supreme Court barred state and local governments from using the police power to gain public benefits in or uses of land through burdensome rules or regulatory blackmail.[154]

Washington State, however, diverged from the U.S. Supreme Court's emphasis on takings jurisprudence and instead resurrected substantive due process. In *Orion Corp. v. State*,[155] and then *Presbytery of Seattle v. King County*,[156] the Supreme Court of Washington accounted for the recent federal Supreme Court's takings cases, but revived substantive due process in a manner echoing the *Petstel* police power tests, which were clearly influenced by the vocabulary of the pre-1930s substantive due process doctrine.

Presbytery involved an attempt to obtain damages by the purchaser of wetland property on the ground that regulations restricting the develop-

148. 482 U.S. 304 (1987).

149. *See id.* at 316 (citing Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922)).

150. 483 U.S. 825 (1987).

151. *Id.* at 831–32.

152. 480 U.S. 470 (1987).

153. *Id.* at 485.

154. *See, e.g.*, Dolan v. City of Tigard, 512 U.S. 374 (1994); Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992).

155. 109 Wash. 2d 621, 747 P.2d 1062 (1987).

156. 114 Wash. 2d 320, 787 P.2d 907 (1990).

ment of the parcel constituted a compensable "taking."[157] The Supreme Court of Washington held that the plaintiff had not shown that the regulation denied all economically viable uses of the property.[158] The case built on *Orion*, detailing the state's unique approach to analyzing the interplay between the takings and the substantive due process doctrines.[159] The court emphasized that the doctrines were alternatives in situations involving allegations of especially severe land use regulations.[160] The court then prescribed a threshold inquiry as to "whether the challenged regulation safeguards the public interest in health, safety, the environment or . . . fiscal integrity,"[161] in contrast to a regulation that goes beyond preventing a public *harm* and actually enhances a publicly owned right in property.[162] The next test was whether the regulation destroys one or more of the "fundamental attributes of ownership—the right to possess, to exclude others and to dispose of property."[163] The court held that if a regulation does not infringe upon a fundamental attribute of ownership, and if it protects the public from one of the specified harms, there would not be any constitutional "taking" requiring compensation.[164]

Having set forth the basic test for determining whether there was a constitutionally protected taking (a test that made it fairly difficult to demonstrate a taking), the *Presbytery* court next brought in substantive due process. Even without a taking, a regulation must still meet the due process test of reasonableness.[165] The court recited a three-prong test, remarkably similar to the *Petstel* tests for determining whether governmental actions are by definition within a government's police powers: "(1) [W]hether the regulation is aimed at achieving a legitimate public purpose; (2) whether it uses means that are reasonably necessary to achieve that purpose; and (3) whether it is unduly oppressive on the landowner."[166] Justice James Andersen's opinion restated the three-part

157. *See id.* at 325, 787 P.2d at 910.

158. *See id.* at 335–36, 787 P.2d at 915–16.

159. *See id.* at 329–33, 787 P.2d at 912.

160. *See id.* at 329, 787 P.2d at 912.

161. *Id.*

162. *See id.*

163. *Id.* at 329–30, 787 P.2d at 912 (footnote omitted).

164. *See id.*

165. *See id.* at 330, 787 P.2d at 912–13.

166. *Id.* (footnote omitted).

test as follows: "1) There must be a public problem or 'evil,' 2) the regulation must tend to solve this problem, and 3) the regulation must not be 'unduly oppressive' upon the person regulated."[167] Justice Andersen seemed to admit that this third prong was not easy to apply, involving the difficult job of balancing the public's and regulated landowner's interests.[168]

In recent years, substantive due process has been reserved to a limited number of Washington land use cases involving facts the court may have seen as egregious exercises of governmental power, that is, situations where the "undue oppression" leapt out at the judges. Three prominent cases involved enactments seeking to shift unfairly to individual property owners the responsibility of providing adequate housing for low-income people,[169] which the court had earlier identified quite clearly as the general public's burden.[170] In two of those cases, the court suggested that local governments may have intentionally flouted the court's earlier pronouncements, much to the disadvantage of aggrieved property owners.[171] Consequently, the court was quite ready to permit the levy of damages on the responsible public entities.[172] In yet another instance, a city council ignored the advice of its own attorney and proceeded to contravene the vested rights of a property owner.[173] This action made it easy for the Supreme Court of Washington to find the sort of overburdensome exercise of police power, which warranted a finding that substantive due process had been violated.[174]

Because of the longstanding strength of municipal police power in Washington and the state supreme court's historical reluctance to second guess decisions by state and local decisionmakers,[175] substantive due

167. *Id.* at 330–31, 787 P.2d at 913; *cf.* the *Petstel* tests, *supra* note 108 and accompanying text.

168. *See Presbytery*, 114 Wash. 2d at 330–31, 787 P.2d at 913.

169. *See* Guimont v. Clarke, 121 Wash. 2d 586, 611, 854 P.2d 1, 15 (1993); Robinson v. City of Seattle, 119 Wash. 2d 34, 59–60, 62–63, 830 P.2d 318, 333–35 (1992); Sintra, Inc. v. City of Seattle, 119 Wash. 2d 1, 22, 829 P.2d 765, 776–77 (1992).

170. *See* San Telmo Assoc. v. City of Seattle, 108 Wash. 2d 20, 25, 735 P.2d 673, 675 (1987).

171. *See Robinson*, 119 Wash. 2d at 53–54, 59–60, 830 P.2d at 329–31, 333–34; *Sintra*, 119 Wash. 2d at 22–24, 829 P.2d at 776–77.

172. *See Robinson*, 119 Wash. 2d at 79–80, 90, 830 P.2d at 344, 349–50; *Sintra*, 119 Wash. 2d at 29, 829 P.2d at 780.

173. *See* Mission Springs v. City of Spokane, 134 Wash. 2d 947, 965–66, 954 P.2d 250, 258–59 (1998).

174. *See id.* at 967, 954 P.2d at 259.

175. *See, e.g.*, CLEAN v. State, 130 Wash. 2d 782, 820, 928 P.2d 1054, 1072 (1996), *as amended* Jan. 13, 1997 (Talmadge, J., concurring); Petstel, Inc. v. King County, 77 Wash. 2d 144, 154–55,

process should continue to be confined to situations involving governmental officials clearly acting in an arbitrary and high-handed way, oppressing the regulated person. Indeed, it may not be at all necessary to resort to a constitutional rationale for rejecting offending governmental actions. In most instances, the court can follow the doctrine, first voiced in 1934 in *Patton v. City of Bellingham*[176] and reinforced in the 1960s by *Valu-Mart*[177] and *Petstel*,[178] that inappropriate and overreaching governmental actions are by definition outside the scope of the police power, *ultra vires*, and therefore void. Because the federal courts generally abstain from interpreting state laws,[179] the U.S. Supreme Court usually must resort to a constitutionally based rationale to overturn any overreaching actions by local governments. However, state courts can and should reject overburdensome regulatory actions as simply beyond the scope of the police power, following the general principle that reviewing courts should abstain from considering constitutional issues unless absolutely necessary.[180]

V. CONCLUSION

Municipal police powers in Washington State have always been strong and continue to be vibrant. Cities and counties exercise as broad an array of police powers as the state, subject only to situations involving explicit preemption and the *Petstel* tests. Despite a quarter century dalliance, the substantive due process approach was often avoided, and then formally rejected in the late 1930s. Substantive due process has been partially revived in a limited set of land use cases involving

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459 P.2d 937, 942–43 (1969); Shepard v. City of Seattle, 59 Wash. 363, 375, 109 P. 1067, 1071 (1910).

176. 179 Wash. 566, 38 P.2d 364 (1934); *see also supra* notes 94–98 and accompanying text.

177. 69 Wash. 2d 712, 419 P.2d 993 (1966); *see also supra* notes 99–102 and accompanying text.

178. 77 Wash. 2d 144, 459 P.2d 937)1969); *see also supra* notes 103–10 and accompanying text.

179. *See* Railroad Comm'n v. Pullman Co., 312 U.S. 496, 499–501 (1941).

180. *See, e.g.*, State v. Martin, 137 Wash. 2d 774, 788, 975 P.2d 1020, 1027 (1999); State v. Hall, 95 Wash. 2d 536, 539, 627 P.2d 101, 103 (1981). Restraining regulatory actions on constitutional grounds clearly *will* be necessary on occasion. The Washington Constitution grants the police power to local governments. *See* Wash. Const. art. XI, § 11. This power is as broad as the State's regulatory authority, except as may be limited by the legislature. Yet, since any state's powers are plenary, and therefore limited only by the state or federal constitutions, it must be the case that only those constitutions can demarcate the outer boundaries of governmental authority. Nevertheless, in almost all situations, courts should constrain themselves to evaluating the appropriateness of regulatory actions on statutory and definitional grounds, that is, on bases other than those constitutional in nature.

regulations the Supreme Court of Washington perceived as overburdensome. However, the court could just as well have applied the *Petstel* tests to reach the same results without reference to a constitutional doctrine. This would provide adequate protection to individuals without interfering with the community's long-held right to enforce regulations for the protection of public health and safety and the general welfare.