Supreme Court of the State of Washington

Opinion Information Sheet

Docket Number: 66831-1
Title of Case: Manufactured Housing Communities of Washington
v.
State of Wa; & Mobile Home Owners of America, Inc
File Date: 11/09/2000
Oral Argument Date: 03/07/2000
02/25/1999

SOURCE OF APPEAL

Appeal from Superior Court,
Thurston County;
95-2-03935-6
Honorable Wm. T. McPhee, Judge.

JUSTICES

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Majority by Ireland, J.
Dissent by Johnson, J.
Dissent by Talmadge, J.
Concurrence by Sanders, J.

No. 66831-1

TALMADGE, J. (dissenting) -- Today, the Washington Supreme Court strikes down legislation designed to assist the vulnerable, and fundamentally alters the judicial treatment of the police power, an attribute of government long-recognized everywhere as essential to our fundamental notions of ordered liberty. Today, the Washington Supreme Court revives the Lochner1 era, when a conservative United States Supreme Court struck down measure after measure of state legislation designed to ease the burdens of the oppressed and those in need. Today, the Washington Supreme Court returns to the days when property rights were considered more important than human rights.

It is bitterly ironic that this should happen in Washington. This state was an early leader in passing laws banning child labor, setting minimum wages for women and children, promoting mine safety, and limiting hours an employer could require employees to work -- all long before federal legislation on the same subjects. In the early 20th Century, our predecessors on this Court upheld such legislation against the challenges of the powerful in society. The spirit that animated those days has been displaced in this case by a new property rights absolutism that distorts the relationship between the legislative and judicial branches, and usurps for the Washington Supreme Court the role of final arbiter of what is good social legislation.

By unsoundly equating any regulation of land with a taking of land by eminent domain, the majority pushes the parameters of Washington's eminent domain law far beyond anything envisioned by our constitutional framers or the framers of any other state constitution. The majority departs from the traditional elements of takings law we articulated in Guimont v. Clarke,

121 Wn.2d 586, 854 P.2d 1 (1993), cert. denied, 510 U.S. 1176, 114 S. Ct. 1216, 127 L. Ed. 2d 563 (1994), in favor of a novel interpretation of art. I, sec. 16 of our Constitution by suggesting even a minor regulation of property may be a taking.

Because the mobile home statute in question here does not effect a taking of the mobile home park owners' property, and because the majority's opinion calls into question numerous other appropriate regulations of property pursuant to the State's well-settled police powers, I agree with Justice Johnson's dissent. I write separately to express my concern for what the majority's disposition of this case does to the police power in Washington as it has been exercised since 1889.

A. Mobile and Manufactured Homes

At the outset, this facial challenge to the Mobile Home Parks Resident Ownership Act, chapter 59.23 RCW (the Act), relates to legislation enacted pursuant to the police power of the State of Washington. The majority has appropriately described how the Act operates and the facial constitutional challenge the petitioners have made to the statutory enactment. But, in conjunction with its flawed interpretation, the majority neglects to discuss the practical reality of mobile home life.

Mobile homes are not mobile. The term is a vestige of earlier times when mobile homes were more like today's recreational vehicles. Today mobile homes are 'designed to be placed permanently on a pad and maintained there for life.' Roger Colton & Michael Sheehan, The Problem of Mass Evictions in Mobile Home Parks Subject to Conversion, 8-Spring, J. Affordable Housing & Community Dev. L. 231, 232 (1999). 'Once 'planted' and 'plugged in,' they are not easily relocated.' Miller v. Valley Forge Vill., 43 N.Y.2d 626, 374 N.E.2d 118, 120 (1978). Moreover,

> In most instances a mobile home owner in a park is required to remove the wheels and anchor the home to the ground in order to facilitate connections with electricity, water and sewerage. Thus it is only at substantial expense that a mobile home can be removed from a park with no ready place to go.

Malvern Courts, Inc. v. Stephens, 275 Pa. Super. 518, 419 A.2d 21, 23 (1980).

Physically moving a double- or triple-wide mobile home involves 'unsealing; unroofing the roofed-over seams; mechanically separating the sections; disconnecting plumbing and other utilities; removing carports, porches, and similar fixtures; and lifting the home off its foundation or supports.' Colton & Sheehan, supra, 232. Costs of relocation, assuming relocation is even possible for older units, can range as high as $10,000.

Id. It is the immobility of mobile homes that 'accounts for most of the problems and abuses endured by mobile home tenants.' Luther Zeigler, Statutory Protections for Mobile Home Park Tenants -- The New York Model, 14 Real Estate L.J. 77, 78 (1985).

The effects on mobile home owners (home owners) faced with moving because mobile home park owners (park owners) want to convert a mobile home park to another use can be devastating. A home owner owns the mobile home, but only rents the land on which it sits. Closure and conversion of a mobile home park force the owner either to move, or to abandon what may be his most valuable equity investment, a mobile home, to the developer's bulldozer. Displacement from a mobile home park can 'mean economic ruin for a mobile home owner.' Karl Manheim, Tenant Eviction Protection and the Takings Clause, 1989 Wis. L. Rev. 925, 956 n.179 (1989). See Granat v. Keasler, 99 Wn.2d 564, 663 P.2d 830 (discussing similar problems for owners of houseboats renting moorage), cert. denied, 464 U.S. 1018, 104 S. Ct. 549, 78 L. Ed. 2d 723 (1983).

Availability of affordable housing is one of the goals of the Growth Management Act. RCW 36.70A.020(4). Mobile homes present affordable housing options for large segments of society. The President's Commission on Housing declared:

{M}anufactured housing is a significant source of affordable housing for American families, particularly first-time homebuyers, the elderly, and low- and moderate-income families. . . . Almost all local and state regulations, however, discriminate against manufactured housing. These discriminatory policies cause communities to ignore and forgo a promising opportunity to narrow the gap between supply and demand for affordable housing.

Molly A. Sellman, Equal Treatment of Housing: A Proposed Model State Code for Manufactured Housing, 20 Urb. L. 73, 74 n.3 (1988) (quoting The Report of the President's Commission on Housing 56, 85 (1982)).

The human dimension to mobile home ownership is considerable. 'Mobile home residents are typically poorer than the average rental household, with incomes lower by one-third. Many home owners are elderly residents with friends, contacts, and community that have centered on the park for years, if not decades.' Colton & Sheehan, supra, at 233. The costs to the community in terms of providing public housing for evicted mobile home owners who are low-income families or the elderly, for example, are enormous. Exacerbating the problem is the scarcity of mobile home parks:

Some towns exclude mobile homes altogether; others limit how long the homes can stay in town. Most frequently, municipalities confine mobile

homes to privately-owned mobile home parks and restrict the number of parks permitted in the town. Consequently, there is a major shortage of space for mobile homes. Thus the owner who needs to rent a lot for his mobile home has no choice but to enter the 'park owner's market' in which the demand for space far exceeds the supply of available lots.

Thomas G. Moukawsher, Mobile Home Parks and Connecticut's Regulatory Scheme: A Takings Analysis, 17 Conn. L. Rev. 811, 814-15 (1985) (footnotes omitted). See Jay M. Zitter, Annotation, Validity of Zoning or Building Regulations Restricting Mobile Homes or Trailers to Established Mobile Home or Trailer Parks, 17 A.L.R.4th 106 (1982). Not surprisingly, abuses abound in this seller's market:

Park owners have been criticized for charging exorbitant entrance fees and for claiming from their tenants miscellaneous, and often arbitrary, charges, in addition to fees for extra cars, children, pets, or guests. Most important, the combination of short leases, entrance fees, and prohibitions of on-the-lot sales have allowed some park owners to make substantial profits by evicting home owners and their homes. Because of the space shortage, many evicted mobile home owners have lost their investments. Park owners have not allowed the homes to be sold on their land, and there are few, if any, other places to put them. Consequently, the evicted homes are worth much less when offered for sale.

Moukawsher, supra, at 815 (footnotes omitted). The Maryland Court of Appeals in 1980 detailed abuses afflicting mobile home tenants:

Despite the rising popularity of relatively low cost mobile homes, many communities have enacted zoning regulations which exclude them entirely or severely limit the areas where they may be placed, frequently restricting them to mobile home parks. Thus, the mobile home owner is compelled to rent space from the park owners who, because of the limited availability of space and the high cost of relocation, are able to dictate unfavorable rental terms and conditions. As a result, mobile home owners often have been forced to buy mobile homes from the park owner in order to obtain a site, to pay excessive entrance fees, to buy specified commodities from specified dealers, to pay the park owner a commission on the sale of the mobile home, or, upon sale, to remove and pay an exit fee.

Cider Barrel Mobile Home Court v. Eader, 287 Md. 571, 414 A.2d 1246, 1248 (1980).

Manifestly, home owners have markedly less bargaining power -- in fact, they have none, as upon eviction they become homeless and may lose

what is likely their most valuable asset, their homes -- than do park owners. As a consequence, home owners are not in a position individually to bargain at arm's length with their landlords, the park owners.

B. The Legislation

In response to these inequities and the abuses home owners often suffer, and in an attempt to bolster the home owners' bargaining position, the Legislature enacted the Mobile Home Relocation Assistance Act in 1989, chapter 59.21 RCW, requiring the owner of a mobile home park to pay relocation assistance to the park's tenants if the owner wanted to close the park or convert it to other use.2 The law provided $4,500 relocation assistance for single-wide mobile homes and $7,500 relocation assistance for double-wide mobile homes. Laws of 1990, ch. 171, sec. 2(1). We struck down the law as a violation of the park owners' substantive due process rights under the Fourteenth Amendment, but we also held the law was not a taking of property without just compensation. Guimont, 121 Wn.2d at 614.

Apparently in response to Guimont and as a reflection of continuing concern about the plight of mobile home owners, the Legislature enacted chapter 59.23 RCW, expressing its findings and intent as follows:

The legislature finds that mobile home parks provide a significant source of homeownership for many Washington residents, but increasing rents and low vacancy rates, as well as the pressure to convert mobile home parks to other uses, increasingly make mobile home park living insecure for mobile home owners. The legislature also finds that many homeowners who reside in mobile home parks are also those residents most in need of reasonable security in the siting of their manufactured homes. It is the intent of the legislature to encourage and facilitate the conversion of mobile home parks to resident ownership in the event of a voluntary sale of the park.

RCW 59.23.005.3 The bill passed both the Senate and the House of Representatives without a single dissenting vote in either body. The House Bill Report of April 8, 1993 states:

This is a compromise worked out between park owners and tenants to address mobile home landlord-tenant issues. Agreement has been reached on such issues as removing problem tenants from the park, eliminating no-cause evictions with 12 months notice, allowing tenants to purchase parks when the owner is selling to other than a relative, and allowing park owners to purchase mobile homes for sale by the tenant to other than relatives. This bill will improve the relationship between good tenants and park owners, and will better enable the few problem tenants and the few problem park owners to be addressed more effectively.

H.B. Rep. ESSB 5482 (Wash. 1993) (emphasis added). According to the same bill report, there was no testimony against the bill, while two representatives of the Washington Mobile Home Park Owners spoke in support of the bill. Two years later the park owners brought the present lawsuit claiming chapter 59.23 RCW is unconstitutional.

C. The Act Does Not Take the Park Owners' Property

In agreeing with the park owners, the majority says: 'The instant case falls within the rule that would generally find a taking where a regulation deprives the owner of a fundamental attribute of property ownership.' Majority op. at 25. For the majority, any regulation affecting any fundamental attribute of property is a taking. Thus does the majority facilely dispose of 130 years of American regulatory taking jurisprudence, beginning with Pumpelly v. Green Bay & Miss. Canal Co., 80 U.S. (13 Wall.) 166, 20 L. Ed. 557 (1871), and continuing to the present day:

Almost from the inception of our regulatory takings doctrine, we have held that whether a regulation of property goes so far that 'there must be an exercise of eminent domain and compensation to sustain the act . . . depends upon the particular facts.' Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413{, 43 S. Ct. 158, 67 L. Ed. 322} (1922); accord, Keystone Bituminous Coal, supra, at 473-474{, 107 S. Ct. 1232}. Consistent with this understanding, we have described determinations of liability in regulatory takings cases as ' 'essentially ad hoc, factual inquiries,' ' Lucas, supra, at 1015{, 112 S. Ct. 2886} (quoting Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124{, 98 S. Ct. 2646, 57 L. Ed. 2d 631} (1978)), requiring 'complex factual assessments of the purposes and economic effects of government actions.'

City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 720, 119 S. Ct. 1624, 143 L. Ed. 2d 882 (1999). No factual inquiries or complex assessments beset the majority and deter it from formulating its unprecedented rule. The majority's analysis is flawed from the outset.

1. The Majority's Gunwall Analysis and Property Rights in Washington.

Without saying why it is necessary to do so, the majority undertakes an analysis pursuant to State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986). The original intent of a Gunwall analysis was to determine whether 'the constitution of the State of Washington should be considered as extending broader rights to its citizens than does the United States Constitution.' Id. at 61.

The majority looks at the first sentence of Wash. const. art. I, sec. 16 -- 'Private property shall not be taken for private use'4 -- and concludes our constitution provides more protection for private property owners than does the Fifth Amendment to the United States Constitution. How the majority gets there is a monumental puzzle, because the Fifth Amendment does not mention 'private use.' The Fifth Amendment speaks only of public use: 'nor shall private property be taken for public use, without just compensation.'

The majority tells us that we have taken a much more restrictive view of the meaning of public use than has the United States Supreme Court. Majority op. at 13. The majority is quite right. Compare, e.g., In re Petition of Seattle, 96 Wn.2d 616, 627, 638 P.2d 549 (1981) (holding a beneficial use is not necessarily a public use), with Haw. Hous. Auth v. Midkiff, 467 U.S. 229, 242, 104 S. Ct. 2331, 81 L. Ed. 2d 186 (1984) (public use requirement coterminous with the scope of a sovereign's police powers.).5 But the term public use does not appear in the first sentence of art. I, sec. 16, the provision the majority says is key to its analysis. It would have been a more revealing and more fruitful exercise for the majority to have compared the constitutional meaning of the sentence it relies on in our constitution -- 'Private property shall not be taken for private use' -- with the United States Supreme Court's treatment of that concept.

In 1896, the Court addressed the question of takings for private use and said categorically: 'The taking by a state of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law, and is a violation of the fourteenth article of amendment of the constitution of the United States.' M. Pac. Ry. Co. v. State of Neb., 164 U.S. 403, 417 17 S. Ct. 130, 41 L. Ed. 489 (1896). This proposition became so well entrenched in federal jurisprudence that the Court of Appeals for the Ninth Circuit was able to say 100 years later: 'It is overwhelmingly clear from more than a century of precedent that the government violates the Constitution when it takes private property for private use. . . .' Armendariz v. Penman, 75 F.3d 1311, 1320-21 (9th Cir. 1996). Indeed, there is a primeval notion in American law to the effect that the taking of private property for private use is not even a permissible action of government. In a famous passage, Justice Samuel Chase said in Calder v. Bull, 3 U.S. (3 Dall.) 386, 388, 1 L.Ed. 648 (1798):

An ACT of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority. The obligation of a law in

governments established on express compact, and on republican principles, must be determined by the nature of the power, on which it is founded. A few instances will suffice to explain what I mean. A law that punished a citizen for an innocent action, or, in other words, for an act, which, when done, was in violation of no existing law; a law that destroys, or impairs, the lawful private contracts of citizens; a law that makes a man a Judge in his own cause; or a law that takes property from A. and gives it to B: It is against all reason and justice, for a people to entrust a Legislature with SUCH powers; and, therefore, it cannot be presumed that they have done it. The genius, the nature, and the spirit, of our State Governments, amount to a prohibition of such acts of legislation; and the general principles of law and reason forbid them.

Justice Chase was speaking here not of constitutional law, but of natural law, of powers no government may exercise because 'general principles of law and reason forbid them.'6 The aphorism about the prohibition against taking from A and giving to B is enshrined in American law. Justice Story said in 1829: 'We know of no case, in which a legislative act to transfer the property of A. to B. without his consent, has ever been held a constitutional exercise of legislative power, in any state in the Union.' Wilkinson v. Leland, 27 U.S. (2 Pet.) 627, 657, 7 L.Ed. 542 (1829). The Supreme Court has cited Chase's aphorism as recently as 1998. See Eastern Enters. v. Apfel, 524 U.S. 498, 522, 118 S. Ct. 2131, 141 L. Ed. 2d 451 (1998).

Although there can be little argument in justification of the idea the government may arbitrarily take your private property and give it over to someone else's private use (as opposed to public use), Chase's aphorism has been employed on occasion to pernicious effect. For example, in invalidating New York's pioneering worker's compensation law, the New York Court of Appeals gave as one of the invalidating reasons the requirement for employers to pay premiums into the fund to pay injured workers was 'taking the property of A. and giving it to B., and that cannot be done under our Constitutions.' Ives v. S. Buffalo Ry. Co., 201 N.Y. 271, 94 N.E. 431, 440 (1911). By contrast, that same year our predecessors on this Court, true to their Progressive Era and Populist roots, rejected similar property rights arguments to become the first court in the country to uphold the constitutionality of worker's compensation legislation. See State v. Clausen, 65 Wash. 156, 184-88, 117 P. 1101 (1911) ("{I}t is established by a series of cases that an ulterior public advantage may justify a comparatively insignificant taking of private property for what, in its immediate purpose, is a private use." (quoting Noble State Bank v.

Haskell, 219 U.S. 104, 110, 31 S. Ct. 186, 55 L. Ed. 112 (1911) (Holmes, J.)).7

Against that background, we turn to Washington's constitutional provision, 'Private property shall not be taken for private use.' That is plain enough, but that is not all the first sentence of art. I, sec. 16 says. The remainder of the sentence goes on to say private property may be taken for private use 'for private ways of necessity, and for drains, flumes, or ditches on or across the lands of others for agricultural, domestic, or sanitary purposes.' But isn't this taking private property from A and giving it to B for private use? Doesn't this provision in our state constitution violate the Fourteenth Amendment per Missouri Pacific Railway? The answer to the first question is yes; the answer to the second question is no.

We considered these very questions in Mountain Timber Co. v. Superior Court of Cowlitz County, 77 Wash. 585, 137 P. 994 (1914). Mountain Timber wanted to condemn land belonging to another for use as a logging road. There was no outlet for the company's timber other than over the land of the respondent. See id. at 586. A 1913 statute enacted pursuant to art. I, sec. 16's exception for private ways of necessity allowed as much: 'An owner, or one entitled to the beneficial use, of land which is so situate with respect to the land of another that it is necessary for its proper use and enjoyment to have and maintain a private way of necessity . . . may condemn and take lands of such other sufficient in area for the construction and maintenance of such private way of necessity, . . . The term 'private way of necessity,' as used in this act, shall mean and include a right of way on, across, over or through the land of another for means of ingress and egress, and the construction and maintenance thereon of roads, logging roads, flumes, canals, ditches, tunnels, tramways and other structures upon, over and through which timber, stone, minerals or other valuable materials and products may be transported and carried.

Mountain Timber, 77 Wash. at 586 (quoting Laws of 1913, at 412). The statute provided for compensation for the condemnation. See id. Nevertheless, the owner of the property resisted the condemnation by demurrer, and the trial court refused to permit the condemnation. See id.

In a unanimous opinion authored by Justice Gose, we began with a 'recurrence to certain fundamental principles,' noting "the power of eminent domain is not a reserved, but an inherent right, a right which pertains to sovereignty as a necessary, constant and inextinguishable attribute." Id.. at 587, 588 (quoting 1 John Lewis, Eminent Domain sec. 3 (3d ed. 1909)).8 After saying the power of eminent domain is an inherent

attribute of sovereignty, we carefully corrected a misstatement in an earlier case that art. I, sec. 16 grants the right to take private property for private use. Not so, we said. The proper way to look at it is that the State, as the sovereign, has the inherent power to condemn any land for any use, and that art. I, sec. 16 carves out a constitutional exception regarding private use. Art. I, sec. 16 simply excludes private ways of necessity from the exception for private use. See Mountain Timber, 77 Wash. at 590. Thus, the challenged statute did nothing more than provide a procedure for what the State had the inherent authority to do.

With respect to the federal constitutionality of the statute, we said: 'The taking of private property for private use for the promotion of the general welfare, upon due notice and hearing and the payment of compensation,9 is not incompatible with due process of law, as guaranteed by the Federal constitution.' Id. at 592 (citing Head v. Amoskeag Mfg. Co., 113 U.S. 9, 5 S. Ct. 441, 28 L. Ed. 889 (1885). The 'general welfare' we referred to existed because the road 'prevents a private individual from bottling up a portion of the resources of the state.' Mountain Timber, 77 Wash. at 590. The Court of Appeals for the Ninth Circuit later affirmed the constitutionality of the statute under the Fourteenth Amendment in Ruddock v. Bloedel Donovan Lumber Mills, 28 F.2d 684, 687 (9th Cir. 1928).

To summarize the foregoing discussion, we know, pursuant to the Ninth Circuit's strong statement in Armendariz, the taking of private property for private use violates Fourteenth Amendment due process under federal jurisprudence. We also know under Wash. const. art. I, sec. 16, the government may take private property for private use so long as the taking promotes the general welfare and compensation is paid, and that such a taking does not violate Fourteenth Amendment due process.10 Consequently, one can hardly agree with the majority that our state constitution provides greater protection for private property than the federal constitution. At the very least, the two constitutions provide similar protection. The taking of private property for private use that occurred in Mountain Timber received validation both in Washington's Supreme Court and the Court of Appeals for the Ninth Circuit.

2. No Taking of Property Occurred Here.

As the majority correctly points out, under either the Fifth Amendment or art. I, sec. 16, in order for a taking to occur, government must take a citizen's property. Thus, the first task in any taking analysis is to identify what property, if any, is involved. The majority identifies two species of property, a right of first refusal and the right to dispose of property, but unfortunately conflates its assessment of the two, leading to analytical confusion. The majority discusses the right of first refusal

and treats it as equivalent to a fundamental attribute of property, the right to dispose of it. But the majority fails properly to characterize the nature of a right of first refusal.

The majority says the right of first refusal in the hands of the property owner is a valuable property right. Justice Johnson correctly points out this so-called right is not a property right susceptible to a takings analysis.

Properly analyzed, what the park owners claim the statute unconstitutionally took from them is their alleged right to sell their mobile home parks in any manner they might choose to whomever they might choose.

Until today, we have interpreted art. I, sec. 16 and the Fifth Amendment as essentially coextensive. Highline Sch. Dist. No. 401 v. Port of Seattle, 87 Wn.2d 6, 11, 548 P.2d 1085 (1976); Orion Corp. v. State, 109 Wn.2d 621, 657-58, 747 P.2d 1062 (1987), cert. denied, 486 U.S. 1022, 108 S. Ct. 1996, 100 L. Ed. 2d 227 (1988). Because the majority offers no sustainable reason why we should not continue to do so, its singular excursion into regulatory taking law, which has no parallel anywhere and in fact directly contradicts all United States Supreme Court decisions on regulatory takings, is difficult to follow or support. The proper course, which we followed in Guimont, is to continue to apply the ample, well-established federal law of regulatory takings.

In Guimont, we adopted the United States Supreme Court's formulation for a facial taking. Neither the park owners nor the majority relies on this test for authority, of course, because they simply cannot show the challenged statute fails any aspect of the Guimont test.

First, a taking may be present where there is a physical invasion of the property by government. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426, 102 S. Ct. 3164, 73 L. Ed. 2d 868 (1982) ('a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve.'). Obviously, no such physical invasion occurs as a result of the challenged statute in this case.

Second, a taking may be present if the action of the government in regulating the uses that can be made of the property denies the landowner all economically viable use of the property:

> . . . {T}o succeed in proving that a statute on its face effects a taking by regulating the uses that can be made of property, the landowner must show that the mere enactment of the statute denies the owner of all economically viable use of the property.

Guimont, 121 Wn.2d at 605 (footnote omitted). As the Supreme Court

explained in PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 84, 100 S. Ct. 2035, 64 L. Ed. 2d 741 (1980), to establish a constitutional taking, a property owner must prove the rights lost were 'so essential to the use or economic value of {the} property that {a} state-authorized limitation of it amounted to a 'taking'.' See also Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1018, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992); City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 119 S. Ct. 1624, 1644, 143 L. Ed. 2d 882 (1999) (holding determination of deprivation of all economically viable use is a jury question). Again, park owners in this case cannot demonstrate such a total taking of property by governmental regulation occurred, in any sense.11

Finally, a taking by enactment of a statute or regulation can be demonstrated when the government action destroys or derogates a fundamental attribute of ownership. Guimont, 121 Wn.2d at 602.12 Guimont indicates a taking cannot be found unless a fundamental attribute of ownership is actually destroyed or derogated. The term 'destroyed or derogated' has been discussed in several Washington cases. See Presbytery of Seattle v. King County, 114 Wn.2d 320, 329-30, 787 P.2d 907 ('court{s} should ask whether the regulation destroys one or more of the fundamental attributes of ownership'), cert. denied, 498 U.S. 911, 111 S. Ct. 284, 112 L. Ed. 2d 238 (1990); Sintra, Inc. v. City of Seattle, 119 Wn.2d 1, 14 n.6, 829 P.2d 765 ('regulation may also be a taking if it destroys one or more of the fundamental attributes of property ownership'), cert. denied, 506 U.S. 1028, 113 S. Ct. 676, 121 L. Ed. 2d 598 (1992); Robinson v. City of Seattle, 119 Wn.2d 34, 50, 830 P.2d 318 ('we ask whether the regulation destroys or derogates any fundamental attribute of ownership'), cert. denied, 506 U.S. 1028, 113 S. Ct. 676, 121 L. Ed. 2d 598 (1992); see also Margola Assocs. v. City of Seattle, 121 Wn.2d 625, 643, 854 P.2d 23 (1993) ('court first asks whether the challenged regulation destroys one or more fundamental attributes of property ownership'). The majority blithely asserts because the Act 'destroys or derogates' a fundamental attribute of ownership, it is a taking. The majority's assertion is superficial and far too simplistic. As Justice Oliver Wendell Holmes so aptly said, 'General propositions do not decide concrete cases.' Lochner v. New York, 198 U.S. 45, 76, 25 S. Ct. 539, 49 L. Ed. 937 (1905) (Holmes, J., dissenting), overruled in part on other grounds by Day-Brite Lighting Inc. v. State of Mo., 342 U.S. 421, 72 S.Ct. 405, 96 L.Ed. 469 (1952).13

First, '{i}t is true that not every destruction or injury to property by governmental action has been held to be a 'taking' in the constitutional sense.' Armstrong v. United States, 364 U.S. 40, 48, 80 S. Ct. 1563, 4 L. Ed. 2d 1554 (1960). Accord Eastern Enters. v. Apfel, 524 U.S. 498, 118 S.

Ct. 2131, 2146, 141 L. Ed. 2d 451 (1998) ('The party challenging the government action bears a substantial burden, for not every destruction or injury to property by such action is a constitutional taking.'); PruneYard, 447 U.S. at 82; Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 144, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978); Alderwood Assocs. v. Wash. Council, 96 Wn.2d 230, 251, 635 P.2d 108 (1981) (Dolliver, J., concurring). Even the intellectual father of the modern property rights movement, Professor Richard A. Epstein, has written, 'But government restraint on property does not necessarily violate the Constitution as a deprivation of property rights. Even if left uncompensated, such restraints could well be justified under the state's police power.' Richard A. Epstein, Lest We Forget: Buchanan v. Warley and Constitutional Jurisprudence of the 'Progressive Era,' 51 Vand. L. Rev. 787, 789 (1998). In other words, simply concluding a regulation affects some fundamental attribute of property initiates the inquiry, rather than ends it, as the majority opinion would have it. The inquiry into when a regulatory taking exists has assumed many forms. A study of each of them demonstrates conclusively the absence of a taking here.

1. The Holmes Test

In the famous case, Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415, 43 S. Ct. 158, 67 L. Ed. 322 (1922), Justice Holmes wrote: '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.' The first part of this sentence, 'property may be regulated to a certain extent,' is often overlooked. It means the police power may legitimately regulate property. As Justice Antonin Scalia, writing for the majority 70 years later said: 'It seems to us that the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers.' Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1027, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992).14 Thus, regulation of property is not forbidden. The question as Holmes posed it is when does a regulation go so far as to constitute a taking: 'For just as there comes a point at which the police power ceases and leaves only that of eminent domain, it may be conceded that regulations of the present sort {rent control} pressed to a certain height might amount to a taking without due process.' Block v. Hirsch, 256 U.S. 135, 156, 41 S. Ct. 458, 65 L. Ed. 865 (1921) (upholding District of Columbia rent control law).

The determination of when a regulation goes 'too far' is necessarily a substantive judgment. The object of the 'too far' inquiry is 'to distinguish the point at which regulation becomes so onerous that it has

the same effect as an appropriation of the property through eminent domain or physical possession.' Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 199, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985). Here, the effect of the challenged Act is negligible. A park owner must simply give the park tenants notice of an impending sale and accept their offer if it equals the first offer. The park owner is financially as well off as if the statute were not in effect. By any test imaginable, other than an absolute prohibition against any regulation of property, the statute in the present case does not go too far.

2. The Armstrong Test

Justice Black said in Armstrong v. United States, 364 U.S. 40, 49, 80 S. Ct. 1563, 4 L. Ed. 2d 1554 (1960), '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.' The Supreme Court has lately referred to this statement as an expression of the Fifth Amendment's 'concern{ } for proportionality.' City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 702, 119 S. Ct. 1624, 143 L. Ed. 2d 882 (1999). Thus, the question of whether a regulation effects a taking 'necessarily requires a weighing of private and public interests.' Agins v. City of Tiburon, 447 U.S. 255, 261, 100 S. Ct. 2138, 65 L. Ed. 2d 106 (1980). In the balance here, is the park owners' wish to sell the park free of the right of first refusal the statute gives the park tenants balanced against the devastating economic and social consequences of the sale of a mobile home park on its tenants. Justice Black used the phrase 'in all fairness and justice.' What fairness or justice is there in the majority's assertion that a month's delay in a park owner's ability to sell is more important than the fates of the park tenants? Park tenants who because of the sale become homeless create new burdens for the people of Washington. To avoid these harsh results, the Legislature voted unanimously to give the park tenants a chance to remain in their homes by buying the park. The Legislature imposed a minimal obligation on the park owner -- to forbear for 30 days to give the tenants a chance to buy the park. That minimal obligation, compared to the severe effects and costs to society of displacing tenants, leads to the conclusion that the statute does not require the park owners to bear a burden out of proportion to the burden that ought to be borne by society as a whole.

3. Substantive Due Process

Petitioner Manufactured Housing Communities of Washington has not challenged the statute on substantive due process grounds, so there is no

substantive due process question before the Court. But because analysis of an alleged taking under both the 'too far' test and the Armstrong test involves substantive weighing determinations, it is helpful and instructive to look at how we might analyze this case under our substantive due process protocol.

We said in Presbytery of Seattle, 114 Wn.2d at 330:

To determine whether the regulation violates due process, the court should engage in the classic 3-prong due process test and ask: (1) whether the regulation is aimed at achieving a legitimate public purpose; (2) whether it uses means that are reasonably necessary to achieve that purpose; and (3) whether it is unduly oppressive on the land owner. 'In other words, 1) there must be a public problem or 'evil,' 2) the regulation must tend to solve this problem, and 3) the regulation must not be 'unduly oppressive' upon the person regulated.' The third inquiry will usually be the difficult and determinative one.

(Footnotes omitted.) Applying that analysis here, it is easy to see the challenged statute has a legitimate public purpose: the avoidance of economic devastation and homelessness following the sale of a mobile home park. The statute plainly uses means reasonably necessary to achieve its goal: giving the park tenants a chance to buy the park would prevent their displacement. Finally, the third prong, consideration of whether the statute is unduly oppressive, can lead only to the conclusion it is not: the statute does not result in any financial detriment to the park owners whatsoever. Compared to the social and economic costs of displacement of park tenants, the trivial delay in the sale of a park the statute imposes can hardly be considered unduly oppressive.

4. The Penn Central Test

Twenty-one years ago in Penn Central, 438 U.S. 104, the United States Supreme Court adopted an analytical protocol for assessing takings. In affirming a New York Court of Appeals decision upholding as against a regulatory taking challenge the City Landmarks Preservation Commission's denial of permission to build a 50-story office building over Grand Central Terminal, the Court noted its regulatory takings jurisprudence had not been based on fixed rules:

In engaging in these essentially ad hoc, factual inquiries, the Court's decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. See Goldblatt v. {Town of} Hempstead, {369 U.S. 590, 594,

82 S. Ct. 987, 990, 8 L.Ed. 2d 130 (1962)}. So, too, is the character of the governmental action. A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government, see, e. g., United States v. Causby, 328 U.S. 256{, 66 S. Ct. 1062, 90 L. Ed. 1206} (1946), than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.

Id. at 124 (emphasis added). Accord Eastern Enterprises, 118 S. Ct. at 2146. Thus, to determine whether a regulatory taking has occurred, the United States Supreme Court looks to the character of the regulation, the economic impact on the landowner, and the extent of interference with investment-backed expectations. Until today, we have followed the Penn Central three-part balancing test. Presbytery of Seattle, 114 Wn.2d at 334. The majority offers no reason why we should now overrule Presbytery and Guimont and abandon the Penn Central test.

In any event, the park owners cannot meet the three-part Penn Central balancing test:

1. Character of the Regulation. Looking first to the character of the regulation, one can hardly deem it oppressive or burdensome. Unlike the statute we struck down in Guimont, the Act requires no financial contribution from the park owners. In fact, it may actually provide a benefit to the owners by helping improve the market for the mobile home park. A prospective third-party purchaser is more likely to offer a higher price for the park, knowing the home owners may match the offer. The statute, by providing notice to tenants and giving them a chance to bid the fair market value for a park, thus has the effect of promoting and encouraging a free and efficient market. An efficient market should work to the financial advantage of park owners.

Moreover, the United States Supreme Court has repeatedly upheld regulations adjusting the benefits and burdens of economic life to promote the social good, even though those regulations may have destroyed or adversely affected property interests.15 See, e.g., Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 225, 106 S. Ct. 1018, 89 L. Ed. 2d 166 (1986) (provisions of Multi-Employer Pension Plan Amendments Act of 1980, requiring withdrawing employers to pay proportionate share of plan's unfunded vested benefits, did not violate Fifth Amendment taking clause); Penn Cent. Transp. Co., 438 U.S. at 125 (owners of historic building could not establish a taking merely by showing landmark preservation ordinance prevented them from exploiting airspace above the building); City of Eastlake v. Forest City Enterps., Inc., 426 U.S. 668, 674, n.8, 96 S. Ct.

2358, 49 L. Ed. 2d 132 (1976) ('By its nature, zoning 'interferes' significantly with owners' uses of property. It is hornbook law that '{m}ere diminution of market value or interference with the property owner's personal plans and desires relative to his property is insufficient to invalidate a zoning ordinance or to entitle him to a variance or rezoning.' 8 E. McQuillin, Municipal Corporations sec. 25.44, p. 111 (3d ed. 1965).'); Goldblatt v. Town of Hempstead, 369 U.S. 590, 592, 82 S. Ct. 987, 8 L. Ed. 2d 130 (1962) ('Concededly the ordinance completely prohibits a beneficial use to which the property has previously been devoted. However, such a characterization does not tell us whether or not the ordinance is unconstitutional. It is an oft-repeated truism that every regulation necessarily speaks as a prohibition. If this ordinance is otherwise a valid exercise of the town's police powers, the fact that it deprives the property of its most beneficial use does not render it unconstitutional.'); Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 47 S. Ct. 114, 71 L. Ed. 303 (1926) (zoning ordinances not unconstitutional takings).

As the Supreme Court said in Connolly, 475 U.S. at 223:

In the course of regulating commercial and other human affairs, Congress routinely creates burdens for some that directly benefit others. For example, Congress may set minimum wages, control prices, or create causes of action that did not previously exist. Given the propriety of the governmental power to regulate, it cannot be said that the Taking Clause is violated whenever legislation requires one person to use his or her assets for the benefit of another.

But the majority's new approach to takings would appear to hold any effect on a use of property by a governmental regulation is sufficient to meet this prong of the test. While there is at least some superficial attraction to the park owners' assertion they have the right to sell their own property to anybody they might want to sell it to for whatever beneficial or whimsical or even capricious reason that occurs to them, our law has never said the right to dispose of property is so fundamental as to be an unfettered right. Such a view is entirely unsupported in our law.

Washington law limits the disposition of property in a legion of ways.16 A person may legally own a large supply of bottled liquor, but cannot go into a retail business to sell it in Washington because liquor sales are permitted only at state-run stores under the authority of the Liquor Control Board. A person may have a license to sell liquor at a restaurant or bar, but cannot sell liquor between the hours of 2:00 a.m. and 6:00 a.m. WAC 314-16-050. We have long upheld the authority of the Liquor Control

Board to set the hours of operation of establishments that sell liquor. State ex rel. Thornbury v. Gregory, 191 Wash. 70, 70 P.2d 788 (1937). Such prohibitions and restrictions on liquor sales survived takings challenges as long ago as 1877. See, e.g., Mugler v. Kansas, 123 U.S. 623, 8 S. Ct. 273, 31 L. Ed. 205 (1887) (upholding Kansas statute prohibiting sale of alcoholic beverages as against a takings challenge based on the loss of value of property devoted to beer production).

A person certainly has no right to sell tobacco products to whomever he or she wishes. It is a gross misdemeanor in Washington to sell tobacco products to those under 18. RCW 26.28.080. This statute, carrying a criminal penalty for its violation, is in derogation of one's right to dispose of one's property. Would the majority declare it a taking for that reason? If not, how would the majority distinguish its holding here?

One may legally own a cache of firearms, but cannot sell them free of an armada of federal and state laws. See 18 U.S.C. sec. 921 (firearms); RCW 9.41.110 (unlawful to sell pistols without a license); RCW 9.41.190 (unlawful to sell machine guns and short-barreled shotguns). Would the majority declare these laws takings and facially unconstitutional derogations of one's right to dispose of property?

Our antidiscrimination law specifically and in no uncertain terms limits the right of a property owner to dispose of property in any way he or she may desire. RCW 49.60.030(1) bars discrimination in real estate transactions. RCW 49.60.222 declares it to be an unfair practice for any person, whether acting for himself, herself, or another, to discriminate 'because of sex, marital status, race, creed, color, national origin, families with children status, the presence of any sensory, mental, or physical disability, or the use of a trained dog guide or service animal by a disabled person{.}' Unfair practices include refusing to engage in a real estate transaction, refusing to negotiate for a real estate transaction, misrepresenting the availability of real property for sale or rental, and expelling a person from real property, with heavy civil penalties for violations enumerated at section .225. Of particular note is the prohibition against expelling someone from occupancy of real property for discriminatory reasons. RCW 49.60.222(1)(i). This statute implicates the right to exclude others, another fundamental attribute of property. The remedy for these violations may be a forced sale to the discrimination victim. RCW 49.60.250(5). Under the majority's analysis, these antidiscrimination statutes are facially unconstitutional and void because they destroy or derogate the right to dispose of property. How would the majority distinguish its holding here?

All zoning laws would be abrogated under the majority's analysis as

well because they interfere with the possession and use of private property.

The majority chooses to consider each stick in the bundle of sticks and concludes any effect on any aspect of property is a taking. It cites Ackerman v. Port of Seattle, 55 Wn.2d 400, 409, 348 P.2d 664 (1960), for the following proposition:17

'Property in a thing consists not merely in its ownership and possession, but in the unrestricted right of use, enjoyment and disposal. Anything which destroys any of these elements of property, to that extent destroys the property itself. The substantial value of property lies in its use. If the right of use be denied, the value of the property is annihilated and ownership is rendered a barren right.'

The majority's analysis is further flawed because there is no such thing in Washington as an 'unrestricted right of use' of property, and there never has been. We said in State v. Lawrence, 165 Wash. 508, 517, 6 P.2d 363 (1931), 'All property is held subject to such restraints and regulations as the state may constitutionally make in the exercise of its police power.'18

Moreover, the United States Supreme Court has never allowed property in takings cases to be assessed in a disaggregated sense and has never accorded 'essential' status to the fundamental attribute of property

asserted in this case, the right to dispose of property. In a seminal case that ought to be dispositive of the issue here, Andrus v. Allard, 444 U.S. 51, 100 S. Ct. 318, 62 L. Ed. 2d 210 (1979), the Court considered a federal statute that prohibited commercial transactions in parts of birds legally killed before the birds came under the protection of the Bald Eagle Protection Act, 16 U.S.C. sec. 668(a).

The issue reached the Court on the petition of persons engaged in the trade of Indian artifacts. They had in their possession for the purpose of sale at the time the Act went into effect artifacts partly composed of feathers from protected birds. They argued the enactment deprived them of property without just compensation because they could no longer sell the artifacts for profit.

The Court rejected the argument. At the outset, the Court noted: {G}overnment regulation -- by definition -- involves the adjustment of rights for the public good. Often this adjustment curtails some potential for the use or economic exploitation of private property. To require compensation in all such circumstances would effectively compel government to regulate by purchase.

Andrus, 444 U.S. at 65 (emphasis omitted). The Court recognized the Act placed a 'significant restriction' on the owners' right to dispose of the artifacts. But this was not enough:

{T}he denial of one traditional property right does not always amount to a taking. At least where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety.

Id. at 65-66. Thus, the Court concluded, the Act did not effect a taking, because even though the artifact owners could no longer sell the artifacts, they 'retain the rights to possess and transport their property, and to donate or devise the protected birds.' Id. at 66.19

The situation in Andrus parallels the situation in the present case, except the effect on the park owners is less onerous because the challenged statute does not destroy their right to sell, as in Andrus; it merely restricts and conditions sale for a short period of time. But the park owners retain every other right of ownership to their property: the right to possess it; the right to use it; the right to manage it; the right to income from it; the right to consume or destroy it at the conclusion of the leasehold terms; the right to modify it; the right to devise it. See Robert J. Goldstein, Green Wood in the Bundle of Sticks: Fitting Environmental Ethics and Ecology into Real Property Law, 25 B.C. Envtl. Aff. L. Rev. 347, 375 (1998) (discussing the rights to property). Pursuant to Andrus, there is no taking in this case where the interference to rights to ownership is so minimal compared to the full panoply of ownership rights the park owners retain.

Other Supreme Court cases in addition to Andrus inveigh against disaggregating property rights -- considering only single sticks from the bundle -- and hold the proper approach is to consider the effect of a regulation on the property as a whole: ' 'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated.' Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 130, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 498, 107 S. Ct. 1232, 94 L. Ed. 2d 472 (1987). In a more recent case, Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for So. Cal., 508 U.S. 602, 644, 113 S. Ct. 2264, 124 L. Ed. 2d 539 (1993), the Court said a 'parcel of property could not first be divided into what was taken and what was left for the purpose of demonstrating the taking of the former to be complete and hence

compensable.' That is also the law of Washington: 'Similarly, our own state case law demonstrates that a regulatory scheme's economic impact is to be determined by viewing the full bundle of property rights in its entirety.' Presbytery of Seattle, 114 Wn.2d at 335 (quoting Penn Cent. and citing Washington cases). Thus, until today, Washington takings jurisprudence has looked to the entirety of the property allegedly taken, not just to one stick in the bundle of property rights. The majority opinion changes that principle without acknowledging what it is doing or justifying the change.

If we did not look at the effect of a regulation on property in its entirety, every land use restriction could be disaggregated from the entirety of the property and challenged as a taking. Examples would include the diminution in value from side yard and setback requirements on individual lots. 'A requirement that a building occupy no more than a specified percentage of the lot on which it is located could be characterized as a taking of the vacant area.' Keystone, 480 U.S. at 498.20

In summary, the character of the regulation here challenged is in the mainstream of regulation that has been constitutionally permissible for most of the twentieth century. There is nothing novel or oppressive enough about the Act to suggest the character of the regulation here fails constitutional muster.

2. Economic Impact on the Owner. Because this case is a facial taking claim, there is no evidence in the record of economic impact. As discussed above, however, a regulation that has no economic effect other than to create the potential for a bidding war over the sale of a mobile home park, thereby assuring a sale at fair market value, can hardly work to a park owner's economic disadvantage.

3. Interference with Investment-Backed Expectations. This inquiry typically arises in the downzone context, where a jurisdiction might attempt to downzone property from a more intensive use, and therefore more lucrative use, to a less intensive use, such as a change from industrial or commercial to single-family residential or park. We addressed a like issue in Estate of Friedman v. Pierce County, 112 Wn.2d 68, 78-79, 768 P.2d 462 (1989) (quoting Junji Shimazaki, Comment, Land Use Takings and the Problem of Ripeness in the United States Supreme Court Cases, 1 B.Y.U. J. Pub. L. 375, 381-82 (1987)):

Unlike eminent domain proceedings where the government actually acquires fee title, land use regulations only limit actual or potential use and enjoyment of private property. Consequently, when land use ordinances are challenged, courts must ascertain the remaining value of the regulated property to determine the amount of economic impact caused by the

regulation. This is done largely by determining what remaining use of the property the ordinance permits. If substantial use remains, the amount of diminution in value or the effect upon the reasonable investment-backed expectations of the landowner are normally not significant enough to warrant a takings judgment. If, on the other hand, nearly all uses are depleted, a taking under the fifth amendment may exist.

One cannot easily detect any interference with investment-backed expectations brought about by the challenged statute in this case, let alone such a reduction in the value of a mobile home park that 'nearly all uses are depleted{.}'

In summary, under all of the United States Supreme Court's tests for a taking, tests we have also adopted in Guimont, there is no taking here.21 The Act permits the park owners to continue to use their property exactly as they had been using it, both as to rents and profits, and as to possible capital gains upon sale. As Justice Holmes noted: 'Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.' Pa. Coal, 260 U.S. at 413. Here, where there is not even a diminution in value, there can be no taking.

CONCLUSION

Every member of the Washington State Senate and House of Representatives, regardless of partisan or philosophical persuasion, in compassionate recognition of the plight of mobile home park tenants forced to move because of a sale of a mobile home park, enacted legislation to give tenants the opportunity to purchase mobile home parks at fair market value in the event owners wish to sell. The legislation restricts the park owner's right to sell for a limited period of only 30 days, and assures the park owner will receive fair market value by allowing the tenants to buy at a price the owner has already deemed acceptable.

Fundamentally, the statute effects no seizure or physical invasion of land, nor damage to land, requiring just compensation. Nor does the challenged statute involve permanent restrictions on the use of private property, as in the case of zoning. Purely and simply, this is a case involving an economic regulation that is within the power of government to enact. That the regulation happens to concern the sale of land is merely incidental, and does not transform this case into a takings case.

The majority's erroneous conclusion that any regulation of an attribute of property is a taking thrusts us into extraordinarily dangerous waters, broadening takings law in ways so wide-ranging and unconfined as to call into question innumerable, legitimate, necessary government actions.

In effect, the majority would have us install the very principles of Referendum 48 the people of Washington resoundingly rejected in the 1995 general election.22

The majority's takings analysis has no principled limitation, and fundamentally affects every aspect of the police power granted to government under our Constitution. As early as Conger v. Pierce County, 116 Wash. 27, 35-36, 198 P. 377 (1921), we said:

> It is easy to understand the principles upon which the police power doctrine is based, but difficult to define in language its limitations. It is not inconsistent with nor antagonistic to the rules of law concerning the taking of private property for a public use. Because of its elasticity and the inability to define or fix its exact limitations, there is sometimes a natural tendency on the part of the courts to stretch this power in order to bridge over otherwise difficult situations, and for like reasons it is a power most likely to be abused. It has been defined as an inherent power in the state which permits it to prevent all things harmful to the comfort, welfare and safety of society. It is based on necessity. It is exercised for the benefit of the public health, peace and welfare. Regulating and restricting the use of private property in the interest of the public is its chief business. It is the basis of the idea that the private individual must suffer without other compensation than the benefit to be received by the general public. It does not authorize the taking or damaging of private property in the sense used in the constitution with reference to taking such property for a public use. 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.

I fear the majority's analysis needlessly intrudes on the police power in untold ways affecting everything from social welfare law to public health rules to environmental and land use regulation.23 The very imprecision of the majority's takings analysis invites innumerable challenges to important police power enactments. I believe the analysis of the Court of Appeals here was fundamentally correct and I would affirm the Court of Appeals' decision.

APPENDIX

The following states have enacted laws to protect mobile home owners from abuse by mobile home park owners. In most cases, these laws are

similar in nature to landlord-tenant legislation, but contain protective provisions specific to mobile home park conditions.
Alaska -- Alaska Stat. sec. 34.03.225 (Lexis 1998).

Arizona -- Mobile Home Parks Residential Landlord and Tenant Act, Ariz. Rev. Stat. Ann. sec.sec. 33-1401 to 33-1492 (West 2000).

California -- Mobilehome Parks Act, Cal. Health & Safety Code sec.sec. 18200-18700 (West 1992). The California Legislature declared the following conditions and rights of residents of mobile home parks:

The Legislature finds and declares that increasing numbers of Californians live in manufactured homes and mobilehomes and that most of those living in such manufactured homes and mobilehomes reside in mobilehome parks. Because of the high cost of moving manufactured homes and mobilehomes, most owners of manufactured homes and mobilehomes reside within mobilehome parks for substantial periods of time. Because of the relatively permanent nature of residence in such parks and the substantial investment which a manufactured home or mobilehome represents, residents of mobilehome parks are entitled to live in conditions which assure their health, safety, general welfare, and a decent living environment, and which protect the investment of their manufactured homes and mobilehomes.

Cal. Health & Safety Code sec. 18250 (West 1992).

Colorado -- Mobile Home Park Act, Colo. Rev. Stat. sec.sec. 38-12-200.1 to 38-12-217 (Bradford 1999).

Connecticut -- Conn. Gen. Stat. Ann. sec. 21-70a (West 1994) (requires park owner to pay mobile home owners relocation expenses and compensatory payments when there is change in land use of mobile home park).

Delaware -- Mobile Home Lots and Leases Act, tit. 25, ch. 70. Legislature found 'emergency situation exists with respect to housing for Delaware citizens, many of them elderly, in mobile home parks intending to convert into multiple-unit usage.' Del. Code Ann. tit. 25, sec. 7101 (Michie 1989). See Del. Code Ann. tit. 25, sec. 7108 (creating in tenants option to purchase park upon notice of intent by park owner to convert the use of the park).

Florida -- Florida Mobile Home Act, tit. 20A, ch. 723. Fla. Stat. Ann.

sec. 723.071 (West 1988) gives mobile home park tenants the right of first refusal on proposed sale of park.

Idaho -- Mobile Home Park Landlord-Tenant Act, Idaho Code sec.sec. 55-2001 to 55-2019 (Michie 1994).

Illinois -- Mobile Home Park Act, Ch. 210, Ill. Comp. Stat. Ann. sec.sec. 115/1-115/27 (West 1998). The Illinois Legislature declared in its statement of findings:

> The General Assembly of Illinois finds: (1) that there is a serious housing shortage in this state; (2) that rising costs in the building construction field has seriously impeded the building of new housing, particularly for moderate and low income citizens; (3) that the existing housing stock is continuously depleted through demolition resulting from aging buildings, urban renewal, highway construction and other necessary public improvements; (4) that advances in the construction of mobile homes has significantly increased the importance of this mode of housing; (5) that through proper regulation and licensing mobile homes can contribute to the quality housing of Illinois citizens.

Id. sec. 115/1.

Iowa -- Mobile Home Parks Residential Landlord and Tenant Act, Iowa Code Ann. sec.sec. 562B.1-562B.32 (West 1992).

Kansas -- Mobile Home Parks Residential Landlord and Tenant Act, Kan. Stat. Ann. sec.sec. 58-25,100 to 58-25, 126 (1994).

Kentucky -- Mobile Home and Recreational Vehicle Park Act of 1972, Ky. Rev. Stat. Ann. sec.sec. 219.310 (Michie 1995).

Maine -- Me. Rev. Stat. Ann. tit. 10, sec.sec. 9091-9100 (West 1997). Section 9094-A requires 45-day notice to tenants prior to owner's executing purchase and sale agreement.

Maryland -- Md. Ann. Code Real Prop. sec. 8A-101 (Michie 1996).

Massachusetts -- Mass. Gen. Laws Ann. Ch. 140, sec.sec. 32F-32S (West 1998). Section 32R establishes the right of first refusal for tenants.

Michigan -- Mobile Home Commission Act, Mich. Stat. Ann. sec. 19.855(128) (Lexis 1998).

Minnesota -- Minn. Stat. Ann. sec. 327C.095 (West 1995) requires payment of relocation costs if park is to convert to other use or close.

Montana -- Residential Landlord and Tenant Act of 1977; Mont. Code Ann. sec. 70-24-436(2) (West 1999) requires notice to tenants for proposed change in use of park.

Nebraska -- Mobile Home Landlord and Tenant Act, Neb. Rev. Stat. Ann. sec.sec. 76-1450 to 76-14, 111 (1996).

Nevada -- Nev. Rev. Stat. Ann. sec. 118B.010 (1999).

New Hampshire -- N.H. Rev. Stat. Ann. sec. 205-A:21 (1989) (requiring 60 days' notice to tenants before owner may accept offer to buy or transfer park; requires owners to consider in good faith offers from tenants to purchase).

New Jersey -- N.J. Stat. Ann. sec.sec. 46:8C to 46:8C-21 (West 1999). Section 46:8C-11 gives right of first refusal to tenants.

New Mexico -- N.M. Stat. Ann. sec.sec. 47-10-2 to 47-10-20 (Michie 1998).

New York -- N.Y. Real Prop. tit. 49, sec. 233 (McKinney 1989).

North Carolina -- N.C. Gen. Stat. sec. 42-36.1 (1999).

North Dakota -- N.D. Cent. Code sec. 23-10-01 (Michie 1999).

Ohio -- Page's Ohio Rev. Code Ann. tit. 37, sec.sec. 3733.09-3733.20 (1997).

Oregon -- Or. Rev. Stat. Ann. sec.sec. 446.003-446.547 (Lexis Supp. 1998).

Pennsylvania -- Pa. Cons. Stat. Ann. tit. 68, sec.sec. 398.1-398.11 (West 1998). 'The purpose of this legislation is to give special protection to mobile home owners in mobile home parks.' Malvern Courts, Inc. v. Stephens, 275 Pa. Super. 518, 419 A.2d 21, 23 (1980).

Rhode Island -- R.I. Gen. Laws sec. 31-44-3.1 (1994) grants right of refusal to tenant associations in mobile home parks.

South Carolina -- Manufactured Home Park Tenancy Act, S.C. Code Ann. tit. 27, sec.sec. 27-47-10 to 27-47-620 (West Supp. 1999).

Utah -- Mobile Home Park Residency Act, Utah Code Ann. sec.sec. 57-16-1 to 57-16-51.1 (Michie 1994). The Utah State Legislature declared:

> The high cost of moving mobile homes, the requirements of mobile home parks relating to their installation, and the cost of landscaping and lot preparation necessitate that the owners of mobile homes occupied within mobile home parks be provided with protection from actual or constructive eviction.

Utah Code Ann. sec. 57-16-2.

Vermont -- Vt. Stat. Ann. tit. 10, sec.sec. 6201-6266 (Michie 1997). Vt. Stat. Ann. tit. 10, sec. 6242 grants right of first refusal to tenants and requires owner negotiate in good faith.

Virginia -- Manufactured Home Lot Rental Act, Va. Code Ann. sec.sec. 55-248.41 to 55-248.52 (Michie 1995).

West Virginia -- W. Va. Code sec.sec. 37-15-1 to 37-15-8 (Michie 1997).

Wisconsin -- Wis. Stat. Ann. sec. 710.15 (West Supp. 1999).

1 Lochner v. New York, 198 U.S. 45, 25 S. Ct. 539, 49 L. Ed. 937 (1905).

2 Most other states have also reacted to the plight of mobile home owners and have enacted protective legislation. See Appendix, infra.

3 A similar statute in Massachusetts contains the following statement of legislative intent:

> Unless mobile home owners receive futher protection in relocating their homes upon mobile home park discontinuances than the law now affords, this increasing shortage of mobile home park sites and increasing cost of relocation will generate serious threats to the public health, safety, and general welfare of the citizens of the commonwealth, particularly the elderly and persons of low and moderate income.

Mass. Gen. Laws Ann., ch. 140, sec. 32L, Historical and Statutory Notes at 512 (West 1991).

4 'What is key is article I, section 16's absolute prohibition against taking private property for private use.' Majority op. at 10.

5 Washington's public use and public purpose standards are more stringent than those of federal jurisdictions. See Victor B. Flatt, A Brazen Proposal: Increasing Affordable Housing Through Zoning and the Eminent Domain Powers, 5 Stan. L. & Pol'y Rev. 115 (1994).

6 Justice Iredell did not agree:

If, on the other hand, the legislature of the Union, or the legislature of any member of the Union, shall pass a law, within the general scope of their constitutional power, the court cannot pronounce it to be void, merely because it is, in their judgment, contrary to the principles of natural justice. The ideas of natural justice are regulated by no fixed standard: the ablest and the purest men have differed upon the subject; and all that the court could properly say, in such an event, would be, that the legislature (possessed of an equal right of opinion) had passed an act which, in the opinion of the judges, was inconsistent with the abstract principles of natural justice.

Calder, 3 U.S. at 398-99. Here, perhaps is the first pitched argument in the United States Supreme Court over judicial restraint.

Furthermore, it may be open to question whether the Chase aphorism is as immutable as property rights absolutists would have it. Justice Holmes once wrote:

All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached. The limits set to property by other public interests present themselves as a branch of what is called the police power of the state. The boundary at which the conflicting interests balance cannot be determined by any general formula in advance, but points in the line, or helping to establish it, are fixed by decisions that this or that concrete case falls on the nearer or farther side. For instance, the police power may limit the height of buildings in a city, without compensation. To that extent it cuts down what otherwise would be the rights of property. But if it should attempt to limit the height so far as to make an ordinary

building lot wholly useless, the rights of property would prevail over the other public interest, and the police power would fail.

Hudson County Water Co. v. McCarter, 209 U.S. 349, 355, 28 S. Ct. 529, 52 L. Ed. 828 (1908). Moreover: 'In the last analysis nearly every law transfers something from A to B. It matters not whether this advantage be tangible or fancied, large or small. Somebody gains, somebody loses, for you cannot create an advantage out of a vacuum. This makes the whole question one of degree, and there is no principle, no fundamental right, in a matter of degree.' R. Luce, Legislative Problems 60 (1935, reprinted 1971) quoted in Frank R. Strong, Substantive Due Process of Law: A Dichotomy of Sense and Nonsense 172 (1986).

7 We addressed New York's contrary Ives decision directly in Clausen::

We shall offer no criticism of the opinion. We will only say that notwithstanding the decision comes from the highest court of the first state of the Union, and is supported by a most persuasive argument, we have not been able to yield our consent to the view there taken.

We conclude, therefore, that the act in question violates no provision of either the state or Federal constitutions, and that the auditor should give it effect. Let the writ issue.

Clausen, 65 Wash. at 212. Constitutional convention leader, Chief Justice Dunbar, signed the majority opinion. Only Justice Chadwick dissented in Clausen, but not on the property rights issue.

8 'This power, denominated the eminent domain of the state, is, as its name imports, paramount to all private rights vested under the government, and these last are, by necessary implication, held in subordination to this power, and must yield in every instance to its proper exercise.' West River Bridge Co. v. Dix, 47 U.S. (6 How.) 507, 532, 12 L. Ed. 535 (1848).

9 The 1913 statute provided compensation for the taking of private ways of necessity. Mountain Timber, 77 Wash. at 586.

10 'This court has repeatedly held that ch. 133, Laws of 1913, p. 412, here drawn in question, is not violative of any rights guaranteed by the state or federal constitution.' Huntoon v. King County, 145 Wash. 307, 313, 260 P.2d 527 (1927).

11 Justice Rehnquist, writing in PruneYard, a case involving the right to exclude others from one's property, said: 'here appellants have failed to demonstrate that the 'right to exclude others' is so essential to the use or economic value of their property that the state-authorized

limitation of it amounted to a 'taking." PruneYard, 447 U.S. at 84. Thus, even the hallowed right to exclude others is not an absolute right permitting no incursion but is subject to a balancing of interests. The majority here does no balancing whatsoever.

12 Although we said this in Guimont, the United States Supreme Court has never indicated that any regulation affecting any fundamental attribute of property is a per se facial taking. Rather, the Court has first concluded that a physical invasion, for instance, is a categorical taking because the right to exclude others is one of the most essential sticks in the bundle of rights concerning property. Thus, simply labeling something a fundamental attribute of property does not automatically mean its deprivation is a categorical taking.

13 One scholar has described attempts to determine when regulation goes so far that it becomes a taking as the 'lawyer's equivalent of the physicist's hunt for the quark.' Charles Haar, Land-Use Planning 766 (3d ed. 1976).

14 Justice Scalia's comment echoes the famous and oft-quoted statement by Chief Justice Lemuel Shaw in 1851:

> We think it a well settled principle, growing out of the nature of well ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it may be so regulated, that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, not injurious to the rights of the community. All property in this commonwealth . . . is derived directly or indirectly from the government, and held subject to those general regulations, which are necessary to the common good and general welfare. Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment, as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law, as the legislature, under the governing and controlling power vested in them by the constitution, may think necessary and expedient.

Commonwealth v. Alger, 61 Mass. (7 Cush.) 53, 84-85 (1851). Accord State v. Dexter, 32 Wn.2d 551, 558, 202 P.2d 906 (1949) (quoting with approval); State v. Van Vlack, 101 Wash. 503, 509, 172 P. 563 (1918) (quoting with approval). Justice Joseph Story wrote: 'All the property and vested rights of individuals are subject to such regulations of police as the legislature may establish with a view to protect the community and its several members against such use or employment thereof as would be

injurious to society or unjust toward other individuals.' 2 Joseph Story, Commentaries on the Constitution of the United States sec. 1954, at 700-01 (5th ed. 1891) (emphasis added) (quoting Commonwealth v. Alger with approval).

15 'Under the 'character-of-the-regulation' prong of the regulatory takings analysis, '{a} 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the social good.' ' Thomas v. Anchorage Equal Rights Comm'n, 165 F.3d 692, 709 (9th Cir. 1999) (quoting Penn Cent., 438 U.S. at 124). As previously noted, no physical invasion is occasioned by the Act.

16 See, e.g., RCW 9.46.310 (unlawful to sell gambling devices without a license); RCW 15.08.070 (unlawful to sell certain by-products of infected fruits and vegetables); RCW 15.13.390 (unlawful to sell horticultural plants that do not meet certain requirements); RCW 15.36.031 (unlawful to sell milk without license); RCW 15.37.030 (unlawful to sell milk that is not Grade A); RCW 15.54.400 (superphosphate containing less than 18 percent available phosphoric acid may not be sold in Washington); RCW 16.49.075 (unlawful to sell uninspected meat); RCW 16.49A.350 (horse carcasses may not be sold unless properly labeled); RCW 32.32.110 (capital stock of mutual savings bank owned by directors and officers may not be sold within three years of purchase); RCW 33.48.180 (savings and loan association may not sell stock without authorization); RCW 70.74.020 (explosives cannot be sold unless in compliance with law). In each of these instances, State law places a restriction or prohibition on the disposition of items otherwise legal to own.

17 The quote Ackerman used was from a 1921 Texas case, Spann v. City of Dallas, 111 Tex. 350, 235 S.W. 513 (1921). The quote speaks of the 'unrestricted right of use' of property. A 'right' to use property without restriction obviously trumps zoning laws. It may be that Spann was the law of Texas in 1921 and forbade zoning laws. But Spann came before the landmark decision upholding the constitutionality of zoning laws, Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 47 S. Ct. 114, 71 L. Ed. 303 (1926), and prior to the 1927 passage of legislation in Texas giving cities the power to enact zoning ordinances. See Price v. City of Junction, 711 F.2d 582, 588 (5th Cir. 1983), for a discussion of Spann. We upheld the constitutionality of zoning ordinances 47 years ago in State ex rel. Miller v. Cain, 40 Wn.2d 216, 218, 242 P.2d 505 (1952) ('Zoning ordinances are constitutional in principle as a valid exercise of the police power{,}' citing Village of Euclid.). For a majority of this Court to reintroduce

Spann into our cases brings into question the constitutional validity of all Washington zoning laws, the Growth Management Act, the Shorelines Management Act, the State Environmental Policy Act, and every other statute that in any way derogates the so-called 'unrestricted right of use' of property. The Spann quote, if taken as the law of Washington, would have a pernicious and devastating effect on decades of Washington land use regulations. We should extirpate it from our case books rather than repeat it here.

18 'It is, we believe, the universally accepted view that all property is derived from society.' Mountain Timber, 77 Wash. at 592. To illustrate the necessity for a societal framework in order for rights to property to exist, consider the statute at bar, RCW 59.23.030, setting forth the sanction for failure to comply with the act: 'If the court determines that the notice provisions of this chapter have been violated, the court shall issue an order setting aside the improper sale.' How would such an order operate?

Surely, as an order affecting real property, someone would record the order with the county auditor, where it would appear with the description of the relevant parcel. The order setting aside the improper sale would effectively reconvey the land to the park owner because the improper conveyance would no longer be of record. This means the purported purchaser would be unable to enforce any rights to the property. He could not seek assistance from the sheriff to 'exclude others' because he could not establish the land belonged to him in the absence of society's recognition of the conveyance. He could not sell the land because he would find no buyers for land he could not show clear title to. He could not enforce collection of rents from the mobile home tenants because in order to do so, he would have to set forth in a complaint that he is the landlord entitled to the rents, and while he may allege as much, he can never prove he is the landlord because there is no record of his ownership the law recognizes as valid. In such a case, while there may have been a valid contract for the sale of land between a willing seller and a willing buyer, without society's imprimatur, no cognizable conveyance of title occurred.

19 The right to dispose of property as a fundamental aspect of property ownership has no firm grounding in Anglo-American law. The noted historian, Forrest McDonald, has observed: 'But the crucial fact is that ownership did not include the absolute right to buy or sell one's property in a free market; that was not a part of the scheme of things in eighteenth-century England and America.' Forrest McDonald, Novus Ordo Seclorum, The Intellectual Origins of the Constitution 14 (1985).

20 Even if such disaggregation of sticks from the bundle were a permissible mode of analysis, the majority's approach would fail to establish a facial taking. Diminution in property value, standing alone, does not establish a 'taking.' Penn Cent., 438 U.S. at 131 (citing cases).

21 I note, however, the majority's belief 'a taking has occurred in this case not only because an owner is deprived of a fundamental attribute of property, but also because this property is statutorily transferred.' (Court's emphasis.) Majority op. at 25. The majority improperly conflates the prohibition of taking with the prohibition of taking for a private use. If there is no taking in the first place, as the foregoing discussion demonstrates, one cannot create a taking out of thin air by arguing what is taken has been taken for private use. Logically, there is no need to reach the question of private versus public use if there has been no constitutionally cognizable taking in the first instance.

But even assuming the majority is correct in reaching the private versus public use question, its disposition of this case would invalidate, for instance, our Minimum Wage Act (MWA), chapter 49.46 RCW, because the requirement to pay minimum wages is the taking of private property (the money of an employer) and transferring it for private use to employees. The constitutionality of the federal minimum wage law, the Fair Labor Standards Act (FLSA), has been settled since United States v. Darby, 312 U.S. 100, 312 U.S. 657, 61 S. Ct. 451, 85 L. Ed. 609 (1941). Washington's MWA survived a constitutional challenge and has been settled law since 1960. Peterson v. Hagan, 56 Wn.2d 48, 351 P.2d 127 (1960). Neither the FLSA nor the MWA would survive the majority's approach. Lest there be any mistake in this regard, Professor Richard A. Epstein has written: 'Restrictions on hours or wages are without question limitations upon the power of the employer to dispose of property.' Richard A. Epstein, Takings 280 (1985). How will the majority distinguish its holding here?

Likewise, many zoning ordinances are for the benefit of private parties. Consider, for instance, an area zoned for single-family residences. Suppose a particular homeowner wished to dismantle his house and build a 24-hour convenience store on his property. Such a commercial use would obviously increase the value of his land greatly. It would also decrease the value of homes in the immediate vicinity of the proposed convenience store, because resulting continual traffic, noise, and parking lot lights at all hours of the day and night would make it unpleasant to live there. The zoning ordinance would forbid such a commercial enterprise in a single-family residential neighborhood, of course. But the owner

wishing to build the convenience store could claim the zoning ordinance diminished the value of his land solely for the private benefit of his neighbors. Under the majority's analysis, the zoning ordinance would be a forbidden taking of private property for private use.

22 Laws of 1995, ch. 98, the so-called Private Property Regulatory Fairness Act, purported to require full compensation to property owners if a governmental entity regulated or took any 'action, requirement, or restriction' limiting 'the use or development {of} private property.' Laws of 1995, ch. 98, sec.sec. 4(2); 7(4). The voters rejected this legislation by a vote of 796, 869 to 544,788 (59 percent to 41 percent).

23 The concurrence presents an aberrational view of the nature and extent of the police power that is reflective of libertarian fabulism rather than history and law. The concurrence quotes a publication of the libertarian 'think tank,' the Cato Institute, for the erroneous proposition that the police power is the "power to secure rights, through restraints or sanctions, not some general power to provide public goods." Concurrence at 2 (quoting Cato Handbook for Congress: Policy Recommendations for the 106th Congress 206 (Edward H. Crane & David Boaz, eds., 1999)). The usual formulation is that the police power is plenary, limited only by constitutional provisions. See, e.g., Rhod-A-Zalea & 35th, Inc. v. Snohomish County, 136 Wn.2d 1, 16 n.1, 959 P.2d 1024 (1998) (police power regulations limited only by constitutional safeguards).

Justice Sanders asserts the modern onset of police power regulation has caused the formerly limited exercise of government regulation to 'erode from its point of origin.' Weden v. San Juan County, 135 Wn.2d 678, 727, 958 P.2d 273 (1998) (Sanders, J., dissenting). The proposition is demonstrably incorrect. This libertarian version of American history is pure fable, as the notion of the police power as a 'substantive limitation on governmental authority,' id. (Sanders, J., dissenting), is inconsistent with history and constitutional law.

One chief libertarian myth about government regulation is that America in the past was a golden age of laissez-faire, free market, antiregulatory government. Scholarly research and commentary, not to mention mere perusal of old statute books, demonstrate the pervasiveness of police power regulation in early times. William Letwin writes:

Before the Civil War, the constitutional authority of the states to carry on any and every form of economic regulation was seldom questioned. And this acceptance was not for want of regulations to question. On the

contrary, state and local governments set the prices to be charged by wagoners, wood sawyers, chimneysweeps, pawnbrokers, hackney carriages, ferries, wharfs, bridges, and bakers; required licensing of auctioneers, retailers, restaurants, taverns, vendors of lottery tickets, and slaughterhouses; and inspected the quality of timber, shingles, onions, butter, nails, tobacco, salted meat and fish, and bread. This very incomplete list attest to an intention to exercise detailed control over the operation of markets, especially (though not only) those that have since been characterized as providing 'public services' and those thought to be morally dubious because of association with usury, betting intoxication, or excessive jubilation.

William Letwin, Economic Regulation, in 2 Encyclopedia of the American Constitution 603 (Leonard W. Levy & Kenneth L. Karst eds., 1996). In colonial America "virtually every aspect of economic life was subject to nonmarket controls." Jonathan R.T. Hughes, The Governmental Habit: Economic Controls from Colonial Times to the Present 49 (1977), quoted in Harry N. Scheiber, Private Rights and Public Power: American Law, Capitalism, and the Republican Polity in Nineteenth-Century America, 107 Yale L.J. 823, 843 (1997). See also William J. Novak, Common Regulation: Legal Origins of State Power in America, 45 Hastings L.J. 1061, 1076-79 (1994) (listing numerous examples of regulation of all aspects of life in early America).

In his dissent in Weden, to which Justice Sanders refers the reader in his present concurrence, he extols Justice T.L. Stiles, a member of Washington's constitutional convention and a justice of this Court from 1889 to 1895. Justice Sanders quotes with evident approval from a speech Stiles gave:

'Laws have been passed in one state and another abridging the right of contract, the right to sell merchandise, the right to labor upon public works, the right to labor more than a certain number of hours, the right to freely come and go, the right to pursue legitimate trades, and a mass of others. . . . {Legislators who support such legislation} hide in swarms, behind the newly coined phrase, 'police power,' and that other more venerable phrase, 'the public welfare,' both of which, like 'public policy,' are often, if one may use such an expression, liveries of heaven stolen to serve the devil in.'

Weden, 135 Wn.2d at 726 (Sanders, J., dissenting) (quoting C.S. Reinhart,

History of the Supreme Court of the Territory and State of Washington 49-50 (n.d.)). Students of the Lochner era will recognize this rhetoric. The service of the devil Stiles was speaking about, of course, was the onset of Progressive Era legislation enacted to remedy the horrendous burdens working men and women faced in the early days of the Industrial Age. Stiles evidently thought such legislation the work of the devil. Stiles refers to the right of contract as sacrosanct. This was the view advanced by those who, like Stiles, were opposed to maximum work hours laws like the eight-hour day. In 1911, the United States Supreme Court put the right-to-contract argument to rest:

{F}reedom of contract is a qualified, and not an absolute, right. There is no absolute freedom to do as one wills or to contract as one chooses. The guaranty of liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts, or deny to government the power to provide restrictive safeguards. Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community.

Chicago, B. & Q.R. Co. v. McGuire, 219 U.S. 549, 566, 31 S. Ct. 259, 55 L. Ed. 328 (1911).

Justice Sanders presents Stiles' comments as evidence of the prevailing view in Washington near the time of our constitutional convention. History shows the views of Stiles, who left the Court in 1895, were aberrational and idiosyncratic, not typical.

Manifestly, in the early years of Washington's existence, the scope of the police power extended far beyond the mere prevention of nuisance, and included a wide range of applications to public welfare. Perhaps the clearest and most powerful exposition of the police power from the early days of Washington's statehood is the following statement by Justice Chadwick:

Having in mind the sovereignty of the state, it would be folly to define the term. To define is to limit that which from the nature of things cannot be limited, but which is rather to be adjusted to conditions touching the common welfare, when covered by legislative enactments. The police power is to the public what the law of necessity is to the individual. It is comprehended in the maxim salus populi suprema lex. It is not a rule, it is an evolution.

State v. Mountain Timber Co., 75 Wash. 581, 588, 135 P. 645 (1913), aff'd 243 U.S. 219, 37 S. Ct. 260, 61 L. Ed. 685 (1917). One hundred years of Washington jurisprudence reveal a much different view of the police power than what Justice Sanders presents. See generally Philip A. Talmadge, The Myth of Property Absolutism and Modern Government: The Interaction of Police Power and Property Rights, 75 Wash. L. Rev. 857 (2000).