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THE PATH OUT OF WASHINGTON'S TAKINGS QUAGMIRE: THE CASE FOR ADOPTING THE FEDERAL TAKINGS ANALYSIS

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Abstract: A quagmire awaits anyone attempting to understand the analysis Washington courts employ to determine whether government action constitutes a "taking" of property for which compensation is due under the U.S. Constitution. The Washington takings analysis is complex and confounding, especially when compared to the relatively straightforward takings analysis established by the U.S. Supreme Court. This Article argues that the Washington State Supreme Court should reject the Washington takings analysis and adopt the federal analysis. Comparing the federal and Washington analyses underscores how, as a matter of form, the Washington analysis easily stymies those who must work with it. Substantively, the Washington analysis is unfounded on three key levels: (1) the existence of differences between the two analyses fatally undermines the Washington analysis; (2) the nature of those differences renders the Washington analysis constitutionally insufficient by lowering the floor of protection that property owners enjoy under the federal analysis; and (3) the differences do not enhance the federal analysis. Rejecting the Washington takings analysis in favor of the federal analysis would be consistent with the doctrine of stare decisis because the Washington State Supreme Court originally intended to harmonize Washington and federal takings law, even though the Court failed to implement that intent. When embracing the federal takings analysis, the Court should avoid mischaracterizations of the federal takings analysis and the temptation to justify the Washington analysis on independent state constitutional grounds for the first time.

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INTRODUCTION

In 1990, the Washington State Supreme Court breathed a sigh of relief. Looking back, the Court lamented the "quagmire" into which Washington and federal courts had wandered when analyzing claims that government regulation constituted a taking of private property for which compensation was due:[1]

> The "tests" for over-regulation have until recently proved somewhat of a quagmire of constitutional theory vacillating between substantive due process and "takings" theory. Both this court and the United States Supreme Court have in the past struggled with the difficult determination of where a mere regulation ends and a "taking" commences.[2]

Looking ahead, however, the Court expressed confidence that it had found a path out of the quagmire through a comprehensive takings analysis harmonizing Washington and federal takings law.[3] Although the

1. As interpreted by federal courts, the U.S. Constitution prohibits the taking of private property by the government, whether through regulation or physical appropriation, without compensation. U.S. CONST. amend. V. *See* Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 537–38 (2005). The Washington State Supreme Court reads the parallel provision in the Washington Constitution, WASH. CONST. art. I, § 16, as providing the "same right." Sintra v. City of Seattle (*Sintra I*), 119 Wash. 2d 1, 13, 829 P.2d 765, 772 (1992); Orion Corp. v. State, 109 Wash. 2d 621, 657, 747 P.2d 1062, 1082 (1987) ("[T]he breadth of constitutional protection under the state and federal just compensation clauses remains virtually identical.").

2. Presbytery of Seattle v. King Cnty., 114 Wash. 2d 320, 328, 787 P.2d 907, 911 (1990).

3. *Id.* at 329–37, 787 P.2d at 912–16. As used in this Article, a "takings analysis" comprises the series of questions or tests a court employs to determine whether a taking has occurred.

Court refined this analysis through 1993, the Court never questioned its 1990 pronouncement that its takings analysis delivered Washington from the takings quagmire.

The Court's confidence has proved unwarranted. Washington remains mired in a cumbersome, confusing, and constitutionally suspect takings analysis. The Court should extricate Washington from this situation by adopting the federal takings analysis.

Part I of this Article compares the straightforward federal takings analysis with Washington's complex and disjointed takings analysis. Part II explains how the Washington takings analysis is unfounded on three key levels: (1) it is fatally undermined by the fact that it differs from the analysis established by the U.S. Supreme Court; (2) the nature of those differences renders the Washington analysis constitutionally insufficient by lowering the floor of protection that property owners enjoy under the federal takings analysis; and (3) the differences do not improve the federal analysis. Part III demonstrates how overruling Washington's takings case law would be consistent with the doctrine of stare decisis, and cautions the Washington State Supreme Court to avoid mischaracterizations of the federal takings analysis and the temptation to justify the Washington analysis on independent state constitutional grounds for the first time.[4]

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4. This Article focuses on claims that government action, most often in the form of a regulation, constitutes a "taking" within the meaning of constitutional protections. This Article excludes at least four related but conceptually distinct claims:

1. No public purpose or use. A property owner may assert that the government lacks the authority to take property, even if compensated, because the taking is not for a "public purpose" or "public use" within the meaning of the federal or Washington takings jurisprudence. This Article discusses that type of claim only to distinguish it from the type of claim at issue in this Article. *See infra* text accompanying notes 276–78.

2. Physical exactions. In an "exaction" claim, the issue is whether the government, instead of paying for a physical easement, may demand or "exact" it as a condition of granting a land use permit sought by the claimant. A court cannot address an "exaction" claim until the court has already concluded that the government has taken property or proposes to take it. *See generally Lingle*, 544 U.S. 528, 546–47.

3. Monetary exactions. Whether a government-imposed fee or charge constitutes a taking is subject to an analysis different from the analysis used to assess whether the government has taken real property. *See* Dean v. Lehman, 143 Wash. 2d 12, 31–32, 18 P.3d 523, 533–34 (2001) ("[I]f a charge is 'reasonably related' to either a benefit provided to, or a burden produced by, a particular citizen it is not a taking.").

4. Damage. Unlike the Federal Takings Clause, the Washington takings clause adds that property may not be "damaged" without compensation. WASH. CONST. art. I, § 16. For a discussion of the potential significance of that addition, see *infra* text accompanying notes 300–01.

I. THE WASHINGTON TAKINGS ANALYSIS IS MORE COMPLEX AND CONFOUNDING THAN THE FEDERAL TAKINGS ANALYSIS

Stark differences exist between the analyses federal and Washington courts apply to a takings claim brought under the U.S. Constitution. Federal courts employ a straightforward, three-part analysis. Washington courts, by contrast, use the three parts of the federal takings analysis, plus three unique elements arranged in a complex series of questions and sub-questions. Washington takings case law is confusing and often difficult to reconcile. The result is a quagmire that vexes attorneys and judges alike.

A. The Federal Takings Analysis Is Relatively Simple and Omits Due Process Considerations

Key to understanding the evolution and current form of the federal takings analysis is the distinction between the federal Due Process and Takings Clauses. The Due Process Clause that regulates state action is in the Fourteenth Amendment to the U.S. Constitution and provides: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."[5] The constitutional remedy for government action that violates this prohibition is the invalidation of the action, not the payment of compensation.[6] By contrast, the Takings Clause is in the Fifth Amendment and states: "[N]or shall private property be taken for public use, without just compensation."[7] The remedy for a violation of this prohibition is the payment of compensation, not the invalidation of the action.[8] The U.S. Supreme Court struggled for a period of decades to keep these two provisions analytically distinct.

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5. U.S. CONST. amend. XIV, § 1.

6. Orion Corp. v. State, 109 Wash. 2d 621, 649, 747 P.2d 1062, 1077 (1987). A *statutory* right to compensation may be available where government action violates due process protections. *See* 42 U.S.C. § 1983 (2006). *See, e.g.*, Sintra, Inc. v. City of Seattle (*Sintra II*), 131 Wash. 2d 640, 651–54, 935 P.2d 555, 561–64 (1997) (discussing the availability of this statutory remedy in Washington courts). As a purely constitutional matter, however, the remedy is injunctive.

7. U.S. CONST. amend. V; Dolan v. City of Tigard, 512 U.S. 374, 383 (1994) ("The Takings Clause of the Fifth Amendment of the United States Constitution [is] made applicable to the States through the Fourteenth Amendment . . . .").

8. *Orion*, 109 Wash. 2d at 649, 747 P.2d at 1077; *see also* First English Evangelical Lutheran Church of Glendale v. Cnty. of L.A., 482 U.S. 304, 314 (1987) ("As its language indicates, and as the Court has frequently noted, this provision does not prohibit the taking of private property, but instead places a condition on the exercise of that power.").

The U.S. Supreme Court initially acknowledged the distinction between the Due Process and Takings Clauses in *Nectow v. City of Cambridge*.[9] Challenging the constitutionality of a new zoning ordinance that limited the uses he could make of his land, the property owner in *Nectow* did not allege a violation of the Takings Clause, but of his due process rights.[10] He did not seek compensation; he sought to relieve his property from the newly imposed use limitations.[11] The Court ruled in his favor. Using a substantive due process test that remains largely unchanged today, the Court ruled that a zoning ordinance "cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare."[12] Because the Court found that the use limitations placed on the property by the zoning ordinance in *Nectow* did not bear a substantial relation to the public health, safety, morals, or general welfare, the Court ruled that the ordinance violated the Due Process Clause.[13] As the property owner requested, the remedy in *Nectow* was not compensation, but freeing the property from the use limitation.[14]

Fifty years later, in 1980, the U.S. Supreme Court overlooked this distinction and conflated due process and takings law. In *Agins v. City of Tiburon*,[15] property owners alleged that a local zoning ordinance effected a taking under the Fifth Amendment, not a violation of due process under the Fourteenth Amendment.[16] Accordingly, they sought compensation, not invalidation of the law.[17] Faced with this takings challenge, the Court curiously turned to *Nectow*, a case that involved only a due process challenge. Citing *Nectow*, the Court added a new

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9. 277 U.S. 183 (1928).

10. *Id.* at 185.

11. *Id.* at 186.

12. *Id.* at 188. For current statements of the substantive due process test, see *Lingle v. Chevron U.S.A., Inc*., 544 U.S. 528, 542 (2005) ("[A] regulation that fails to serve any legitimate governmental objective may be so arbitrary or irrational that it runs afoul of the Due Process Clause."), and *N. Pacifica LLC v. City of Pacifica*, 526 F.3d 478, 484 (9th Cir. 2008) (citing Crown Point Dev. Inc. v. City of Sun Valley, 506 F.3d 851, 856 (9th Cir. 2007)) (noting that a due process claim exists where "land use action lacks any substantial relation to the public health, safety, or general welfare" and that "[t]he irreducible minimum of a substantive due process claim challenging land use regulation is failure to advance any governmental purpose").

13. *Nectow*, 277 U.S. at 188–89.

14. *Id.*

15. 447 U.S. 255 (1980).

16. *Id.* at 258.

17. *Id.* at 259.

element to the federal takings analysis: government action effects a taking if it does not "substantially advance legitimate state interests."[18]

Agins began a quarter-century misadventure for federal takings law. Even if mostly in dicta, the Court continued to recite the *Agins* "substantially advances" element as part of the federal takings analysis in subsequent cases.[19]

The U.S. Supreme Court corrected its mistake in 2005. *Lingle v. Chevron U.S.A., Inc*.[20] involved a state statute intended to protect small, independent gas station operators by reducing the amount of rent that oil companies could charge their gas station dealers.[21] An oil company challenged the constitutionality of the statute under the Takings Clause.[22] Invoking *Agins* and its progeny, the oil company argued that the statute took its property—and thus the government owed the company compensation—because the statute failed to substantially advance a legitimate state interest.[23]

Although the company's argument prevailed as the case shifted several times between the federal district and circuit courts,[24] a unanimous and contrite U.S. Supreme Court ultimately rejected that argument. The Court ruled that it had erred in *Agins*: "Today we correct course. We hold that the 'substantially advances' formula is not a valid takings test, and indeed conclude that it has no proper place in our takings jurisprudence."[25] The Court removed the "substantially advances" element because it was aimed at the wrong target. The "substantially advances" element is "derived from due process, not takings, precedents"[26] and ultimately probes whether a regulation is effective, not whether it takes property.[27] "The notion that . . . a

18. *Id.* at 260. Applying that analysis to the challenged zoning ordinance, the Court ultimately rejected the challenge. *Id.* at 261–63.

19. *See* Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 546 (2005) ("[I]n most of the cases reciting the 'substantially advances' formula, the Court has merely assumed its validity when referring to it in dicta." (citing Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 334 (2002); Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 704 (1999); Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1016 (1992); Yee v. Escondido, 503 U.S. 519, 534 (1992); United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 126 (1985))).

20. 544 U.S. 528 (2005).

21. *Id.* at 532–33.

22. *Id.* at 533.

23. *Id.* at 533–34.

24. *Id.* at 534–36.

25. *Id.* at 548.

26. *Id.* at 540.

27. *Id.* at 542.

regulation . . .'takes' private property for public use merely by virtue of its ineffectiveness or foolishness is untenable."[28] Instead, the goal of the federal takings analysis is "to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain."[29] To do that, the federal analysis "focuses directly upon the severity of the burden that government imposes upon private property rights."[30] By contrast, *Agins*' "substantially advances" element "reveals nothing about the magnitude or character of the burden a particular regulation imposes upon private property rights."[31]

In correcting course by removing the "substantially advances" element, *Lingle* provided a concise summary of the three remaining elements of the federal takings analysis. Two of those elements probe "categorical" or "per se" takings.[32] First, in a test associated most closely with *Loretto v. Teleprompter Manhattan CATV Corp.*,[33] a taking occurs "where government requires an owner to suffer a permanent physical invasion of her property—however minor . . . ."[34] Second, using the test announced in *Lucas v. South Carolina Coastal Council*,[35] government actions constitute takings where they "completely deprive an owner of '*all* economically beneficial us[e]' of her property . . . except to the extent that 'background principles of nuisance and property law' independently restrict the owner's intended use of the property."[36] Federal courts refer to that element as a test for a "total regulatory taking" or "total taking."[37]

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28. *Id.* at 543.

29. *Id.* at 539.

30. *Id.*

31. *Id.* at 542 (emphasis in original). Because the oil company relied exclusively on the "substantially advances" element, the U.S. Supreme Court upheld the challenged statute without applying any of the other elements of the federal takings analysis. *Id.* at 545.

32. *Id.* at 538 (using "per se" and "categorical"); Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992) ("categorical").

33. 458 U.S. 419 (1982).

34. *Lingle*, 544 U.S. at 538 (citing *Loretto*, 458 U.S. 419).

35. 505 U.S. 1003 (1992).

36. *Lingle*, 544 U.S. at 538 (alteration and emphasis in original) (quoting *Lucas*, 505 U.S. at 1019, 1027–32).

37. *See, e.g.*, *Lingle*, 544 U.S. at 538 ("total regulatory taking"); *Lucas*, 505 U.S. at 1030 ("total taking").

Finally, in situations that do not present a per se taking, federal courts apply the factors established in *Penn Central Transportation Co. v. New York City*[38]:

> Primary among those factors are "[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations." In addition, the "character of the governmental action"—for instance whether it amounts to a physical invasion or instead merely affects property interests through "some public program adjusting the benefits and burdens of economic life to promote the common good"—may be relevant in discerning whether a taking has occurred.[39]

For government action that survives application of the two per se elements, the *Penn Central* factors preclude resort to a single, yes-or-no question for resolving whether that action constitutes a taking.[40] Although the U.S. Supreme Court understands that each of the *Penn Central* factors "has given rise to vexing subsidiary questions," the Court still embraces those factors as "the principal guidelines" for resolving takings claims left unresolved by the per se elements of the federal analysis.[41]

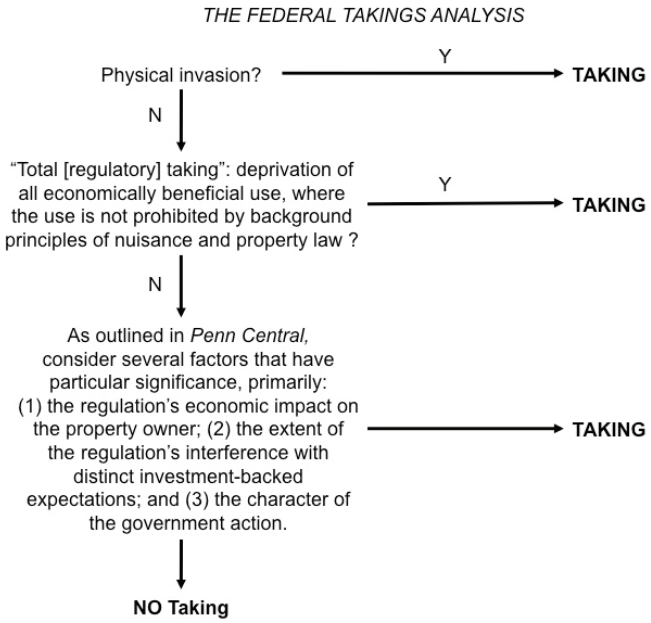
Graphically, the federal takings analysis comprises the *Loretto* physical invasion element, the *Lucas* "total [regulatory] taking" element, and the *Penn Central* factors in a simple, sequential order:

38. 438 U.S. 104 (1978).

39. *Lingle*, 544 U.S. at 538–39 (citations omitted) (quoting *Penn Cent.*, 438 U.S. at 124).

40. *See Penn Cent.*, 438 U.S. at 124 (characterizing the factors as requiring "essentially ad hoc, factual inquiries" rather than a "set formula").

41. *Lingle*, 544 U.S. at 539.



B. The Washington Takings Analysis Remains a Quagmire for Those Who Must Discern and Apply It

Little is simple about the Washington takings analysis, which must be extracted from confusing case law. The Washington analysis remains a quagmire that stymies those who must use it.

1. The Complex Washington Takings Analysis Must Be Coaxed from Disjointed Case Law

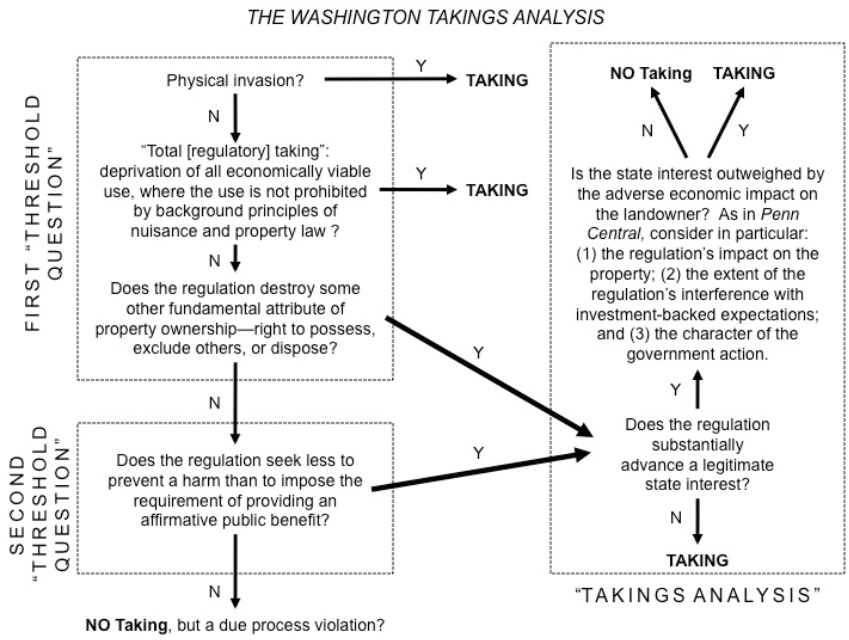
Washington case law has no analogue to *Lingle*. No single decision succinctly outlines the elements of the Washington takings analysis. Most recitations of the Washington analysis point to *Guimont v. Clarke* (*Guimont I*),[42] issued in 1993, as the Washington State Supreme Court's takings summary.[43] Unfortunately, even *Guimont I* fails to fully or

42. 121 Wash. 2d 586, 854 P.2d 1 (1993).

43. *See, e.g.*, City of Seattle v. McCoy, 101 Wash. App. 815, 828, 4 P.3d 159, 166 (2000) (stating that *Guimont I* "outlines the framework for analyzing regulatory takings"); WASH. STATE ATT'Y GEN., ADVISORY MEMORANDUM: AVOIDING UNCONSTITUTIONAL TAKINGS OF PRIVATE PROPERTY, at 9 (2006) [hereinafter AG MEMO]; Elaine L. Spencer, *Regulatory Taking and Inverse*

clearly cover all the elements of the Washington takings analysis. As a result, the Washington analysis must be pieced together from disjointed case law.[44]

An elaborate picture of the Washington takings analysis emerges from that exercise:



Understanding the elements of the Washington takings analysis—and how it differs from the federal analysis—requires attention to detail and tolerance for complexity and inconsistencies.

The Washington analysis employs the three elements that compose the federal analysis. Under the Washington analysis, and consistent with the federal analysis, courts begin by asking whether the government has

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Condemnation, *in* 7 WASH. STATE BAR ASS'N, WASH. REAL PROPERTY DESKBOOK § 110.4(1), at 110-16, § 110.4(2)–(3) (Edward W. Kuhrau et al. eds., 3d ed. 1996).

44. In addition to *Guimont I*, the primary decisions through which the Washington State Supreme Court developed the Washington takings analysis were *Margola Assocs. v. City of Seattle*, 121 Wash. 2d 625, 854 P.2d 23 (1993); *Robinson v. City of Seattle*, 119 Wash. 2d 34, 830 P.2d 318 (1992); *Sintra v. City of Seattle* (*Sintra I*) 119 Wash. 2d 1, 829 P.2d 765 (1992); and *Presbytery of Seattle v. King Cnty.*, 114 Wash. 2d 320, 787 P.2d 907 (1990).

physically invaded private property.[45] If the court finds no physical invasion, it poses a question nearly identical to the one federal courts ask: whether the government has committed a "total [regulatory] taking" by denying the property owner "all economically viable use."[46] The Washington analysis ends with another element based on, even if not identical to, the federal *Penn Central* factors.[47] What distinguishes Washington's approach are three unique elements sandwiched between those endpoints.

The first unique Washington element generally asks whether the regulation destroys some other fundamental attribute of property ownership, such as the right to possess, exclude others, or dispose.[48] Highlighting the imprecision of this element, the Washington State Supreme Court poses this question using a variety of verbs without appearing to intend different meanings—it does not seem to matter whether the regulation destroys,[49] denies,[50] deprives,[51] derogates,[52] infringes on,[53] or merely implicates[54] some other fundamental attribute of property ownership.

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45. *Margola*, 121 Wash. 2d at 644, 854 P.2d at 33–34; *Guimont I*, 121 Wash. 2d at 597, 854 P.2d at 7; *accord* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (analogous federal authority).

46. *Guimont I*, 121 Wash. 2d at 600, 602, 605, 854 P.2d at 9–10, 12 . The U.S. Supreme Court, by contrast, asks whether the government has denied the property owner all economically *beneficial* use. *Lingle*, 544 U.S. at 538; Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1019, 1026–32 (1992). This Article urges the Washington State Supreme Court to adopt the federal analysis directly, which would mean using "beneficial" rather than "viable" in this element of the analysis. *See infra* text accompanying notes 262–63.

47. *Guimont I*, 121 Wash. 2d at 596, 854 P.2d at 6; *Presbytery*, 114 Wash. 2d at 335–36, 787 P.2d at 915. Unlike the U.S. Supreme Court, the Washington State Supreme Court casts these factors as probing whether the state's legitimate interest is outweighed by the adverse economic impact on the landowner. *See, e.g.*, *Guimont I*, 121 Wash. 2d at 604, 854 P.2d at 11; *see also* Peste v. Mason Cnty., 133 Wash. App. 456, 473, 136 P.3d 140, 149 (2006); Guimont v. City of Seattle (*Guimont II*), 77 Wash. App. 74, 81, 896 P.2d 70, 76–77 (1995). This Article urges the Washington State Supreme Court to correct this mischaracterization of the *Penn Central* factors. *See infra* Part III.B.1.

48. *Guimont I*, 121 Wash. 2d at 601–02, 854 P.2d at 10; Robinson v. City of Seattle, 119 Wash. 2d 34, 49–50, 52, 830 P.2d 318, 328–29 (1992); *Presbytery*, 114 Wash. 2d at 329–30, 333 & n.21, 787 P.2d at 912, 914 & n.21.

49. *See Margola*, 121 Wash. 2d at 643, 854 P.2d at 33; *Robinson*, 119 Wash. 2d at 50, 52, 830 P.2d at 328–29; *Presbytery*, 114 Wash. 2d at 329–30, 787 P.2d at 912.

50. *See Presbytery*, 114 Wash. 2d at 333, 787 P.2d at 914.

51. *See Guimont I*, 121 Wash. 2d at 605 n.7, 854 P.2d at 12 n.7.

52. *See Robinson*, 119 Wash. 2d at 49, 830 P.2d at 328.

53. *See Presbytery*, 114 Wash. 2d at 333 n.21, 787 P.2d at 914 n.21.

54. *See Margola*, 121 Wash. 2d at 645, 854 P.2d at 34; *Guimont I*, 121 Wash. 2d at 601, 603, 854 P.2d at 9, 10.

Regardless of the verb it employs, the Washington State Supreme Court lumps the "fundamental attribute" element with two from the federal analysis—the "physical invasion" and "total [regulatory] taking" elements—into what the Court deems the first "threshold question."[55] This grouping is odd because it does not actually comprise a single question. The "physical invasion" and "total [regulatory] taking" elements probe per se takings—affirmative answers to either of those elements ends the analysis with a finding of a taking.[56] By contrast, application of the "fundamental attribute" element cannot end the analysis, but can only determine where the analysis turns next. If the challenged regulation does not destroy (or perhaps deny, deprive, derogate, infringe on, or merely implicate) a fundamental attribute of property ownership, the analysis moves to the second "threshold question";[57] otherwise, the analysis proceeds to what Washington deems the "takings analysis."[58]

The second "threshold question" consists of the second unique Washington element. It asks whether the regulation "seeks less to

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55. *See Margola*, 121 Wash. 2d at 643–45, 854 P.2d at 33–34; *Guimont I*, 121 Wash. 2d at 594–95, 854 P.2d at 6. The Court also refers to this as the first "threshold inquiry." *Margola*, 121 Wash. 2d at 643, 854 P.2d at 33; *Guimont I*, 121 Wash. 2d at 602–03, 854 P.2d at 10. Washington courts are not always clear about whether this question (or inquiry) consists of all three elements or just one. For example, one court recently cast the entire first threshold question as asking simply if there has been a "total taking." Conner v. City of Seattle, 153 Wash. App. 673, 698, 223 P.3d 1201, 1214 (2009), *review denied*, 168 Wash. 2d 1040 (2010). More frequently, Washington courts pose the first threshold question in terms solely of the "fundamental attribute" element, while mentioning the rights to exclude others (which necessarily includes a right against physical invasions) or to make some economically viable use of one's property (which is implicit in the "total taking" element of the takings analysis) as mere examples of fundamental attributes. *See, e.g.*, *Margola*, 121 Wash. 2d at 643–44, 854 P.2d at 33–34; Peste v. Mason Cnty., 133 Wash. App. 456, 471, 136 P.3d 140, 148 (2006); Paradise, Inc. v. Pierce Cnty., 124 Wash. App. 759, 770, 102 P.3d 173, 179 (2004); Edmonds Shopping Cntr. Assocs. v. City of Edmonds, 117 Wash. App. 344, 362, 71 P.3d 233, 241 (2003); City of Seattle v. McCoy, 101 Wash. App. 815, 828, 4 P.3d 159, 166 (2000); Kahuna Land Co. v. Spokane Cnty., 94 Wash. App. 836, 841–42, 974 P.2d 1250, 1252 (1999).

56. *See Margola*, 121 Wash. 2d at 644, 854 P.2d at 33–34; *Guimont I*, 121 Wash. 2d at 602–03, 854 P.2d at 10.

57. *Guimont I*, 121 Wash. 2d at 603, 854 P.2d at 10.

58. *Guimont I*, 121 Wash. 2d at 603–04, 854 P.2d at 10–11. Deepening the inscrutability of Washington takings case law, the Washington State Supreme Court reordered the two threshold questions in 1993. *Id.* at 600–01. As a result, pre-1993 case law discussing the first threshold question is actually discussing what is now the second threshold question. *See, e.g.*, *Presbytery*, 114 Wash. 2d at 329–30, 787 P.2d at 912. This complicates the task facing anyone attempting to research the background and relationship of the elements that compose the Washington takings analysis.

The Washington State Supreme Court first explained the rationale for grouping the elements of the Washington analysis into "threshold questions" and a "takings analysis" in *Presbytery*. *Id.* This Article explains and critiques that rationale. *See infra* Part II.B.

prevent a harm than to impose on those regulated the requirement of providing an affirmative public benefit."[59] Under this element, government action designed primarily to prevent a harm is insulated from takings claims, whereas government action that primarily seeks to provide a public benefit enjoys no such protection.[60] Clouding application of this element is a debate over whether it poses the relevant question. One faction of the Washington State Supreme Court argued that the proper question initially was, and should have remained, whether the regulation is employed to enhance the value of publicly held property.[61] Despite this protest and lingering confusion over the proper question posed by this element,[62] most Washington courts recite a "seeks less to prevent a harm than to impose an affirmative public benefit" question as a unique element of the Washington takings analysis.[63]

If the government has not committed a per se taking, and if either of Washington's threshold questions yields an affirmative answer, the Washington analysis proceeds to what the Washington State Supreme Court calls the "takings analysis."[64] This label leaves the misimpression that the "threshold questions" are somehow outside the Washington takings analysis. Nevertheless, what the Washington State Supreme Court labels the "takings analysis" begins with the third element unique

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59. *See Guimont I*, 121 Wash. 2d at 603, 854 P.2d at 10 (quoting *Robinson*, 119 Wash. 2d at 49, 830 P.2d at 328); Sintra v. City of Seattle (*Sintra I*), 119 Wash. 2d 1, 14, 829 P.2d 765, 772 (1992).

60. *See Guimont I*, 121 Wash. 2d at 603, 854 P.2d at 10; *Presbytery*, 114 Wash. 2d at 329–30 & n.13, 787 P.2d at 912 & n.13.

61. *Guimont I*, 121 Wash. 2d at 617–20, 854 P.2d at 18–20 (Utter, J., concurring) (citing *Presbytery*, 114 Wash. 2d at 329, 787 P.2d at 912; Orion Corp. v. State, 109 Wash. 2d 621, 651, 747 P.2d 1062, 1078 (1987)). Although not cited in any of the Washington case law relevant to this debate, historical support for an "enhance the value of publicly held property" element was offered by a scholar who, in a 1980 article, argued that a taking must involve a transfer of property from a property owner to a government with the power of eminent domain and "only when governmental land receives 'special' benefits or perhaps 'special and direct' benefits." William B. Stoebuck, *Police Power, Takings, and Due Process*, 37 WASH. & LEE L. REV. 1057, 1091–93 (1980).

62. *See, e.g.*, Manufactured Hous. Cmtys. of Wash. v. State, 142 Wash. 2d 347, 355, 13 P.3d 183, 187 (2000) (summarizing the question in dicta as whether "the regulations were employed to enhance the value of publicly held property" (citing *Orion*, 109 Wash. 2d at 651, 747 P.2d at 1078)).

63. *See, e.g.*, Sintra, Inc. v. City of Seattle (*Sintra II*), 131 Wash. 2d 640, 676, 935 P.2d 555, 573 (1997) (Durham, J., concurring) (citing *Guimont I*, 121 Wash. 2d at 595, 854 P.2d at 6) ("A restriction or condition on the use of property which goes beyond the prevention of harm to provide an affirmative 'benefit to the public' may constitute a regulatory taking."); Paradise, Inc. v. Pierce Cnty., 124 Wash. App. 759, 770–74, 102 P.3d 173, 179–81 (2004); Rhoades v. City of Battle Ground, 115 Wash. App. 752, 772, 63 P.3d 142, 152 (2002).

64. "The court first asks two threshold questions to determine if a regulation is susceptible to a takings challenge. If the regulation passes this threshold inquiry, the court proceeds to a takings analysis." *Guimont I*, 121 Wash. 2d at 594, 854 P.2d at 5.

to Washington takings law: Does the regulation substantially advance a legitimate state interest?[65] This, of course, is the due process-based question that *Lingle* removed from the federal analysis in 2005.[66] If the court answers that question in the negative, the regulation is a taking.[67] If the answer is affirmative, the court proceeds to the final element, which is based on the *Penn Central* factors adopted from the federal analysis.[68]

2. *Federal Courts, the Washington Court of Appeals, and Attorneys Struggle to Apply the Washington Takings Analysis*

The complexity of the Washington takings analysis is perhaps lost on the Washington State Supreme Court, which has avoided entangling itself in its own creation. After developing the Washington takings analysis from 1987 through 1993,[69] the Court essentially exited the takings field. Since then, the Court has either denied review of actual takings cases,[70] resolved takings claims without resorting to (or even mentioning) the Washington analysis,[71] or reviewed collateral takings

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65. *Presbytery*, 114 Wash. 2d at 333, 787 P.2d at 914.

66. For a discussion of *Lingle*, see *supra* text accompanying notes 20–31.

67. Margola Assocs. v. City of Seattle, 121 Wash. 2d 625, 645, 854 P.2d 23, 35 (1993).

68. *Id*. at 645–46, 854 P.2d at 35. Connecting the factors recited in *Margola* to *Penn Central* involves several steps. *See id*. (citing Presbytery of Seattle v. King Cnty., 114 Wash. 2d 320, 336, 787 P.2d 907, 915 (1990)); *Presbytery*, 114 Wash. 2d at 336 n.30, 787 P.2d at 915 n.30 (citing Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 495 (1987)); *Keystone*, 480 U.S. at 495 (quoting Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979)); *Kaiser Aetna*, 444 U.S. at 175 (citing Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978)).

69. This Article details and critiques the evolution of the Washington takings analysis. *See infra* text accompanying notes 111–37.

70. *See, e.g.*, Peste v. Mason Cnty., 133 Wash. App. 456, 471–73, 136 P.3d 140, 148–49 (2006), *review denied*, 159 Wash. 2d 1013, 154 P.3d 919 (2007); City of Des Moines v. Gray Buss., LLC, 130 Wash. App. 600, 611–15, 124 P.3d 324, 330–32 (2005), *review denied*, 158 Wash. 2d 1024, 149 P.3d 379 (2006); Paradise, Inc. v. Pierce Cnty., 124 Wash. App. 759, 767–74, 102 P.3d 173, 177–81 (2004), *review denied*, 154 Wash. 2d 1027, 120 P.3d 73 (2005); Guimont v. City of Seattle (*Guimont II*), 77 Wash. App. 74, 79–85, 896 P.2d 70, 75–79, *review denied*, 127 Wash. 2d 1023, 904 P.2d 1157 (1995).

71. Brutsche v. City of Kent, 164 Wash. 2d 664, 680–84, 193 P.3d 110, 119–21 (2008) (applying *Eggleston v. Pierce County*, 148 Wash. 2d 760, 64 P.3d 618 (2002), to resolve the Washington constitutional claim, and applying federal law to the federal takings claim); Tiffany Family Trust Corp. v. City of Kent, 155 Wash. 2d 225, 233–37, 119 P.3d 325, 332–32 (2005) (refusing to entertain the takings claim because the claimant failed to follow statutory procedural prerequisites); *Eggleston*, 148 Wash. 2d at 768–69, 64 P.3d at 623–24 (resolving the case on historical evidence that, when Washington adopted its constitution, damaging property for evidence in a criminal case did not constitute a taking); Asarco, Inc. v. Dep't of Ecology, 145 Wash. 2d 750, 760–61, 43 P.3d 471, 476 (2001) (dismissing the takings claim as unripe, and in dictum citing only federal takings authority).

issues unrelated to whether a government action constituted a taking for which compensation was due.[72]

The closest the Court came to applying the Washington analysis was in *Manufactured Housing Communities of Washington v. State*.[73] *Manufactured Housing* did not involve the usual assertion of a taking remediable through compensation. Instead, the case involved a facial challenge to the validity of a statute that gave qualified tenants a right of first refusal to purchase their mobile home parks.[74] Because the plaintiff property owners sought to invalidate the statute, their claim was premised on an argument that the government lacked the authority to take any property, even if compensated.[75] The Court reasoned that, before it could determine whether the government had the *authority* to take property through that statute, the Court first had to determine whether the statute, if it were applied, would actually *take* property.[76] To do that, the Court purported to apply the Washington analysis.[77] In reality, the Court resolved *Manufactured Housing* by applying law that differed from that analysis in two crucial respects.

First, *Manufactured Housing* misstated the Washington analysis. Citing its prior takings decisions, the Court reported that a regulation could be challenged on a "facial" or "categorical" basis for four reasons, including that the regulation destroys any fundamental attribute of property ownership.[78] Applying that rule, *Manufactured Housing* concluded that the challenged statute would constitute a taking solely because it would deprive owners of the right of first refusal, which the

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72. Dickgeister v. State, 153 Wash. 2d 530, 538–42, 105 P.2d 26, 30–32 (2005) (finding that logging activity constituted a "public use" such that an inverse condemnation claim should be allowed to proceed to trial, but not applying any takings analysis to the facts of that case); Manufactured Hous. Cmtys. of Wash. v. State, 142 Wash. 2d 347, 370–74, 13 P.3d 183, 194–96 (2000) (finding that the potential taking would not be for a "public use"); Phillips v. King Cnty., 136 Wash. 2d 946, 959–60, 964–65, 968 P.2d 871 (1998) (refusing to treat the claim as raising a regulatory takings issue, as the court of appeals had); Sintra, Inc. v. City of Seattle (*Sintra II*), 131 Wash. 2d 640, 644–45, 935 P.2d 555, 558 (1997) (dealing with the amount of compensation due after constitutional violations had already been established).

73. 142 Wash. 2d 347, 13 P.3d 183 (2000).

74. *Id.* at 351, 13 P.3d at 185.

75. *Id.* at 353, 13 P.3d at 186; *see also infra* text accompanying note 273 (discussing *Manufactured Housing* in the context of its decision to invoke independent state constitutional grounds for its decision).

76. *Manufactured Housing*, 142 Wash. 2d at 363–64, 13 P.3d at 191.

77. *Id.* at 355, 13 P.3d at 187 (reciting certain elements of the Washington analysis); *id.* at 363–68, 13 P.3d at 191–94 (applying one of those elements).

78. *Id.* at 355, 13 P.3d at 187.

court deemed a fundamental attribute of property ownership.[79] But no such rule exists. Under the Washington takings analysis, the only way to prove a facial or categorical taking is to establish either a physical invasion or a total regulatory taking.[80] Beyond that, even if a property owner establishes that a regulation infringes on some other fundamental attribute of property ownership, the owner must still prove, on a fact-specific basis, that the regulation does not advance a legitimate state interest or fails application of the *Penn Central* factors.[81] Because *Manufactured Housing* neither followed nor overruled the Washington takings analysis the Court had finalized just seven years earlier, the decision remains little more than an example of the inconsistency plaguing Washington takings jurisprudence.

Second, *Manufactured Housing* added yet another reason, untethered to the Washington analysis, for finding that the challenged statute would take property. Through elusive logic, *Manufactured Housing* leapt from dated case law about the authority to condemn property to a conclusion that a taking may be proven through an implicit "condemnatory effect":

> Washington law recognizes that "'[t]he authority to condemn must be expressly given or *necessarily implied*.'" *State ex rel. Wauconda Inv. Co. v. Superior Court*, 68 Wash. 660, 662, 124 P. 127 (1912) (emphasis added) (quoting 1 John Lewis, A TREATISE ON THE LAW OF EMINENT DOMAIN (3d ed.) § 371, at 679 (3d ed. 1909)). While [the challenged statute] says nothing

79. *Id.* at 368, 13 P.3d at 193.

80. Guimont v. Clarke (*Guimont I*), 121 Wash. 2d 586, 602–03, 854 P.2d 1, 10 (1993).

81. *Id.* at 603–04, 13 P.2d at 10–11. *Manufactured Housing* also said that merely proving that "the regulations were employed to enhance the value of publicly [owned] property" would, like the "fundamental attribute" element, be sufficient to establish a "facial" or "categorical" taking. *Manufactured Housing*, 142 Wash. 2d at 355, 13 P.3d at 187. Although *Manufactured Housing* did not actually apply the "enhance the value of publicly owned property" test, its recitation of that test suffered from two problems. First, as with the "fundamental attribute" test, the Court misstated its own precedent, which maintains that a facial or categorical taking may be proven only by establishing a physical invasion or a deprivation of all economically viable use. *See Guimont I*, 121 Wash. 2d at 602–04, 854 P.2d at 10–11. Second, seven years before *Manufactured Housing*, the Court declined to use "enhance the value of publicly owned property" as an element of the Washington analysis, and held instead that the question is really whether the regulation seeks less to prevent a harm than to impose the requirement of providing an affirmative public benefit. *Compare Guimont I*, 121 Wash. 2d at 603, 854 P.2d at 10 (identifying the element) *with id.*, 121 Wash. 2d at 617–20, 854 P.2d at 18–20 (Utter, J., concurring) (arguing unsuccessfully that the element should be phrased as whether a regulation is used to enhance the value of publicly owned property). *See supra* text accompanying notes 61–63.

> about condemnation, its condemnatory effect is *necessarily implied*.[82]

Manufactured Housing cited no Washington or federal case law for this "condemnatory effect" test. None exists in the Washington takings analysis.

Although the Washington State Supreme Court has managed to sidestep its own takings analysis, the rest of Washington's legal community has not. Federal courts have drawn different and often incorrect lessons from the Washington takings analysis. For example, in *Heitman v. City of Spokane Valley*,[83] the U.S. District Court for the Eastern District of Washington eschewed the Washington analysis altogether and applied only the federal analysis to resolve a takings claim brought under the U.S. and Washington State Constitutions.[84] By contrast, in *Tapps Brewing, Inc. v. City of Sumner*,[85] the U.S. District Court for the Western District of Washington first applied the federal analysis to resolve a federal takings claim, and then applied the Washington analysis on the mistaken assumption that it is unique to claims under the Washington State Constitution.[86] Furthermore, the court in *Tapps Brewing* was confused by the Washington analysis. The court reported that affirmative answers to Washington's threshold questions mean that the challenged government action is "susceptible to a constitutional taking challenge," while a negative answer means that the action is "subjected to a *Penn Central* type analysis."[87] There is, however, no actual difference between a "taking challenge" under the Washington analysis and application of the *Penn Central* factors; the

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82. *Manufactured Housing*, 142 Wash. 2d at 369–70 (emphasis in original); *id.*, 13 P.3d at 194 (same, but incorrectly citing *In re Willis Ave.*, 56 Mich. 244, 22 N.W. 871 (1885), rather than Lewis, as the source of the quote in *Wauconda*). Under the facts of that case, the Court ruled that, "in effect," a taking occurred because the challenged statute transferred a fundamental attribute away from one property owner to another. *Id.*, 142 Wash. 2d at 370, 13 P.3d at 194.

83. No. CV-09-0070-FVS, 2010 WL 816727 (E.D. Wash. Mar. 5, 2010).

84. Heitman v. City of Spokane Valley, No. CV-09-0070-FVS, 2010 WL 816727, at *4–6 (E.D. Wash. Mar. 5, 2010).

85. 482 F. Supp. 2d 1218 (W.D. Wash. 2007), *aff'd sub nom.* McGlung v. City of Sumner, 548 F.3d 1219 (9th Cir. 2008), *cert. denied*, ___ U.S. ___, 129 S. Ct. 2765 (2009).

86. *Tapps Brewing*, 482 F. Supp. 2d at 1228–32. Although the property owners appealed the district court decision, they did not seek appellate review of their state law claims. *See McGlung*, 548 F.3d at 1223 n.1. The Washington takings analysis has remained a mistaken attempt to track federal law under the U.S. Constitution; it has never been an application of unique Washington constitutional protections. *See infra* text accompanying notes 111–22, 228–29, and 269–72.

87. *Tapps Brewing*, 482 F. Supp. 2d at 1231–32.

latter are an integral part of the former.[88] The threshold questions determine which challenged actions must go through a takings challenge (including the *Penn Central* factors) and which need not.[89]

The Washington Court of Appeals also has attempted to apply the Washington takings analysis since 1993[90] and, to no surprise, has been confused by the analysis. The court expressed its frustration most pointedly in its 1995 decision in *Guimont v. City of Seattle* (*Guimont II*),[91] a case involving the same parties as, but legal issues distinct from, the case that resulted in the Washington State Supreme Court's 1993 *Guimont I* decision.[92] In attempting to recite the takings analysis, *Guimont II* mistakenly included the "fundamental attribute of property ownership" element twice, forcing the court of appeals to search unsuccessfully for "a clue to the distinction" in this repetition.[93] *Guimont II* considered whether repetition of the element could have been caused by distinctions among the verbs "destroy," "derogate," and "infringe," but the court ultimately rejected that as the reason and abandoned the search.[94]

As testament to the confusion surrounding Washington's takings law, the Washington Court of Appeals in *Peste v. Mason County*[95] subsequently misread *Guimont II*'s unsuccessful search for a clue as a success.[96] *Peste* not only followed *Guimont II*'s mistaken repetition of the "fundamental attribute" element, but also recited as settled law what *Guimont II* merely considered but rejected as a reason for the repetition:

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88. *See Guimont I*, 121 Wash. 2d at 595–96, 854 P.2d at 6 (explaining that government action susceptible to a "takings challenge" is subject to application of the *Penn Central* factors, even if not identifying them as such).

89. *See Guimont I*, 121 Wash. 2d at 594, 854 P.2d at 5.

90. Peste v. Mason Cnty., 133 Wash. App. 456, 471–74, 136 P.3d 140, 148–49 (2006); City of Des Moines v. Gray Buss., LLC, 130 Wash. App. 600, 611–15, 124 P.3d 324, 330–32 (2005); Paradise, Inc. v. Pierce Cnty., 124 Wash. App. 759, 767–74, 102 P.3d 173, 177–81 (2004); Edmonds Shopping Ctr. Assocs. v. City of Edmonds, 117 Wash. App. 344, 362–64, 71 P.3d 233, 241–42 (2003); Rhoades v. City of Battle Ground, 115 Wash. App. 752, 770–72, 63 P.3d 142, 152–53 (2002); City of Seattle v. McCoy, 101 Wash. App. 815, 827–39, 4 P.3d 159, 166–72 (2000); Kahuna Land Co. v. Spokane Cnty., 94 Wash. App. 836, 841–43, 974 P.2d 1250, 1252–53 (1999); Schreiner Farms, Inc. v. Smitch, 87 Wash. App. 27, 32–38, 940 P.2d 274, 276–80 (1997); Guimont v. City of Seattle (*Guimont II*), 77 Wash. App. 74, 79–86, 896 P.2d 70, 75–79 (1995); Jones v. King Cnty., 74 Wash. App. 467, 478–79, 874 P.2d 853, 859 (1994).

91. 77 Wash. App. 74, 896 P.2d 70 (1995).

92. *See id.* at 77–78, 896 P.2d at 75 (distinguishing *Guimont I*).

93. *Id.* at 80–81 & n.6, 896 P.2d at 76 & n.6.

94. *Id.*

95. 133 Wash. App. 456, 471–74, 136 P.3d 140, 148–49 (2006)

96. *Peste*, 133 Wash. App. at 472–73, 136 P.3d at 148–49.

distinctions between "infringe" and "destroy."[97] Given the complexity of the Washington analysis, such confusion should not be surprising.

Guimont II's critique of the Washington analysis went further. Beyond its confusion over its mistaken repetition of the "fundamental attribute" element, *Guimont II* also could not determine "where the analysis goes if a regulation does not effect a 'total taking' or 'physical invasion' but *does* implicate a fundamental attribute of property ownership."[98] The court ultimately decided that, under the facts of that case, it could "leave this conundrum to another day."[99] With perceptible relief, *Guimont II* noted that "this case does not require us to completely rehash the complex, confusing and often-ethereal realm of theoretical law that has developed in Washington under the taking clause of the 5th and 14th Amendments to the United States Constitution."[100] Aptly recognizing what would be involved in trying to untangle the Washington takings analysis, *Guimont II* confessed "we have no desire to add more heat to the discussion at the expense of light . . . ."[101]

Because attorneys must advise their clients in advance of any litigation, they frequently struggle with the Washington takings analysis. This is especially true of attorneys for local governments. The Washington Growth Management Act (GMA)[102] embraces a number of land use planning goals to guide the development of local comprehensive plans and development regulations.[103] Among those goals is one that parrots the Federal Takings Clause: "Private property shall not be taken for public use without just compensation having been made."[104] Local governments can face litigation to overturn comprehensive plan or development regulation amendments on the ground that local governments adopted them without first evaluating the

97. *Id.* at 472–73, 136 P.3d at 149; *cf. Guimont II*, 77 Wash. App. at 81 n.6, 896 P.2d at 76 n.6.

98. *Guimont II*, 77 Wash. App. at 85 n.9, 896 P.2d at 78 n.9 (emphasis in original).

99. *Id.* at 85 n.9, 896 P.2d at 78 n.9.

100. *Id.* at 79, 896 P.2d at 75–76.

101. *Id.* at 80, 896 P.2d at 76.

102. WASH. REV. CODE §§ 36.70A.010–.903 (2010).

103. Those goals include the reduction of urban sprawl, the encouragement of affordable housing and economic development, and the preservation of historic resources. *Id.* § 36.70A.020(2), (4), (5), (13). A comprehensive plan is a "generalized coordinated land use policy statement of the governing body of a county or city." *Id.* § 36.70A.030(4). Development regulations are "the controls placed on development or land use activities by a county or city." *Id.* § 36.70A.030(7). The GMA requires counties with populations above a certain size, and the cities within those counties, to "adopt a comprehensive plan under [the GMA] and development regulations that are consistent with and implement the comprehensive plan." *Id.* § 36.70A.040(3)(d).

104. WASH. REV. CODE § 36.70A.020(6) (2010); *accord* U.S. CONST. amend. V: "[N]or shall private property be taken for public use, without just compensation."

amendments' potential to take property unconstitutionally.[105] To help local governments meet this procedural requirement to subject almost every piece of local land use legislation to a takings analysis, the GMA directs Washington's Attorney General to establish an "orderly, consistent process, including a checklist if appropriate, that better enables . . . local governments to evaluate proposed regulatory or administrative actions to assure that such actions do not result in an unconstitutional taking of private property."[106] Unfortunately, the Attorney General's process does little more than prompt local governments to consider the elements of the convoluted Washington takings analysis.[107] Like others' good faith attempts to explain the Washington analysis as black letter law,[108] the Attorney General's

105. The Growth Management Hearings Boards have initial jurisdiction over claims that a local comprehensive plan or development regulation amendment violates the GMA. WASH. REV. CODE § 36.70A.280 (2010); *see generally* WASH. REV. CODE §§ 36.70A.250–36.70A.330 (2010) (provisions related to the Board). Although the Washington Legislature recently ordered the various boards to consolidate, they remained three separate entities, each with jurisdiction over a distinct region of Washington, during the first two decades of the GMA's existence. *Compare* Act of July 16, 1991, ch. 32, § 5, 1991 Wash. Sess. Laws 2903, 2907 (initial establishment of the Western Washington, Central Puget Sound, and Eastern Washington Growth Management Hearings Boards), *with* Act of Mar. 25, 2010, ch. 211, § 17, 2010 Wash. Sess. Laws 1679, 1697–98 (recent consolidation). All of the boards agreed that the GMA provides a cause of action to enforce the GMA's takings goal through a procedural requirement that local governments must give "appropriate" or "adequate" consideration to whether comprehensive plan and development regulation amendments might effect a taking. *See, e.g.*, Shulman v. City of Bellevue, No. 95-3-0076, 1996 WL 681286, at *7 (Cent. Puget Sound Growth Mgmt. Hearing Bd. May 13, 1996); Achen v. Clark Cnty., No. 95-2-0067c, 1995 WL 903178, at *6 (W. Wash. Growth Mgmt. Hearing Bd. Sept. 20, 1995).

106. WASH. REV. CODE § 36.70A.370(1) (2010). Although the GMA orders local governments to use the Attorney General's process, WASH. REV. CODE § 36.70A.370(2) (2010), the GMA makes clear that it does not "grant[] a private party the right to seek *judicial* relief requiring compliance" with that requirement. WASH. REV. CODE § 36.70A.370(4) (2010) (emphasis added). Nevertheless, the formerly distinct Growth Management Hearings Boards disagreed on whether a private party could seek a board order to force a local government to comply with the Attorney General's process. *Compare Shulman*, 1996 WL 681286, at *11 (no cause of action), *and* Wilma v. Stevens Cnty., No. 06-1-0009c, 2007 WL 1153336, at *24 (E. Wash. Growth Mgmt. Hearing Bd. Mar. 12, 2007) (same), *with* Laurel Park Cmty., LLC v. City of Tumwater, No. 09-2-0010, 2009 WL 3844487, at *10–12 (W. Wash. Growth Mgmt. Hearing Bd. Oct. 13, 2009) (finding that a city failed to comply with the Attorney General's process).

107. AG MEMO, *supra* note 43, at 13–16 (advising the use of "warning signals" that are essentially the questions posed by the various elements of the Washington takings analysis).

108. *See, e.g.*, Spencer, *Regulatory Taking*, *supra* note 43, § 110.4 (3d ed. 1996 & Supp. 2002); Timothy H. Butler, Presentation at Government Takings Seminar: Overview of State Regulatory Takings Law (Nov. 15, 2001).

largely uncritical summary of the analysis risks misstatement, oversimplification, and loss of critical detail.[109]

In sum, the Washington takings analysis vexes anyone trying to understand and apply it. Despite the Washington State Supreme Court's declaration two decades ago that it had delivered Washington takings law from its quagmire,[110] the Washington analysis continues to mire those who venture into it.

II. THE WASHINGTON TAKINGS ANALYSIS IS UNFOUNDED

If complexity were its only vice, there would be little justification for criticizing the Washington takings analysis. Law does not have to be simple.

But law should be well-founded. The Washington takings analysis is unfounded on at least three levels. First, the Washington analysis is fatally undermined by the fact that it differs from the analysis established by the U.S. Supreme Court, which must remain the ultimate arbiter of how courts apply federal constitutional protections. Second, the Washington analysis is constitutionally insufficient because it enhances protections for government and thus necessarily lowers the floor of protection set for property owners by the federal analysis. Finally, each of the elements unique to the Washington analysis offers little value or has been discredited by the U.S. Supreme Court.

A. Differences Between the Washington and Federal Takings Analyses Fatally Undermine the Washington Analysis

The Washington State Supreme Court created the Washington analysis as an interpretation of the Takings Clause of the U.S. Constitution. The Court believed that it successfully coordinated the Washington and federal analyses of that provision. The Court was mistaken. The analyses are decidedly different. That fact alone is a fatal flaw of the Washington analysis.

Understanding how the Court committed this error requires a review of the decisions that built the unique Washington analysis from 1987

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109. *See, e.g.*, AG MEMO, *supra* note 43, at 7–10 (recognizing few differences between the Washington and federal analyses). This is not meant as a criticism of the Attorney General's memorandum, which is a laudable attempt to comply with the GMA's directive to assist local governments. The Attorney General is not at liberty to change the Washington takings analysis, and the Attorney General's memorandum is not an appropriate platform from which to urge reform of that analysis.

110. Presbytery of Seattle v. King Cnty., 114 Wash. 2d 320, 328, 787 P.2d 907, 912 (1990).

through 1993. Decided in 1987, *Orion Corp. v. State*[111] devoted pages to discussing the Court's view of how Washington takings case law had departed from elusive and ambiguous federal case law.[112] *Orion* ultimately decided to follow the federal takings analysis: "[I]n order to avoid exacerbating the confusion surrounding the regulatory takings doctrine, and because the federal approach may in some instance provide broader protection, we will apply the federal analysis to review all regulatory takings claims, including Orion's."[113] By then relying primarily on federal case law to review the claim before it,[114] *Orion* not only rendered its discussion of the unique Washington approach dictum, but also declared that approach to be different from, and less desirable than, the federal analysis.

Having identified and then rejected a unique Washington approach in *Orion*, the Court appropriately hewed to federal law three months later when it next faced a takings claim in *Allingham v. City of Seattle*.[115] For the recitation of the takings analysis in that decision, the Court cited only a federal takings decision and a 1968 Washington decision that did not actually involve a takings claim.[116] As originally issued, *Allingham* did not even cite *Orion*.[117]

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111. 109 Wash. 2d 621, 747 P.2d 1062 (1987).

112. *Id.* at 645–53, 747 P.2d at 1075–79.

113. *Id.* at 657, 747 P.2d at 1082.

114. *Id.* at 658–66, 670–71, 747 P.2d at 1082–86, 1088.

115. 109 Wash. 2d 947, 952–53, 749 P.2d 160, 163–64, *modified*, 757 P.2d 533 (1988), *overruled in part on other grounds by Presbytery*, 114 Wash. 2d at 335, 787 P.2d at 915.

116. *Id.* at 952, 749 P.2d at 163 ("A zoning ordinance constitutes a taking of private property where it (1) does not substantially promote legitimate public interests, or (2) deprives the owner of any profitable use of the land." (citing Agins v. Tiburon, 447 U.S. 255, 260–61, (1980); Carlson v. Bellevue, 73 Wash. 2d 41, 51, 435 P.2d 957 (1968))). Although the U.S. Supreme Court subsequently removed *Agins* and the "substantially promotes legitimate public interests" element from the federal takings analysis, see *supra* text accompanying notes 20–31 (discussing *Lingle*), that element was part of the federal analysis when *Allingham* was decided in 1988. To the extent that *Carlson* touched upon takings law, it recited federal authority. *See Carlson*, 73 Wash. 2d at 44–45, 435 P.2d at 959 (invoking federal law similar to what became the *Penn Central* factors to resolve a challenge to an exercise of "legislative discretion" under an "arbitrary and capricious" standard of review).

117. Although inconsistent with the proper distinction between due process claims (for which invalidation is the proper constitutional remedy) and takings claims (for which compensation is the proper constitutional remedy), see *supra* text accompanying notes 5–8, the plaintiffs in *Allingham* successfully pressed a takings claim to seek invalidation of the challenged land use regulation, not compensation for application of that regulation. *Allingham*, 109 Wash. 2d at 948, 953, 749 P.2d at 161, 164. Perhaps aware of this inconsistency, the Washington State Supreme Court later modified *Allingham* to add a two-sentence footnote, one sentence of which cited *Orion* generally for the following statement: "The remedy we grant of invalidation of the ordinance is a remedy consistent with the denial of substantive due process." 757 P.2d at 534 (Order Changing the Opinion). This

In 1990, the Court compounded the confusion it sought to avoid in *Orion*. In *Presbytery of Seattle v. King County*,[118] the Court explained that it was considering "the 'taking' analysis used by the United States Supreme Court and by this court in *Orion*." [119] On its face, this statement could refer only to the federal takings analysis because *Orion* applied federal case law in lieu of a unique Washington analysis.[120] But that is apparently not what *Presbytery* meant. *Presbytery* displayed no appreciation of the fact that *Orion* abandoned a Washington takings analysis in favor of the federal analysis. Instead of reading *Orion* as having chosen between a federal and a Washington analysis, *Presbytery* cast *Orion* as having "coordinated" both analyses into the start of a "comprehensive formula" for resolving takings challenges.[121] To improve that coordinated, federal-state formula, *Presbytery* devoted six pages to converting the unique Washington approach described in *Orion* into a formal, multi-part analysis through citations to both federal and Washington case law.[122]

Despite deriving a "comprehensive formula" from *Orion* and thereby radically recasting *Orion*'s true lesson, *Presbytery* did not actually apply that formula or any other takings analysis because the Court resolved *Presbytery* not on takings grounds, but on ripeness grounds.[123] This crucial juncture in Washington's takings law—where the Washington State Supreme Court formally articulated a unique analysis on the mistaken assumption that it was coordinating Washington and federal law—therefore arose in dictum.[124]

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was likely a reference to *Orion*'s discussion of the respective remedies available for takings and due process violations. *See Orion*, 109 Wash. 2d at 649, 747 P.2d at 1077.

The Washington State Supreme Court later overruled *Allingham* in part, not because it invoked federal takings law instead of *Orion*'s summary of Washington takings law, but because *Allingham* misapplied federal law on the question of whether the entire parcel of property must be considered when determining whether a taking has occurred. *See* Presbytery of Seattle v. King Cnty., 114 Wash. 2d 320, 335, 787 P.2d 907, 915 (1990).

118. 114 Wash. 2d 320, 787 P.2d 907 (1990).

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

120. *See* Orion Corp. v. State, 109 Wash. 2d 621, 658–66, 670–71, 747 P.2d 1062, 1082–86, 1088 (1987).

121. *Presbytery*, 114 Wash. 2d at 328, 787 P.2d at 912.

122. *Id.* at 329–30, 333–37, 787 P.2d at 912, 914–16.

123. *Compare id.* at 327, 787 P.2d at 911 (explaining in a "Prefatory Note" why the Court felt compelled to explore takings law even though the Court ultimately resolved the case on ripeness grounds), *with id.* at 337–40, 787 P.2d at 916–18 (resolution of the case).

124. *Accord* Jeffrey M. Eustis, *Between Scylla and Charybdis: Growth Management Act Implementation That Avoids Takings and Substantive Due Process Limitations*, 16 U. PUGET

Two years later, in 1992, when faced with its next pair of takings cases—*Sintra v. City of Seattle* (*Sintra I*)[125] and *Robinson v. City of Seattle*[126]—the Court welcomed its first opportunity to apply the coordinated analysis it had heralded in *Presbytery*: "This court's recent opinions in [*Orion* and *Presbytery*] have formulated a comprehensive state 'regulatory takings' doctrine. Thus, this State's current rule on the law of inverse condemnation has only recently taken shape, and [the new pair of cases present] opportunities for this court to apply [its] recently adopted analysis."[127] *Sintra I* and *Robinson* embraced *Presbytery*'s assumption that the Court had coordinated the federal and Washington takings analyses into a seamless whole in which federal and Washington authority coexist without friction.[128] Both cases presented claims solely under the U.S. Constitution.[129] The Court noted that "[s]tate law may provide useful guidance in this determination, but federal law is ultimately controlling."[130] Nevertheless, the Court followed its *Presbytery* dictum (which incorrectly equated the Washington takings analysis with the federal takings analysis) rather than its *Orion* dictum (which cast the Washington analysis as different from, and less desirable than, the federal analysis).[131]

The following year, in 1993, the Court tinkered with the Washington analysis in another pair of decisions, both of which underscored the Court's mistaken assumption that it had successfully blended Washington and federal takings law. First, in *Guimont v. Clarke* (*Guimont I*),[132] the Court modified *Presbytery*'s description of the Washington analysis to incorporate the "total [regulatory] taking" element that the U.S. Supreme Court added to the federal analysis in

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SOUND L. REV. 1181, 1191–92 (1993) (recognizing that *Presbytery*'s framework "was largely set forth in dicta").

125. 119 Wash. 2d 1, 829 P.2d 765 (1992).

126. 119 Wash. 2d 34, 830 P.2d 318 (1992).

127. *Id.*, 119 Wash. 2d at 47–48, 830 P.2d at 327. As it turned out, the Court was able to take advantage of that opportunity only in *Robinson*. Because the Court dismissed *Sintra I* as unripe, it did not apply a takings analysis, but instead discussed it only as dictum. *Sintra I*, 119 Wash. 2d at 18–20, 829 P.2d at 774–76.

128. *See, e.g.*, *Sintra I*, 119 Wash. 2d at 13–14, 829 P.2d at 772 ("In *Presbytery* . . . this court clarified regulatory takings analysis and made plain the necessary steps to show that a taking had occurred.").

129. *Sintra I*, 119 Wash. 2d at 14, 829 P.2d at 772; *Robinson*, 119 Wash. 2d at 47, 830 P.2d at 327.

130. *Sintra I*, 119 Wash. 2d at 14, 829 P.2d at 772.

131. *Id.* at 13–18, 829 P.2d at 771–74; *Robinson*, 119 Wash. 2d at 49–54, 830 P.2d at 327–30.

132. 121 Wash. 2d 586, 854 P.2d 1 (1993).

1992.[133] *Guimont I* applied "only the federal constitution" and, in determining whether a taking had occurred in that case, cited far more federal authority than it cited *Presbytery* or other Washington case law.[134] Finally, in *Margola Associates v. City of Seattle*,[135] the Court recited the Washington analysis as newly modified by *Guimont I* (dubbing it the "revised *Presbytery* analysis"),[136] and then cited federal case law almost exclusively to find that no taking occurred.[137]

At least two weaknesses emerge from the six-year evolution of the Washington takings analysis. One relatively minor weakness stems from the circumstances of its birth: its origins in dicta should undercut its precedential value.[138]

The other weakness is fatal: the existence of differences between the Washington and federal takings analyses. When, as here, the Washington State Supreme Court interprets the U.S. Constitution, the Court is not free to substitute its own analysis for that of the U.S. Supreme Court, which "acts as the final arbiter of controversies arising under the federal constitution."[139] Although the Washington State Supreme Court articulated this axiom in a different context, its words apply to a present-day analysis of takings claims:

> These questions . . . are by no means novel; they have often been raised, and the supreme court [of the United States] has often considered them, as an analysis of its cases will readily reveal. It scarcely needs be said that, with respect to matters involving the Federal constitution, we, as an inferior tribunal, must follow the pronouncements of that court no matter what our private views may be.[140]

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133. *Id.* at 594–604, 854 P.2d at 5–11 (incorporating Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992)). For a discussion of the role *Lucas* plays in the federal takings analysis, see *supra* text accompanying notes 36–37.

134. Guimont v. Clarke (*Guimont I*), 121 Wash. 2d at 604–08, 854 P.2d at 11–13.

135. 121 Wash. 2d 625, 854 P.2d 23 (1993).

136. *Id.* at 642–46, 854 P.2d at 33–35.

137. *Id.* at 646–49, 854 P.2d at 35–36. The Washington Court of Appeals appears to accept the notion that the Washington and federal takings analyses are equivalent. That court has frequently applied the Washington analysis only after noting that federal takings law must control. *E.g.*, Schreiner Farms, Inc. v. Smitch, 87 Wash. App. 27, 33–35, 940 P.2d 274, 277–78 (1997); Guimont v. City of Seattle (*Guimont II*), 77 Wash. App. 74, 79 n.4, 896 P.2d 70, 75 n.4 (1995).

138. *See* Malted Mousse, Inc. v. Steinmetz, 150 Wash. 2d 518, 531–32, 79 P.3d 1154, 1161 (2003) (applying this reasoning to undercut other Washington State Supreme Court precedent).

139. State v. Laviollette, 118 Wash. 2d 670, 673–74, 826 P.2d 684, 686 (1992).

140. B.F. Goodrich Co. v. State, 38 Wash. 2d 663, 676, 231 P.2d 325, 332 (1951).

The U.S. Supreme Court has likewise reeled in state courts that attempt to apply a federal constitutional provision in a manner contrary to an established federal analysis.[141]

Through its frequent consideration of takings claims, the U.S. Supreme Court has articulated a comprehensive federal takings analysis. Although the Washington State Supreme Court assumed it was coordinating the Washington and federal analyses from *Presbytery* through *Margola*, that assumption was incorrect then and remains incorrect today. As a glance at the flow charts representing the two analyses reveals,[142] the federal and Washington takings analyses are, without doubt, different. The existence of those differences—even if one thought that they improved upon the federal analysis—cripples the Washington analysis. Because the U.S. Supreme Court has dictated the steps a court must take when analyzing a takings claim, the Washington State Supreme Court must follow those steps. Its failure to yield to the superior tribunal fundamentally undermines the Washington takings analysis.

B. The Washington Takings Analysis Grew from an Illusory Premise into a Constitutionally Insufficient Substitute for the Federal Analysis

Although the existence of differences between the Washington and federal takings analyses should provide an adequate basis for discarding the Washington analysis, an additional reason lies in the motivation for, and constitutional implications of, those differences. They stem from a premise that has proved unstable and led to a Washington analysis that is constitutionally insufficient because it offers individuals fewer opportunities to prevail on a takings claim than under the federal analysis.

1. The Washington Analysis Is Structured on a Police-Power-or-Eminent-Domain Dichotomy and a Desire to Enhance Protections for Local Governments

A unique and central feature of the Washington takings analysis is the prominent role substantive due process plays in shielding government from monetary damages. This feature is rooted in a line of cases that

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141. *See, e.g.*, North Carolina v. Butler, 441 U.S. 369, 375–76 (1979); Oregon v. Hass, 420 U.S. 714, 719–20, 719 n.4 (1975).

142. *See supra* figures following notes 41 and 44.

repeat a simple-sounding dichotomy: a regulation must be evaluated as an exercise of *either* the police power under due process law *or* the power of eminent domain under takings law.[143] Because these cases paint the picture of two mutually exclusive categories, an action that is a valid exercise of the police power cannot also be a taking.

The police-power-or-eminent-domain dichotomy grew from a nineteenth century U.S. Supreme Court decision, *Mugler v. Kansas*,[144] which observed that "[a] prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking . . . ."[145] Over three decades later, in its 1921 decision in *Conger v. Pierce County*,[146] the Washington State Supreme Court relied on that statement to formulate Washington's police-power-or-eminent-domain dichotomy: "Eminent domain takes private property for a public use, while the police power regulates its use and enjoyment, or if it takes or damages it, it is not a taking or damaging for the public use, but to conserve the safety, morals, health and general welfare of the public."[147]

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143. *See, e.g.*, Eggleston v. Pierce Cnty., 148 Wash. 2d 760, 767–68, 64 P.3d 618, 623 (2002) ("Courts have long looked behind labels to determine whether a particular exercise of power was properly characterized as police power or eminent domain."); Presbytery of Seattle v. King Cnty., 114 Wash. 2d 320, 329, 787 P.2d 907, 912 (1990) ("These two constitutional theories are *alternatives* in cases where overly severe land use regulations are alleged," so in each case, the court must "determine which of these two constitutional tests to utilize"); Orion Corp. v. State, 109 Wash. 2d 621, 646, 650–51, 747 P.2d 1062, 1075–76, 1078 (1987); Cougar Bus. Owners Ass'n v. State, 97 Wash. 2d 466, 476, 647 P.2d 481, 486 (1982) ("It is a well established principle that if a regulation is a valid exercise of the State's police powers, it does not constitute a taking."); Rains v. Dep't of Fisheries, 89 Wash. 2d 740, 745, 575 P.2d 1057, 1059 (1978) ("The critical determination under this constitutional provision is between a 'taking' and a regulation or restriction on the use of private property in the public interest, which is deemed to be a valid exercise of the police power of the State for which there is no right to compensation."); Maple Leaf Investors, Inc. v. Dep't of Ecology, 88 Wash. 2d 726, 731, 565 P.2d 1162, 1164 (1977) (casting the issue as whether the government's action "is a taking or damaging of private property for public use in violation of [the Washington State] Const. art. 1, § 16, and the fifth amendment to the United States Constitution, or whether the prohibition is a valid exercise of the state police power."); Ackerman v. Port of Seattle, 55 Wash. 2d 400, 408, 348 P.2d 664, 669 (1960) ("The difficulty arises in deciding whether a restriction is an exercise of the police power or an exercise of the eminent domain power."), *overruled on other grounds by* Highline Sch. Dist. No. 401 v. Port of Seattle, 87 Wash. 2d 6, 548 P.2d 1085 (1976); Conger v. Pierce Cnty., 116 Wash. 27, 36, 198 P. 377, 380 (1921); City of Des Moines v. Gray Buss., LLC, 130 Wash. App. 600, 608, 124 P.3d 324, 328 (2005) ("The threshold question in any taking claim is whether the government action is an exercise of its eminent domain power or its police power."); *see also* Stanley H. Barer, Comment, *Distinguishing Eminent Domain from Police Power and Tort*, 38 WASH. L. REV. 607 (1963).

144. 123 U.S. 623 (1887).

145. *Id.* at 668–69.

146. 116 Wash. 27, 198 P. 377 (1921).

147. *Id*. at 36, 198 P. at 380.

Subsequent Washington decisions recited the dichotomy as settled law, pointing to *Mugler* or *Conger*.[148]

This line of authority collided with a separate line of federal case law that began in 1922, just one year after Washington embraced the police-power-or-eminent-domain dichotomy in *Conger*. In *Pennsylvania Coal Co. v. Mahon*,[149] the U.S. Supreme Court offered what eventually became an axiom of federal takings law: "The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[150] This axiom left courts asking how a governmental action could simultaneously be: (1) *both* an exercise of the police power *and* a taking, as suggested by *Pennsylvania Coal*; and (2) *only* an exercise of the police power *or* the eminent domain power—but not both—as suggested by *Mugler*.

The Washington takings analysis emerged from an effort to resolve this apparent conundrum. *Orion* took stock of how Washington courts had addressed this question. *Orion* cast *Mugler* and its progeny as holding that "an exercise of the police power protective of the public, health, safety, or welfare cannot be a taking requiring compensation" and concluded that the tension between that holding and *Pennsylvania Coal* rendered federal takings law ambiguous.[151] The Court believed that this ambiguity left local governments uncertain about whether their land use regulations would be deemed a taking (for which compensation would necessarily be required) or a violation of due process (for which the remedy was mere invalidation of the regulation).[152] *Orion* warned that the risk of paying compensation for a takings claim chills needed land use regulations:

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148. *See, e.g.*, *Orion*, 109 Wash. 2d at 646, 747 P.2d at 1075; *Cougar Bus. Owners Ass'n*, 97 Wash. 2d at 476, 647 P.2d at 486–87; *Rains*, 89 Wash. 2d at 745, 575 P.2d at 1059; *Maple Leaf Investors*, 88 Wash. 2d at 732–33, 565 P.2d at 1165; *Ackerman*, 55 Wash. 2d at 408, 348 P.2d at 669.

149. 260 U.S. 393 (1922).

150. *Id.* at 415; *see* Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 537 (2005) (describing this aspect of *Pennsylvania Coal* as a "watershed" in federal takings decisions).

151. *Orion*, 109 Wash. 2d at 645–46, 747 P.2d at 1075. Academic articles in the 1980s and early 1990s also described the tension between *Mugler* and *Pennsylvania Coal*. *See, e.g.*, Stoebuck, *supra* note 61, at 1059–63, 1079 (casting *Mugler* and *Pennsylvania Coal* as being "hopelessly at odds" and "poles apart"); Ross A. Macfarlane, Comment, *Testing the Constitutional Validity of Land Use Regulations: Substantive Due Process as a Superior Alternative to Takings Analysis*, 57 WASH. L. REV. 715, 723 (1982) (concluding that the conflict between the two cases was never resolved); John M. Groen & Richard M. Stephens, *Takings Law,* Lucas, *and the Growth Management Act*, 16 U. PUGET SOUND L. REV. 1259, 1262 (1993) ("[T]his unresolved tension [between these two decisions] has been a source of much confusion and misinterpretation.").

152. *Orion*, 109 Wash. 2d at 649, 747 P.2d at 1077.

> [C]hoosing to invoke the takings analysis instead of the due process test will necessarily trigger the specter of financial liability. If all excessive regulations require just compensation, rather than invalidation, land-use decision makers, who adopt regulations in a good faith attempt to prevent a public harm, will nevertheless be held strictly liable for regulations that result in a taking. Undoubtedly, the specter of strict financial liability will intimidate legislative bodies from making the difficult, but necessary choices presented by the most sensitive environmental land-use problems.[153]

To resolve this apparent problem, Washington courts shielded local government from the specter of takings claims by effectively giving government the opportunity to cop a plea: to absorb a disappointing substantive due process loss that would at least preclude an expensive takings loss. According to *Orion*, Washington courts did this to resolve the tension in federal law in favor of *Mugler* and the police-power-or-eminent-domain dichotomy it spawned:

> We have long recognized a conceptual difference between a "taking" by eminent domain, which takes property for public use, and the exercise of the police power, which limits the landowner's use to "conserve the safety, morals, health and general welfare of the public." In so doing, we have reflected the position adopted by the [U.S.] Supreme Court in *Mugler*, where the Court stated that a prohibition on injurious uses must be tested not under principles governing eminent domain, but rather under the due process guaranty.[154]

Orion recognized that this position put Washington at odds with federal law: "Certain aspects of our state regulatory takings doctrine appear to conflict with federal analysis. We believe whatever differences exist result from our willingness to expressly recognize the role of substantive due process."[155] *Orion* decided not to follow prior Washington takings case law precisely because that law had departed from federal law. Instead, *Orion* applied the federal takings analysis to

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153. *Id.*

154. *Id.* at 650, 747 P.2d at 1078 (citations omitted); *accord* Richard L. Settle, *Regulatory Taking Doctrine in Washington: Now You See It, Now You Don't*, 12 U. PUGET SOUND L. REV. 339, 368–69 (1989) (noting that the difference in remedies to be applied motivated *Orion* "to make a precise determination of the relative applicability of due process and taking limitations"); Stoebuck, *supra* note 61, at 1097 (advocating use of substantive due process and its remedy as an "escape hatch" against takings claims).

155. *Orion*, 109 Wash. 2d at 657, 747 P.2d at 1081.

reduce confusion and because the federal analysis might actually provide individuals broader protection.[156]

That point was lost on the Washington State Supreme Court in its subsequent decisions that formulated the current Washington takings analysis.[157] From *Presbytery* through *Margola*, the Court mistakenly assumed that *Orion* had harmonized Washington and federal takings law.[158] That mistake committed Washington courts to a takings analysis premised on the *Mugler* police-power-or-eminent-domain dichotomy and structured around a prominent role for substantive due process to shield government from monetary damages.

The unique "threshold questions" at the heart of the Washington analysis manifest the goal—articulated but rejected in *Orion*—of diverting takings claims into due process analyses where possible. The Washington State Supreme Court employs the "threshold questions" specifically "[t]o determine which of these constitutional tests to utilize"—takings or substantive due process.[159] One of those questions asks whether the challenged regulation seeks less to prevent a harm than to impose the requirement of providing an affirmative public benefit.[160] Under the Washington takings analysis, a negative answer to that question is tantamount to a finding that the action is intended primarily to prevent a harm and must therefore constitute an exercise of the police power susceptible only to a due process challenge, not a takings challenge.[161] The Washington State Supreme Court likewise casts a

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156. *Id.* at 657, 747 P.2d at 1082.

157. *See supra* text accompanying notes 118–37 (discussing how the Washington takings analysis evolved from *Presbytery* through *Margola*).

158. *Id. Orion* determined that Washington case law had sided with *Mugler* over *Pennsylvania Coal*. *See Orion*, 109 Wash. 2d at 650, 747 P.2d at 1078. Nevertheless, *Orion* reported that Washington had somehow harmonized those decisions: "By harmonizing *Pennsylvania Coal* and *Mugler*, our case law implicitly recognized a dividing line between land-use regulations that deprive property rights with due process and land-use regulations that go one step further to effect a compensable taking." *Id.* at 651, 747 P.2d at 1078. In reality, *Pennsylvania Coal* and *Mugler* cannot be harmonized. *Pennsylvania Coal* has supplanted *Mugler*. *See infra* text accompanying notes 164–77; *see also* Eustis, *supra* note 124, at 1189–97 (criticizing how Washington case law "has run takings and substantive due process analyses together").

159. Presbytery of Seattle v. King Cnty., 114 Wash. 2d 320, 329, 787 P.2d 907, 912 (1990); *accord* Guimont v. Clarke (*Guimont I*), 121 Wash. 2d 586, 593–94, 854 P.2d 1, 5 (1993).

160. *Guimont I*, 121 Wash. 2d at 594–95, 600, 603 & n.5, 854 P.2d at 6, 9, 10 & n.5; Robinson v. City of Seattle, 119 Wash. 2d 34, 49, 53, 830 P.2d 318, 328, 330 (1992); Sintra v. City of Seattle (*Sintra I*), 119 Wash. 2d 1, 14–16, 829 P.2d 765, 772–73 (1992).

161. *Guimont I*, 121 Wash. 2d at 594–95, 854 P.2d at 6; *Presbytery*, 114 Wash. 2d at 329–30, 787 P.2d at 912; *accord* AG MEMO, *supra* note 43, at 9 ("When government regulation has the effect of appropriating private property for a public benefit rather than to prevent some harm, it may be the functional equivalent of the exercise of eminent domain.").

negative answer to the other threshold question—whether the regulation infringes on a fundamental attribute of property ownership—as potentially freeing the regulation from a takings challenge, even if the regulation might still face a substantive due process challenge.[162] *Presbytery* left no doubt that the Washington takings analysis would, by design, result in takings claims being diverted into a substantive due process analysis:

> No compensation (which properly belongs with a "taking" analysis) is warranted in the face of a due process violation.
>
> Invalidation of the ordinance (instead of compensation) also avoids intimidating the legislative body . . . . Accordingly, many challenges to land use regulations will most appropriately be analyzed under a due process formula rather than under a "taking" formula.[163]

Structuring Washington's takings analysis around substantive due process law allowed the Washington State Supreme Court to relieve the perceived tension between *Mugler* (and its supposed holding that a valid exercise of the police power cannot be a taking) and *Pennsylvania Coal* (and its observation that an exercise of the police power can be a taking if it goes "too far"). Downplaying *Pennsylvania Coal*, the Court used the *Mugler*-inspired police-power-or-eminent-domain dichotomy to build a takings escape hatch for government.

2. The Police-Power-or-Eminent-Domain Dichotomy Is Illusory

The problem with designing a takings analysis to relieve the tension between *Mugler* and *Pennsylvania Coal* is that no such tension exists. *Pennsylvania Coal* controls. No takings analysis should be structured around *Mugler* or its supposed police-power-or-eminent-domain dichotomy.

Mugler is effectively a dead letter for three reasons. First, *Mugler*'s brief diversion into takings law is weak precedent. *Mugler* neither cited nor mentioned the Fifth Amendment—the source of federal takings protections. Instead, *Mugler* dealt solely with a due process challenge raised under the Fourteenth Amendment by a brewer who unsuccessfully

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162. *Guimont I*, 121 Wash. 2d at 603–04, 854 P.2d at 10–11; *Presbytery*, 114 Wash. 2d at 329–30, 787 P.2d at 912. A negative answer to this question is not sufficient to avoid a takings claim under the Washington takings analysis; only negative answers to both threshold questions provides a shield from a takings claim. *See Guimont I*, 121 Wash. 2d at 595, 854 P.2d at 6 (describing the *Presbytery* version of the analysis); *id.* at 603–04, 854 P.2d at 10–11 (describing what remains in the current version).

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

challenged a law that banned the brewing of beer.[164] *Mugler* discussed takings only because the brewer premised an argument on *Pumpelly v. Green Bay Co.*,[165] which involved a takings claim under the Wisconsin Constitution.[166] *Pumpelly* dealt with the permanent flooding of land by the government that deprived the owner of all uses of the land.[167] *Mugler* distinguished *Pumpelly*'s takings holding because it had "no application to the [due process] case under consideration" in *Mugler*.[168] *Mugler*'s treatment of *Pumpelly* could have ended there. Nevertheless, in what is arguably dictum, *Mugler* then offered the sentence that continues to reverberate in Washington takings law: "A prohibition simply upon the use of property for *purposes* that are declared . . . to be injurious . . . cannot, in any just sense, be deemed a taking . . . for the public benefit."[169] Later in that same paragraph, in a sentence generally overlooked in Washington law, *Mugler* clarified that it was distinguishing government action that merely prevents a particular use while allowing other uses: "prohibition of [property's] use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use . . . ."[170] Read in context, *Mugler* simply noted that the facts of *Pumpelly*—where government flooding destroyed land for *all* purposes—rendered it inapplicable to a brewing-ban claim, where the government was prohibiting the use of property only for a *particular* purpose. Put another way, *Mugler* presented a fact pattern that, had it actually been challenged as a taking in federal court today, would have been deemed to be a regulation that did not go far enough to

164. *See* Mugler v. Kansas, 123 U.S. 623, 657 (1887); *accord id.* at 657–64. Even as due process precedent, *Mugler* carries little weight. As recounted by the Washington State Supreme Court roughly a dozen years before *Orion*, *Mugler* was part of the now-abandoned era in which the U.S. Supreme Court used the Due Process Clause to strike down government regulations. Aetna Life Ins. Co. v. Wash. Life & Disability Ins. Guar. Ass'n, 83 Wash. 2d 523, 531–34, 520 P.2d 162, 168–69 (1974). *Aetna Life* reported that "[t]he judicial intrusion of the due process clause upon a state's police power reached its acme in *Mugler* . . . where the court defined the police power as embracing no more than the power to promote public health, morals and safety." *Id.* at 532, 520 P.2d at 168. Concluding its history lesson, *Aetna Life* noted that the U.S. Supreme Court's due process jurisprudence had come "full circle" by the middle of the twentieth century by repudiating cases like *Mugler*. *Id.* at 533–34, 520 P.2d at 169.

165. 80 U.S. (13 Wall.) 166 (1872).

166. *Mugler*, 123 U.S. at 667–68.

167. *See id.*

168. *Id.* at 668.

169. *Id.* at 668–69 (emphasis added).

170. *Id.* at 669.

constitute a taking under the rationale of *Pennsylvania Coal*.[171] There is, in short, no tension between *Mugler* and *Pennsylvania Coal* on the question of what may constitute a taking.

Second, the U.S. Supreme Court does not recognize any tension between *Mugler*'s diversion into takings law and *Pennsylvania Coal*'s announcement that a police power regulation may constitute a taking if it goes "too far." Indeed, had there been any tension between the two decisions, one would expect *Pennsylvania Coal* to have distinguished *Mugler*. Yet *Pennsylvania Coal* did not even cite *Mugler*.[172]

Finally, to the extent there might have been tension between *Mugler* and *Pennsylvania Coal*, the U.S. Supreme Court resolved it in favor of *Pennsylvania Coal*. In its 1992 *Lucas* decision,[173] the U.S. Supreme Court rejected an argument that *Mugler* provided a police-power shield against takings claims. *Lucas* reversed a lower court that relied on *Mugler* to conclude incorrectly that a valid exercise of the police power—no matter the severity of its impact on the property owner—could not be deemed a taking.[174] The Court held that a government deprivation of "*all* economically beneficial uses," even if in pursuit of a valid exercise of the police power, constitutes a taking, except to the extent that "background principles of nuisance and property law" independently restrict the owner's intended use of the property.[175] According to *Lucas*, the facts of *Mugler* presented just one example of a case where a valid police power regulation merely affected property values without depriving the owner of all economically beneficial uses.[176] In its 2005 *Lingle* decision, which rid the federal takings analysis

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171. In 1992, the U.S. Supreme Court noted that, unlike other cases, *Mugler* involved only the "prohibition upon use of a building as a brewery; other uses [were] permitted." Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1026 n.13 (1992).

172. One scholar speculated that the author of *Pennsylvania Coal* was aware of *Mugler*, even though *Pennsylvania Coal* did not cite *Mugler*. Macfarlane, *supra* note 151, at 723 n.54.

173. Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992).

174. *See id.* at 1009–10, 1020–22.

175. *Id.* at 1019, 1026–32.

176. *Id.* at 1022, 1026 n.13. Just a year after *Lucas* was announced, two scholars recognized it as *Mugler*'s death knell. Groen & Stephens, *supra* note 151, at 1284–85. Time has validated their pronouncement: the only relevant post-*Lucas* citation made by a U.S. Supreme Court justice to *Mugler* was in a dissenting opinion that cited both *Lucas* and *Mugler* to support the proposition that takings and due process analyses are distinct. Kelo v. City of New London, 545 U.S. 469, 519–20 (2005) (Thomas, J., dissenting).

Another scholar credited *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987)—decided five years before *Lucas*—as "explicitly rejecting" *Mugler*. Settle, *supra* note 154, at 353, 375. This is incorrect. To the contrary, *First English* expressly noted that it had "no occasion to decide" the relevance of *Mugler* as a defense to a takings claim, and cited *Mugler* to keep open the possibility that the government in *First English* might be

of substantive due process law, a unanimous U.S. Supreme Court called *Pennsylvania Coal* a "watershed decision" in takings law, but did not even mention *Mugler*.[177] Time has proved *Pennsylvania Coal* worthy of respect, but has left *Mugler* behind.

Because *Mugler* plays no meaningful role in federal takings law, no foundation exists for the *Mugler*-inspired police-power-or-eminent-domain dichotomy at the heart of the Washington takings analysis. The essential lesson from the U.S. Supreme Court in *Lingle* is that due process and takings analyses must be applied independently; a regulation may or may not violate due process protections, but that has nothing to do with whether the regulation constitutes a taking.[178] Government action may continue to be a valid exercise of the police power (and thus survive a due process challenge) even if, as cautioned by *Pennsylvania Coal*, it also goes "too far" and constitutes a taking. The same action can violate neither, one, or both constitutional provisions.[179] The U.S. Constitution does not force a binary choice.

Because the police-power-or-eminent-domain dichotomy is illusory, there is no basis for Washington to allow local governments to evade a takings claim simply by demonstrating that the challenged action is an exercise of the police power, and thereby necessarily proving that the action cannot also be an exercise of eminent domain power subject to a takings claim. One has nothing to do with the other. The extent to which a government action resembles an act of eminent domain is at the heart of any takings analysis because an effective ouster from one's domain is a "touchstone" of a taking.[180] But assessing the extent to which the government action does *not* resemble a valid exercise of the police power is irrelevant to a takings analysis. If a property owner has been ousted, it should not matter whether the ouster resulted from an exercise of the police power.

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able to demonstrate on remand that its challenged action was "insulated [from a taking claim] as a part of the State's authority to enact safety regulations." *First English*, 482 U.S. at 313; *accord* Groen & Stephens, *supra* note 151, at 1262 (asserting that the tension between *Mugler* and *Pennsylvania Coal* "reached its peak" in *First English* and another decision issued the same year).

177. Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 537 (2005).

178. *See generally supra* text accompanying notes 20–31 (discussing *Lingle*'s role in federal takings law).

179. Federal decisions in the wake of *Lingle* recognize that property owners may maintain separate takings and due process challenges in the same suit. *See, e.g.*, North Pacifica LLC v. City of Pacifica, 526 F.3d 478, 484–85 (9th Cir. 2008); Crown Point Dev., Inc. v. City of Sun Valley, 506 F.3d 851, 856 (9th Cir. 2007).

180. *Lingle*, 544 U.S. at 539.

It is difficult to blame the Washington State Supreme Court for confusing takings and due process law in the late 1980s and early 1990s. At that time, "[c]onfusion over the proper role of substantive due process and over the relationship between due process and takings [was] a pervasive problem . . . ."[181] The U.S. Supreme Court itself did not rid the federal takings analysis of due process elements until *Lingle* in 2005.[182] But even if the Washington State Supreme Court could have legitimately justified structuring a unique state takings analysis around the police-power-or-eminent-domain dichotomy two decades ago, the Court cannot sustain that justification today.

3. *The Washington Analysis Is Constitutionally Insufficient Because, by Design, It Hampers Property Owners' Ability to Press Takings Claims*

The Washington State Supreme Court's rationale for a unique Washington takings analysis not only lacks a foundation in law, but also calls into question the constitutional adequacy of the Washington analysis. Federal constitutional provisions set the floor—the minimum level of protection accorded individual rights against intrusion by the government.[183] The Washington State Supreme Court embraced a takings analysis designed to fall below this floor of protection.

In *Orion*, the Court conceded that "the federal approach may in some instance provide broader protection" than the Washington approach.[184] That concession rings true because the Washington approach employs substantive due process law to enhance protections for local governments,[185] not property owners. *Orion* could afford to be frank

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181. Stoebuck, *Police Power, Takings, and Due Process*, *supra* note 61, at 1081; *accord* Orion Corp. v. State, 109 Wash. 2d 621, 653, 747 P.2d 1062, 1079 (1987); *see also* Spencer, *Regulatory Taking*, *supra* note 43, § 110.4, at 110-14 ("[T]he vacuum in federal jurisprudence occurred at the very time when state courts, including Washington courts, were required by a series of cases to confront the issue [of what constitutes a taking].").

182. *See generally supra* text accompanying notes 20–31 (discussing *Lingle*'s role in federal takings law).

183. *Orion*, 109 Wash. 2d at 652, 747 P.2d at 1079 ("It is well recognized . . . that the federal constitution sets a minimum floor of protection below which state law may not go."). Because states may not provide less protection for individuals, the Washington State Supreme Court does not engage in constitutional analyses distinct from federal analyses unless "the constitution of the State of Washington should be considered as extending *broader* rights to its citizens than does the United States Constitution." State v. Gunwall, 106 Wash. 2d 54, 61, 720 P.2d 808, 812 (1986) (emphasis added).

184. *Orion*, 109 Wash. 2d at 657–58, 747 P.2d at 1082.

185. *See supra* Part II.B.1.

about the fact that the Washington analysis may set a lower floor of takings protection for individuals because *Orion* opted not to embrace a unique Washington analysis and expressly decided the better course was to follow the federal analysis.[186]

The Washington State Supreme Court ultimately did not heed the caution advised by *Orion*. By embracing the unique Washington analysis outlined in the *Orion* dictum on the mistaken belief that *Orion* harmonized Washington and federal takings law, *Presbytery* and subsequent Washington State Supreme Court decisions set a lower floor of takings protection for individuals. The Washington analysis was designed to offer the government an opportunity to defeat a takings claim and avoid paying compensation, albeit in exchange for facing a substantive due process challenge.[187] Therefore, to enhance protections for government, the Washington analysis diverts property owners from the Fifth Amendment remedy of compensation and toward the Fourteenth Amendment remedy of invalidating the challenged government action.

In an analogous situation, the U.S. Supreme Court held that a state court's attempt to substitute invalidation for compensation was "constitutionally insufficient." In *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*,[188] the Court considered whether the government owed compensation for the time during which it applied a regulation ultimately found to effect a taking, or whether invalidation of the regulation was sufficient.[189] A California court had decided that invalidation was the appropriate remedy by reasoning that the threat of paying compensation would inhibit salutary land use regulation: "In combination, the need for preserving a degree of freedom in the land-use planning function, and the inhibiting financial force

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186. *Id.* at 657, 747 P.2d at 1081–82. For a fuller discussion of the evolution of the Washington analysis, including *Orion*'s role, see *supra* text accompanying notes 111–37.

187. *See supra* text accompanying notes 159–63. For example, by demonstrating only that a challenged regulation is designed more to prevent a harm than to provide an affirmative public benefit, a government can defeat a takings claim under the Washington analysis. *See, e.g.*, Connor v. City of Seattle, 153 Wash. App. 673, 700, 223 P.3d 1201, 1214–15 (2009) (finding no need to engage in further takings analysis after concluding that the challenged regulation safeguards the public interest in the environment), *review denied*, 168 Wash. 2d 1040, 233 P.3d 889 (2010); Paradise, Inc. v. Pierce Cnty., 124 Wash. App. 759, 773–74, 102 P.3d 173, 180–81 (2004) (declining to consider a plaintiff's *Penn Central* argument because the court had answered the various "threshold questions" in the negative); Jones v. King Cnty., 74 Wash. App. 467, 479–80, 874 P.2d 853, 859 (1994) (failing to mention, let alone reach, the *Penn Central* factors after answering the "impose an affirmative public benefit" question in the negative).

188. 482 U.S. 304, 322 (1987).

189. *Id.* at 306–07.

which inheres in the [compensation] remedy, persuade us that on balance mandamus or declaratory relief rather than [compensation] is the appropriate relief under the circumstances."[190] The U.S. Supreme Court disagreed and held that where government action amounts to a taking, invalidation of the action cannot relieve the government of "the duty to provide compensation for the period during which the taking was effective."[191] The Court concluded that a desire to shield government from the risk of compensation cannot trump the Fifth Amendment:

> We realize that even our present holding will undoubtedly lessen to some extent the freedom and flexibility of land-use planners and governing bodies of municipal corporations when enacting land-use regulations. But such consequences necessarily flow from any decision upholding a claim of constitutional right; many of the provisions of the Constitution are designed to limit the flexibility and freedom of governmental authorities, and the Just Compensation Clause of the Fifth Amendment is one of them.[192]

The Washington takings analysis suffers from the same constitutional infirmity. Like the California court reined in by *First English*, the Washington State Supreme Court has decided to shield government policy-makers from the specter of the compensation remedy by channeling property owners toward the invalidation remedy.[193] Under *First English*, this is constitutionally insufficient.[194] If government action

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190. *Id.* at 317 (quoting the language of the opinion of the California Court of Appeals, which the U.S. Supreme Court reviewed directly after the California State Supreme Court denied review); *see id.* at 308–09 (history of the state proceedings).

191. *Id.* at 321.

192. *Id.* at 321; *see also id.* at 317 ("We, of course, are not unmindful of these considerations [regarding the possible inhibition of land use regulation], but they must be evaluated in the light of the command of the Just Compensation Clause of the Fifth Amendment.").

193. *See, e.g.*, Presbytery of Seattle v. King Cnty., 114 Wash. 2d 320, 332–33, 787 P.2d 907, 913–14 (1990) ("Invalidation of the ordinance (instead of compensation) also avoids intimidating the legislative body . . . ."); Orion Corp. v. State, 109 Wash. 2d 621, 649, 747 P.2d 1062, 1077 (1987). ("Undoubtedly, the specter of strict financial liability will intimidate legislative bodies from making the difficult, but necessary choices presented by the most sensitive environmental land-use problems.").

194. *Orion* aptly recognized that *First Evangelical* "invalidat[ed] as violative of the Fifth and Fourteenth Amendments the California rule limiting the remedy for a regulatory taking to invalidation." *Orion*, 109 Wash. 2d at 652, 747 P.2d at 1079. Yet that observation—like *Orion*'s rejection of a unique Washington's takings analysis—was lost on the Washington State Supreme Court as it embraced and tinkered with the Washington analysis from *Presbytery* in 1990 through *Guimont I* and *Margola* in 1993. *See supra* text accompanying notes 111–37 (discussing the evolution of the Washington takings analysis); *accord* Jill M. Teutsch, Comment, *Taking Issue With Takings: Has the Washington Supreme Court Gone Too Far?*, 66 WASH. L. REV. 545, 546 (1991)

constitutes a taking under the federal analysis, compensation is due. Washington may not lower that floor of constitutional protection.[195]

C. Each of the Unique Elements of the Washington Takings Analysis Offers Little Value or Has Been Discredited by the U.S. Supreme Court

Setting aside the Washington State Supreme Court's constitutionally dubious mission of shielding government from the specter of paying compensation, might there still be value in the three unique elements distinguishing the Washington takings analysis from its federal counterpart? Those elements require a court to ask whether the challenged government action:

1. destroys some "other fundamental attribute" of property ownership (beyond constituting a physical invasion or a deprivation of all economically viable use);
2. seeks less to prevent a harm than to impose on those regulated the requirement of providing an affirmative public benefit; and
3. substantially advances a legitimate state interest.[196]

Washington's unique elements offer little value or have been discredited by the U.S. Supreme Court. They cannot justify the unique Washington takings analysis.

(concluding that *Presbytery* "fails to comport with federal precedent" and thus is "constitutionally suspect").

195. *Cf.* Dolan v. City of Tigard, 512 U.S. 374, 383 (1994) ("The Takings Clause of the Fifth Amendment of the United States Constitution [is] made applicable to the States through the Fourteenth Amendment . . . ."). It does not matter that, through a federal statute, a property owner might be entitled to compensation for damages resulting from a government action that denies the property owner due process. *See* 42 U.S.C. § 1983 (2006); Sintra, Inc. v. City of Seattle (*Sintra II*), 131 Wash. 2d 640, 651–54, 935 P.2d 555, 561–62 (1997). Practically, that alternative remedy would be unavailable in a situation where government action takes private property without also violating due process protections. *See supra* note 12 (current statements of the substantive due process test) and Part II.B.2 (explaining that an action that takes property need not also violate due process protections). Legally, a court should not deny a remedy provided by the U.S. Constitution—the highest law of the land—just because a statute might yield a similar remedy in some situations.

196. These elements are discussed in greater detail *supra* in text accompanying notes 48–66, and are depicted in the figure following note 44.

1. The "Fundamental Attribute" Element Stems from an Incorrect Prediction About the Direction of Federal Law, and Can Be Subsumed into the Penn Central *Factors*

At heart, asking whether a government action destroys some other fundamental right of property ownership raises the question of what "property" means. That is a necessary question because there is nothing relevant to "take" within the meaning of constitutional protections if the regulation does not affect "property."[197]

But why make this a separate inquiry? The question of whether a "fundamental" property ownership interest is affected could be addressed through application of the *Penn Central* factors. The first factor requires a court to consider the regulation's impact on the property owner—an exercise that must include an evaluation of the owner's underlying property interest.[198] Elevating this to a separate, "threshold" inquiry is redundant.

Another reason to question the "other fundamental attribute" element is its origin as an incorrect prediction about the direction of federal takings law. Moreover, that prediction was offered not in Washington case law,[199] but in a 1989 law review article.[200] Published two years after the Washington State Supreme Court began articulating a unique

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197. *See, e.g.*, Manufactured. Hous. Cmtys. of Wash. v. State, 142 Wash. 2d 347, 363–64, 13 P.3d 183, 191 (2000) ("Before engaging in a takings analysis, however, it must first be determined if 'property' has actually been taken.").

198. *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124–25 (1978) (discussing "decisions in which this Court has dismissed 'taking' challenges on the ground that, while the challenged government action caused economic harm, it did not interfere with interests that were sufficiently bound up with the reasonable expectations of the claimant to constitute 'property' for Fifth Amendment purposes").

199. The phrase "fundamental attribute" appears in *Orion*, the 1987 decision that triggered the evolution of the current Washington takings analysis, but the phrase appears only in the portion of the decision where the Court ultimately resolved the case by applying the federal *Penn Central* factors. *Orion*, 109 Wash. 2d at 664–65, 747 P.2d at 1085. In that passage, *Orion* was applying *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987), a case that itself invoked the ad hoc *Penn Central* factors—factors common to the federal and the Washington takings analyses. *See Keystone*, 480 U.S. at 494–95. The point of that passage was simply that, because the property owner could identify no fundamental attribute of property ownership that the challenged regulation extinguished, the property owner was limited to arguing that a mere reduction in property value was sufficient to constitute a taking under what was effectively the *Penn Central* factors. *Orion*, 109 Wash. 2d at 664–65, 747 P.2d at 1085. By contrast, under the takings analysis constructed by the Washington State Supreme Court in subsequent decisions, a property owner who cannot demonstrate that a fundamental attribute of property ownership has been extinguished fails to answer one of the "threshold questions" in the affirmative and risks never being able to apply the *Penn Central* factors.

200. Settle, *supra* note 154.

Washington takings analysis in *Orion*, the article attempted to discern order amid the apparent chaos of federal law not from articulated standards, but by inferring principles and doctrine from the results of case law.[201] The article observed that, at that time, the U.S. Supreme Court had "never held a regulation that merely restricts use, no matter how severely, to be a taking."[202] The article reasoned that, "[u]nless or until the Supreme Court holds that the taking clause is no longer applicable to use regulation cases, much can be done to reduce confusion about the governing principles."[203] According to the article, a "threshold" governing principle was the need to identify regulations that affect fundamental attributes of property ownership:

> This threshold principle, consistently implied but never clearly articulated by the courts, effectively recognizes that there are two categories of police power regulation that are subject to quite different taking standards. These categories divide regulations, on the basis of their purpose and effect, into those that effectively deprive a property owner of a fundamental attribute of property and those that do not.[204]

This distinction was so important, the article concluded, that it should be made "at the beginning of the taking inquiry."[205]

The U.S. Supreme Court ultimately did not follow the path down which the article inferred the Court was headed. In its 1992 *Lucas* decision, the Court undermined the premise of the article's analysis by holding that a regulation that only restricts the use of property *can* be a taking, if the regulation deprives the property owner of "*all* economically beneficial uses" of the property.[206] Contrary to the article's prediction, the U.S. Supreme Court has not employed a "fundamental attribute" distinction as a separate question, threshold or otherwise.[207]

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201. The author was frank about his use of inference. *See, e.g.*, *id.* at 354 ("[D]octrine may be inferable from some of the decisions even though it has not been fully articulated."); *see also id.* at 389 n.308 (acknowledging that a particular inference had not "been clearly or fully articulated by the courts. However, to the extent that the doctrine is unarticulated and intuitive, coherent principles explaining outcomes are inferable"); *id.* at 402 ("This Article focused on what is and, by logical inference and extrapolation, what might be the law of regulatory takings.").

202. *Id.* at 391.

203. *Id.* at 392.

204. *Id.* at 386–87 (footnotes omitted).

205. *Id.* at 389.

206. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1019 (1992) (emphasis in original).

207. Although the article's predictions ultimately proved incorrect, one should not judge the article too harshly. At the time, both federal and Washington takings jurisprudence was in a state of flux. The article appropriately called for greater clarity from courts, cautioning that, "[w]ithout a solid foundation of guiding principles, largely intuitive judicial responses and vague, somewhat

The Washington State Supreme Court did not have the benefit of hindsight as it began constructing a unique Washington takings analysis. In *Presbytery*, issued after *Orion* but before *Lucas*, the Court grafted the article's inferred threshold "fundamental attribute" question onto the Washington analysis. Citing the 1989 article liberally, the Court concluded that, to determine whether to apply a due process or a takings analysis to a challenged regulation, one of the first questions courts should ask is "whether the regulation destroys one or more of the fundamental attributes of ownership . . . ."[208] Once grafted, this element remained a part of the Washington analysis,[209] despite its grounding in what proved to be an incorrect prediction about the direction in which federal takings law was headed.

2. *The "Seeks Less to Prevent a Harm than Provide a Public Benefit" Element Is Unworkable and Premised on Due Process Law, Not Takings Law*

Like the "fundamental attribute" element of the Washington analysis, the "seeks less to prevent a harm than provide a public benefit" element is also undermined by its conceptual roots. The Washington State Supreme Court developed this harm-benefit element from substantive due process law,[210] and the Washington Court of Appeals has referred to this element as a "due process takings analysis."[211] But as explained by the U.S. Supreme Court in *Lingle* in 2005, due process law has no place in a takings analysis.[212]

Furthermore, as a practical matter, the harm-benefit element is unworkable. When the Washington State Supreme Court announced it in *Presbytery*, the Court acknowledged "that the determination of whether

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aimless doctrine seem inevitable." Settle, *supra* note 154, at 402. U.S. Supreme Court takings case law after 1989, culminating in *Lingle* in 2005, did much to provide the guiding principles to federal takings law that the article called for in 1989, even if those principles ultimately proved to be different from the principles that the article's author inferred from pre-1989 federal case law.

208. Presbytery of Seattle v. King Cnty., 114 Wash. 2d 320, 329–30, 787 P.2d 907, 912 (1990).

209. *See* Manufactured. Hous. Cmtys. of Wash. v. State, 142 Wash. 2d 347, 363, 13 P.3d 183, 191 (2000) (treating the Settle article as the source of the "fundamental attribute" element); Guimont v. Clarke (*Guimont I*), 121 Wash. 2d 586, 603, 854 P.2d 1, 8 (1993); Robinson v. City of Seattle, 119 Wash. 2d 34, 49–50, 52, 830 P.2d 318, 328–29 (1992).

210. *See Presbytery*, 114 Wash. 2d at 329, 787 P.2d at 912; Orion Corp. v. State, 109 Wash. 2d 621, 650–51, 747 P.2d 1062, 1078 (1987).

211. Conner v. City of Seattle, 153 Wash. App. 673, 700, 223 P.3d 1201, 1214 (2009), *review denied*, 168 Wash. 2d 1040, 233 P.3d 889 (2010).

212. *See generally supra* text accompanying notes 20–31 (discussing *Lingle*'s role in federal takings law).

a given regulation seeks to protect the public from harm will not always be an easy decision. Both the conferral of benefit and the prevention of harm are often present in varying degrees."[213] Nevertheless, the Washington State Supreme Court adhered to that element.[214] By contrast, the U.S. Supreme Court made a similar observation two years later in *Lucas* and used it to bar a harm-benefit element from entering federal takings law. *Lucas* observed that such an element would call for a distinction that "is difficult, if not impossible, to discern on an objective, value-free basis . . . ."[215] "[T]he distinction between 'harm-preventing' and 'benefit-conferring' regulation is often in the eye of the beholder . . . . Whether one or the other of the competing characterizations will come to one's lips in a particular case depends primarily upon one's evaluation of the worth of competing uses of real estate."[216]

Although the Washington State Supreme Court altered its takings analysis in *Guimont I* to embrace the "total [regulatory] taking" element introduced by *Lucas* a year earlier,[217] the Court failed to heed *Lucas*'s apt rejection of a harm-benefit element. The Washington State Supreme Court apparently felt it needed even clearer guidance on the question from the U.S. Supreme Court:

> Several parties and the concurrence argue this part of the [Washington] threshold test is undermined by language in *Lucas* questioning harm versus benefit analysis . . . .We decline to address their arguments [because] . . . . it would be premature to begin dismantling our takings framework, carefully crafted in *Presbytery*, *Sintra*, and *Robinson*, without more definitive guidance on this issue from the United States Supreme Court. Therefore, we decline to further modify our framework at this time and reserve discussion of additional modifications, if any,

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

214. *Id.* ("[T]he initial decision as to whether the predominant goal of the regulation is the prevention of a real harm to the public or the conferral of a benefit upon other publicly held property must be made according to the facts of each individual case."); *see also Guimont I*, 121 Wash. 2d at 594–95, 600, 603, 854 P.2d at 6, 9, 10–11 (reciting this element in the Washington takings analysis).

215. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1026 (1992).

216. *Id.* at 1024–25.

217. *See Guimont I*, 121 Wash. 2d at 594–604, 854 P.2d at 5–11; Eustis, *supra* note 124, at 1202–03 (calling, before *Guimont I*, for the integration of *Lucas* into the Washington takings analysis).

> until we are presented with a case that squarely addresses the issue.[218]

Evidently, the Washington State Supreme Court has not yet found the opportunity to address this issue. The impractical harm-benefit element remains an unwelcome and unworkable fixture of the Washington takings analysis.

3. The "Substantially Advances a Legitimate State Interest" Element Has Been Rejected by the U.S. Supreme Court

Little more need be said about Washington's "substantially advances a legitimate state interest" element than what the U.S. Supreme Court said in *Lingle* when extirpating that element from the federal takings analysis.[219] In sum, *Lingle* abandoned the very federal case law on which Washington courts relied when including the "substantially advances" element in the Washington analysis.[220]

Almost immediately after *Lingle* was announced in 2005, the Washington Court of Appeals noted that *Lingle* may affect the Washington analysis.[221] The dissenting judge in that case was more blunt. She correctly characterized *Lingle* as rendering the "substantially advances" test "doctrinally and practically untenable in takings analysis"[222] and predicted that *Lingle* would ultimately result in the Washington analysis being "replaced by the takings analysis recently articulated by the United States Supreme Court in *Lingle* . . . ."[223] The Washington State Supreme Court, however, has not yet examined the import of *Lingle* for the Washington takings analysis.

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218. *Guimont I*, 121 Wash. 2d at 603 n.5, 854 P.2d at 11 n.5 (citation omitted); *accord* Margola Assocs. v. City of Seattle, 121 Wash. 2d 625, 645 n.7, 854 P.2d 23, 34 n.7 (1993) (nearly identical footnote in *Guimont I*'s companion decision). At the time, some scholars recognized that *Lucas* should have gutted the "seeks less to prevent a harm than provide a public benefit" element of the Washington takings analysis. *See, e.g.*, Groen & Stephens, *supra* note 151, at 1293 ("*Lucas* directly undermines the core component of Washington's threshold inquiry."); Elaine Spencer, *Dashed "Investment-Backed" Expectations: Will the Constitution Protect Property Owners from Excesses in Implementation of the Growth Management Act?*, 16 U. PUGET SOUND L. REV. 1223, 1229 (1993); *see also* Settle, *supra* note 154, at 373 (noting, even before *Lucas*, that this element "frequently has been criticized as unworkable").

219. *See generally supra* text accompanying notes 20–31 (discussing *Lingle*).

220. *See* Orion Corp. v. State, 109 Wash. 2d 621, 647, 747 P.2d 1062, 1076 (1987) (quoting Agins v. Tiburon, 447 U.S. 255, 260 (1980)).

221. City of Des Moines v. Gray Buss., LLC, 130 Wash. App. 600, 612 n.33, 124 P.3d 324, 330 n.33 (2005).

222. *Id.* at 621, 124 P.3d at 335 (Becker, J., dissenting).

223. *Id.*

III. THE PATH OUT OF THE QUAGMIRE: ADOPT THE FEDERAL ANALYSIS

The time has come to reform the confounding and unfounded Washington takings analysis. Reform would be straightforward: adopt the federal takings analysis. Overruling Washington's takings case law would be consistent with the doctrine of stare decisis and the Washington State Supreme Court's professed intent to coordinate Washington and federal law. While conceding that it failed to implement that intent two decades ago, the Court should also correct its other mischaracterizations of the federal takings analysis, and should avoid the temptation to justify the Washington takings analysis on independent state constitutional grounds for the first time.

A. The Washington State Supreme Court Can Reverse Course While Remaining Consistent with the Doctrine of Stare Decisis and the Court's Original Intent to Track Federal Law

Abandoning the Washington takings analysis in favor of the federal analysis would mean overruling nearly twenty years of Washington case law. The doctrine of stare decisis, designed "to accomplish the requisite element of stability in court-made law,"[224] might counsel against such a reversal. But that doctrine is not absolute. Courts will abandon an established rule of law "when reason so requires" upon a "clear showing" that the rule is "incorrect and harmful."[225] Nearly two decades of experience with the Washington takings analysis prove that it is both incorrect and harmful. Among other things, the Washington analysis is a failed attempt to coordinate Washington and federal law. This failure has left Washington with law that harms not only property owners, whose takings claims may be diverted into due process claims more readily than under federal law, but also attorneys and federal and lower court judges, who must struggle to make sense of a needlessly convoluted body of law.[226]

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224. *In re* Rights to Use Waters of Stranger Creek, 77 Wash. 2d 649, 653, 466 P.2d 508, 511 (1970).

225. *Id.*

226. This is not to suggest that the federal analysis is flawless. By inviting case-by-case assessments, the *Penn Central* factors at the heart of the federal and Washington takings analyses continue to insert an element of unpredictability and have long been the subject of pointed critiques. *See, e.g.*, Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 539 (2005) (noting that each of the *Penn Central* factors "has given rise to vexing subsidiary questions"); Spencer, *Dashed "Investment-Backed" Expectations*, *supra* note 218, at 1226–27; Stoebuck, *Police Power, Takings, and Due Process*, *supra* note 61, at 1069.

Rejecting the Washington analysis in favor of the federal analysis would not be an abrupt about-face because the Washington State Supreme Court always intended to harmonize Washington and federal takings law.[227] In *Orion* in 1987, this attempt at harmonizing meant applying federal case law instead of what the Washington State Supreme Court identified as a distinct analysis lurking in Washington case law.[228] In subsequent decisions, fostering harmony meant following and refining the Washington analysis precisely because the Court believed, albeit mistakenly, that *Orion* had coordinated the Washington and federal analyses.[229] Even though the Court failed to act on its intent correctly, that intent remained clear: to apply an analysis at least equivalent to the federal analysis. The best way to implement that intent is to adopt the federal analysis.

B. Adopting the Federal Takings Analysis Would Mean Adhering to the Language of the Federal Analysis

Washington takings case law is plagued by mischaracterizations of the federal analysis and its elements. These misstatements risk confusing readers and tugging Washington law in unintended directions. The Washington State Supreme Court would do well to correct these errors and avoid similar missteps in the future by adhering to the precise language of the federal analysis.

1. The Penn Central *Factors Cannot Be Reduced to a "Balancing Test"*

The Washington State Supreme Court miscasts the *Penn Central* factors. Because the U.S. Supreme Court "ha[d] been unable to develop any 'set formula'" for identifying government actions that amount to a taking, the Court in *Penn Central* turned to "essentially ad hoc, factual inquiries."[230] The primary factors relevant to those inquires are the "economic impact of the regulation" on the property owner, the "extent

227. This was clear to at least one federal court, which concluded that "Washington state courts have expressed an intent for a regulatory takings analysis to be consistent with the federal constitution." Heitman v. City of Spokane Valley, No. CV-09-0070-FVS, 2010 WL 816727, at *4 (E.D. Wash. Mar. 5, 2010) (citing Orion Corp. v. State, 109 Wash. 2d 621, 657–58, 747 P.2d 1062, 1081–82 (1987)).

228. *See supra* text accompanying notes 111–14.

229. *See supra* text accompanying notes 118–37.

230. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

to which the regulation has interfered with distinct investment-backed expectations," and the "character of the governmental action."[231]

The Washington State Supreme Court seemingly fails to appreciate that the *Penn Central* factors cannot be reduced to a formula or test. The Court casts the *Penn Central* factors as implementing a "balancing test" in which "[t]he court asks whether the state interest in the regulation is outweighed by its adverse economic impact to the landowner."[232] Although the Washington State and U.S. Supreme Courts employ the same factors, the U.S. Supreme Court does not share a goal of using those factors to answer the ultimate question posed by the Washington State Supreme Court: whether the government interest outweighs the private impact.

The Washington State Supreme Court should abandon the "balancing test" mischaracterization of the *Penn Central* factors for the reasons described by the U.S. Supreme Court in *Lingle*. *Lingle* rejected the

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231. *Id.*; *accord Lingle*, 544 U.S. at 538–39.

232. Guimont v. Clarke (*Guimont I*), 121 Wash. 2d 586, 604, 854 P.2d 1, 11 (1993). Washington courts that recite this mischaracterization of the *Penn Central* factors now cite *Guimont I* as the source. *See, e.g.*, Peste v. Mason Cnty., 133 Wash. App. 456, 473, 136 P.3d 140, 149 (2006) (citing *Guimont I* and *Guimont II*); Paradise, Inc. v. Pierce Cnty., 124 Wash. App. 759, 767–68, 102 P.3d 173 (2004) (citing Edmonds Shopping Ctr. Assocs. v. City of Edmonds, 117 Wash. App. 344, 362–63, 71 P.3d 233, 241 (2003) (citing *Guimont I*); *Edmonds*, 117 Wash. App. at 363, 71 P.3d at 241 (citing *Guimont I*); Guimont v. City of Seattle (*Guimont II*), 77 Wash. App. 74, 81, 896 P.2d 70, 76–77 (1995) (citing *Guimont I*).

The source of Washington's mischaracterization is unclear. The Washington State Supreme Court cited no authority for it. *See Guimont I*, 121 Wash. 2d at 604, 854 P.2d at 11. Although the Court cited two of its own precedents as authority for the *Penn Central* factors, those decisions provide no support for characterizing the factors as a "balancing test." *See id.* (citing Presbytery of Seattle v. King Cnty., 114 Wash. 2d 320, 335–36, 787 P.2d 907, 915 (1990); Robinson v. City of Seattle, 119 Wash. 2d 34, 51, 830 P.2d 318, 328 (1992)). To the extent those precedents discussed a balancing test, those discussions were in the context of substantive due process claims, not takings claims. *Presbytery*, 114 Wash. 2d at 330–31, 787 P.2d at 912–13; *Robinson*, 119 Wash. 2d at 51–52, 830 P.2d at 328–29. Whether this means that the Washington State Supreme Court mistakenly transposed the "balancing test" from substantive due process case law and the Washington takings analysis remains a matter of speculation.

Even if not attributed to a particular source, the "balancing test" mischaracterization might not have been plucked from thin air. One other reference to a balancing test can be found in the case law that led to the current Washington takings analysis. *Orion* reported that, under the federal takings analysis, a taking can result "if the property owner suffers an economic deprivation significant enough to outweigh the public interest served by the regulation." *Orion*, 109 Wash. 2d at 655, 747 P.2d at 1080; *see also id*., 109 Wash. 2d at 647, 747 P.2d at 1076 (similar statement). For that proposition, *Orion* cited *Keystone*, in which the U.S. Supreme Court quoted *Agins* as saying that the question of whether a taking has occurred "necessarily requires a weighing of private and public interests." *See* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 492 (1987) (quoting Agins v. Tiburon, 447 U.S. 255, 260–261 (1980)). Whether that means that *Agins*—which *Lingle* ultimately ejected from federal takings law, see *supra* text accompanying notes 20–31—was the ultimate source of the "balancing test" mischaracterization also remains speculative.

notion that a court should consider a regulation's ability to advance the public interest when assessing whether the regulation effects a taking.[233] Instead, the *Penn Central* factors, like the other elements of the federal takings analysis, "focus[] directly upon the severity of the burden that government imposes upon private property rights."[234] To measure that burden, the *Penn Central* factors "turn[] in large part, albeit not exclusively, upon the magnitude of a regulation's economic impact and the degree to which it interferes with legitimate property interests."[235]

On its face, the *Penn Central* factor that probes the character of the government action[236] might seem to invite an assessment of the public interest in that action. But this factor considers only the severity of the burden on the property owner, asking whether the burden is more like an ouster from one's domain (which a court may find more readily to be a taking) than "some public program adjusting the benefits and burdens of economic life to promote the common good" (which is less likely to be a taking).[237] Because that inquiry omits any consideration of the public interest, there is no basis for characterizing this *Penn Central* factor as placing the common good and private impact on opposite sides of a scale to gauge their relative weight.

2. *The Federal Analysis Cannot Be Summarized as an Assessment of Whether a Burden Should, "In All Fairness and Justice," Be Borne by the Public as a Whole*

As part of a reform of Washington takings law, the Washington State Supreme Court should disavow another mischaracterization of federal law that threatens to creep into Washington case law. Quoting the U.S. Supreme Court's decision in *Armstrong v. United States*,[238] the Washington State Supreme Court stated in *Mission Springs, Inc. v. City of Spokane*[239] that "[t]he talisman of a taking is government action which forces some private persons alone to shoulder affirmative public

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233. *See, e.g.*, *Lingle*, 544 U.S. at 543 ("The notion that . . . a regulation . . . 'takes' private property for public use merely by virtue of its ineffectiveness or foolishness is untenable."); *see generally id.* at 542–43.

234. *Id.* at 539.

235. *Id.* at 540.

236. *Penn Cent.*, 438 U.S. at 124.

237. *Id.*; *accord Lingle*, 544 U.S. at 539 ("Each [element in the federal takings analysis] aims to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain.").

238. 364 U.S. 40 (1960).

239. 134 Wash. 2d 947, 954 P.2d 250 (1998).

burdens, 'which, in all fairness and justice, should be borne by the public as a whole.'"[240]

This "talisman" has so far gained no additional traction. *Mission Springs* remains the only majority opinion in which the Court proclaimed this "in all fairness and justice" takings litmus test.[241] This is not surprising because *Mission Springs* turned solely on a due process claim.[242]

The Washington State Supreme Court should continue to ignore this "talisman," no matter how pithy it might appear, for four reasons. First, the "in all fairness and justice" test arises from dictum in *Armstrong*, which was decided in 1960 and does not reflect a half century of subsequent federal takings case law. Even under takings jurisprudence then in effect, the U.S. Supreme Court did not invoke "in all fairness and justice" to resolve *Armstrong*. That case involved a straightforward claim by a subcontractor on a shipbuilding project.[243] At the time the federal government took possession of certain hulls under construction, the subcontractor had not been paid, so it asserted liens under state law for materials it furnished to the project's prime contractor.[244] The federal government refused to honor the liens.[245] The U.S. Supreme Court sided with the subcontractor for the unremarkable reason that "[t]he total destruction by the Government of all value of these liens, which constitute compensable property, has every possible element of a Fifth Amendment 'taking[,]'"[246] giving rise to the "constitutional obligation to pay just compensation for the value of the liens the petitioners lost and of which loss the Government was the direct, positive beneficiary."[247]

None of this reasoning involved determining whether the subcontractor was bearing a burden that society as a whole should bear.

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240. *Id.* at 964, 954 P.2d at 258 (quoting *Armstrong*, 364 U.S. at 49).

241. The author of the majority opinion in *Mission Springs* continued to cite this test as a holding in several of his concurring and dissenting opinions. *E.g.*, Eggleston v. Pierce Cnty., 148 Wash. 2d 760, 779, 64 P.3d 618, 629 (2002) (Sanders, J., dissenting); Asarco, Inc. v. Dep't of Ecology, 145 Wash. 2d 750, 777–82, 43 P.3d 471, 484–86 (2001) (Sanders, J., dissenting); Manufactured. Hous. Cmtys. of Wash. v. State, 142 Wash. 2d 347, 381, 13 P.3d 183, 200 (2000) (Sanders, J., concurring).

242. *See, e.g.*, *Mission Springs*, 134 Wash. 2d at 963, 954 P.2d at 257 ("This situation must be analyzed under well-established due process criteria as distinguished from that associated with taking property without just compensation.").

243. *Armstrong*, 364 U.S. at 41.

244. *Id.*

245. *Id.* at 41–42.

246. *Id.* at 48.

247. *Id.* at 49.

Because *Armstrong* was a simple case of government paying for what it appropriates, *Armstrong* is consistent with *Lingle*'s statement forty-five years later of the "touchstone" of a taking: "actions that are functionally equivalent to the classic taking in which government directly appropriates private property . . . ."[248] It is only in *Armstrong*'s concluding paragraph that the Court indulged in a rhetorical flourish about the "design" or purpose of the federal Takings Clause.[249] The Court cited no authority for this indulgence, and followed it immediately with a statement that resolution of the case turned on the Court's interpretation of the Fifth Amendment itself, not on some intent lurking in that provision's design:

> The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole. A fair interpretation *of this constitutional protection* entitles these lienholders to just compensation here.[250]

Second, even though federal and Washington courts have repeated *Armstrong*'s statement about the design or purpose of the Takings Clause,[251] and even though a desire to advance that purpose arguably motivated what became the *Penn Central* factors in the federal takings analysis,[252] the U.S. Supreme Court expressly rejected *Armstrong*'s "in

248. Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 539 (2005).

249. *Armstrong*, 364 U.S. at 49.

250. *Id.* (emphasis added).

251. *E.g.*, Palazzolo v. Rhode Island, 533 U.S. 606, 617–18 (2001) (noting the inquiries that make up the federal takings analysis "are informed by the purpose of the Takings Clause"); E. Enters. v. Apfel, 524 U.S. 498, 522 (1998) (describing the "aim" of the Federal Takings Clause); Dolan v. City of Tigard, 512 U.S. 374, 384 (1994) (describing the "principal purposes" of the Takings Clause); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 835 n.4 (1987) (same); First English Evangelical Lutheran Church v. Cnty. of L.A., 482 U.S. 304, 318–19 (1987) (describing the "design[]" of the Takings Clause); Manufactured Hous. Cmtys. of Wash. v. State, 142 Wash. 2d 347, 371, 13 P.3d 183 (2000) (describing the "design[]" of the Takings Clause, not a test through which to apply that clause); Orion Corp. v. State, 109 Wash. 2d 621, 648–49, 747 P.2d 1062 (1987) (using "justice and fairness" to describe the "primary problem" with excessive regulation, which can be addressed either through a takings analysis or a due process analysis); *In re* 14255 53rd Ave. S., 120 Wash. App. 737, 748–49, 86 P.3d 222, 227 (2004) (declining to apply "all fairness and justice" as a takings element); Benchmark Land Co. v. City of Battle Ground, 103 Wash. App. 721, 724–25, 14 P.3d 172 (2000) (describing the "purpose" of the Takings Clause, not a test for it); Burton v. Clark Cnty., 91 Wash. App. 505, 515, 958 P.2d 343, 350 (1998) (same).

252. *See* Yee v. City of Escondido, 503 U.S. 519, 522–23 (1992); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 123–24 (1978). Two scholars characterize this case law as the Court "stress[ing] the importance of determining whether the government action unfairly shifts public burdens onto private individuals." Groen & Stephens, *supra* note 151, at 1281. However, a closer

all fairness and justice" language as a test in the federal takings analysis. Although *Lingle* quoted *Armstrong* as a justification for the federal takings test,[253] *Lingle* rejected an attempt to use *Armstrong* as part of the test itself:

> [The property owner] appeals to the general principle that the Takings Clause is meant "'to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" But that appeal is clearly misplaced . . . [because a] test that tells us nothing about the actual burden imposed on property rights, or how that burden is allocated, cannot tell us when justice might require that the burden be spread among taxpayers through the payment of compensation.[254]

Instead of a test that identifies what burdens should properly be borne by the public as a whole, *Lingle* says that the primary touchstone of takings law is a test that discerns "regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain."[255] Instead of first probing the *justification* for or *distribution* of the burden, the focus must be "directly upon the *severity* of the burden that government imposes upon private property rights."[256] That focus is consistent with the U.S. Supreme Court's conclusion that any compensation required by the Takings Clause "is measured by the property owner's loss rather than the government's gain."[257] It does not matter what the government gets from the taking or even whether the government should have secured it from others. What matters is that the government pays the property owner the value of the property lost by the owner.

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reading of this case law reveals that the U.S. Supreme Court, while keeping an eye on the framers' intent of ensuring fair distribution of burdens within society, developed the *Penn Central* factors precisely because the Court did not want to make unbounded determinations about "justice and fairness" in a given case—just as it could not derive a "set formula" that would rigidly dictate all cases. *See Penn Cent.*, 438 U.S. at 124 ("[T]his Court, quite simply, has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons.").

253. *Lingle*, 544 U.S. at 537.

254. *Id.* at 542–43 (citation omitted).

255. *Id.* at 539.

256. *Id.* (emphasis added).

257. Brown v. Legal Found. of Wash., 538 U.S. 216, 235–36 (2003).

Finally, "in all fairness and justice" is too subjective to use as a constitutional test. A former Washington State Supreme Court justice illustrated this point by once dissenting on the grounds that "fairness and justice" required a finding of a taking:[258] "I would conclude by any traditional notion of justice . . . [that the situation presented by the plaintiff] deeply offends fundamental notions of fairness and justice."[259] A constitutional test should rely on more than sticking one's fingers into the wind of "traditional notions" of fairness and justice to probe the depth of a perceived offense.

3. Other Misstatements of the Federal Elements Are Needlessly Confusing

Other misstatements of the federal takings analysis lurk in Washington case law. For example, although federal courts use one of the *Penn Central* factors to consider the economic impact of the challenged regulation on the property *owner*,[260] Washington courts purport to use that factor to consider the economic impact on the *property* itself.[261]

Another error occurs in Washington's version of the "total [regulatory] taking" element. Federal courts ask whether government action deprives the property owner of all economically "beneficial" use,[262] but Washington courts ask whether the action deprives the owner of all economically "viable" use.[263]

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258. Asarco, Inc. v. Dep't of Ecology, 145 Wash. 2d 750, 777–82, 43 P.3d 471, 484–86 (2001) (Sanders, J., dissenting).

259. *Id.* at 779, 43 P.3d at 485.

260. *See, e.g.*, Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978); *Lingle*, 544 U.S. at 538–39.

261. *See, e.g.*, Guimont v. Clarke (*Guimont I*), 121 Wash. 2d 586, 596, 854 P.2d 1, 6 (1993); Presbytery of Seattle v. King Cnty., 114 Wash. 2d 320, 335, 787 P.2d 907, 915 (1990).

262. *Lingle*, 544 U.S. at 538; Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1019 (1992). The U.S. and Washington State Supreme Courts initially used "viable" in the context of the *Penn Central* factors. *See, e.g.*, Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 495 (1987) (quoting Agins v. Tiburon, 447 U.S. 255, 260 (1980)); *Penn Cent.*, 438 U.S. at 138 n.36; *Presbytery*, 114 Wash. 2d at 333–34, 787 P.2d at 914; Orion Corp. v. State, 109 Wash. 2d 621, 655–56, 747 P.2d 1062, 1081 (1987). The U.S. Supreme Court ceased that practice in *Lucas*—the 1992 decision that added the "total taking" element to the federal analysis. *Lucas*, 505 U.S. at 1019, 1030–31. Since *Lucas*, that element has employed the term "beneficial," not "viable." *See, e.g.*, Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., ___ U.S. ___, 130 S. Ct. 2592, 2601 (2010); *Lingle*, 544 U.S. at 538; Palazzolo v. Rhode Island, 533 U.S. 606, 617 (2001).

263. *Guimont I*, 121 Wash. 2d at 600, 602, 605, 854 P.2d at 9, 10, 12; Margola Assocs. v. City of Seattle, 121 Wash. 2d 625, 643–44, 854 P.2d 23, 33 (1993). When incorporating *Lucas* into the Washington takings analysis, the Washington State Supreme Court appeared to appreciate that *Lucas* used "beneficial." *Guimont I*, 121 Wash. 2d at 598, 599, 854 P.2d at 8 (quoting *Lucas*).

Although these misstatements are unlikely to yield results substantively different from ones produced by application of the exact language of the federal analysis, they remain confusing and likely unintended points of departure between federal and Washington takings law. They highlight the need for the Washington State Supreme Court to exercise care when reciting federal takings law.

C. Attempting to Justify the Washington Takings Analysis on Independent State Constitutional Grounds Would Be Unwarranted Historically and Legally

The Washington takings analysis has always been an attempt, however ill-fated, to track the federal analysis. When the Washington State Supreme Court revisits its takings jurisprudence, it should not attempt to justify its twenty-year-old takings analysis on independent state constitutional grounds. Such an attempt would ignore history and should fail on its merits.

1. The Washington State Supreme Court Never Performed a Gunwall *Analysis to Justify Its Unique Takings Analysis*

Like all state courts, the Washington State Supreme Court is free to interpret its state constitution to provide greater protection for individual rights than does the U.S. Constitution. As explained in the Court's well-worn *Gunwall*[264] decision, "states can do this because each state has the 'sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution.'"[265]

Creating distinct state constitutional law is the exception, not the rule. The Washington State Supreme Court deems it "self evident that . . . . state courts should be sensitive to developments in federal law," because "[t]he opinions of the [U.S.] Supreme Court, while not controlling on state courts construing their own constitutions, are nevertheless important guides on the subjects which they squarely address."[266] The Washington State Supreme Court therefore resolved

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Nevertheless, without explanation, the Court reverted to "viable" in its statement of the Washington takings analysis. *Id.* at 600, 602, 605, 854 P.2d at 9, 10, 12; *see also Margola*, 121 Wash. 2d at 643–44, 854 P.2d at 33.

264. State v. Gunwall, 106 Wash. 2d 54, 720 P.2d 808 (1986).

265. *Id.* at 59, 720 P.2d at 811 (quoting Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 81 (1980)).

266. *Id.* at 60–61, 720 P.2d at 812 (quoting State v. Hunt, 450 A.2d 952, 964 (N.J. Sup. Ct. 1982) (Handler, J., concurring)). The Washington State Supreme Court has criticized state courts that fail to explain why they diverge from federal constitutional precedent: "The difficulty with such

that "[r]ecourse to our state constitution as an independent source for recognizing and protecting the individual rights of our citizens must spring not from pure intuition, but from a process that is at once articulable, reasonable and reasoned."[267] Heeding this lesson, the Washington State Supreme Court will analyze six nonexclusive criteria—often called the "*Gunwall* factors"—before deciding to part ways with federal case law on matters of constitutional interpretation.[268]

An attempt to use *Gunwall* to support the Washington takings analysis now, more than two decades after its creation, would be an attempt to rewrite history. The Washington State Supreme Court has never applied the *Gunwall* factors to assess whether the Washington State Constitution offers greater protections to individuals against uncompensated takings for public use, and thus whether a different Washington takings analysis is appropriate. Even though *Orion*, which spawned the Washington takings analysis, was decided fewer than two years after *Gunwall* itself, *Orion* did not cite *Gunwall*.[269] *Guimont I*, which effectively capped the Court's development of the Washington takings analysis in 1993,[270] did not consider the property "owners' arguments that the state constitution provides greater protection" because they had "not briefed the relevant *Gunwall* factors necessary for determining whether an independent analysis of the state constitution is proper."[271] The Washington Court of Appeals has frequently noted the

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decisions is that they establish no principled basis for repudiating federal precedent and thus furnish little or no rational basis for counsel to predict the future course of state decisional law." *Id.* at 60, 720 P.2d at 811–12.

267. *Id.* at 63, 720 P.2d at 813; *see also id.* at 62–63, 720 P.2d at 813 (stating the Court's intent to "use independent state constitutional grounds in a given situation" only "for well founded legal reasons and not by merely substituting [its] notion of justice for that of . . . the United States Supreme Court").

268. *Id.* at 61–62, 720 P.2d at 812–13. The Washington State Supreme Court characterized the six criteria as "neutral" and summarized them as: "(1) the textual language; (2) differences in the texts; (3) constitutional history; (4) preexisting state law; (5) structural differences; and (6) matters of particular state or local concern." *Id.* at 58.

269. *See* Manufactured Hous. Cmtys. of Wash. v. State, 142 Wash. 2d 347, 356 n.7, 13 P.3d 183, 187 n.7 (2000) ("[A]lthough *Orion* was decided 18 months after *Gunwall*, it makes no reference to *Gunwall*.").

270. *See* Sintra, Inc. v. City of Seattle (*Sintra II*), 131 Wash. 2d 640, 676–77, 935 P.2d 555, 574 (1997) (Durham, C.J., concurring) (noting that no reconfiguration of the Washington analysis was needed after 1993 because *Guimont I* had already integrated the latest U.S. Supreme Court takings case law).

271. Guimont v. Clarke (*Guimont I*), 121 Wash. 2d 586, 604, 854 P.2d 1, 11 (1993); *accord Manufactured Hous.*, 142 Wash. 2d at 356 n.7, 13 P.3d at 187 n.7 ("[T]he *Guimont* court specifically declined to undertake a state constitutional *Gunwall* analysis.").

absence or insufficiency of any attempt to discern broader state takings protections through application of the *Gunwall* factors.[272]

A trio of Washington State Supreme Court decisions nevertheless appears to suggest that an application of the *Gunwall* factors supports the Washington takings analysis. Those suggestions prove unconvincing under closer inspection.

The first of this trio is *Manufactured Housing Communities of Washington v. State* (*Manufactured Housing*).[273] There, a plurality of the Court[274] invalidated a statute because it purported to authorize the government to take property for a purpose not authorized by the Washington State Constitution.[275] Although the U.S. Supreme Court reads the U.S. Constitution to authorize takings that advance what a legislative body determines to be a public *purpose*,[276] the Washington State Supreme Court has long held that the Washington State Constitution authorizes takings only for a narrower set of purposes that may be deemed a direct public *use*.[277] *Manufactured Housing* applied the

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272. *See, e.g.*, Schreiner Farms, Inc. v. Smitch, 87 Wash. App. 27, 32–33, 940 P.2d 274, 276–77 (1997) (noting the continued absence of any *Gunwall* analysis); Guimont v. City of Seattle (*Guimont II*), 77 Wash. App. 74, 79 n.4, 896 P.2d 70, 75 n.4 (1995) ("Although [the property owner] argues that the state constitution affords greater protection to property owners than does the federal constitution, its argument on the *Gunwall* factors does not support an independent state constitutional analysis.").

273. 142 Wash. 2d 347, 13 P.3d 183 (2000).

274. *See id.* at 375, 13 P.3d at 197 (showing only three justices concurring in the lead opinion, with one justice concurring in the result).

275. *Id.* at 374, 13 P.3d at 196.

276. Kelo v. City of New London, 545 U.S. 469, 479–80 (2005).

277. This law was established well before the advent of the *Gunwall* factors in 1986. *See, e.g.*, Petition of City of Seattle, 96 Wash. 2d 616, 624, 638 P.2d 549, 554–55 (1981); Hogue v. Port of Seattle, 54 Wash. 2d 799, 813, 341 P.2d 171, 178 (1959); State *ex rel.* Or.–Wash. R.R. & Navigation Co. v. Superior Court, 155 Wash. 651, 657–58, 286 P. 33, 36 (1930).

This law stemmed from three crucial differences between the federal and Washington takings provisions. First, the Washington provision adds a key limitation: "Private property shall not be taken *for private use* . . . ." WASH. CONST. art. I, § 16 (amended 1920) (emphasis added). This provision alone makes it much more difficult under the Washington State Constitution for a local government to condemn private property and convey it to a different set of private hands.

Second, the Washington State Constitution accords no deference to legislative judgment in determining what constitutes a "public use." *Id.* ("Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such, without regard to any legislative assertion that the use is public . . . ."); *cf. Kelo*, 545 U.S. at 480–83 (deferring largely to a local determination of a public purpose).

Finally, the Washington State Constitution has been frequently amended to define certain activities as "public uses." This suggests that, but for these express examples, "public use" has a relatively narrow meaning under Washington law. *See, e.g.*, WASH. CONST. art. I, § 16 (amended 1920) ("[T]he taking of private property by the state for land reclamation and settlement purposes is

Gunwall factors to reaffirm that long-understood difference between federal and state law on the issue of whether the government *may* take property at all, even if the government pays compensation.[278] *Manufactured Housing* did not employ *Gunwall* to justify a unique Washington analysis for determining whether the government *has* actually taken property.[279]

In the second case of the trio, *Eggleston v. Pierce County*,[280] the Washington State Supreme Court exaggerated the reach of *Manufactured Housing*'s *Gunwall* analysis. In *Eggleston*, the Court faced the issue of whether damage to a home caused by police gathering evidence pursuant to a search warrant constituted a taking for which compensation had to be paid.[281] Even though the Court resolved the case by applying Washington law rather than federal law, the Court did not apply the Washington takings analysis.[282] Instead, the Court looked to "the principles underlying [its] jurisprudence" (namely, that an exercise of the police power cannot be a taking)[283] and "evidence from an 1886 Oregon Supreme Court case" to conclude that, when the Washington State Constitution was adopted in 1889, "the production of evidence . . . would not have been considered a taking."[284] Among its reasons for omitting the requisite *Gunwall* analysis, the Court cited

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hereby declared to be for public use."); WASH. CONST. art. VIII, § 8 (amended 1966) ("The use of public funds by port districts in such manner as may be prescribed by the legislature for industrial development or trade promotion . . . shall be deemed a public use for a public purpose . . . ."); WASH. CONST. art. VIII, § 11 (amended 1985) ("The use of agricultural commodity assessments by agricultural commodity commissions in such manner as may be prescribed by the legislature for agricultural development or trade promotion and promotional hosting shall be deemed a public use for a public purpose . . . .").

278. Manufactured Hous. Cmtys. of Wash. v. State, 142 Wash. 2d 347, 356–61, 13 P.3d 183, 187–90 (2000).

279. Consistent with *Manufactured Housing*'s limited scope, the Washington State Supreme Court three months later declined, in the absence of a *Gunwall* analysis, to address whether "the Washington Takings Clause should be interpreted more expansively than its federal counterpart" when addressing a claim that a taking actually occurred. Dean v. Lehman, 143 Wash. 2d 12, 33, 18 P.3d 523, 535 (2001). *Dean* involved a claim that a user fee constituted a taking "in the nature of a monetary exaction." *Id.* at 31–32, 18 P.3d at 534. That claim is subject to a different analysis than the one at issue in this Article. *See id. Dean* is nevertheless relevant because it belies later contentions by the Court that *Manufactured Housing* obviated future *Gunwall* analyses of the differences between the federal and Washington takings clauses. *See infra* text accompanying notes 280–90.

280. 148 Wash. 2d 760, 64 P.3d 618 (2002).

281. *Id.* at 763, 64 P.3d at 620.

282. Other than citing *Guimont I* among a string of other cases, *Eggleston* did not mention the Washington takings analysis. *See id.* at 767, 64 P.3d at 622.

283. This principle is described and critiqued above. *See supra* Part II.B.

284. *Eggleston*, 148 Wash. 2d at 769, 64 P.3d at 623.

Manufactured Housing as though it had already satisfied *Gunwall*'s requirements.[285] The Court concluded that "the threshold function *Gunwall* performs is less necessary when we have already established a state constitutional provision provides more protection than its federal counterpart."[286]

In the final decision of the trio, *Brutsche v. City of Kent*,[287] the Washington State Supreme Court attempted to obviate a *Gunwall* analysis for all takings issues. Because *Brutsche* presented the same issue resolved in *Eggleston*, the Court resolved *Brutsche* primarily by holding that *Eggleston* was both indistinguishable as a factual matter and correct as a legal matter.[288] In a footnote, *Brutsche* rehashed *Eggleston*'s reasons for not performing a *Gunwall* analysis.[289] The Court concluded by signaling that it saw no need to apply the *Gunwall* factors to Washington's takings clause: "Because it is settled that article I, section 16 is to be given independent effect, it is unnecessary to engage in a *Gunwall* analysis."[290] Unfortunately, as demonstrated by a reading of *Manufactured Housing* and *Eggleston*, no court has addressed, let alone settled, the matter of whether Washington's takings clause justifies the unique Washington takings analysis.

The actual foundation of the Washington analysis is a mistaken belief that it is equivalent to the federal analysis.[291] The Washington State

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285. *Id.* at 766, 64 P.3d at 622 (citing *Manufactured Housing Communities of Washington v. State*, 142 Wash. 2d 347, 356 n.7, 13 P.3d 183, 187 n.7 (2000), for the proposition that the Washington takings clause "is significantly different from its United States constitutional counterpart, and in some ways provides greater protection."). It is difficult to square that statement with the Washington State Supreme Court's 1987 conclusion that "the federal approach [to takings] may in some instance provide broader protection" than the Washington approach. Orion Corp. v. State, 109 Wash. 2d 621, 657, 747 P.2d 1062, 1082 (1987).

286. *Eggleston*, 148 Wash. 2d at 767 n.5, 64 P.3d at 622 n.5. Among other reasons for excusing the requisite *Gunwall* analysis, the Court reported that "a satisfactory *Gunwall* analysis was provided by an amicus." *Id.* The Court omitted the fact that the amicus brief focused on the import of the phrase "or damaged" in the Washington State Constitution—a phrase not employed in *Eggleston* or ever invoked to justify the Washington takings analysis. *See* Brief of Amicus Curiae American Civil Liberties Union of Washington, *Eggleston*, 148 Wash. 2d 760, 64 P.3d 618 (2003) (No. 71296-4), 2002 WL 33003998, at *14–20. The Washington takings clause reads: "No private property shall be taken *or damaged* for public or private use without just compensation having been first made . . . ." WASH. CONST. art. I, § 16 (amended 1920) (emphasis added). For a discussion of whether "or damaged" could be a basis for the unique Washington takings analysis, see *infra* text accompanying note 300.

287. 164 Wash. 2d 664, 193 P.3d 110 (2008).

288. *Id.* at 680–82, 193 P.3d at 119–20.

289. *Id.* at 680 n.11, 193 P.3d at 119–20 n.11.

290. *Id.*

291. *See supra* text accompanying notes 111–22, 228–29.

Supreme Court should not compound that mistake by attempting to justify the Washington takings analysis as the product of a *Gunwall* analysis.

2. *The* Gunwall *Factors, Even if Applied to Washington's Takings Clause, Would Likely Not Justify the Washington Takings Analysis*

Even if the Washington State Supreme Court were to perform a *Gunwall* analysis now, there is little reason to think that it would justify a unique Washington takings analysis, especially not the particular analysis the Court finished creating in 1993. There is no need to belabor this point with a complete *Gunwall* analysis, especially when Washington courts have consciously developed and applied the Washington takings analysis for two decades in the absence of a relevant *Gunwall* analysis.[292] Two considerations cast serious doubt on *Gunwall*'s ability to justify the Washington takings analysis.

First, a basic premise of *Gunwall* is that it identifies situations where "the constitution of the State of Washington should be considered as extending broader rights to its citizens than does the United States Constitution."[293] Yet when explaining the Washington takings analysis, the Washington State Supreme Court first stated that "the breadth of constitutional protection under the state and federal just compensation clauses remains virtually identical,"[294] and then proclaimed that "[t]he Washington Constitution provides the same right" as the Federal Takings Clause.[295] More crucially, by deliberately enhancing protection of government, the Washington analysis provides narrower protection to individuals,[296] not the broader protection fostered by *Gunwall*. Without turning *Gunwall* on its head, the Washington State Supreme Court cannot now point to the Washington State Constitution to justify a twenty-year-old analysis that restricts rights afforded by the U.S. Constitution.

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292. *See supra* text accompanying notes 269–72.

293. State v. Gunwall, 106 Wash. 2d 54, 61, 720 P.2d 808, 812 (1986).

294. Orion Corp. v. State, 109 Wash. 2d 621, 657, 747 P.2d 1062, 1082 (1987).

295. Sintra v. City of Seattle (*Sintra I*), 119 Wash. 2d 1, 13, 829 P.2d 765, 772 (1992); *accord* Eustis, *supra* note 124, at 1193 n.79 ("The Washington State Supreme Court has construed the state constitutional provision to be identical to that of the federal Constitution."). The Court added: "State law may provide useful guidance in this determination, but federal law is ultimately controlling." *Sintra I*, 119 Wash. 2d at 14, 829 P.2d at 772.

296. *See supra* text accompanying notes 183–95 (discussing why the Washington analysis is insufficient under the U.S. Constitution).

Second, the *Gunwall* factor that assesses differences in the relevant texts of the two constitutions suggests no basis for an independent Washington analysis.[297] When determining whether a government action constitutes a taking requiring compensation, there are no significant differences in the Takings Clauses of the U.S. and Washington State Constitutions. The federal provision reads: "[N]or shall private property be taken for public use, without just compensation."[298] Stripped to its essence, the parallel Washington provision is functionally identical: "No private property shall be taken or damaged for public or private use without just compensation having been first made . . . ."[299] Even though the Washington takings provision includes the words "or damaged," the Washington State Supreme Court has noted that "no Washington decision has attached significance to the difference in language in the context of police power regulation," and suggested that "or damaged" might have more to do with tort law than takings law.[300] To the extent

297. *See Gunwall*, 106 Wash. 2d at 58, 720 P.2d at 811.

298. U.S. CONST. amend. V.

299. WASH. CONST. art. I, § 16 (amended 1920). In full and in context, the Washington takings clause reads:

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

Id. (emphasis added). The addition of "or private use" is relevant to the range of purposes for which the government may take property; that phrase is irrelevant to whether a taking has occurred. *See supra* notes 276–79 and accompanying text. On its face, the requirement that compensation be made "first" is relevant only to the timing of the compensation, not to whether any compensation is due.

300. Presbytery of Seattle v. King Cnty., 114 Wash. 2d 320, 328 n.10, 787 P.2d 907, 911 n.10 (1990); *accord* Schreiner Farms, Inc. v. Smitch, 87 Wash. App. 27, 32, 940 P.2d 274, 276–77 (1997); Settle, *supra* note 154, at 344. A line of Washington authority relies on the "or damaged" language in the conceptually distinct situation of government road work substantially impairing access to one's property. *See, e.g.*, Pande Cameron & Co. of Seattle, Inc. v. Cent. Puget Sound Reg'l Transit Auth., 610 F. Supp. 2d 1288, 1303–06 (W.D. Wash. 2009), *aff'd*, 376 F. App'x 672 (9th Cir. 2010) (applying Washington law); Keiffer v. King Cnty., 89 Wash. 2d 369, 372, 572 P.2d 408, 410 (1977); Walker v. State, 48 Wash. 2d 587, 589–90, 295 P.2d 328, 330 (1956); Brown v. City of Seattle, 5 Wash. 35, 38–41, 31 P. 313, 314–15 (1892); *see* William B. Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553, 555 n.8 (1972) (noting the presence of "or damaged" in twenty-six state constitutions, tracing its origin to Illinois, and explaining that it was "intended to liberalize the allowance of compensation for loss of certain kinds of property rights, particularly street access").

"or damaged" actually injects notions of tort liability into takings jurisprudence, that concept is not unique to Washington. Despite the absence of "or damaged" from the Federal Takings Clause, the U.S. Supreme Court has held that "when the government uses its own property in such a way that it destroys private property, it has taken that property."[301]

CONCLUSION

In evaluating whether to abandon the Washington takings analysis, *Lingle* remains instructive. After examining a twenty-five-year-old element of its takings analysis, a unanimous U.S. Supreme Court admitted an error, corrected course, and properly clarified the federal law of takings.[302] The Washington State Supreme Court should likewise examine its twenty-year-old takings analysis, concede its now-evident flaws, and correct course by adopting the federal analysis. Only then will Washington's citizens, attorneys, and judges extricate themselves from a needless takings quagmire.

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301. Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., ___ U.S. ___, 130 S. Ct. 2592, 2601 (2010). As support for that statement, the U.S. Supreme Court cited cases in which it found takings where military aircraft flew so low over property as to render it uninhabitable, *United States v. Causby*, 328 U.S. 256, 261–62 (1946), and where a dam flooded property, *Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166, 177–78 (1871).

302. Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 548 (2005). For a discussion of *Lingle*, see *supra* text accompanying notes 20–31.