

REGULATORY TAKINGS BY MEANS-ENDS FAILURE? DOES A REGULATION THAT FAILS TO ADVANCE A LEGITIMATE GOVERNMENTAL INTEREST RESULT IN A REGULATORY TAKING?

by: John Echeverria*

Over the last two decades, the United States Supreme Court has repeatedly stated that a regulation results in a taking under the Fifth Amendment to the United States Constitution if it does not "substantially advance a legitimate state interest." However, the Court has never squarely relied upon this purported means-ends takings test to uphold a finding of a taking, except in the case of challenges to permit conditions involving physical occupations of private property. Upon careful analysis, Mr. Echeverria argues, it is apparent that this test (which essentially restates the traditional due process means-ends inquiry) is inconsistent with the language and original understanding of the Takings Clause, as well as with basic principles of modern takings doctrine. This Article asserts that a kind of means-ends analysis does play an appropriate and logical role in takings challenges to permit conditions involving physical occupations but that the analysis should be confined to that special context. Although the Court appears to be divided on the issue, this Article argues that the Court's recent decisions support the conclusion that the purported means-ends takings test does not in fact represent a legitimate general test for a regulatory taking.

Introduction

The most important and controversial question in regulatory takings law today is whether a regulation that fails to advance a legitimate governmental interest results in a compensable taking under the Fifth Amendment to the United States Constitution.¹ The United States Supreme Court appears to be divided on the issue and, for the moment, is overtly undecided. How the Court ultimately resolves this question will go a long way toward determining the scope of regulatory takings doctrine.

Those who closely follow takings developments anticipated that the Supreme Court would resolve the issue in the case of *City of Monterey v. Del Monte Dunes at Monterey, Ltd. (Del Monte Dunes)*.² However, because of the odd procedural posture of the case, the Court acknowledged the importance of the issue in its May 1999 ruling, but left it for resolution in some future case.³ Therefore, the lower federal and state courts have been left to muddle through as best they can.

This Article asserts that, in general, the failure of a regulation to advance a legitimate governmental interest does not result in a taking. Such an action may be illegal on some other basis—for example, under the Due Process Clauses of the Fifth and Fourteenth Amendments⁴—but it is not a taking.

The gist of the argument is as follows. The Takings Clause⁵ was originally drafted to apply only to direct physical appropriations of private property for public use.⁶ Since the beginning of this century, the Supreme Court has interpreted the clause to apply not only to appropriations but also to regulations that are so economically burdensome that they are equivalent to appropriations.⁷ In the words of Justice Holmes, the basic issue in a regulatory takings case is whether the regulation "has very nearly the same effect for constitutional purposes as appropriating or destroying [the property]."⁸ However, the purported means-ends test would introduce into takings jurisprudence a strain of analysis that is fundamentally at odds with the origins and modern understanding of the Takings Clause. By incorporating what is in essence a due process analysis, the purported means-ends takings test would expand the focus of regulatory takings doctrine from burdensome but otherwise valid government actions to arbitrary or invalid government actions, without regard to the type of economic burden they may impose. In general, this type of means-ends analysis has no logical place in regulatory takings doctrine.

Part II of this Article describes the means-ends takings test, its background, and its current status. Part III outlines and discusses the arguments for and against the use of the means-ends takings test and contends that the arguments for rejecting its use are more persuasive. Parts IV and V analyze respectively the two recent cases of *Eastern Enterprises v. Apfel*⁹ and *Del Monte Dunes*, and describe how the two cases suggest that the Supreme Court may be preparing to reject the means-ends takings test. Part VI briefly raises, but does not attempt to definitively resolve, the question of whether a failure to advance a legitimate state interest may preclude a finding of a taking. Part VII explains why, as a practical matter, it is important whether traditional due process means-ends analysis is imported into the takings doctrine. The Article concludes with the hopeful suggestion that the Supreme Court's recent takings decisions point toward the emergence of a new, more coherent regulatory takings doctrine.

The Means-Ends Test in the Takings Arena

The famously muddy doctrine of regulatory takings is as muddy as it gets when it comes to the question of whether the alleged failure of a regulatory action to advance a legitimate governmental interest (in shorthand, the "purported means-ends test") is really a takings test at all. More than twenty years ago, in *Penn Central Transportation Co. v. New York City (Penn Central)*,¹⁰ the Court stated that "a use restriction may constitute a 'taking' if [it is] not reasonably necessary to the effectuation of a substantial government purpose."¹¹ Two years later, in *Agins v. City of Tiburon*,¹² the Court said essentially the same thing: a government action "effects a taking" if it "does not substantially advance legitimate state interests."¹³

Since that pair of decisions, the Supreme Court has repeated this purported means-ends takings test in over half a dozen cases.¹⁴ Indeed, in *Nollan v. California Coastal Commission*,¹⁵ the Court (per Justice Scalia) went so far as to state that "[w]e have long recognized that . . . regulation does not effect a taking if it 'substantially advance[s] legitimate state interests.'"¹⁶

Notwithstanding the visibility and longevity of the purported means-ends test, there is substantial reason to doubt that the Court really meant what it said twenty years ago, or at least, that it would say the same thing today. The Court has never squarely applied the purported means-ends test to uphold a finding that a regulatory restriction effected a taking. In *Nollan and Dolan v. City of Tigard*,¹⁷ the Court relied in part on the purported means-ends test to support the conclusion that so-called exactions resulted in a taking.¹⁸ However, for the reasons discussed below, those decisions are logically confined to their particular context and do not support the idea that the purported means-ends test provides a general test for review of regulations under the Takings Clause.¹⁹

In the face of this uncertainty, the majority of lower courts that have addressed the issue over the last decade or so have rejected the idea that the purported mean-ends test represents an independent test for a regulatory taking. For example, the United States Court of Federal Claims|the federal trial court with specialized jurisdiction over most takings claims against the United States|has rejected this test. Ten years ago, Chief Judge Loren Smith of the United States Claims Court concluded that means-ends review does not represent an independent takings test, stating that "no court has ever found a taking has occurred solely because a legitimate state interest was not substantially advanced."²⁰

Many state courts that have addressed the issue have also concluded that there is no independent means-ends takings test. For example, in *Brunelle v. Town of South Kingston*,²¹ the Rhode Island Supreme Court overruled a trial court's conclusion that "a regulatory taking can be compensable if the ordinance in question does not substantially advance a legitimate state interest," stating that "a discussion of the arbitrariness or capriciousness of a particular state action is properly examined under the light of the Fourteenth Amendment due process clause and not the Fifth Amendment takings clause."²² Likewise, in *Mission Springs, Inc. v. Feature Realty, Inc.*,²³ the Washington Supreme Court held that a city's allegedly "arbitrary" and "illegal" denial of

a permit stated a claim under the Due Process Clause, but not under the Takings Clause.²⁴ And in *Tampa-Hillsborough County Expressway Authority v. AGWS Corp.*,²⁵ the Florida Supreme Court held that an unreasonable state mapping statute was invalid under the Due Process Clause, but did not necessarily result in a compensable taking under the Takings Clause.²⁶

Over the last few years, in a pair of important cases, the Supreme Court approached but did not definitively resolve the issue of the validity of the purported means-ends takings test.²⁷ In *Eastern Enterprises v. Apfel*,²⁸ decided in June 1998, a bare majority of the Court, using somewhat opaque language, apparently reached the conclusion that the purported means-ends test is not in fact a takings test.²⁹ In that case, the Court struck down as unconstitutional the federal Coal Industry Retiree Health Benefit Act of 1992,³⁰ but five Justices (Justice Kennedy and the four dissenting Justices) rejected the means-ends takings claim in the case.³¹ The discussion in *Eastern Enterprises* raised the hope that the Supreme Court would definitively resolve in *Del Monte Dunes* whether the purported means-ends test actually exists or not.

The hope for guidance from the Supreme Court was short lived. In a five to four decision in May 1999, the Court in *Del Monte Dunes* upheld a jury finding of a taking based on jury instructions incorporating the means-ends theory.³² But the Court did not thereby endorse the means-ends theory. Justice Kennedy, writing for the majority, and Justices Souter and Scalia, who wrote separate opinions, all concluded that the issue of the validity of the means-ends test was not properly before the Court because counsel for the city had not objected to the jury instructions and had therefore waived any right to object to the legal theory upon which the instructions were based.³³ As a result, we must continue to wait for clearer guidance from the Supreme Court on the validity of the purported means-ends test.

The Debate

There are substantial arguments for why the Supreme Court|and the lower federal and state courts pending a ruling by the high court|should reject the purported means-ends test as a general takings test. While there are also arguments on the other side of the issue, they are less persuasive.

Arguments For Discarding the Purported Means-Ends Takings Test

Due Process Test In Disguise

The Court's apparent adoption of the purported means-ends takings test in *Penn Central* and *Agins* stemmed from an inadvertent muddling of legal doctrines. While the Court in these cases described means-ends analysis as an appropriate takings test, a careful reading of the decisions shows that the Court was actually referring to a due process test.

In *Penn Central*, the Court relied upon due process, not takings, precedents to support the idea that "a use restriction may constitute a 'taking' if [it is] not reasonably necessary to the effectuation of a substantial government purpose."³⁴ Specifically, the *Penn Central* Court cited *Nectow v. City of Cambridge*,³⁵ which involved a due process challenge to a zoning regulation in which the owner alleged that the restriction did "not bear a substantial relationship to the public health, safety, morals, or general welfare."³⁶ *Nectow* patently was not a takings case, but instead involved a due process claim that the ordinance "deprived [the owner] of his property without due process of law in contravention of the Fourteenth Amendment."³⁷ And although the second precedent cited by the Court *Goldblatt v. Town of Hempstead*³⁸ involved claims under both the *Takings and the Due Process Clauses*,³⁹ the means-ends analysis in *Penn Central* clearly draws upon *Goldblatt's* due process discussion.⁴⁰

In *Agins*, the Court stated that a governmental action "effects a taking" if it "does not substantially advance legitimate state interests."⁴¹ But again, the primary authority the Court cited to support this test was the *Nectow* due process case.⁴² The due process origins of the misbegotten takings test are further confirmed by the fact that the portion of *Nectow* cited by *Agins* quotes from *Village of Euclid v. Ambler Realty Co.*⁴³ another due process case.⁴⁴

In sum, the lineage of the purported means-ends takings test shows that the Court's adoption of the test was based on a muddling of legal doctrines, not a considered analysis of whether, as a matter of first principles, takings law includes|or should include|a means-ends test.⁴⁵

Viewed in its historical context, the Supreme Court's confusion of takings and due process analyses is less surprising than it might initially appear. In the 1970s and 1980s a fundamental debate took place in the courts over whether regulations could ever give rise to a claim for compensation under the Takings Clause, or whether the Due Process Clause instead provided the proper constitutional vehicle for challenges to overly burdensome regulation of property. For example, the New York Court of Appeals adopted the latter approach in *Fred F. French Investing Co. v. City of New York*,⁴⁶ in which it concluded that the *Supreme Court in Pennsylvania Coal Co. v. Mahon (Pennsylvania Coal)*⁴⁷ the origin of the regulatory takings doctrine|had used the word "taking" only "metaphorically."⁴⁸ The *Fred F. French Investing Co.* court concluded that the "gravamen of the constitutional challenge to the regulatory measure [in *Pennsylvania Coal*] was that it was an invalid exercise of the police power under the due process clause, and the [Pennsylvania Coal case was] decided under that rubric."⁴⁹

The Supreme Court's decision in *Williamson County Regional Planning Commission v. Hamilton Bank*,⁵⁰ in which the Court discussed at length (but did not definitively resolve) the theory of taking as a due process violation,⁵¹ further illustrates the importance of this debate. Not until the 1987 decision in *First English Evangelical Lutheran Church v. Los Angeles (First English)*⁵² did the Court finally resolve this issue and conclude that the Takings Clause independently supports a constitutional challenge to overly burdensome regulatory activity.⁵³ Against this backdrop, it is hardly surprising that the Court's decisions of this era intermingled due process and takings doctrines.

Plain Language

Turning to first principles of constitutional interpretation, the plain language of the Takings Clause|and the different plain language of the Due Process Clause|also support the conclusion that the failure of a regulation to advance a legitimate governmental interest cannot support a finding of a taking. First, the purported means-ends takings test is inconsistent with the word "take" in the Takings Clause. The government "takes" private property when it seizes it. Regulations that eliminate all or substantially all of a property's economic use also can reasonably be viewed as "taking" the property. By contrast, there is no apparent warrant in the word "take" for a separate inquiry|divorced from the actual burden imposed by a regulation|into the legitimacy of the ends served by the action or into the means used to achieve those ends.

Second, the purported means-ends takings theory is inconsistent with the part of the Takings Clause that limits compensable takings to those takings that serve a "public use." In *Hawaii Housing Authority v. Midkiff*,⁵⁴ the Supreme Court established that the Takings Clause prohibits a taking not for a "public use," whether just compensation is paid or not.⁵⁵ Resolution of the issue of whether a government action meets the "public use" requirement turns, the Court said, upon whether "the legislature's purpose is legitimate," and whether "its means are not irrational."⁵⁶ This is basically the same test, the Court said, as the test traditionally used to determine whether an action is valid under the Due Process Clause.⁵ Thus, under *Midkiff*, a means-ends analysis determines whether or not a government action is within the scope of the Takings Clause to begin with, whether or not compensation is paid. The same analysis cannot logically provide the test for

determining whether a government action requires payment of compensation pursuant to the Takings Clause.⁵⁸

The important differences in language between the Takings Clause and the Due Process Clauses also contradict the idea that takings doctrine can include essentially the same means-ends test as due process doctrine. The Takings Clause in the Fifth Amendment states that "private property [shall not] be taken for public use, without just compensation,"⁵⁹ while the Due Process Clauses in the Fifth and Fourteenth Amendments state that no person shall be "deprived" of "property, without due process of law."⁶⁰ The usual rule of constitutional interpretation is that differences in constitutional language must be interpreted to support differences in meaning, especially in interpreting language within a single constitutional provision. As the Supreme Court said in *Harmelin v. Michigan*,⁶¹ "[w]hen two parts of a [constitutional amendment] use different language to address the same or similar subject matter, a difference in meaning is assumed."⁶² In this case, the difference in language between the two clauses demonstrates that the analyses under each clause must be different.

Original Understanding

The purported means-ends takings test also conflicts with the original understanding of the Takings Clause. Jurists and academics of virtually all ideological persuasions recognize that the Takings Clause was originally intended to address only direct appropriations of private property, as the plain language of the clause makes clear. As Justice Scalia stated in *Lucas v. South Carolina Coastal Council*,⁶³ prior to the early twentieth century, "it was generally thought that the takings clause reached only a 'direct appropriation' of property . . . or the functional equivalent of a 'practical ouster of [the owner's] possession.'"⁶⁴ This conclusion is also supported, for example, by the extensive historical research into colonial legal materials by Professor John Hart⁶⁵ and Professor William Michael Treanor.⁶⁶

At least partly out of deference to the original understanding of the Takings Clause, the Supreme Court has basically confined takings claims to those "extreme circumstances" in which regulations impose severe economic burdens analogous to direct physical appropriations.⁶⁷ The purported means-ends takings test would extend the Takings Clause to circumstances in which regulations may have little or no adverse economic impact and bear no similarity to the type of direct appropriations envisioned by the drafters of the Takings Clause. Thus, the original understanding of the Takings Clause does not support the purported means-ends takings test.

Basic Takings Principles

Finally, the purported means-ends takings test conflicts with two frequently repeated principles of regulatory takings jurisprudence. First, the purported means-ends test conflicts with the understanding, first articulated by the *Supreme Court in Armstrong v. United States*,⁶⁸ that the Takings Clause is designed to prevent the 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."⁶⁹ Implicit in this statement is the idea that the Takings Clause embodies a bilateral relationship of right and obligation; the clause identifies the circumstances in which, in "all fairness and justice," property owners should receive compensation and the responsibility for paying compensation should be assigned to the general public.⁷⁰ The Takings Clause calls for compensation when individual property owners are burdened by the government's pursuit of a valid public objective, but not when a government official takes some action that is improper and provides no legitimate public benefit.

In the Supreme Court's takings jurisprudence, this idea has been most articulately expressed by former Justice William Brennan. He observed that if a regulation advances a legitimate public purpose, "it is axiomatic that the public receives a benefit while the offending regulation is in

effect," and in that circumstance, it is "fair" for the public to pay just compensation.⁷¹ On the other hand, this statement suggests, if the government action fails to advance a legitimate public purpose, and therefore no public benefit is achieved, "fairness and justice" do not compel payment of public compensation under the Takings Clause.

Second, the purported means-ends takings test also is inconsistent with the related principle that regulatory takings doctrine presupposes that the government is acting for a "proper" public purpose. As Chief Justice Rehnquist explained in *First English Evangelical Lutheran Church v. Los Angeles*,⁷² the Takings Clause "is designed . . . to secure compensation in the event of otherwise proper interference amounting to a taking."⁷³ A regulation may be improper in the nominal sense that it effects a taking, and therefore can only go forward upon the condition that just compensation be paid. But in order for there to be a taking, the action must otherwise be proper. A government action that fails to advance a legitimate governmental purpose cannot result in a compensable taking because such an action is not otherwise proper. As Justice Rehnquist stated in *Keystone Bituminous Coal Ass'n v. DeBenedictis*,⁷⁴ the issue of whether or not a regulation serves a public purpose "does not resolve the question whether a taking has occurred," because "the existence of such a public purpose is merely a necessary prerequisite to the government's exercise of its taking power."⁷⁵

Arguments in Defense of the Means-Ends Takings Test

The Nollan-Dolan Model

Apart from the obvious point that the Supreme Court must have meant what it has repeated so frequently since 1978,⁷⁶ there are some more specific counter-arguments in favor of the purported means-ends takings test. One such counter-argument is that, however weak the support originally provided for the purported means-ends test by *Agins* and *Penn Central*, the Supreme Court subsequently definitively adopted means-ends analysis as a component of regulatory takings doctrine in the cases of *Nollan v. California Coastal Commission*⁷⁷ and *Dolan v. City of Tigard*.⁷⁸ In support of this argument, one can point to the fact that Nollan explicitly relied upon the means-ends language in *Agins* to explain the "essential nexus" test adopted in that case.⁷⁹ Moreover, in *Dolan*, which builds upon *Nollan*, the Court relied upon *Penn Central* in framing the "rough proportionality" test developed in that case.⁸⁰ Upon analysis, however, it is apparent that *Nollan* and *Dolan* are logically confined to the context of regulatory exactions involving public occupation of private property. To whatever extent the purported means-ends test articulated in *Agins* and *Penn Central* is consistent with *Nollan* and *Dolan*, *Nollan* and *Dolan* themselves provide no support for the idea that the purported means-ends test provides an appropriate general test for takings challenges to ordinary regulations.

This conclusion is supported by the facts and reasoning in both cases. Both *Nollan* and *Dolan* involved regulatory takings challenges to permit conditions that effected a permanent physical occupation of private property.⁸¹ In *Nollan*, the California Coastal Commission had demanded public access along an ocean beach in front of a homeowner's private property.⁸² In *Dolan*, the city mandated that the owner of a hardware store provide a public bike path and a greenway.⁸³ In both cases, the Court thought it indisputable that these requirements, standing alone, would have effected a taking under the Court's *per se* takings rule for government actions that effect a physical occupation of private property.⁸⁴ The issue that these cases presented was whether the conclusion that a taking had occurred was altered by the fact that the dedication requirements were imposed not directly but as a condition of the government's grant of permission to the owners to expand development on their properties. Taking the view that neither owner was automatically entitled under the Takings Clause to receive the development approval he or she sought, the Court concluded that the *per se* takings analysis did not apply.⁸⁵ In other words, because the government could have rejected the development applications outright without effecting a taking, the government's decision to grant development approval subject to conditions could not automatically effect a taking.⁸⁶ On the other hand, because the imposed exactions

involved particularly serious invasions of private property rights, the Court also concluded that the propriety of the exactions had to be determined using a relatively stringent standard of review.

The Supreme Court stated that a landowner can mount a successful takings challenge to a regulatory exaction if he or she establishes that the exaction is not closely related to the legitimate purposes of the regulatory process itself.⁸⁷ More specifically, the Court ruled that attaching otherwise unconstitutional exactions to regulatory permits would not effect a taking only if 1) there was an essential nexus between the conditions and the government's regulatory purposes (Nollan)⁸⁸ and 2) there was a rough proportionality between what the owner surrendered and the impacts of the proposed development (Dolan).⁸⁹

According to some courts⁹⁰ and commentators,⁹¹ the nexus and proportionality inquiries developed in Nollan and Dolan provide an appropriate template for analyzing all types of regulatory actions under the Takings Clause. Under this view, the essential nexus and rough proportionality tests provide an appropriate general regulatory takings test. In other words, in evaluating takings challenges to any kind of regulatory decision, the courts should closely scrutinize the logical relationship between the governmental decision and the public objectives being served, as well as the degree to which the decision advances those objectives.

Given the facts and reasoning of Nollan and Dolan, however, these decisions cannot properly be read so broadly. They adopt a special type of means-ends analysis that is explained and justified by—and is logically confined to—the context of physical occupations. Time and time again, the Supreme Court has emphasized the special character of permanent physical occupations and observed that they require particularly stringent review under the Takings Clause.⁹² The tests applied in Nollan and Dolan are directly related to the fact that the conditions at issue in those cases involved physical occupations. Underscoring the point, the Court stated in Dolan that the conditions at issue in that case "differ[ed]" in several particulars from ordinary land use regulations, including the fact that "the conditions imposed were not simply a limitation on the use petitioner might make of her own parcel, but a requirement that she deed portions of the property to the city."⁹³ The means-ends analysis in Nollan and Dolan is specifically adapted to the problem of determining whether a forced physical occupation in a regulatory context results in a taking. The same analysis cannot logically be extended to regulations that simply limit the permissible uses of private property.

As discussed below, the Supreme Court's recent decision in *Del Monte Dunes*, which declined to extend the Dolan rough proportionality standard beyond the exactions context, further undermines, if not completely repudiates, the idea that the Dolan and Nollan tests support a general means-ends regulatory takings test.⁹⁴

Stricter and Different

Another argument in favor of the purported means-ends takings test is that the test is actually more rigorous than, and therefore is different from, the traditional due process means-ends test. This argument for a distinctive, more demanding means-ends takings test draws support from Justice Scalia's majority opinion in Nollan, in which he stated that

our opinions do not establish that these standards [under the Takings Clause] are the same as those applied to due process and equal protection claims. To the contrary, our verbal formulations in the takings field have generally been quite different. . . . [T]here is no reason to believe (and the language of our cases gives some reason to disbelieve) that so long as the regulation of property is at issue the standards for takings challenges, due process challenges, and equal protection challenges are identical.⁹⁵

For several different reasons, this argument is not persuasive. First, although the Supreme Court's formulations of the means-ends takings test have indeed varied, it is obvious from the Court's reliance in *Penn Central* and *Agin* on *Nectow*, *Goldblatt*, and *Village of Euclid* that the purported means-end takings test was derived from, and simply restates, a due process test.⁹⁶ No analysis in any of the Court's decisions purports to explain how the Takings Clause independently supports a means-ends test, much less a means-ends test that would be more demanding than the ordinary due process test. In fact, it is simply a due process test.

Moreover, while the Court's formulation of the purported means-ends takings test relies upon the word "substantially," which suggests a somewhat more demanding level of scrutiny than typically applies in modern due process review,⁹⁷ that difference can be easily explained. Between the 1920s and the 1970s the Supreme Court heard very few land use cases. When the Court formed a renewed interest in land use issues and took on the *Agin* and *Penn Central* cases, it naturally referred back to its earlier land use decisions from the 1920s. However, these due process cases, which were decided prior to the constitutional revolution of the 1930s, articulated a standard of due process review that is more exacting than that which the Court uses today. In short, the distinctive language in the Supreme Court's formulation of the purported means-ends takings test far from supporting the idea that there is a distinctive takings means-ends test confirms that this test originated in the Due Process Clause and is in fact only a due process test.

Eastern Enterprises

On June 25, 1998, the United States Supreme Court issued a set of opinions in *Eastern Enterprises v. Apfel*⁹⁸ that provide substantial support for the argument that takings doctrine does not include a free-standing means-ends test. *Eastern Enterprises* involved both takings and due process challenges⁹⁹ to the federal Coal Industry Retiree Health Benefit Act of 1992 (Coal Act). The Coal Act imposed a significant retroactive financial liability on *Eastern Enterprises* and a number of other companies previously engaged in coal mining by requiring the companies to help pay the large health care costs of some of their former miners and their dependents, including costs that had no relationship to the workers' former employment.¹⁰⁰ The Court declared the retroactive imposition of this new responsibility unconstitutional, but failed to reach agreement on whether this result rested on the Takings Clause or the Due Process Clause.¹⁰¹

Four Justices (Rehnquist, Scalia, Thomas, and O'Connor) concluded that the Coal Act effected a taking.¹⁰² These four Justices declined to decide the separate due process issue.¹⁰³ Justice Kennedy, speaking for himself, concluded that the Takings Clause did not apply, but that the Coal Act violated the Due Process Clause.¹⁰⁴ Together, these five Justices created the majority that struck down the Coal Act.

The four dissenting Justices (Stevens, Souter, Breyer, and Ginsburg) agreed with Justice Kennedy that the Takings Clause did not apply and that the case was properly analyzed under the Due Process Clause.¹⁰⁵ But they disagreed with Justice Kennedy on the merits and concluded that the company had not demonstrated a due process violation.¹⁰⁶ Thus, in an odd twist, although the Court struck down the Coal Act as unconstitutional, the only claim on which a majority of the Justices agreed was that the Act did not result in a taking.

Justice Kennedy identified two bases for the conclusion that the Takings Clause did not apply, both of which were embraced by the four dissenters, making a five-member majority in favor of both arguments.¹⁰⁷ First, he concluded that there was no taking because the Coal Act, unlike other laws and regulations previously declared to effect a taking, did "not operate upon or alter an identified property interest."¹⁰⁸ While the Coal Act imposed an obligation on *Eastern Enterprises* to perform an act (namely, to help pay the health care costs of some of its retired workers) the Act imposed an obligation on the firm as a whole and did not operate on a "specific property right or interest."¹⁰⁹ Justice Kennedy justified this reading of the Takings Clause partly on the basis that it would avoid "expand[ing] an already difficult and uncertain rule to a vast [new] category of cases

not deemed, in our law, to implicate the Takings Clause."¹¹⁰ By contrast, Justice Kennedy stated, the plurality opinion "would throw one of the most difficult and litigated areas of the law into confusion, subjecting States and municipalities to the potential of new and unforeseen claims in vast amounts."¹¹¹

Second, and of more immediate relevance for present purposes, Justice Kennedy rejected the takings claim because, in his view, the contention that the Coal Act imposed an unfair and arbitrary retroactive financial obligation raised an issue under the Due Process Clause, but not under the Takings Clause.¹¹² Drawing a sharp line between the two clauses, Justice Kennedy stated that the Due Process Clause blocks government action that is "arbitrary" or "irrational," while the Takings Clause "operates as a conditional limitation, permitting the Government to do what it wants so long as it pays the charge."¹¹³ In Justice Kennedy's view, a court "should proceed first to general due process principles, reserving takings analysis for cases where the governmental action is otherwise permissible."¹¹⁴ The unavoidable inference is that the purported means-ends test|because it focuses on the validity of government action|cannot be regarded as an appropriate test for a taking.

The four dissenting Justices quite clearly endorsed Justice Kennedy's reasoning on this point. Justice Breyer, speaking for himself and three of the other Justices, stated that "at the heart of the [Takings Clause] lies a concern, not with preventing arbitrary or unfair government action, but with providing compensation for legitimate government action that takes 'private property' to serve the 'public' good."¹¹⁵ Again, the obvious implication is that the alleged failure of a regulation to advance a legitimate public interest cannot support a regulatory takings claim.

The plurality opinion in *Eastern Enterprises* is rich with irony. After concluding that the Coal Act effected a taking, Justice O'Connor, the author of the plurality opinion, proceeded to address the due process claim.¹¹⁶ Although she might simply have declined to resolve this claim (because she had effectively resolved the case on takings grounds), she went out of her way to state that the Due Process Clause provided an inappropriate ground for seeking to invalidate the Coal Act.¹¹⁷ In doing so, she referred to earlier Supreme Court decisions that expressed "concern" about relying on the "vague contours" of the Due Process Clause to review economic regulation.¹¹⁸ Granting Justice O'Connor her point about the Due Process Clause, it is nonetheless difficult to see how her resort to the Takings Clause avoided the difficulties she identified. In her plurality opinion, she defined the basic issue under the Takings Clause as one of "justice and fairness."¹¹⁹ This understanding of the Takings Clause would seem to have contours at least as vague as those of due process review. Moreover, given the language and original understanding of the Takings Clause, there is certainly no greater warrant for reading the Takings Clause as supporting a free-wheeling means-ends review of government regulation than there is for reading such a meaning into the Due Process Clause.

Del Monte Dunes

The outcome and reasoning in *Eastern Enterprises* created the expectation that the United States Supreme Court would definitively resolve the validity of the purported means-ends test in the then-pending case of *City of Monterey v. Del Monte Dunes at Monterey, Ltd. (Del Monte Dunes)*.¹²⁰ *Del Monte Dunes* appeared to squarely frame the issue, because it involved a finding of a taking based on the purported means-ends takings test.¹²¹ In the end, the Supreme Court deferred resolution of the validity of the means-ends takings test. Nonetheless, the Court's separate opinions contain some strong hints about how the Court will ultimately resolve the issue.

The Background

The case arose from a long and complicated dispute over the proposed development of a thirty-eight-acre oceanfront parcel in Monterey, California. The developer submitted a series of

increasingly less ambitious development plans in response to requests by the planning commission and the city council that it scale back the proposed development to minimize impacts on nearby parkland, maintain public beach access, retain view corridors, and avoid impacting endangered species habitat. The city and the developer ultimately disagreed about whether the review process left the developer any realistic development options. In any event, the developer filed a lawsuit asserting, among other things, a due process violation as well as a taking. The latter claim was based on both the alleged denial of all economic use of the property and the alleged failure of the city's regulatory decisions to reasonably advance any legitimate public purpose. Complicating the picture still further, during the course of the litigation, the State of California purchased the property for public parkland. Notwithstanding the state's purchase, the developer proceeded with its claim for damages based on the alleged interference with its development plans.

After some extended procedural skirmishing,¹²² the federal district court, over the city's objection, tried the question of the city's liability for the alleged taking before a jury. In addition to instructing the jury that it could find a taking on the ground that the owner had been denied "all economically viable use of its property," the court also instructed the jury on a means-ends theory.¹²³ The court first instructed the jury that the city's goals, including its efforts to protect the environment and preserve open space, represented legitimate public purposes.¹²⁴ It then instructed the jurors that "one of your jobs . . . is to decide if the city's decision here substantially advanced any such legitimate public purpose."¹²⁵ More specifically, the court instructed the jury that "[t]he regulatory actions of the city or any agency substantially advanc[e] a legitimate public purpose if the action bears a reasonable relationship to that objective."¹²⁶ The jury delivered a general verdict for the owner that did not identify the specific takings theory upon which the jury relied.¹²⁷ After the jury's verdict, the district court, which had not submitted the due process issue to the jury, resolved that claim in favor of the city.¹²⁸

The United States Court of Appeals for the Ninth Circuit affirmed.¹²⁹ The appellate court rejected the city's argument that the district court had erred in submitting the takings claim to the jury.¹³⁰ In addition, the Ninth Circuit upheld the finding of a taking, concluding that the evidence was sufficient to support a finding of liability either on the theory that the owner had been denied all economic use of the property or that the city's regulatory actions failed to advance a legitimate state interest.¹³¹ Finally, in the course of discussing how a reasonable jury could have found a taking on the means-ends theory, the Ninth Circuit, citing the United States Supreme Court's Dolan decision, stated that "[e]ven if the City had a legitimate interest in denying Del Monte's development application, its action must be 'roughly proportional' to furthering that interest. That is, the City's denial must be related 'both in nature and extent to the impact of the proposed development.'"¹³²

The city then sought and was granted review by the United States Supreme Court on three issues. First, the city renewed its argument that the district court had improperly submitted the takings issue to the jury.¹³³ Second, the city contended that the appellate court had erred in applying the Dolan rough proportionality standard in the context of a denial of a development application.¹³⁴ Third, the city contended that the appellate court had adopted a legal standard that allowed the jury to second-guess the judgment of local officials.¹³⁵ Although related to the means-ends takings theory that was submitted to the jury, this argument was not framed as an objection to the jury instructions themselves, to which the city had lodged no objections. Numerous amici curiae filed briefs in support of the city, including the United States and a coalition of conservation groups led by the California League for Coastal Protection, both of which argued at great length that the purported means-ends takings test does not represent a valid takings test.¹³⁶

The Supreme Court Ruling

On May 24, 1999, after nearly eight months of deliberation following oral argument|an extraordinarily long period by the standards of the Supreme Court|the Court issued a five-to-four

ruling upholding the Ninth Circuit's judgment.¹³⁷ Justice Kennedy wrote the opinion for the Court, concluding that the takings claim had been properly submitted to the jury, and that the jury had not been allowed to improperly second-guess the judgments of city officials.¹³⁸ He also concluded that the Dolan rough proportionality standard did not apply, but that the Ninth Circuit's error in invoking Dolan was irrelevant.¹³⁹ In a concurring opinion, Justice Scalia focused on the jury issue, and joined in all but one part of Justice Kennedy's opinion.¹⁴⁰ Justice Souter, for himself and three other Justices, filed a dissenting opinion and argued at great length that the takings liability issue should not have been submitted to the jury.¹⁴¹ However, he concurred in other parts of the majority opinion, including the Court's conclusion that Dolan should not be extended to this type of case.¹⁴²

The Court devoted little explicit attention to the purported means-ends test, because the Court unanimously concluded that the city had waived any possible objection to the jury instructions based on this theory. Justice Kennedy, speaking for the Court, stated that

[a]s the city itself proposed the essence of the instructions given to the jury, it cannot now contend that the instructions did not provide an accurate statement of the law. In any event, although this Court has provided neither a definitive statement of the elements of a claim for a temporary regulatory taking nor a thorough explanation of the nature or applicability of the requirement that a regulation substantially advance legitimate public interests outside the context of required dedications . . . , we note that the trial court's instructions are consistent with our previous general discussions of regulatory takings liability.¹⁴³

Justice Kennedy then went on to list the numerous prior decisions in which the Court has articulated the purported means-ends takings test.¹⁴⁴ Finally, returning to his principal waiver point, Justice Kennedy concluded that

[t]he city did not challenge below the applicability or continued viability of the general test for regulatory takings liability recited by these authorities and upon which the jury instructions appear to have been modeled. Given the posture of the case, we decline the suggestions of amici to revisit these precedents.¹⁴⁵

Justices Scalia and Souter, who filed separate opinions, agreed that this issue had to be deferred until some future case. Justice Scalia, while agreeing that the means-ends test was properly submitted to the jury in the context of this case, reserved the question of whether this test actually represented a valid takings test. "As the Court explains," he said, "petitioner forfeited any objection to this standard . . . , and I express no view as to [the standard's] propriety."¹⁴⁶ Justice Souter, on the other hand, disagreed that the purported means-ends test could properly be submitted to the jury, but agreed with both Justice Kennedy and Justice Scalia that resolution of the validity of the purported means-ends test had to be reserved for another day. Justice Souter wrote, "I offer no opinion here on whether *Agins* was correct in assuming that this prong of liability was properly cognizable as flowing from the Just Compensation Clause of the Fifth Amendment, as distinct from the Due Process Clause of the Fifth and Fourteenth Amendment."¹⁴⁷

Although the Court did not directly address the validity of the purported means-ends test, it did discuss and reject the argument raised by the city that the application of this purported test by the appellate court allowed the jury to "second-guess public land-use policy."¹⁴⁸ According to the Court, the Ninth Circuit did not apply "a rule of takings law allowing wholesale interference by judge or jury with municipal land-use policies, laws, or routine regulatory decisions."¹⁴⁹ The Court emphasized that the case did not involve a challenge to the city's "general zoning laws or land-use policies," but instead involved only a "particular zoning decision."¹⁵⁰ It further emphasized that the case did not involve a challenge to the "reasonableness, per se, of the customized, ad hoc conditions imposed on the property's development." Instead, the case focused on whether the city's denial of development approval was "reasonably related" to any (concededly proper) public purpose.¹⁵¹

As to the Dolan issue, Justice Kennedy squarely ruled that Dolan was irrelevant in a takings challenge to a denial of development approval. He wrote, "[W]e have not extended the rough-proportionality test of Dolan beyond the special context of exactions|land-use decisions conditioning approval of development on the dedication of property to public use."¹⁵² The rough proportionality test, he said, "was not designed to address, and is not readily applicable to, the much different questions arising where, as here, the landowner's challenge is based not on excessive exactions but on denial of development."¹⁵³ Accordingly, Justice Kennedy concluded, "[t]he rough proportionality test of Dolan is inapposite to a case such as this one."¹⁵⁴ Justice Scalia joined in this portion of Justice Kennedy's opinion,¹⁵⁵ and Justice Souter, speaking for the rest of the Court, wrote, "I agree in rejecting extension of 'rough proportionality' as a standard for reviewing land-use regulations generally."¹⁵⁶

While the Court did not expressly address the scope of the Nollan test, the Court's ruling limiting the scope of the Dolan test appears to necessarily apply to Nollan as well. Both decisions rested on the fact that the conditions at issue in the cases involved physical occupations of private property.¹⁵⁷ If, as the Court ruled in *Del Monte Dunes*, the rough proportionality test cannot logically be extended beyond the type of physical dedications at issue in Dolan,¹⁵⁸ then the same reasoning requires that Nollan be similarly limited.

Finally, with respect to the jury issue, the Court rejected the Ninth Circuit's conclusion that section 1983¹⁵⁹ conferred a right to a jury trial and instead ruled that the claimant was entitled to a jury under the Seventh Amendment.¹⁶⁰ Applying the two-part test articulated in *Markman v. Westview Instruments, Inc.*,¹⁶¹ the Court made two determinations. First, section 1983 damages actions are sufficiently analogous to actions that were tried at law when the Seventh Amendment was drafted to support a right to a jury trial.¹⁶² Second, at least on the particular facts of the case, the takings issues presented by the claimant were appropriate for resolution by a jury.¹⁶³

The Implications of the Decision

What is one to make of this decision and how, in particular, are the lower federal and state courts to resolve the question of the validity of the purported means-ends takings test until the Supreme Court finally provides more definitive guidance? On the surface, the decision in *Del Monte Dunes* points in opposite directions at once. On the one hand, the decision can be read to support the validity of the purported means-ends takings test because the Court upheld for the first time a finding of liability for a regulatory taking based on a means-ends test outside the exactions context.¹⁶⁴ On the other hand, five of the Justices, speaking through Justices Scalia and Souter, expressly reserved judgment on the validity of the means-ends test. Moreover, all three opinions in the case underscored the fact that the city's failure to object to the application of the purported means-ends test removed it from consideration by the Court.¹⁶⁵

The outcome is also confusing in terms of the opinions of the individual Justices. Justice O'Connor|usually a sure vote in favor of a takings claim|sided with the dissenters, while Justice Stevens|traditionally the most liberal Justice on the takings issue|sided with the plurality. Justice Kennedy's conclusion that the application of the means-ends takings test in *Del Monte Dunes* did not allow the jury to improperly second-guess local land use decisions seems to conflict with his reasoning in *Eastern Enterprises*.¹⁶⁶ In that case, he concluded that the alleged arbitrariness of government action should be resolved as a threshold matter under the Due Process Clause, reserving for takings review only those regulations that satisfy due process.¹⁶⁷ In addition, Justice Kennedy's support for upholding the jury verdict in *Del Monte Dunes* appears to conflict with the concern he expressed in *Eastern Enterprises* about "throw[ing] one of the most difficult and litigated areas of the law into confusion, subjecting States and municipalities to the potential of new and unforeseen claims in vast amounts."¹⁶⁸ Finally, Justice Scalia, whose decision in *Nollan* suggests that he would be a strong supporter of the purported means-ends test, took the surprising step of "express[ing] no view as to its propriety."¹⁶⁹

On balance, while it is full of ambiguities, the Court's decision and the various associated opinions appear to reinforce the conclusion, already supported by a majority in *Eastern Enterprises*, that the purported means-ends takings test is not a valid takings test.

As a threshold matter, the Court has obviously declared that its numerous prior recitations of the purported means-ends takings test do not definitively establish that such a test actually exists. Every Justice in *Del Monte Dunes* avoided the opportunity provided by the case to affirm the purported means-ends test. In addition, five Justices wrote or joined in opinions expressly asserting that they were undecided on the question of the validity of this purported takings test. Certainly, therefore, the Court has drawn back from its seemingly unthinking recitation of the purported means-ends takings test in past cases. At a minimum, the various opinions in *Del Monte Dunes* verify that the issue of the validity of the means-ends test is both an important and an open question.

Justice Souter's opinion, which comes closest to directly addressing the validity of the purported means-ends takings test, provides several cogent reasons to believe that the means-ends test cannot be a valid takings test. His comments were made in the context of the jury issue,¹⁷⁰ and therefore only address the validity of the purported means-ends takings test obliquely. However, none of the other Justices took direct issue with Justice Souter on these specific points, lending plausibility to the idea that Justice Souter's thinking about the purported means-ends takings test might well represent the views of a majority of the Court.

Justice Souter points out, for example, the contradiction inherent in submitting the purported means-ends takings compensation test to a jury when a landowner who raises essentially the same argument in support of a claim that a proposed taking is not for a "public use" would not be entitled to a jury.¹⁷¹ Justice Souter's argument reaffirms the point discussed above: the alleged failure of a regulation to advance a legitimate governmental interest cannot logically supply both the test for whether an action is for a public use within the meaning of the Takings Clause and the test for whether property has been taken within the meaning of the clause. In the same vein, Justice Souter also points out the "inconsistency" between the submission of the purported means-end takings test to a jury and the rule that the similar claims, when labeled as due process issues, are "routinely reserved without question for the court."¹⁷²

Ultimately, however, the Supreme Court's unanimous conclusion that the Dolan rough proportionality test does not apply outside the exactions context¹⁷³ provides the most persuasive indication that a majority of the Court will reject the purported means-ends takings test as a general takings test. By limiting the scope of the Dolan rough proportionality test (and implicitly the *Nollan* essential nexus test), the *Del Monte Dunes* Court has circumscribed the use of the means-ends formula articulated in *Penn Central* and *Agins*. In so doing, the Court has already completed the hard work in defining the appropriate role for|and limits of|means-ends analysis under the Takings Clause.

Means-Ends Failure: Is It Irrelevant to a Takings Claim|Or Does It Preclude a Takings Claim?

It is noteworthy that the preceding discussion contains a lurking ambiguity that deserves exploration at greater length on some other occasion. The basic thesis outlined above is that the alleged failure of a regulation to advance a legitimate governmental purpose does not independently support a finding of a taking. However, the adoption of this thesis leaves open two strikingly different options.

The first option is that the failure of the government to meet a means-ends standard can be viewed as irrelevant to the takings inquiry. If a government action results in a taking under the generally applicable economic burden test, then a court should find a taking, whether or not the

action can survive means-ends review. The second option is that the failure of a government action to survive means-ends review should be treated as not only not supporting a finding of a taking, but also as positively precluding it. This option is supported in particular by the requirement that a taking be for a public use|a requirement that a regulation that fails to advance a legitimate governmental purpose arguably cannot meet. Under the first option, an invalid or arbitrary government action could not be held to be a taking on that basis, but might nonetheless be found to be a taking because it has deprived the owner of all economic use of the property. Under the second option, a valid government action is a prerequisite for a finding of a taking and, therefore, there can be no taking if the action fails means-ends review, regardless of the action's impact on the property owner. An invalid regulation might support a claim for relief on some statutory or other constitutional basis, but it can never support a taking.

Justice Kennedy's swing opinion in *Eastern Enterprises* apparently comes the closest to endorsing the view that a regulation that fails to meet a means-ends test can never result in a taking.¹⁷⁴ Justice Kennedy distinguished the Due Process Clause, which he said blocks government action that is "arbitrary" or "irrational," from the Takings Clause, which he said "operates as a conditional limitation, permitting the Government to do what it wants so long as it pays the charge."¹⁷⁵ Given this difference, he believed that a court "should proceed first to general due process principles, reserving takings analysis for cases where the governmental action is otherwise permissible."¹⁷⁶ The obvious inference is that the Takings Clause supports a claim for compensation only when the government action passes means-ends review. Based on this reading, the conclusion that a regulation fails to advance a legitimate governmental purpose should preclude a finding of a taking.

Why the Takings-Due Process Distinction Matters

Finally, it is worthwhile to address whether characterizing a set of allegations as a takings claim, or as the most likely alternative|a due process claim|really matters. At the end of the day, does it make any difference whether means-ends analysis is conducted under the due process or the takings label? In terms of logical presentation, one might wonder whether this threshold question might have been better asked and answered at the outset of this Article rather than at the end. Because the answer to this question relies heavily on the preceding discussion, as will become apparent, it is far more convenient to proceed back to front. In short, the answer to the labeling question makes a great deal of difference, both for practical and doctrinal reasons.

First, labeling a means-ends inquiry as a takings test would greatly expand the scope of government liability under the Takings Clause. Historically, regulatory takings law has focused on regulations that eliminate "all or substantially all" of a property's economic value.¹⁷⁷ Adopting the idea that government can be liable under the Takings Clause for a regulation because it fails to advance a legitimate governmental purpose would expand takings doctrine to encompass regulations that may have little or even no adverse economic impact on a property owner. Furthermore, if claimants could invoke this expanded version of takings doctrine to demand "just compensation" under the Takings Clause, claimants could potentially gain substantial windfalls at public expense.¹⁷⁸

Second, the labeling issue makes a great deal of difference to both federal and state governments, but makes less of a difference to local governments. The Supreme Court established in *First English* that the Takings Clause provides a financial remedy in the event that a government action results in a taking.¹⁷⁹ By contrast, the Due Process Clause has generally been understood not to be a money-mandating provision.¹⁸⁰ Thus, when the United States or a state is the defendant, the choice between a due process label and a takings label determines whether the government is subject to a simple injunction or instead is liable for compensation. However, because a local government is subject to a suit for damages under section 1983,¹⁸¹ regardless of whether the claim is framed as a takings issue or a due process issue, the choice of labels is less important in the case of local governments. Nevertheless, even for local

governments, the measure of damages might vary depending upon the constitutional theory advanced.

Third, the label might matter if, in affirming the means-ends test as part of takings analysis, the Supreme Court were to formulate the test to be more demanding of government than the modern, deferential due process means-ends test. In *Agins*, the Court stated that a regulation effects a taking if it does not "substantially" advance a legitimate state interest.¹⁸² As discussed, the use of the word "substantially" suggests that the means-ends fit under the Takings Clause must be considerably tighter than under the Due Process Clause. Justice Scalia, speaking for the Court in *Nollan*, focused on the word "substantially" and asserted that "there is no reason to believe (and the language of our cases gives some reason to disbelieve) that so long as the regulation of property is at issue the standards for takings challenges, due process challenges, and equal protection challenges are identical."¹⁸³ However, as discussed above, the word "substantially" can be viewed as simply confirming the due process origins of the purported means-ends test. Moreover, in his concurring opinion in *Del Monte Dunes*, Justice Scalia appeared to contradict his earlier statement by expressly reserving the question whether the Takings Clause includes a means-ends test at all, without even addressing whether this takings test was more demanding than means-ends review under the Due Process Clause.¹⁸⁴

Fourth, the label may also matter because it might significantly influence the degree of deference given to government decision making. In reaction to the searching due process review of government economic programs in the *Lochner* era,¹⁸⁵ modern due process precedents are replete with expressions of the substantial deference due to government decision makers.¹⁸⁶ The same is not true of modern takings precedents. There are several explanations for this difference. Because the Takings Clause was not a primary vehicle for searching judicial review of economic regulations in the *Lochner* era, takings doctrine never underwent the revisionist reinterpretation that the Due Process Clause did. More fundamentally, however, the notion of deference to government decision making is foreign to takings jurisprudence. As discussed, the Takings Clause has long been read "not to prohibit the taking of private property, but instead [to] place[] a condition on the exercise of that power."¹⁸⁷ Because, in this sense, a takings claim does not draw into question the government's right to proceed, deference to agency decision making has generally been understood to have no logical place in takings analysis.¹⁸⁸ From a practical perspective, of course, this formal understanding of the character of the Takings Clause has little importance. A requirement that the government pay financial compensation as a condition of enforcing a regulation interferes with the government's ability to operate at least as much, if not more, than the threat of an injunction under the Due Process Clause.¹⁸⁹ Moreover, it is nonsensical to suppose that essentially an identical means-ends inquiry should be applied with varying degrees of deference depending upon whether it is called a takings or a due process test. This idea is doubly nonsensical once one recognizes that the purported means-ends takings test was derived from due process precedents.

In sum, the differing approaches to the issue of deference to agency decision making in takings and due process cases reflect differences in the basic character of the two clauses, but do not support the idea that a similar means-ends test can be applied with varying degrees of deference under the two clauses. In fact, the lack of a tradition of deference in takings cases (which is based on the fact that a takings claim presupposes the validity of the government action) simply confirms the point that means-ends analysis has no place in takings doctrine.

Fifth, the choice of labels might determine the availability of a jury trial. In *Del Monte Dunes*, the Court determined that the plaintiff was entitled to have a jury hear its means-ends claim under the Takings Clause,¹⁹⁰ but the Court apparently recognized and left undisturbed the traditional rule that a due process means-ends claim is not heard by a jury.¹⁹¹ However, it is questionable whether this possible difference would have much significance given the limited practical import of the recognition of a jury trial right in *Del Monte Dunes*.¹⁹²

Finally, as indicated above, the label may affect the types of defenses available to a government defendant. Under the purported means-ends takings test, the failure of a regulation to advance a legitimate public purpose would support a claim for just compensation under the Takings Clause. However, if a means-ends inquiry is recognized as a due process issue instead, and if the alleged failure of a regulation to advance a legitimate governmental purpose is determined to preclude a finding of a taking for public use, then facts that would support a viable due process claim could also serve as an absolute defense to a takings claim. Justice Kennedy apparently said as much in his concurring opinion in *Eastern Enterprises*.

Conclusion

The greatest sources of confusion in regulatory takings law is the erroneous idea that the failure of a regulatory action to advance a legitimate governmental interest can support a finding of a taking. In its most recent decisions the Supreme Court has acknowledged the incoherence of its prior descriptions of regulatory takings doctrine and disavowed its earlier unthinking recitation of the purported means-ends takings test. The path to a coherent regulatory takings doctrine has never been clearer.

Footnotes:

*Director, Environmental Policy Project, Georgetown University Law Center; J.D. 1981, Yale Law School; M.F.S. 1981, Yale School of Forestry and Environmental Studies; B.A. 1976, Yale College. I thank Professor Michael Blumm of Northwestern School of Law of Lewis & Clark College for his generous suggestion to publish this collection of regulatory takings articles based on presentations made at the regulatory takings conference cosponsored by the Environmental Policy Project in San Francisco, California, September 1998.

¹U.S. CONST. amend. V.

² 119 S. Ct. 1624 (1999).

³ *Id.* at 1630.

⁴ U.S. CONST. amends. V, XIV.

⁵ *Id.* amend. V ("nor shall private property be taken for public use, without just compensation").

⁶ See discussion *infra* Part III.A.3.

⁷ See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415(1922).

⁸ *Id.* at 414.

⁹ 524 U.S. 498 (1998).

¹⁰ 438 U.S. 104 (1978).

¹¹ *Id.* at 127.

¹² 447 U.S. 255 (1980).

¹³ *Id.* at 260.

¹⁴ See, e.g., *Dolan v. City of Tigard*, 512 U.S. 374, 388 (1994); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016 (1992); *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 485 (1987); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126 (1985).

¹⁵ 483 U.S. 825 (1987).

¹⁶ *Id.* at 834 (quoting *Agins*, 447 U.S. at 260).

¹⁷ *Dolan*, 512 U.S. at 374.

¹⁸ See *id.* at 386; *Nollan*, 483 U.S. at 834.

¹⁹ See discussion *infra* Part III.B.1.

²⁰ *Loveladies Harbor, Inc. v. United States*, 15 Cl. Ct. 381, 390 (1988), *aff'd*, 28 F.3d 1171 (Fed. Cir. 1994); see also *Florida Rock Indus., Inc. v. United States*, 45 Fed. Cl. 21 (1999) (adopting an extraordinarily expansive theory of "partial takings," but recognizing that takings claims should be limited to valid government actions: "The Takings Clause was designed to protect individuals and compensate them for very legitimate exercises of government power. The due process clause of the Fifth Amendment protects individuals from illegitimate exercises of such power.").

²¹ 700 A.2d 1075 (R.I. 1997).

²² Id. at 1083 n.5.
²³ 954 P.2d 250 (Wash. 1998).
²⁴ Id. at 258.
²⁵ 640 So. 2d 54 (Fla. 1994).
²⁶ Id. at 58. Concededly, there is contrary authority in other cases that rely upon the language of the Agins opinion and find takings based on a means-ends theory. See, e.g., *Richardson v. City & County of Honolulu*, 124 F.3d 1150 (9th Cir. 1997) (invalidating a rent control ordinance as a taking because it did not "substantially further[] a legitimate government interest"); *Seawall Assocs. v. City of New York*, 74 N.Y.2d 92 (N.Y. 1989) (striking down a ban on the conversion of single room occupancy units as a taking because the plaintiff failed to demonstrate that the ordinance "substantially advanced" the goal of relieving homelessness). See also *Whitehead Oil Co. v. City of Lincoln*, 515 N.W.2d 401 (Neb. 1994), which is apparently the only case in the nation in which a court has entered a final award of financial compensation under a means-ends theory. Cf. *Santa Monica Beach, Ltd. v. Superior Court*, 968 P.2d 993, 1012 (1999) (Kennard, J., concurring) (employing the "substantially advances" test to uphold a rent control statute, but noting the existence of the "more fundamental question" whether "a means-ends test [is] an appropriate measure of whether a regulatory taking has occurred").
²⁷ See *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 119 S. Ct. 1624 (1999); *Eastern Enters. v. Apfel*, 524 U.S. 498 (1998).
²⁸ 524 U.S. at 498.
²⁹ See id. at 529.
³⁰ 26 U.S.C. §§ 9701-9708, 9711-9712, 9721-9722 (1994 & Supp. III 1997).
³¹ See 524 U.S. at 539.
³² *Del Monte Dunes*, 119 S. Ct. at 1645.
³³ Id. at 1644 (Kennedy, J. writing for the Court); id. at 1649 n.2 (Scalia, J., concurring in part and concurring in the judgment); id. at 1660 n.12 (Souter, J., concurring in part and dissenting in part).
³⁴ *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 127 (1978).
³⁵ 277 U.S. 183 (1928).
³⁶ Id. at 188.
³⁷ Id. at 185.
³⁸ 396 U.S. 590 (1962).
³⁹ See id. at 591.
⁴⁰ See id. at 594.
⁴¹ *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980).
⁴² Confusingly, the Agins Court cited *Nectow* as the basis for the means-ends test and cited *Penn Central* as support for the economic burden test. Id. (citing *Nectow*, 277 U.S. at 188, and *Penn Central*, 438 U.S. at 138 n.36).
⁴³ 272 U.S. 365 (1926).
⁴⁴ *Agins*, 447 U.S. at 260 (citing *Nectow*, 277 U.S. at 188 (quoting *Village of Euclid*, 272 U.S. at 395)).
⁴⁵ A number of commentators have previously observed that the *Penn Central/Agins* means-ends test was rooted in due process doctrine. See, e.g., J. Peter Byrne, *Ten Arguments for the Abolition of the Regulatory Takings Doctrine*, 22 *ECOLOGICAL L.Q.* 89, 104 (1995); Jerold S. Kayden, *Land Use Regulations, Rationality, and Judicial Review: The RSVP in the Nollan Invitation (Part I)*, 23 *URB. LAW.* 301, 316-25 (1991); see also John Echeverria & Sharon Dennis, *The Takings Issue and the Due Process Clause: A Way Out of a Doctrinal Confusion*, 17 *VT. L. REV.* 695, 698-701 (1993); Jan G. Laitos, *The Public Use Paradox and the Takings Clause*, 13 *J. ENERGY NAT. RESOURCES & ENVTL. L.* 9, 49 (1993).
⁴⁶ 350 N.E.2d 381 (N.Y. 1976).
⁴⁷ 260 U.S. 393, 415 (1922).
⁴⁸ 350 N.E.2d at 385.
⁴⁹ Id.
⁵⁰ 473 U.S. 172 (1985).
⁵¹ See id. at 197-200.
⁵² 482 U.S. 304 (1987).
⁵³ See id. at 318-22.

⁵⁴ 467 U.S. 229 (1984).
⁵⁵ *Id.* at 242-43.
⁵⁶ *Id.*
⁵⁷ *Id.* at 241 (citing *Missouri Pacific Ry. Co. v. Nebraska*, 164 U.S. 403, 416 (1896), and *Thompson v. Consolidated Gas Utils. Corp.*, 300 U.S. 55, 80 (1937) (both due process cases)).
⁵⁸ Justice Brennan made essentially the same point in his opinion in *San Diego Gas & Electric v. City of San Diego*, 450 U.S. 621, 656 n.32 (1981) (Brennan, J., dissenting) (distinguishing a claim that a valid government action effects a compensable taking from the "different case . . . where a police power regulation is not enacted in furtherance of the public health, safety, morals, or general welfare so that there may be no 'public use'").
⁵⁹ U.S. CONST. amend. V.
⁶⁰ *Id.*; *id.* amend. XIV, § 1.
⁶¹ 501 U.S. 957 (1991).
⁶² *Id.* at 978 n.9.
⁶³ 505 U.S. 1003 (1992).
⁶⁴ *Id.* at 1014 (quoting *Legal Tender Cases*, 79 U.S. 457, 551 (1871), and *Transp. Co. v. Chicago*, 99 U.S. 635, 642 (1878)).
⁶⁵ John Hart, *Colonial Land Use Law and its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252 (1996).
⁶⁶ William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782 (1995); see also WILLIAM MICHAEL TREANOR, ENVIRONMENTAL POLICY PROJECT, *THE ORIGINAL UNDERSTANDING OF THE TAKINGS CLAUSE* (1998). Some scholars, notably Richard Epstein of the University of Chicago, have read the relevant historical evidence to support a more liberal assessment of the original understanding of the Takings Clause. See RICHARD EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985). But that minority viewpoint does not withstand an objective reading of the relevant historical materials. As stated in characteristically pithy fashion by former judge Robert Bork, a noted skeptic about government regulation and perhaps the nation's leading advocate of faithful adherence to the original understanding of the Constitution, "[the] difficulty is not that [Richard] Epstein's constitution would repeal much of the New Deal and the modern regulatory-welfare state but rather that these conclusions are not plausibly related to the original understanding of the takings clause." ROBERT BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 230 (1990).
⁶⁷ *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126 (1985).
⁶⁸ 364 U.S. 40 (1960).
⁶⁹ *Id.* at 49.
⁷⁰ See *id.*
⁷¹ *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 656 (1981) (Brennan, J., dissenting).
⁷² 482 U.S. 304 (1987).
⁷³ *Id.* at 305 (second emphasis added); see also *Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1, 11 (1990).
⁷⁴ 480 U.S. 470 (1987) (Rehnquist, C.J., dissenting).
⁷⁵ *Id.* at 511 (emphasis added).
⁷⁶ See discussion *supra* Part II.
⁷⁷ 483 U.S. 825 (1987).
⁷⁸ 512 U.S. 374 (1994).
⁷⁹ 483 U.S. at 834 (citing *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980)).
⁸⁰ 512 U.S. at 388 (citing *Nollan*, 483 U.S. at 834 (quoting *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 127 (1978))).
⁸¹ *Dolan*, 512 U.S. at 391; *Nollan*, 483 U.S. at 827.
⁸² 483 U.S. at 828.
⁸³ 512 U.S. at 379-81.
⁸⁴ See *Dolan*, 512 U.S. at 384; *Nollan*, 483 U.S. at 831.
⁸⁵ See *Dolan*, 512 U.S. at 384-85; *Nollan*, 483 U.S. at 836-37.
⁸⁶ See *Dolan*, 512 U.S. at 384-85; *Nollan*, 483 U.S. at 836-37.

⁸⁷ Dolan, 512 U.S. at 388-91; Nollan, 483 U.S. at 837-41.

⁸⁸ 483 U.S. at 837.

⁸⁹ 512 U.S. at 391.

⁹⁰ See, e.g., *Seawall Assocs. v. City of New York*, 74 N.Y.2d 92 (N.Y. 1989); cf. *Richardson v. City & County of Honolulu*, 124 F.3d 1150, 1166 (9th Cir. 1997) (invalidating a rent control ordinance as a taking because it did not "substantially further a legitimate government interest").

⁹¹ See, e.g., Jan Laitos, *Takings and Causation*, 5 WM. & MARY BILL RTS. J. 359, 426 (1997) (proffering the nexus test generally for the evaluation of "regulations affecting property"). See, e.g., *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (holding that a regulation that imposes a physical occupation of property results in a categorical taking regardless of how little property is occupied).

⁹² 512 U.S. at 385.

⁹³ See discussion *infra* Part V.B.

⁹⁴ *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 n.3 (1987).

⁹⁵ See discussion *supra* Part III.A.1.

⁹⁶ The Court provided a classic statement of the modern standard for review of economic relations under the Due Process Clause in *Nebbia v. New York*, 291 U.S. 502 (1934). The Court said that if "the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary, nor discriminatory, [then] the requirements of due process are satisfied." *Id.* at 537. The Court emphasized that its proper role is not to evaluate the wisdom of government action, because "[w]ith the wisdom of the policy adopted, [and] with the adequacy . . . of the law enacted to forward it, the courts are both incompetent and unauthorized to deal." *Id.*

⁹⁷ 524 U.S. 498 (1998).

⁹⁸ *Id.* at 517 (plurality opinion).

⁹⁹ *Id.* at 536.

¹⁰⁰ See *id.* at 519-68.

¹⁰¹ *Id.* at 529-37.

¹⁰² *Id.* at 537-38.

¹⁰³ *Id.* at 539-50 (Kennedy, J., concurring in the judgment and dissenting in part).

¹⁰⁴ *Id.* at 550-68 (Stevens, J., dissenting, and Breyer, J., dissenting).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 539-47 (Kennedy, J., concurring in the judgment and dissenting in part); see *id.* at 553-58 (Stevens, J., dissenting).

¹⁰⁷ *Id.* at 540 (Kennedy, J., concurring in the judgment and dissenting in part).

¹⁰⁸ *Id.* at 541.

¹⁰⁹ *Id.* at 542.

¹¹⁰ *Id.* Justice Kennedy's reasoning, though endorsed by four other members of the Court, was somewhat unexpected in light of some of the Court's earlier decisions. In particular, in *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211 (1986), and *Concrete Pipe & Products, Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602 (1993), the Court had considered very similar takings challenges to government regulation of pension obligations that imposed new financial liabilities on private firms. The Court ultimately rejected the takings claims in both cases, but did not suggest that the Takings Clause might be completely inapplicable for lack of any impact on a specific property right or interest. Thus, the analysis by the majority in *Eastern Enterprises*, though not an outright repudiation of earlier precedent, represents a change in course for the Court and establishes an important new limit on the scope of regulatory takings claims.

¹¹¹ 524 U.S. at 539-50.

¹¹² *Id.* at 546-47.

¹¹³ *Id.*

¹¹⁴ *Id.* at 554 (Breyer, J., dissenting).

¹¹⁵ *Id.* at 537 (plurality opinion).

¹¹⁶ *Id.* at 537-38.

¹¹⁷ *Id.* (citing *Ferguson v. Skrupa*, 372 U.S. 726, 731 (1963), and *Williamson v. Lee Optical, Inc.*, 348 U.S. 483, 488 (1955)).

¹¹⁸ *Id.* at 523 (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979)).

¹¹⁹ 119 S. Ct. 1624 (1999). The Supreme Court issued its decision in *Eastern Enterprises* on June

25, 1998. The Court had granted the petition for certiorari in *Del Monte Dunes* three months earlier, on March 30, 1998. *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 523 U.S. 1045 (1998) (granting certiorari).

¹²⁰ See *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 95 F.3d 1422, 1430 (9th Cir. 1996), *aff'd*, 119 S.Ct. 1624 (1999).

¹²¹ See 119 S. Ct. at 1633 (Kennedy, J., writing for the Court). The district court had initially dismissed the action as not ripe on the ground that the developer had neither obtained a definitive decision from the city nor sought just compensation in state court. *Id.* The appellate court reversed and remanded the case. See *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 920 F.2d 1496 (9th Cir. 1990), *aff'd after remand*, 95 F.3d 1422 (9th Cir. 1996), *oral reh'g granted*, 118 F.3d 660 (9th Cir. 1997), *reh'g en banc denied*, 127 F.3d 1149 (9th Cir. 1997), *aff'd*, 119 S. Ct. 1624 (1999).

¹²² *Del Monte Dunes*, 119 S. Ct. at 1634.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

Del Monte Dunes at Monterey, Ltd. v. City of Monterey, 95 F.3d 1422, 1435 (9th Cir. 1996), *aff'd*, 119 S. Ct. 1624 (1999).

¹²⁸ *Id.* at 1428-29.

¹²⁹ *Id.* at 1430-34.

¹³⁰ *Id.* at 1430 (quoting *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994)).

¹³¹ *Del Monte Dunes*, 119 S. Ct. at 1635.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ The author served as counsel for the League for Coastal Protection et al. See Brief Amicus Curiae of League for Coastal Protection, Planning and Conservation League, Center for Marine Conservation, Chesapeake Bay Foundation, National Trust for Historic Preservation, National Wildlife Federation, and Sierra Club in Support of Petitioner, *Del Monte Dunes* (No. 97-1235).

¹³⁵ *Del Monte Dunes*, 119 S. Ct. at 1630.

¹³⁶ *Id.* at 1643-44.

¹³⁷ *Id.* at 1644-45, 1635.

¹³⁸ *Id.* at 1645-50 (Scalia, J., concurring in part and concurring in the judgment).

¹³⁹ *Id.* at 1651-53 (Souter, J., concurring in part and dissenting in part).

¹⁴⁰ *Id.* at 1650.

¹⁴¹ *Id.* at 1636 (Kennedy, J., writing for the Court).

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 1649 n.2 (Scalia, J., concurring in part and concurring in the judgment).

¹⁴⁵ *Id.* at 1660 n.12 (Souter, J., concurring in part and dissenting in part).

¹⁴⁶ *Id.* at 1635 (Kennedy, J., writing for the Court).

¹⁴⁷ *Id.* at 1637.

¹⁴⁸ *Id.* at 1636.

¹⁴⁹ *Id.* at 1636-37.

¹⁵⁰ *Id.* at 1635.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ See *id.* at 1645 (Scalia, J., concurring in part and concurring in the judgment).

¹⁵⁴ *Id.* at 1650 (Souter, J., concurring in part and dissenting in part).

¹⁵⁵ See *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 827 (1987).

¹⁵⁶ 119 S. Ct. at 1635 (Kennedy, J., writing for the Court).

¹⁵⁷ 42 U.S.C. § 1983 (1994).

¹⁵⁸ 119 S. Ct. at 1642-44 (citing U.S. CONST. amend. VII).

¹⁵⁹ 517 U.S. 370 (1996).

¹⁶⁰ 119 S. Ct. at 1642-44 (plurality opinion). Although it was the most hotly debated issue in the case, the Court's jury trial ruling, which stated that a takings claimant suing in federal court under section 1983 is entitled to a jury trial under the Seventh Amendment, is likely to have little practical significance in future cases. As noted by the Court, a takings claimant cannot bring suit in federal court unless and until the claimant has been denied an adequate postdeprivation remedy. *Id.* at 1644. The Court said that the claimant in *Del Monte Dunes* was excused from this requirement only because, at the time the suit was filed, it was not clear whether California courts provided a forum for claims for compensation under regulatory takings doctrine. *Id.* at 1638-39. However, California courts have since recognized their obligation to hear such claims. *Id.* at 1644. Therefore, because a claimant in the position of the *Del Monte Dunes* developer must now pursue his or her claim in state court first, the precise issue raised in *Del Monte Dunes* is unlikely to arise in any future case. [fcfp] Furthermore, because the Seventh Amendment does not apply to state courts, the ruling in *Del Monte Dunes* is not directly applicable to state inverse condemnation proceedings. *Id.* at 1643. The question of a takings claimant's entitlement to a jury trial in a section 1983 regulatory takings action in federal court may arise in the future when a takings claimant, having pursued state remedies and been denied relief, seeks to relitigate the issue in federal court. In such a context, before even reaching the jury question, there will be a substantial question as to whether relitigation of the claim in federal court is barred by principles of claim and issue preclusion or by the *Rooker-Feldman* doctrine, under which a party losing in state court is barred from seeking in federal court what in substance would be appellate review of the state court judgment. See *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 416 (1923). [fcfp] Finally, the Court suggested that the jury trial right that it recognized in *Del Monte Dunes* rested on the fact that the claimant was denied "even an adequate forum for seeking compensation." 119 S.Ct. at 1641. Thus, even if the takings claim were otherwise viable in federal court, the availability of an adequate state forum for the claim might preclude the claim of a jury trial right in an attempted relitigation of the case in federal court.

¹⁶⁰ *Del Monte Dunes*, 119 S. Ct. at 1644.

¹⁶¹ See *id.* at 1630.

¹⁶² *Id.* at 1636; *id.* at 1649 n.2 (Scalia, J., concurring in part and concurring in the judgment); *id.* at 1650 (Souter, J., concurring in part and dissenting in part).

¹⁶³ See *Eastern Enters. v. Apfel*, 524 U.S. 498, 539-42 (1998) (Kennedy, J., concurring in the judgment and dissenting in part); see also *supra* note 114 and accompanying text.

¹⁶⁴ See 524 U.S. at 542. Because the district court in *Del Monte Dunes* had rejected the due process claim, 119 S. Ct. at 1634 (Kennedy, J., writing for the Court), Justice Kennedy did not have the option of relying on the Due Process Clause rather than the Takings Clause in ruling in favor of the plaintiff. His reliance on the Takings Clause may therefore be viewed as *serendipitous*.

¹⁶⁵ 524 U.S. at 542 (Kennedy, J., concurring in the judgment and dissenting in part).

Del Monte Dunes, 119 S. Ct. at 1649 n.2 (Scalia, J., concurring in part and concurring in the judgment).

¹⁶⁶ *Id.* at 1650-51 (Souter, J., concurring in part and dissenting in part).

¹⁶⁷ *Id.* at 1654.

¹⁶⁸ *Id.* at 1659-60.

¹⁶⁹ *Id.* at 1635 (Kennedy, J., writing for the Court).

¹⁷⁰ See *Eastern Enters. v. Apfel*, 524 U.S. 498, 545 (1998) (Kennedy, J., concurring in the judgment and dissenting in part) (citing *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 314-315 (1987)).

¹⁷¹ *Id.*

¹⁷² *Id.* at 546.

¹⁷³ The basic test for a regulatory taking is whether a regulation "denies an owner economically viable use of his land." *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980) (citing *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 138 n.36 (1978)); see also *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016 (1992) (stating that, absent exceptional circumstances, a regulation that "denies all economically beneficial or productive use of land" results per se in a taking). Most lower federal and state courts have faithfully applied this test. See, e.g., *Rehard v.*

Lee County, 968 F.2d 1131, 1135(11th Cir. 1992) ("[T]he only issue in just compensation claims is whether an owner has been denied all or substantially all economically viable use of his property."); *Midnight Sessions, Ltd. v. City of Philadelphia*, 945 F.2d 667, 677 (3d Cir. 1991) (finding no taking where court could not conclude "that the alleged diminution in the value of the properties deprived appellees of all economically viable use of them"); *Zealy v. City of Waukesha*, 548 N.W.2d 528, 531 (Wis. 1996) ("[T]he rule emerging from opinions of our state courts and the United States Supreme Court is that a regulation must deny the owner all or substantially all practical use of a property in order to be considered a taking for which compensation is required."). But see *Florida Rock Indus., Inc. v. United States*, 18 F.3d 1560, 1569-73 (Fed. Cir. 1994) (adopting a so-called "partial taking" theory).

¹⁷⁴ In *Tampa-Hillsborough County Expressway Authority v. AGWSCorp.*, 640 So. 2d 54 (Fla. 1994), the Florida Supreme Court reasoned that a state mapping statute should be deemed invalid under the Due Process Clause, but not viewed as effecting a compensable taking, in part to avoid a potential flood of claims for "just compensation" for temporary takings based on the properties' rental value when in fact the statute had imposed only nominal economic burdens on the landowners. *Id.* at 57-58.

¹⁷⁵ *First English*, 482 U.S. at 314.

¹⁷⁶ See *Crocker v. United States*, 125 F.3d 1475, 1476 (Fed. Cir. 1997).

¹⁷⁷ 42 U.S.C. § 1983 (1994); see *Monell v. New York City Dep't of Social Serv.*, 436 U.S. 658, 690 (1978); cf. *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 64-71 (1989) (holding that a state is not a "person" for the purposes of section 1983). No statute comparable to section 1983 provides general authorization for damage suits against the United States for constitutional violations.

¹⁷⁸ See *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980).

¹⁷⁹ *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 n.3 (1987).

¹⁸⁰ *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 119 S.Ct. 1624, 1649 n.2 (1999) (Scalia, J., concurring in part and concurring in the judgment). It is also noteworthy that in *Del Monte Dunes*, in the instructions it gave to the jury, the district court interpreted the *Agins* means-ends test as requiring the city to show only a "reasonable relationship" to a legitimate public purpose to avoid a taking. *Id.* at 1634 (Kennedy, J., writing for the Court). The Supreme Court, in rejecting the argument that the appellate court had allowed the jury to second-guess local officials, repeated this reformulation of the *Agins* test several times without comment. *Id.* at 1636-37. Thus, the *Del Monte Dunes* decision can be read to support the conclusion that the takings means-ends test (assuming it exists at all) is no more demanding than ordinary due process means-ends analysis.

¹⁸¹ See *Lochner v. New York*, 198 U.S. 45 (1905) (striking down state regulation of bakers' hours as violative of due process).

¹⁸² See, e.g., *Concrete Pipe & Prods., Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 637 (1993) ("It is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way.") (quoting *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976)).

¹⁸³ *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 314 (1987).

¹⁸⁴ See *id.* at 315.

¹⁸⁵ See *Florida Rock Indus., Inc. v. United States*, 18 F.3d 1560, 1575 (Fed. Cir. 1994) (Nies, J., dissenting) ("The more often the government must pay for exercising control over private property, the less control there will be. That is the reality.").

¹⁸⁶ See *City of Monterey v. Del Monte Dunes at Monterey, Inc.*, 119 S. Ct. 1624, 1644 (1999) (Kennedy, J., writing for the Court).

¹⁸⁷ See, e.g., *County of Sacramento v. Lewis*, 523 U.S. 833, 853-55 (1998).

¹⁸⁸ See *supra* note 162.