

Revvng the Engines in Neutral: City of Monterey v. Del Monte Dunes at Monterey, Ltd.
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This paper written by John D. Echeverria was published in the *Environmental Law Reporter News & Analysis*. The Editors Summary: The U.S. Supreme Courts recent decision in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.* and its implications for takings challenges, are comprehensively discussed in this Article. The author describes the claims that were before the Court, and why several earlier Court rulings were implicated. The Article then reviews the Courts holdings on three major issues, and explores the extent to which the Court provided definitive guidance regarding the scope and nature of the regulatory taking doctrine. The author's conclusion is that the law of regulatory takings remains as muddled as ever, and that significant issues were either not addressed or remain unanswered after the Court's ruling.

On May 24, 1999, after deliberating for eight long months, the U.S. Supreme Court finally decided its latest regulatory takings case, *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*,¹ and affirmed a jury verdict of \$1.45 million in favor of the property owner. Looking at the issues the Court actually resolved, it is remarkable that it took so much time and effort to decide so little. The most interesting aspect of *Del Monte Dunes* turns out to be what the Court left for resolution in future cases.

In part, the decision represents a victory for developers and other landowners who sue under the Takings Clause² or use the threat of doing so as leverage in negotiations with government officials. The "bottom line" is that the plaintiff won, extending an unbroken string of landowner victories stretching back more than a decade in Court land use takings cases involving state or local governments.³ In terms of doctrine, the Court resolved that the Seventh Amendment accorded the plaintiff the right to a jury trial in a federal court takings action under 42 U.S.C.1983-though, for the reasons discussed below, other litigants' ability to invoke this new jury right may prove to be quite limited.

The decision also contains positive news for government defendants. There had been a sharp debate in the lower federal and state courts about whether the "rough proportionality" test the Court established in *Dolan v. City of Tigard*⁴ applied only in takings challenges to development exactions, or whether it represented a general test for regulatory takings. The debate over this issue also implicated a more fundamental question about the appropriate degree of scrutiny of government regulations under the Takings Clause. Unanimously, the *Del Monte Dunes* Court decided that the *Dolan* test, and the relatively demanding standard of review implied by that decision, are confined to the exactions context.

Most significant, however, is the question the Court did not decide: whether the alleged failure of a regulation to advance a legitimate governmental purpose states a claim under the Takings Clause? The Court has long recognized that the Takings Clause requires compensation for regulations that eliminate a property's economic value.⁵ Far less clear has been whether the clause also supports a claim for compensation because a regulation fails to advance a legitimate governmental purpose, because, for example, the regulation is unauthorized, irrational, or otherwise improper. The Court had recited such a means-ends takings test in many prior decisions but had never explained it, and the Court's decision the year before in *Eastern Enterprises v. Apfel*⁶ cast significant doubt on its validity. In *Del Monte Dunes*, the Court not only passed on the opportunity to resolve the issue, but made it more patent than before that the validity of the ostensible means-ends takings test is both an important and an open question.

The Court's uncertainty about basic elements of regulatory takings doctrine is striking. After more than 20 years of intensive engagement in the issue, one might suppose that the Court would have settled the basic outlines of takings law. But Justice Kennedy, speaking for the Court, declared that "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...."⁷ This statement may signal the Court's intention to buckle down and come up with some definitive answers, perhaps in the next few years. Or it may reflect the Court's frustration at its inability to lay down clearer rules, possibly suggesting some uncertainty about the Court's ability to ever bring order to this famously intractable area of the law.⁸

The Preliminaries

The lawsuit arose from a long and complicated dispute over the proposed development of a 38-acre oceanfront parcel in Monterey, California. Over a period of years, the developer, Del Monte Dunes at Monterey, Ltd. (Del Monte), submitted increasingly less ambitious residential development plans in response to requests from the planning commission and the city council that it scale back the project to minimize impacts on adjacent parkland, maintain public beach access, retain view corridors, and avoid impacting endangered species habitat. The developer's efforts to address these concerns sharply restricted its ability to develop the property. With respect to the endangered species issue in particular, Del Monte objected that investigations had discovered only one specimen of the species, the Smith's Blue Butterfly, and argued that the proposed habitat improvement program included in the development proposal would actually produce a net gain in butterfly habitat.

The city and the developer disagreed about whether the review process left the developer a realistic option to develop any portion of the property. In any event, the developer filed suit under 42 U.S.C. 1983 alleging a due process violation, an equal protection violation, and a compensable taking under the Takings Clause of the Fifth Amendment. In the taking claim, Del Monte alleged, in conventional fashion, that the city's actions had denied it all economic use of the property and, more problematically, that the city's actions failed 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 extended skirmishing over the issue of the ripeness of Del Monte's takings claim,⁹ the federal district court brought the case to trial. Over the city's objections, the court decided to submit both the taking claim and the equal protection claim to the jury. The court determined to resolve the due process claim itself. As to the taking issue, at the close of evidence the court instructed the jury that it could find a taking on the ground that the owner had been denied "all economically viable use of its property" or, alternatively, that the city's rejection of the developer's final development proposal "did not substantially advance a legitimate public purpose."¹⁰ On the latter issue, the court instructed the jury that the city's stated goals, including its efforts to protect the environment and preserve open space, represented legitimate public purposes, and that the jurors' task was "to decide if the city's decision here substantially advanced" any of these purposes.¹¹ The court emphasized that "[t]he regulatory actions of the city or any agency substantially advance a legitimate public purpose if the [actions bear] a reasonable relationship to that objective."¹²

The jury delivered a general verdict for Del Monte on the taking claim (which did not identify the specific takings theory upon which the jury relied), and a separate verdict for the developer on the equal protection claim. The jury made an award of \$1.45 million. After receiving the jury's verdict, the district court resolved the remaining due process claim in favor of the city, asserting that this conclusion was not inconsistent with the jury's verdict on the takings and equal protection claims.

The city appealed and the Ninth Circuit affirmed.¹³ First, the appeals court rejected the city's argument that the district court had erred in submitting the taking claim to the jury.¹⁴ Without addressing whether Del Monte might have been entitled to a jury trial under the Seventh

Amendment, the court concluded that 1983 granted a jury right. In addition, the appeals court 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 public purpose.¹⁵ In a near throw away line that ultimately became quite significant, the court said, invoking the Court's decision in *Dolan*, 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.'"¹⁶ Finally, having concluded that the verdict could be upheld under the Takings Clause, the appeals court determined that it was unnecessary to address the equal protection claim.

Defining the Playing Field

The city then filed a petition for *certiorari*, which the Court granted, presenting three issues for review.

The Jury Issue

First, the city renewed its argument that the taking issue had been improperly submitted to the jury. On its face, this issue was probably the most clearly "*cert. worthy*," because the Ninth Circuit's decision presented a clear conflict with a decision on this issue by the Eleventh Circuit.¹⁷ Under the established procedure for resolving right-to-jury issues, the Court used a two-part inquiry.¹⁸ First, before even considering the potential constitutional issue, the Court had to determine whether a right to jury trial was granted by statute, in this case by 1983. If the Court found no statutory right to a jury, it then had to proceed to the question whether the Seventh Amendment granted a jury right. Under the Court's decision in *Markman v. Westview Instruments, Inc.*,¹⁹ the constitutional issue would, in turn, present another two-part inquiry. First, "we ask... whether we are dealing with a cause of action that either was tried at law at the time of the founding or is at least analogous to one that was."²⁰ Second, "[i]f the action in question belongs in the law category, we then ask whether the particular trial decision must fall to the jury in order to preserve the substance of the common-law right as it existed in 1791."²¹

The jury issue presented the Court a thorny potential federalism problem. The claimed right to a jury trial created an apparent conflict with precedent in California,²² and the rule followed in a number of other states,²³ that claimants have no right to a jury trial in inverse condemnation actions. Because 1983 claimants can file in state court as easily as federal court,²⁴ the Ninth Circuit's jury ruling created the risk that claimants could circumvent state court jury practice simply by asserting a claim under 1983. On the other hand, the general practice in the lower federal courts, outside the takings context, has been to grant jury trials in 1983 actions.²⁵ Thus, the Ninth Circuit's resolution of the jury issue had the apparent virtue of promoting uniform federal court practice in actions brought under section 1983.

Moreover, as Justice Ginsburg highlighted during oral argument, the jury issue presented a potentially rather large tempest in a rather small teapot. It was clear that, whatever its decision, the Court's resolution of the jury issue would have no effect on takings actions against the United States, in which the non availability of a jury has long been settled.²⁶ Nor could the Court's ruling have any direct bearing on the state courts if the Court concluded that 1983 did not create a jury right but recognized such a right only under the Seventh Amendment, which does not apply in the state courts.²⁷

It was even uncertain what impact the jury ruling would have on other similar actions brought pursuant to 1983 against local governments in federal courts. In 1985, in *Williamson County Regional Planning Commission v. Hamilton Bank*,²⁸ the Court ruled that a takings claimant suing a local government has no "ripe" claim under the Fifth Amendment if the claimant has not

pursued available state procedures for seeking the compensation claimed. In *Del Monte Dunes* the Ninth Circuit ruled that *Williamson County* did not apply because at the time the suit was filed it was not yet clear that California courts were required to provide a forum for claims for regulatory takings.²⁹ But now, as a result of the Supreme Court's decision in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*,³⁰ the California courts, along with all other state courts, must hear such claims. Thus, if *Del Monte Dunes* were filed today, the issue of the right to a jury trial in federal court simply would not arise, because the federal claim could not even be filed in the first instance in federal court.³¹ In the end, the Court wondered, would the jury question ever arise in any future litigation, and if not why was the Court bothering to address it? By the time these complexities became apparent, the decision to grant the petition had come and gone, and the Court was well into the merits of the case.³²

The Dolan Issue

The second issue in the petition for *certiorari* was whether the court of appeals had erred in invoking the *Dolan*³³ "rough proportionality" standard. The scope of *Dolan* was, on its face, somewhat of a side issue in the case. The jury instructions did not reflect the "rough proportionality" standard, and in fact *Dolan* had not even been handed down until after the trial. *Dolan* became an issue in the litigation only because the Ninth Circuit cited the decision to bolster its ruling upholding the jury's finding of liability. Nonetheless, the issue was important because of the uncertainty about the scope of the *Dolan* test in the lower federal and state courts.

Dolan involved a regulatory takings challenge to a city's requirement that the owner of a plumbing supply store dedicate a portion of her property for use as a bike path and a green way as a condition of receiving a permit to expand the business. Reversing the Oregon Supreme Court, the Court ruled that these conditions could be imposed consistent with the Takings Clause only upon a showing that the effects of the conditions on the landowner were "roughly proportional" to the anticipated impacts of the development itself. The Court concluded that the claimant had a viable taking claim under this test because the city had failed to demonstrate with sufficient precision how the bike path and greenway requirements were related, respectively, to the projected impact of the store expansion on traffic congestion, or increased flooding as a result of more intensive development of the property.

The Court's formulation of the "rough proportionality" test in *Dolan* built upon its analysis in the case of *Nollan v. California Coastal Commission*,³⁴ decided seven years earlier. In that case, the Court struck down as a taking a requirement by the California Coastal Commission that a property owner grant public access to the beach in front of his property as a condition of a permit to expand his existing residential property. The *Nollan* Court held that this beach access requirement effected a taking because it had no logical "nexus" with the projected impacts of the owner's redevelopment plans. In *Dolan*, the Court concluded that the *Nollan* "nexus" test was satisfied and then proceeded to address the "question left open by our decision in *Nollan*..., [that is] what is the required degree of connection between the exactions imposed by the [government] and the projected impacts of the proposed development."³⁵ The "rough proportionality" test was the result.

Nollan and *Dolan* both involved very particular factual situations. In both cases the Court thought it indisputable that the permit conditions, standing alone, represented takings under the Court's per se rule for government actions that result in a physical occupation.³⁶ The issue presented by these cases 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 a regulatory permit. The Court concluded that a government defendant could avoid a finding of a taking, but only if it could demonstrate that the conditions were closely related to the legitimate purposes of the regulatory process itself based on the "nexus" and "rough proportionality" tests.

Lower federal and state courts had given varying interpretations to the scope of the *Dolan/Nollan* tests. Most courts had ruled that the heightened standard of review established by these decisions was logically explained by and appropriately limited to the context of conditions involving physical occupations.³⁷ But one important question was whether these standards applied to permit conditions requiring payments of money rather than dedication of land. A divided California Supreme Court had extended the *Dolan* test to monetary exactions,³⁸ but most other courts had refused to do so.³⁹ And some courts⁴⁰ and commentators⁴¹ believed that the "nexus" and "rough proportionality" inquiries provided an appropriate template for analyzing all types of regulatory actions under the Takings Clause. According to this view, as exemplified by the Ninth Circuit's analysis in *Del Monte Dunes*, the courts should closely scrutinize whether and to what degree a regulatory action serves the stated objectives of the regulatory program as a whole.

The Court's decision to grant the petition for *certiorari* presented an opportunity to settle the debate. *The Second-Guessing/Means-Ends Issue* Finally, the petition raised the issue, which the Court described as "somewhat obscure,"⁴² whether the court of appeals "impermissibly based its decision on a standard that allowed the jury to reweigh the reasonableness of the city's land-use decision."⁴³ This assignment of error challenged the Ninth Circuit's ruling upholding the jury verdict to the extent it rested on the theory that the city's actions were "not reasonably related to legitimate public interests." This argument did not challenge the sufficiency of the evidence (a near impossible argument at the Supreme Court level), nor did it raise a direct question about the legal accuracy of the jury instructions, which the city had played a role in drafting and as to which it had reserved no objections. Instead, the city argued that the Ninth Circuit had interpreted the means-ends test in a way that gave no deference to the judgments of local officials and, in effect, authorized the jury to "second-guess" the decision of city officials.⁴⁴

Underlying the issue the city raised was a more fundamental question about whether the "reasonable relationship" test the district court applied in its instructions was actually a valid takings test at all. Several *amici* who supported the city, including the United States and a coalition of conservation groups led by the California League for Coastal Protection,⁴⁵ emphasized this argument. These efforts to focus the Court's attention on this threshold issue were justified in part by the Court's decision in *Eastern Enterprises*,⁴⁶ handed down three months after the Court granted review in *Del Monte Dunes*.⁴⁷ In *Eastern Enterprises* a majority of the Court strongly suggested that a means-ends challenge to the validity of government action raised an issue under the Due Process Clause, but not under the Takings Clause. The Court, by a vote of 5-4, struck down as unconstitutional the federal Coal Industry Retiree Health Benefit Act. But five Justices (Justice Kennedy and the four dissenting Justices in the case) rejected the takings claim, which was based on a standard similar to the means-ends test applied by the Ninth Circuit in *Del Monte Dunes*.

The basic challenge to the Coal Act was that it imposed an arbitrary and unfair retroactive financial obligation on the company, which had formerly been involved in the coal business, to help pay for the health care of its retired workers and their dependents, including health care costs that were unrelated to the workers' former employment. Justice Kennedy rejected the takings claim, in part,⁴⁸ because he thought the allegations raised an issue more appropriately analyzed under the Due Process Clause. Drawing a sharp line between the two clauses, he stated that the Due Process Clause bars 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."⁴⁹ 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."⁵⁰ The inference was that if an action fails to reasonably advance legitimate public purposes, and is therefore not "permissible," it cannot be found to effect a taking. The four dissenting Justices endorsed Justice Kennedy's reasoning.⁵¹

The remaining four Justices who joined in Justice O'Connor's plurality opinion rejected this reading of the Takings Clause. They concluded that the legitimacy of the Coal Act was properly analyzed under the Takings Clause. On the other hand, as to the due process claim, the plurality concluded not simply that the company had not demonstrated a violation, but that the Due Process Clause provided an inappropriate basis for evaluating the validity of economic legislation such as the Coal Act.

This sharp division in *Eastern Enterprises* reflected a long-festering uncertainty about whether the alleged failure of a government action to serve a legitimate public purpose actually represents an independent takings test. The Court first articulated a means-ends takings test over 20 years earlier in *Penn Central Transportation Co. v. City of New York*,⁵² repeating it several years later in *Agins v. City of Tiburon*.⁵³ After that pair of decisions, the Supreme Court recited the test in at least half a dozen cases.⁵⁴ Indeed, in *Nollan*, the Court (per Justice Scalia), went so far as to state that "[w]e have long recognized that land use regulation does not effect a taking" if "it 'substantially advance(s) legitimate state interests.'"⁵⁵

On the other hand, there was substantial justification for the majority's refusal in *Eastern Enterprises* to accept this expansive reading of the Takings Clause. Commentators had long expressed doubt about the validity of the *Penn Central/Agins* means-ends test,⁵⁶ and the Court itself had never squarely applied this ostensible takings test to uphold a finding of a regulatory taking. In *Nollan* and *Dolan*, the Court relied in part on the means-ends test to support the conclusion that a dedication requirement can effect a taking. However, for the reasons discussed above, the tests announced in those decisions were arguably limited to regulations involving physical occupation of private property. Therefore, application of the *Penn Central/Agins* formula in that context did not necessarily support the idea that means-ends analysis represents an appropriate general test for regulatory takings.

In addition, there was substantial reason to believe that this ostensible takings test was really a due process test. A careful reading of the *Agins* and *Penn Central* decisions indicates that the means-ends takings test was derived from due process precedents.⁵⁷ While the Court stated in these cases that takings doctrine encompasses a kind of means-ends test, the Court was simply relabeling a due process issue as a taking issue. Nothing in the Court's discussion of this ostensible test suggested why or how, as a matter of first principles, takings law could be read to include a means-ends test.

Furthermore, the ostensible means-ends takings test was in serious tension with the language and original understanding of the Takings Clause. In a literal sense, government "takes" private property when it seizes it. Consistent with this reading, it is generally agreed that the drafters of the Takings Clause intended to address only direct appropriations of private property. As Justice Scalia stated in *Lucas v. South Carolina Coastal Council*,⁵⁸ prior to the early 20th 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.'"⁵⁹ Out of deference to this original understanding of the Takings Clause, the Court traditionally confined takings claims in the field of land use regulation to those "extreme circumstances" when regulations imposed severe economic burdens analogous to direct physical appropriations.⁶⁰ By contrast, there was no apparent justification in either the language or original understanding for a separate inquiry, totally divorced from the issue of the burdensomeness of the government action, into the legitimacy of the ends served by the action or into the means used to achieve a public purpose.⁶¹

It also was apparent that the ostensible means-ends takings theory conflicted with the part of the Takings Clause which limits compensable takings to those takings which serve a "public use." In *Hawaii Housing Authority v. Midkiff*,⁶² the Supreme Court established that the Takings Clause prohibits a taking not for a "public use," whether just compensation is paid or not. Resolution of the issue 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."⁶³ However, that test is essentially identical to the ostensible means-ends takings test articulated in *Agins*. The same means-ends test could not logically provide the standard for determining whether a government action is a "taking" and also whether it is a taking "for public use."

Finally, the idea that arbitrary or invalid government actions effected a taking was in conflict with the Court's frequently repeated statements that the Takings Clause is intended to apply only to valid government actions. As Chief Justice Rehnquist explained in *First English*,⁶⁴ the Takings Clause "is designed... to secure *compensation* in the event of *otherwise proper* interference amounting to a taking."⁶⁵ 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 be "otherwise proper." According to this logic, a government action which fails to advance a legitimate government purpose cannot result in a compensable taking because such an action is not "otherwise proper."⁶⁶

In light of the majority's rejection of the takings claim in *Eastern Enterprises*, and the substantial uncertainty about the validity of the ostensible means-ends takings test, *Del Monte Dunes* appeared to offer the Court an opportunity to definitively resolve this important issue.

The Outcome

On May 24, 1999, the Court, by a 5-4 vote, upheld the jury verdict.

Justice Kennedy wrote the opinion for the Court, addressing the three issues raised in the petition. He concluded that the takings issue was properly submitted to a jury, that the jury had not been allowed to improperly "second-guess" the judgments of city officials, and that the *Dolan* "rough proportionality" standard did not apply (but that the court of appeals' error in invoking *Dolan* was irrelevant to the outcome). Justice Scalia wrote a separate concurring opinion, focusing on the jury issue, and joined in all but one part of Justice Kennedy's opinion. Justice Souter, for himself and three other Justices, filed a dissenting opinion, arguing at length that the takings liability issue should not have been submitted to the jury, but concurring in other parts of the majority opinion, including the conclusion that *Dolan* should not be extended to this type of case.

The Jury Issue

On the jury issue, the Court concluded, without dissent, that 1983 did not itself create a right to a jury trial.⁶⁷ Justice Kennedy, speaking for the Court, rejected *Del Monte's* argument (and the Ninth Circuit's conclusion) that the statute creates a jury right because it authorizes a party claiming a deprivation of a federal right to sue through, among other things, "an action at law." He acknowledged that the Court had pointed to similar language in upholding a statutory jury right in an earlier case,⁶⁸ but concluded that this language standing alone was not sufficient to sustain the argument.

The Court's discussion of the next question, whether the Seventh Amendment guaranteed *Del Monte* a jury, was more complicated. Justice Kennedy's opinion embraced two different theories for why a section 1983 regulatory taking claim meets the first prong of *Markman*, that is, that it is "analogous" to a claim "tried at law." First, Justice Kennedy's opinion endorsed the view, independently set forth at length by Justice Scalia in his concurring opinion,⁶⁹ that all 1983 actions for monetary relief meet this test, regardless of the nature of the substantive claim being asserted. According to Justice Kennedy, claims newly created by statute meet the *Markman* test, so long as the claims "sound in tort" and involve a claim for "legal relief."⁷⁰ A 1983 claim, he said, sounds in tort because, just as a state tort remedy provides relief for invasions of state property interests, 1983 provides relief "for invasions of rights protected under federal law."⁷¹ This action

also involved a claim for legal relief, Justice Kennedy said, whether the claim was viewed as a request for compensation under the Fifth Amendment, or for damages for compensation unlawfully withheld.⁷²

Second, Justice Kennedy, joined by only three other Justices (not including Justice Scalia), concluded that Del Monte met the first branch of *Markman* even on the assumption the issue had to be resolved by examining the nature of the substantive claim (regulatory takings) being asserted. The plurality first rejected the argument that a regulatory taking claim is analogous to a direct condemnation proceeding, in which it is well settled that jury trial is not available.⁷³ For one thing, in a regulatory taking action, the plurality said, the significant burden of discovering the infringement on property rights and initiating legal proceedings is shifted to the individual. For another, the plurality stressed, this burden is "all the greater" when, as in this case, "the government not only denies liability but fails to provide an adequate post deprivation remedy...."⁷⁴

In lieu of the direct condemnation analogy, the plurality concluded that a regulatory takings action was "most analogous to the various actions at common law to recover damages for interference with property interests."⁷⁵ Justice Kennedy cited a wide range of decisions, including many from the 19th and even 18th centuries, characterizing suits for nonconsensual takings as actions in trespass or nuisance.⁷⁶ Justice Kennedy thought that the tort analogy was reinforced in this case because Del Monte claimed that it was denied "not only" its property and just compensation, but "even an adequate forum for seeking" compensation.⁷⁷

Having resolved that the first branch of *Markman* was satisfied (on either or both of two grounds), the Court proceeded to determine that the second branch of *Markman* also was satisfied, based on what it called "considerations of process and function."⁷⁸ Justice Kennedy had no difficulty concluding that the issue of the economic impact of the city's decision was a "predominantly factual question" appropriate for resolution by the jury. However, he thought it "a more difficult question" whether the jury also could properly decide "whether a land-use decision substantially advances legitimate public interests within the meaning of our regulatory takings doctrine," which he termed "a mixed question of law and fact."⁷⁹ Avoiding any broad doctrinal pronouncement, and essentially without meaningful explanation, he simply concluded that it was appropriate to submit this "narrow, fact bound" question to the jury: "whether, when viewed in light of the context and protracted history of the development application process, the city's decision to reject a particular development plan bore a reasonable relationship to its proffered justification."⁸⁰

In the closing paragraphs of his opinion for the Court, Justice Kennedy "note[d] the limitations of our Seventh Amendment ruling."⁸¹ He emphasized that this was not an ordinary state-law inverse condemnation action but an action brought under 1983. He also observed that now, under *Williamson County*, a federal court cannot entertain a 1993 regulatory taking "unless or until the complaining landowner has been denied an adequate post-deprivation remedy."⁸² He also noted the limits of the ruling's "conceptual reach"; given the city's waiver of any objections to the jury instructions, he said, "[t]he posture of the case does not present an appropriate opportunity to define with precision the elements of a temporary regulatory takings claim."⁸³

Justice Kennedy also stressed that, whatever the ultimate role of a jury in applying the ostensible means-ends takings test, it was undoubtedly a narrow one. In a case involving a challenge to a city's general land use ordinance or policies, he said, the means-ends taking issue "might well fall within the province of the judge."⁸⁴ He also said that "we do not address the proper trial allocation" of jury responsibilities in a suit alleging that "the city's general regulations were unreasonable as applied."⁸⁵ In this case, the theory was that the city's actions were "inconsistent not only with the city's general ordinances and policies but even with the shifting ad hoc restrictions previously imposed by the city."⁸⁶ Ultimately, "[a]s is often true in 1983 actions, the disputed questions were whether the government had denied a constitutional right in acting outside the bounds of its authority, and, if so, the extent of any resulting damages. These were questions for the jury."⁸⁷

Dolan

As to the *Dolan* issue, the Court decided that the *Dolan* "rough proportionality" standard does not apply in a suit such as *Del Monte Dunes* involving a challenge to the denial of development approval. Justice Kennedy said, "we 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."⁸⁸ The "rough proportionality" test, he continued, "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."⁸⁹ Thus, "the rough proportionality test of *Dolan* is inapposite to a case such as this one."⁹⁰

Justice Scalia joined in this portion of Justice Kennedy's opinion.⁹¹ Justice Souter, speaking for the rest of the Court, said, "I agree in rejecting extension of 'rough proportionality' as a standard for reviewing land-use regulations generally."⁹²

Despite this ruling, the Court concluded that the Ninth Circuit's error in invoking *Dolan* was harmless. Because the jury instructions "did not mention proportionality," Justice Kennedy said, the court's discussion of *Dolan* "was unnecessary to sustain the jury's verdict" and "irrelevant" to the Supreme Court's resolution of the case.⁹³ In short, while the city of Monterey achieved a victory for local governments, the victory provided the city of Monterey no benefit in this case.

Second-Guessing/Means-Ends

The Court also rejected the argument that the court of appeals had applied the ostensible means-ends test in a way that allowed the jury to improperly "second-guess" local government officials. In his rather brief discussion of the issue,⁹⁴ Justice Kennedy did not expressly discuss the city's position that the Ninth Circuit's decision reflected inadequate deference to local decision makers, nor did he directly address the type or degree of deference generally applicable in regulatory takings cases. Instead, he simply attempted to resolve the issue based on the particular facts on this case.⁹⁵ Justice Kennedy's discussion creates the clear impression that, given the facts of the case, he and the rest of the majority wished to affirm the judgment, but make as little law as possible in the process.

Justice Kennedy first said that the jury had not been asked to conduct an assessment of "the reasonableness of [the city's] general zoning laws or land-use policies."⁹⁶ In addition, he stated that the instructions "did not allow the jury to consider the reasonableness, *per se*, of the customized, ad hoc conditions imposed on the property's development."⁹⁷ He also declared that the jury "was instructed, in unmistakable terms, that the various purposes asserted by the city were legitimate public interests."⁹⁸ Moreover, the jury was not asked to consider the question of reasonableness in the abstract, he said, but only "in light of the tortuous and protracted history of attempts to develop the property."⁹⁹ In the end, the issue submitted to the jury "was confined" to whether "in light of all the history and the context of the case, the city's particular decision to deny *Del Monte Dunes*' final development proposal was reasonably related to the city's proffered justifications."¹⁰⁰ At least as confined in this fashion, according to Justice Kennedy, "it is clear that the Court of Appeals did not adopt a rule of takings law allowing wholesale interference by judge or jury with municipal land-use policies, laws, or routine regulatory decisions."¹⁰¹

Neither Justice Scalia nor Justice Souter directly addressed the issue of the appropriate degree of deference in reviewing local land use decisions. Justice Souter came the closest in an oblique comment in his discussion of the jury issue. In arguing against submission of the ostensible means-ends takings test to the jury, Souter observed that this was "far removed from traditional practice," given that the means-ends test is ordinarily viewed as a due process issue, which is not tried to a jury.¹⁰² He continued: "The usual practice makes perfect sense. While juries are not

customarily called upon to assume the subtleties of deferential review, courts apply this sort of limited scrutiny in all sorts of contexts and are routinely accorded institutional competence to do it."¹⁰³ It appears that at least in this context Justice Souter and his fellow dissenters take a more expansive view than the majority of the degree of deference courts owe local government decision makers.

The Court resolved the "second-guessing" issue without attempting to resolve whether the ostensible means-ends takings test is actually a valid takings test. All of the Justices agreed that the city had waived any possible objection to the jury instructions reflecting this theory.¹⁰⁴ Justice Kennedy wrote 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."¹⁰⁵ "In any event," he observed, 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.¹⁰⁶

He concluded:

The 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 *amicito* to revisit these precedents.¹⁰⁷

Justices Scalia and Souter, in their separate opinions, agreed that the issue had to be deferred to some future case. Justice Scalia, while acknowledging that the means-ends test was, at least in the context of this case, properly submitted to the jury, reserved the question of whether this standard actually stated a valid takings test. "As the Court explains," he said, "petitioner forfeited any objection to this standard..., and I express no view as to its propriety."¹⁰⁸ Justice Souter, on the other hand, disagreed that the ostensible means-ends test could properly be submitted to the jury, but agreed with both Justice Kennedy and Justice Scalia that the issue of the validity of the means-ends test should be reserved for another day. He said, "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 Clauses of the Fifth and Fourteenth Amendments."¹⁰⁹

While it is difficult to decipher the precise direction of the Court's thinking on the ostensible means-ends takings test, a few things seem clear from this decision. First, the Court obviously thinks the issue is important, as demonstrated by the care with which all the opinions state that the Court is not resolving it in this case. Second, and more significantly, five Justices (Justice Scalia, and Justice Souter and the three Justices who joined his opinion) expressly declared an open mind about whether the ostensible means-ends test is valid.

Consequences and Implications

What does the Court's decision in *Del Monte Dunes* mean? Remarkably little, it turns out. The Court has raised (or renewed) as many questions as it answered. In the end, the Court succeeded in the seemingly impossible: making the muddled law of takings even more muddled than it already was. *The Jury Issue* The Court's resolution of the jury issue, the single clear doctrinal victory for the plaintiff, will likely turn out to have relatively little practical impact in future litigation.

As discussed, *Del Monte Dunes* is virtually *sui generis* because it dealt with the question of a claimant's entitlement to a jury trial in a 1983 federal court action when no state forum was

available to hear the claim. For the future, the key question is what (if any) significance this ruling has given that a state forum now is available to hear regulatory taking claims in California and every other state.

Even before getting to the jury question, however, there is an important threshold question about whether a claimant who pursues a regulatory takings claim in state court, as required by *Williamson County*, can later enter a federal court house with a request to relitigate the claim. The issue whether a claimant might be entitled to a jury in federal court after *Del Monte Dunes* is obviously moot if the federal courts cannot even entertain the cause in these circumstances. In general, government defendants appear to have a substantial defense that standard principles of claim or issue preclusion, applicable as between state and federal courts by virtue of the Full Faith and Credit Act,¹¹⁰ bar prosecution of a regulatory taking claim in federal court if the claimant already had a full and fair opportunity to litigate the matter in state court.¹¹¹ In addition, once a takings claim has been fully litigated in the state courts, an attempt to relitigate the claim in the federal courts would apparently be barred by the Rooker-Feldman doctrine, which holds that the lower federal courts lack jurisdiction to hear appeals from state court judgments because that power is reserved to the Supreme Court.¹¹²

Assuming these (substantial) threshold obstacles could be overcome, Justice Kennedy's majority opinion suggests that a regulatory takings claimant seeking to relitigate the claim in federal court still might not be entitled to a jury trial under the Seventh Amendment. Without elaborate explanation, Justice Kennedy justified the conclusion that *Del Monte's* claim was jury triable based in part on the fact that company had been denied "even an adequate forum for seeking" compensation in the state courts. The necessary implication is that a claimant might not have a federal court jury right (or at least the Court has not decided whether a claimant has such a right) when a state forum *is* available.¹¹³

Despite the fact that *Del Monte Dunes* addressed the issue of right-to-jury in federal court, the decision might ultimately have greater impact in the state courts. As discussed, in most state court systems there is no right to a jury in inverse condemnation actions.¹¹⁴ However, takings claimants in state courts are likely to invoke *Del Monte Dunes* in an attempt to argue that the state courts should revisit the question whether there is a jury right as a matter of state law. Justice Kennedy's position that a regulatory taking claim is analogous to a common-law tort could potentially support such an argument. But the force of the argument is obviously undermined by the fact that a majority of the Court declined to embrace it.

Without belaboring other specific questions raised by the *Del Monte Dunes* ruling on the jury issue, the limited character of the jury right established by this decision can be conveniently summed up using a "top 10" list. Without any pretense to having necessarily covered the entire range of potential limitations, these appear to be the top 10 limitations on this new Seventh Amendment "jury right" in the land use field:

1. It does not apply in a regulatory takings action against the United States.¹¹⁵
2. It has no relevance in a regulatory takings action against a state filed in federal court.¹¹⁶
3. It does not apply in a regulatory takings action in which the plaintiff is seeking injunctive relief.¹¹⁷
4. It does not apply in suits filed in state courts (where the Seventh Amendment does not apply), but might encourage state courts to revisit the question of whether state law grants a jury right in inverse condemnation cases.¹¹⁸

5. It would not come into play unless and until a plaintiff suing a local government has exhausted available state remedies, as required under *Williamson County*.¹¹⁹
6. If a plaintiff has exhausted available state remedies as required by *Williamson County*, there is likely to be a substantial question whether raising the same matter again in federal court is barred by the doctrines of claim or issue preclusion.¹²⁰
7. If a claimant has exhausted available state remedies there also is likely to be a substantial question whether assertion of the same claim again in federal court is barred by the Rooker-Feldman doctrine, which generally bars the lower federal courts from sitting in appellate review of state court decisions.¹²¹
8. The right to a jury trial recognized in *Del Monte Dunes* may well not exist if (unlike the situation in this case) a state forum is available to hear the regulatory taking claim.¹²²
9. If the ostensible means-ends test turns out to be a due process issue, then this claim would presumably not be jury triable based on the long-standing rule that due process claims must be resolved by the court rather than a jury.¹²³
10. Finally, even if the means-ends question (whether viewed as a taking or a due process issue) is jury triable, *Del Monte Dunes* indicates that a claimant might be able to assert this right only if it contends that the local government was "acting outside the bounds of its authority."¹²⁴

Dolan

The Court's limitation of the *Dolan* "rough proportionality" test represents a significant step. In *Dolan*, the Court expressly indicated that its "rough proportionality" test was intended to be more demanding of government than ordinary review of government regulations under the Takings Clause.¹²⁵ Thus, the Court's ruling limiting the scope of *Dolan* also implicitly confines the arena of takings cases in which heightened scrutiny is appropriate.

Because the Court's reasoning is somewhat cryptic, however, it is not entirely clear how broadly to read the decision. The Court said that the *Dolan* rule "considers whether dedications demanded as conditions of development are proportional to the development's anticipated impacts," and that it "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."¹²⁶ This statement can be read to make the simple point that, as a practical matter, the *Dolan* "rough proportionality" test for reviewing regulatory exactions cannot easily be applied to other types of government actions, such as a denial of a development application. However, the statement that *Dolan* was "not designed" to address "much different questions" suggests that the Court thought the underlying rationale for *Dolan* was not transferable to other factual contexts. Time and again the Supreme Court has emphasized the special character of physical occupations of real property and observed that they require particularly stringent review under the Takings Clause.¹²⁷ Properly read, *Del Monte Dunes* probably rests on the idea that the special, heightened *Dolan* standard for addressing exactions is explained by, and logically confined to, the context of physical occupations.

If this represents a correct reading of *Del Monte Dunes*, then the decision resolves a number of questions about the scope of the *Dolan* rule.¹²⁸ Local governments in particular impose a wide variety of nonphysical-occupation-type development conditions, such as conditions relating to design, landscaping, construction materials, and so on. The proposed reading of *Del Monte Dunes* indicates that *Dolan* does not apply to this type of routine development condition. In addition, this reading of *Del Monte Dunes* also suggests that monetary exactions, which have

never been viewed as a kind of physical occupation of private property,¹²⁹ are not, at a minimum, subject to review under the stringent *Dolan* test.¹³⁰

Finally, this reading of *Dolan* also implicitly limits the scope of *Nollan*. In *Del Monte Dunes* the Court expressly discussed only the scope of the *Dolan* "rough proportionality" test. Thus, *Del Monte Dunes* could conceivably be read as not affecting the scope of the *Nollan* "nexus" test, as well as the heightened standard of review adopted in that decision. But if the "rough proportionality" test cannot logically be extended beyond the type of physical exactions at issue in *Dolan*, the same reasoning apparently requires that *Nollan*, which involved a physical occupation as well, be limited to the same extent. Thus, *Del Monte Dunes* appears to limit the scope of *Nollan* as well as *Dolan*.

The Second-Guessing/Means-Ends Issue

Finally, what is one to make of the Court's resolution of the "second-guessing" issue and its determination not to resolve the issue of the validity of the means-ends takings test? How, in particular, are the lower federal and state courts to resolve takings claims based on a means-ends theory until the Court finally provides more definitive guidance?

As to the Court's determination that the jury was not improperly permitted to "second-guess" city officials, it is difficult to come to any firm conclusion about what the Court meant. As framed by the city, this issue was distinct from but intertwined with the issue of the validity of the means-ends test itself, which the city did not raise and which the Court declined to address. In explaining its rejection of the "second-guess" argument the Court stated that the issue presented to the jury "was couched... in an instruction that had been proposed in essence by the city, and as to which the city made no objections."¹³¹ This statement implies that the city's waiver affected not only its potential objection to the means-ends test, but also its objection to the degree of deference with which that standard was applied. Read in this way, the Court's rejection of the "second-guess" argument on the facts of this case may have little doctrinal bite.

But this reading may give too little attention to the result in this case, which can be viewed as effectively sanctioning relatively nondeferential judicial review of land use decisions by local government officials. The dissenters led by Justice Souter expressly asserted that this type of case should be resolved applying "deferential review."¹³² Judge Kennedy included no similar language in his discussion of the jury's liability finding. Furthermore, Judge Kennedy seemed unbothered by the charge that the jury was permitted to "second-guess" local officials, at least based on his understanding of the narrowness of the issues the jury actually addressed.

If Judge Kennedy's ad hoc resolution of this case actually presages a new, nondeferential standard for the review of local government actions, the implications would be quite remarkable. At least since the 1930s and the demise of *Lochner*, means-ends review under the Due Process Clause has required the courts to grant wide latitude in reviewing the wisdom and rationality of government actions.¹³³ It would be strange if the Court were to conclude that what is basically a single means-ends inquiry should be applied differently depending upon whether a taking (instead of a due process) label is attached to the inquiry in the particular case. This conclusion would be stranger still given that the ostensible means-ends takings test was obviously derived from decisions interpreting the Due Process Clause. There may be fair ground for debate about the level of scrutiny appropriately applied to local land use decisions under the traditional due process means-ends test, but frank and thoughtful analysis of this issue is hardly furthered by the device of relabeling a due process issue as a taking issue.

On the underlying issue of the validity of the means-ends test, the decision points in opposite directions at the same time. On the one hand, the decision can be read to support the validity of the ostensible means-ends test because, focusing on the actual outcome, the Court upheld, for

the first time (outside the exactions context), a finding of liability for a regulatory taking based (in part) on this test. On the other hand, every opinion in the case underscored the fact that the city waived any objection to application of the ostensible means-ends test, and the opinions on behalf of five Justices (by Justices Scalia and Souter) expressed a clear willingness to consider the validity of this ostensible test as a matter of first principles.

The views of individual Justices on the means-ends issue are difficult to fathom. Justice O'Connor, usually a sure pro-property vote, sided with the dissenters, while Justice Stevens, traditionally the most liberal Justice on land use issues, sided with the majority. This surprising switch probably demonstrates that these Justices were more concerned by the general jury-right implications of the case than the land use implications; it almost certainly does not reflect any fundamental change in their thinking on the takings issue. Justice Kennedy's conclusion that application of the means-ends test did not allow the jury to improperly second-guess local officials seems to conflict with his conclusion in *Eastern Enterprises* that the alleged arbitrariness of government action should be resolved under the Due Process Clause rather than the Takings Clause.¹³⁴ His opinion in favor of municipal liability also is in tension with the concern he expressed in *Eastern Enterprises* that applying the Takings Clause to government demands for money which did not effect a specific property interest 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."¹³⁵ Finally, Justice Scalia, whose opinion for the Court in *Nollan* suggests that he would be a strong supporter of the ostensible means-ends test, took the somewhat surprising step of "express[ing] no view as to its propriety."¹³⁶

The Court's application of the means-ends test in this case (even while reserving judgment about its ultimate validity) also is difficult to square with the result and reasoning in *Eastern Enterprises*, in which the Court said that a similar means-ends challenge to government action fell outside the scope of the Takings Clause. Justice Kennedy, who wrote the decisive concurring opinion in *Eastern Enterprises* rejecting the takings claim authored the opinion for the Court in *Del Monte Dunes*. Remarkably, neither Justice Kennedy nor any of the other Justices even mentioned *Eastern Enterprises* in *Del Monte Dunes*. If there is a plausible basis for reconciling these two decisions, it might lie in the fact that *Eastern Enterprises* involved a challenge to general legislation whereas *Del Monte Dunes* involved a challenge to "a particular zoning decision."¹³⁷ The Court played on the same theme in *Dolan*, in which the Court concluded that the Takings Clause has greater bite as applied to exactions established through administrative proceedings than to those established by general legislation.¹³⁸ The distinction between ad hoc administrative decisions and general legislation appears to reflect an important emerging thread in modern takings decisions.¹³⁹

The Court obviously determined to apply the means-ends test (whatever its validity) narrowly. The claim the city was permitted to present did not involve a challenge to the city's general laws or policies, or even to the application of the city's laws and policies in this case. Rather, the Court said, the theory the Court permitted to be tried "was that the city's denial of the final development permit was inconsistent not only with the city's general ordinances and policies but even with the shifting ad hoc restrictions previously imposed by the city."¹⁴⁰ The argument, "in short," was "not that the city had followed its zoning ordinances and policies but rather that it had not done so."¹⁴¹ Ultimately, the court said, "[a]s is often true in section 1983 actions, the disputed questions were whether the government had denied a constitutional right in acting outside the bounds of its authority."¹⁴²

The most striking aspect of Justice Kennedy's attempt to confine the scope of the decision in *Del Monte Dunes* is that he ends up focusing the takings inquiry on an issue which, according to Justice Kennedy's thinking in *Eastern Enterprises*, far from supporting a taking claim, would positively preclude an award of compensation. In *Eastern Enterprises*, Justice Kennedy stated that the Due Process Clause serves to stop government actions that are "arbitrary" or "irrational,"¹⁴³ while the Takings Clause "operates as a conditional limitation, permitting the

Government to do what it wants so long as it pays the charge."¹⁴⁴ In his *Eastern Enterprises* version of takings doctrine, a court "should proceed first to general due process principles, reserving takings analysis for cases in which the government action is otherwise permissible."¹⁴⁵ In *Del Monte Dunes*, however, Justice Kennedy seems to have completely turned the principle around. The Takings Clause, rather than coming into play only when a government action is "permissible," is now said to come into play only when the government action is "impermissible."

In short, *Del Monte Dunes* is full of confusion and ambiguities. Nonetheless, on balance, it appears to reinforce the argument, apparently supported by *Eastern Enterprises*, that the ostensible means-ends takings test should not be treated as an independent takings test.

Del Monte Dunes certainly establishes that the Court's numerous prior recitations of the ostensible means-ends takings test are now inoperative. Every Justice eschewed the opportunity provided by the case to squarely affirm the ostensible means-ends test. Instead, every Justice either wrote or joined in an opinion stating that the Court was not addressing the argument that the test was illegitimate. In addition, five Justices wrote or joined in opinions expressly asserting that were undecided about the validity of the ostensible takings test. Thus, the Court has drawn back from its seemingly unthinking recitation of the ostensible means-ends takings test in past cases. After *Del Monte Dunes*, 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 ostensible 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, and therefore only address the validity of the ostensible means-ends test obliquely. But none of the other Justices took direct issue with Justice Souter on these points, lending plausibility to the idea that Justice Souter's thinking about the ostensible means-ends test might ultimately sway a majority of the Court.

Justice Souter points out, for example, the anomalousness of submitting the ostensible 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.¹⁴⁶ This argument simply makes in a different way the point discussed above that the alleged failure of a regulation to advance a legitimate governmental interest cannot logically supply the test for whether an action is for a "public use" within the meaning of the Takings Clause and also supply the test for whether property has been "taken" under the clause.

In the same vein, Justice Souter also points out the "inconsistency" between submission of the ostensible means-end takings test to a jury and the rule that the similar claims, labeled as due process issues, are "routinely reserved without question for the court."¹⁴⁷

In the end, the Court's unanimous conclusion that the *Dolan* "rough proportionality" test does not apply outside the exactions context provides the most persuasive indication that a majority of the Court will likely reject the ostensible means-ends test as a general takings test. As discussed, *Nollan* and *Dolan* are the two Supreme Court decisions in which the Court has applied the means-ends formula as articulated in *Penn Central*, *Agins*, and their progeny. The "rough proportionality" and "nexus" tests articulated in *Dolan* and *Nollan* represent, in a sense, a kind of means-ends analysis in action. The Court's decision to limit the scope of the *Dolan* "rough proportionality" test or the *Nollan* "nexus" test can therefore be read to also cabin the *Penn Central/Agins* test being applied in those decisions. Thus, notwithstanding its declaration in *Del Monte Dunes* that it was not resolving the issue of the validity of the means-ends test, the Court has in effect already done the hard work by limiting the *Dolan/Nollan* analysis to the physical exactions context. By taking that step, the Court has very arguably defined the appropriate role for--and limits of--means-ends analysis under the Takings Clause in general.

Conclusion

Del Monte Dunes leaves the courts and litigants with many open questions about fundamental aspects of regulatory takings doctrine. As a result, the Court's decision imposes both a major burden and a major responsibility on those compelled to attempt to resolve regulatory takings issues. Once parsed with care, however, *Del Monte Dunes* provides some indication of the likely path ahead.

Footnotes:

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1. 119 S. Ct. 1624, 29 ELR 21133 (1999).
2. The Fifth Amendment to the U.S. Constitution provides that " no person shall ... be deprived of ... property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V.
3. See *Suitum v. Tahoe Regional Planning Agency*, 117 S. Ct. 1659, 27 ELR 21064 (1997); *Dolan v. City of Tigard*, 512 U.S. 374, 24 ELR 21083 (1994); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 22 ELR 21104 (1992); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 17 ELR 20918 (1987); *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 17 ELR 20787 (1987).
4. 512 U.S. 374, 388, 24 ELR 21083, 21087 (1994).
5. See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (" 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."). See also *Lucas*, 502 U.S. at 1003, 22 ELR at 21104.
6. 118 S. Ct. 2131 (1998).
7. *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 119 S. Ct. 1624, 1636, 29 ELR 21133, 21136. See also *id.* at 1644, 29 ELR at 21140 (" The posture of the case does not present an appropriate occasion to define with precision the elements of a temporary regulatory takings claim....").
8. It has become conventional to introduce an article on the takings issue by describing takings law as a " mess" or a " muddle" and collecting the numerous prior articles making the same point. For a particularly comprehensive collection of these disparaging characterizations of modern takings doctrine, see Jed Rubenfeld, *Usings*, 102 Yale L.J. 1077, 1078 n.2 (1993).
9. 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. See 119 S. Ct. at 1633, 29 ELR at 21135. The Ninth Circuit reversed and remanded the case. See *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 920 F.2d 1496 (9th Cir. 1990).
10. 119 S. Ct. at 1634, 29 ELR at 21135.
11. *Id.* at 1633, 29 ELR at 21135.
12. *Id.*
13. *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 95 F.3d 1422 (9th Cir. 1996).
14. *Id.* at 1428.
15. *Id.* at 1430-34.
16. *Id.* at 1430 (quoting *Dolan v. City of Tigard*, 512 U.S. 374, 391, 24 ELR 21083, 21087 (1994)).
17. See *New Port Largo, Inc. v. Monroe County*, 95 F.3d 1084, 1092, 27 ELR 20170, 20173 (11th Cir. 1996).
18. See *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 345 (1998) (quoting *Tull v. United States*, 481 U.S. 412, 417 n.3, 17 ELR 20667, 20668 n.3 (1987)) (" Before inquiring into the applicability of the Seventh Amendment, we must 'first ascertain whether a construction of the statute is fairly possible by which the [constitutional] question may be avoided.'").
19. 517 U.S. 370 (1996).
20. *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 119 S. Ct. 1624, 1638, 29 ELR 21133, 21137 (1999) (citing *Markham v. Westview Instruments, Inc.*, 517 U.S. 370, 376 (1996)).

21. *Id.*
22. See *Hensler v. City of Glendale*, 876 P.2d 1043 (Cal. 1994), *cert. denied*, 513 U.S. 1184 (1995).
23. See, e.g., *Schaller v. State of Iowa*, 537 N.W.2d 738 (Iowa 1995); *Department of Agric. & Consumer Servs. v. Mid-Florida Growers, Inc.*, 521 So. 2d 101 (Fla. 1988), *cert. denied*, 488 U.S. 870 (1988). See generally Brief of Amicus Curiae of State Attorneys General, *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, at 9-11 (discussing state court practice with respect to jury issue in inverse condemnation suits).
24. See *Maine v. Thiboutot*, 448 U.S. 1, 3 n.1 (1980) (state courts have concurrent jurisdiction over 1983 actions). See generally Steven H. Steinglass, Section 1983 Litigation in State Courts 9.2 (1987).
25. See 119 S. Ct. at 1648, 29 ELR at 21141 (Scalia, J., concurring) (collecting numerous examples of lower federal court cases in which section 1983 damages actions were tried to a jury).
26. 42 U.S.C. 1983 is not available to challenge federal government actions because it applies only to persons acting "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia." And "[i]t has long been settled that the Seventh Amendment right to trial by jury does not apply in actions against the Federal Government." *Lehman v. Nakshian*, 453 U.S. 156, 160 (1981).
27. See *Minneapolis & St. Louis R.R. Co. v. Bombolis*, 241 U.S. 211 (1916).
28. 473 U.S. 172 (1985).
29. See *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 920 F.2d 1496, 1507 (9th Cir. 1990).
30. 482 U.S. 304, 17 ELR 20787 (1987). See *Del Monte Dunes*, 920 F.2d at 1507 (discussing how the Court's decision in *First English* compels state courts to provide claimants an opportunity to seek monetary relief in regulatory takings actions).
31. The questions left open following application of *Williamson County's* ripeness rule are whether, assuming the claimant has unsuccessfully pursued available state remedies, the claimant can pursue a second action in federal court and, if so, whether the claimant has a right to a jury in such an action. See *infra* notes 120-122.
32. The Court's obvious consternation over the awkward posture of the jury issue encouraged speculation that the Court might possibly dismiss the case as improvidently granted.
33. *Dolan v. City of Tigard*, 512 U.S. 374, 24 ELR 21083 (1994).
34. 483 U.S. 825, 17 ELR 20918 (1987).
35. 512 U.S. at 377, 24 ELR at 21083.
36. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).
37. See, e.g., *New Port Largo, Inc. v. Monroe County*, 95 F.3d 1084, 1088, 27 ELR 20170, 20171 (11th Cir. 1996), *cert. denied*, 521 U.S. 1121 (1997); *Clajon Prod. Corp. v. Petera*, 70 F.3d 1566, 1578-79, 26 ELR 20213, 20218 (10th Cir. 1995).
38. *Ehrlich v. City of Culver City*, 12 Cal. 4th 854 (1996).
39. See, e.g., *Commercial Builders v. Sacramento*, 941 F.2d 872, 876 (9th Cir. 1991), *cert. denied*, 504 U.S. 931 (1992); *Home Builders Ass'n of Cent. Arizona v. City of Scottsdale*, 930 P.2d 993 (Ariz. 1997).
40. See, e.g., *Seawall Assocs. v. City of New York*, 74 N.Y.2d 92 (N.Y. 1989); cf. *Richardson v. City and County of Honolulu*, 124 F.3d 1150 (9th Cir. 1997) (invalidating rent control ordinance as a taking because it did not "substantially further[] a legitimate government interest")
41. See, e.g., Jan Laitos, *Takings and Causation*, 5 Wm. & Mary Bill Rts. J. 359 (1997).
42. *Del Monte Dunes*, 119 S. Ct. at 1635, 29 ELR at 21136.
43. *Id.*
44. *Id.*
45. The author served as counsel for the League for Coastal Protection et al. A copy of the League's amicus brief can be found on the Environmental Policy Project website at www.envpoly.org.
46. *Eastern Enterprises v. Apfel*, 118 S. Ct. 2131 (1998).
47. The Court granted the petition for *certiorari* in *Del Monte Dunes* on March 30, 1998. The court issued its decision in *Eastern Enterprises* three months later, on June 25, 1998.

48. Justice Kennedy also rejected the company's regulatory takings claim on the separate ground that the assessment of financial liability against Eastern Enterprises under the Coal Act did not "operate upon or alter an identified property interest." 118 S. Ct. at 2156. *See also id.* at 2162 (Breyer, J., dissenting) (agreeing that Takings Clause did not apply on the ground that the Coal Act imposed an "ordinary liability to pay money"). The majority's conclusion on this point was somewhat unexpected in light of some of the Court's earlier decisions. In *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211 (1986) and *Concrete Pipe & Prods. v. Construction Laborers Pension Trust*, 508 U.S. 602 (1993), the Court had considered very similar takings challenges to government regulation of pension obligations which imposed new financial liabilities on private firms. The Court ultimately rejected the takings claims in both cases, but not because it thought 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 and establishes an important new limit on regulatory takings doctrine. *See also infra* note 130 (discussing Professor Bosselman's idea that *Eastern Enterprises* makes monetary exactions immune from challenge under the Takings Clause).

49. 118 S. Ct. at 2157.

50. *Id.* at 2157-58.

51. Justice Breyer, speaking for himself and three 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.'" *Id.* at 2161. Again, the obvious implication is that the alleged failure of a government action to advance a legitimate public interest cannot support a regulatory takings claim.

52. 438 U.S. 104, 127, 8 ELR 20528, 20534 (1978) (stating, somewhat vaguely, that "a use restriction may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial government purpose").

53. 447 U.S. 255, 260, 10 ELR 20361, 20362 (1980) (stating that a regulatory action "effects a taking" if it "does not substantially advance legitimate state interests").

54. *See Dolan v. City of Tigard*, 512 U.S. 374, 388, 24 ELR 21083, 21085 (1994); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016, 22 ELR 21104, 21107 (1992); *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834, 17 ELR 20918, 20920 (1987); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 485, 17 ELR 20440, 20445 (1987); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126, 16 ELR 20086, 20087 (1985).

55. 483 U.S. at 834, 17 ELR at 20920 (quoting *Agins* and also citing *Penn Central*).

56. *See, e.g.*, J. Peter Byrne, *Ten Arguments for the Abolition of the Regulatory Takings Doctrine*, 22 Ecology L.Q. 89, 104 (1995); Jerold S. Kayden, *Land Use Regulations, Rationality, and Judicial Review: The RSVP in the Nollan Invitation*, 23 Urb. Law. 301, 316-25 (1991); Jan G. Laitos, *The Public Use Paradox and the Takings Clause*, 13 J. Energy Nat. Resources & Envtl. L. 9 (1993). *See also* John Echeverria & Sharon Dennis, *The Takings Issue and the Due Process Clause: A Way Out of the Doctrinal Confusion*, 17 Vt. L. Rev. 695, 698-701 (1993).

57. The primary authority the *Agins* Court cited to support this ostensible takings test was *Nectow v. City of Cambridge*, 277 U.S. 183 (1924), which involved a constitutional challenge to a zoning regulation in which the owner alleged, mirroring the language in *Agins*, that the restriction did "not bear a substantial relationship to the public health, safety, morals, or general welfare." *Id.* at 188. *Nectow* was patently not a takings case, but instead involved a due process claim that an ordinance "deprived [the owner] of his property without due process of law in contravention of the Fourteenth Amendment." *Id.* at 183. The due process origin of the *Agins* test is further confirmed by the fact that the page in the text of *Nectow* to which *Agins* refers quotes from *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), another due process case. Similarly, in *Penn Central*, the Court also relied upon due process, not takings, precedents; these included *Nectow* and *Goldblatt v. Hempstead*, 396 U.S. 590 (1962). While *Goldblatt* involved claims under both the takings and the due process clauses, the discussion in *Penn Central* of means-ends analysis clearly draws upon *Goldblatt's* discussion of the due process claim in that case.

58. 505 U.S. 1003, 22 ELR 21104 (1992).

59. 505 U.S. at 1014, 22 ELR at 21107. This conclusion also is supported, for example, by the extensive historical research into colonial legal materials by Prof. John F. Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, 109 Harv. L. Rev. 1252 (1996), and Prof. William M. Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 96 Colum. L. Rev. 782 (1995).

60. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126, 16 ELR 20086, 20087 (1985).

61. The idea that takings doctrine includes essentially the same means-ends test as due process doctrine also was contradicted by the important differences in language between the Takings Clause and the Due Process Clause. The Takings Clause in the Fifth Amendment states that " private property [shall not] be taken for public use, without just compensation," while the Due Process Clause in the Fifth and Fourteenth Amendment states that no person shall be " deprived" of property " without due process of law." Reading an essentially identical means-ends test into both clauses would violate the normal rule of constitutional interpretation that differences in constitutional language should be interpreted to support differences in meaning. See *Harmelin v. Michigan*, 501 U.S. 957, 978 n.9 (1991) (" When two parts of a [constitutional amendment] use different language to address the same or similar subject matter, a difference in meaning is assumed.")

62. 467 U.S. 229, 14 ELR 20549 (1984).

63. *Id.* at 242-43, 14 ELR at 20549.

64. 482 U.S. 304, 17 ELR 20787 (1987).

65. 482 U.S. at 315, 17 ELR at 20790 (second emphasis added). See also *Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1, 11, 20 ELR 20454, 20456 (1990) (quoting *First English*).

66. See also *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 511, 17 ELR 20440, 20450 (1987) (Rehnquist, J., dissenting) (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").

67. See *Del Monte Dunes*, 119 S. Ct. at 1637-45, 29 ELR at 21136-37. Justice Scalia expressly endorsed the conclusion that 1983 did not confer a jury trial right, see *id.* at 1645, 29 ELR at 21140 (Scalia, J., concurring in part and concurring in the judgment), as did Justice Souter, *id.* at 1650, 29 ELR at 21142 (Souter, J., concurring in part and dissenting in part).

68. See *id.* at 1637, 29 ELR at 21136 (discussing *Lorrillard v. Pons*, 434 U.S. 575 (1978)).

69. Justice Scalia took the view that " the cause of action created by 1983 is, and was always regarded as, a tort claim." *Id.* at 1647, 29 ELR at 21141. He also stressed that, with respect to other issues, such as statutes of limitations or immunities in 1983 actions, the Court had evaluated these issues in terms of 1983 generally, rather than by reference to the specific substantive claim being asserted

70. *Id.* at 1629, 29 ELR at 21137.

71. *Id.* at 1638, 29 ELR at 21138.

72. Justice Souter rejected this argument for uniform treatment of all 1983 claims because he preferred a result that achieved uniform treatment of all Fifth Amendment takings claims. See *id.* at 1659, 29 ELR at 21146 (" Because constitutional values are superior to statutory values, uniformity as between different applications of a given constitutional guarantee is more important than uniformity as between different applications of a given statute.").

73. *Id.* at 1640, 29 ELR at 21137.

74. *Id.* at 1640, 29 ELR at 21138.

75. *Id.* Justice Scalia refused to support this alternative argument for a Seventh Amendment jury right in a 1983 regulatory takings action, preferring to rely exclusively on the position that all 1983 damage actions are analogous to common-law tort actions which were tried to a jury at the time of the founding. Justice Souter also rejected this alternative theory, principally because he thought the analogy with direct condemnations (in which the absence of a jury right is clearly established) was the most apt, see *id.* at 1650-51, 29 ELR at 21142, and because he thought there was no convincing precedent supporting the characterization of a regulatory takings action as a tort, see *id.* at 1655-59, 29 ELR at 21143. Justice Souter also thought it would be anomalous to recognize a right to a jury in a regulatory takings action involving a claim based on the

ostensible means-ends test, given that this test was derived from due process precedents and due process claims " are, of course, routinely reserved without question for the court." *Id.* at 1600, 29 ELR at 21146.

76. *Id.* at 1638, 29 ELR at 21138.

77. *Id.* at 1641, 29 ELR at 21138.

78. *Id.* at 1643, 29 ELR at 21139.

79. *Id.* at 1644, 29 ELR at 21139.

80. *Id.* Justice Scalia adopted essentially the same reasoning in his concurring opinion, including the conclusion that the ostensible means-ends test was appropriately submitted to the jury " at least in the highly particularized context of the present case." *Id.* at 1649, 29 ELR at 21142. In virtually the same breath, he stated that he expressed " no view" as to the " propriety" of the means-ends takings test as a matter of substantive takings law. *Id.* at 1649 n.2, 29 ELR at 21142 n.2.

81. *Id.* at 1644, 29 ELR at 21139.

82. *Id.*

83. *Id.* at 1644, 29 ELR at 21140.

84. *Id.* at 1644-45, 29 ELR at 21140.

85. *Id.* at 1645, 29 ELR at 21140.

86. *Id.*

87. *Id.*

88. *Id.* at 1635, 29 ELR at 21135.

89. *Id.*

90. *Id.*

91. *Id.* at 1645, 29 ELR at 21140.

92. *Id.* at 1650, 29 ELR at 21142.

93. *Id.* at 1635, 29 ELR at 21135-36.

94. *Id.* The Court made the sweeping statement that "[t]o the extent the city argues that, as a matter of law, its land-use decisions are immune from judicial scrutiny under all circumstances, its position is contrary to settled regulatory takings principles." *Id.* at 1635, 29 ELR at 21136.

Contrary to one possible reading of this statement, the city did not actually make the argument that its actions were completely immune from challenge under the Takings Clause, a position that obviously would have been difficult to support in light of the Court's decision in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 22 ELR 21104 (1992), and its other recent takings decisions.

95. See 119 S. Ct. at 1635-37, 29 ELR at 21136.

96. *Id.* at 1636, 29 ELR at 21136.

97. *Id.*

98. *Id.* at 1637, 29 ELR at 21136.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* at 1660, 29 ELR at 21146.

103. *Id.*

104. See *id.* at 1636, 29 ELR at 21136 (Kennedy, J.); *id.* at 1649 n.2, 29 ELR at 21142 n.2 (Scalia, J., concurring); *id.* at 1660 n.12, 29 ELR at 21146 n.12 (Souter, J., dissenting).

105. *Id.* at 1636, 29 ELR at 21136.

106. *Id.*

107. *Id.*

108. *Id.* at 1650 n.2, 29 ELR at 21142 n.2.

109. *Id.* at 1660 n.12, 29 ELR at 21146 n.12.

110. 28 U.S.C. 1738.

111. For federal court decisions holding that litigation of a regulatory taking claim in state court bars relitigation of the taking claim in federal court, see *Wilkinson v. Pitkin County Bd. of County Comm'rs*, 142 F.3d 1319, 28 ELR 21253 (10th Cir. 1998); *Palomar Mobilehome Park Ass'n v. City of San Marcos*, 989 F.2d 362, 364 (9th Cir. 1993). See also *Dodd v. Hood River County*, 59 F.3d 852 (9th Cir. 1995) (concluding that claim preclusion did not apply when government

defendant " implicitly" consented to claim-splitting, but applying doctrine of issue preclusion to regulatory taking claim).

112. See generally Symposium, *The Rooker-Feldman Doctrine*, 74 Notre Dame L. Rev. 1081-1234 (1999).

113. See also 119 S. Ct. at 1661, 29 ELR at 21147 (Souter, J., dissenting) (" And the plurality presumably does not mean to address any Seventh Amendment issue that someone might raise when the government has provided an adequate remedy, for example, by recognizing a compensatory action for inverse condemnation....").

114. See *supra* note 23.

115. The Court said it is " settled" that the Seventh Amendment does not apply in " suits against the United States," 119 S. Ct. at 1643, 29 ELR at 21139 (citing *Lehman v. Nakshian*, 453 U.S. 156 (1981)).

116. A takings compensation claim against a state in federal court is barred at the threshold by the Eleventh Amendment, which precludes suits for monetary relief against the states in federal court. This principle has been routinely invoked by federal courts to dismiss regulatory takings actions against states. See, e.g., *Lynch v. State of West Virginia*, 805 F. Supp. 12 (S.D. W.Va. 1992); *Stephans v. State of Nevada*, 685 F. Supp. 217 (D. Nev. 1988). Furthermore, to the extent the jury right recognized in *Del Monte Dunes* is based on the fact that a suit under 1983 is analogous to an " action at law" for the purposes of Seventh Amendment analysis, that reasoning cannot be extended to suits against states because a state is not a " person" subject to suit under that provision. See *Will v. Michigan Dep't of State Police*, 491 U.S. 58 (1989).

117. The Court said it is " settled" that the Seventh Amendment does not apply in " suits seeking only equitable relief." 119 S. Ct. at 1643, 29 ELR at 21139 (citing *Parsons v. Bedford*, Breedlove & Robesen, 7 L. Ed. 732, 747 (1830)).

118. The Court said it is " settled" that the Seventh Amendment does not apply in " suits brought in state courts." *Id.* (citing *Curtis v. Loetner*, 415 U.S. 189, 192 n.6 (1974)).

119. 199 S. Ct. at 1644, 29 ELR at 21139 (" A federal court ... cannot entertain a takings claim under 1983 unless or until the complaining landowner has been denied an adequate postdeprivation remedy.").

120. See *supra* note 111. See generally Kathryn E. Kovacs, *Accepting the Relegation of Takings Claims to State Courts: The Federal Courts' Misguided Attempts to Avoid Preclusion Under Williamson County*, 26 Ecology L.Q1 (1999).

121. See *supra* note 112 and accompanying text.

122. See *supra* note 113 and accompanying text.

123. See 119 S. Ct. at 1660, 29 ELR at 21146 (Souter, J., dissenting) (" Substantive due process claims are, of course, routinely reserved without question for the court.") (citing *County of Sacramento v. Lewis*, 523 U.S. 833 (1998); *Washington v. Glucksberg*, 521 U.S. 702 (1997)). The majority opinion might conceivably be read as overturning the long-standing rule that a due process issue is not jury triable, at least where the plaintiff makes the kind of " narrow, factbound" claim at issue in *Del Monte Dunes*. However, the Court certainly gave no indication that it intended to change the long-standing rule that a due process claim presents an issue for the court.

124. 119 S. Ct. at 1645, 29 ELR at 21140.

125. See *Dolan v. City of Tigard*, 512 U.S. 374, 391, 24 ELR 21083, 21087 (1994) (expressly distinguishing the relatively stringent standard of review under the " rough proportionality" test from the " minimal" standard applicable in means-ends review under the Due Process Clause).

126. 119 S. Ct. at 1635, 29 ELR at 21135.

127. See generally *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (establishing that a permanent physical occupation of private property by the government, no matter how minute, results in a per se taking). Reinforcing the idea that the distinctive character of government actions involving a physical occupation underlies the " rough proportionality" test, the Court in *Dolan* stated that the conditions 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." 512 U.S. at 385, 24 ELR at 21085.

128. *Del Monte Dunes* does not speak to, but apparently leaves undisturbed, the other major

limitation on the *Dolan* "rough proportionality" test identified by the lower courts, namely that the test does not apply to physical-occupation exactions established by general legislation as opposed to ad hoc administrative decisions. See, e.g., *Home Builders Ass'n v. City of Scotsdale*, 930 P.2d 993 (Ariz. 1997); *Parking Ass'n v. City of Atlanta*, 450 S.E.2d 200 (Ga. 1994), *cert. denied*, 515 U.S. 1116 (1995). *But see* *Manocherian v. Lenox Hill Hosp.*, 643 N.E.2d 479 (N.Y. 1994), *cert. denied*, 514 U.S. 1109 (1995) (applying *Dolan* standard, over strong dissent, to city rent control legislation).

129. See *United States v. Sperry*, 493 U.S. 52, 62 n.9 (1989) ("it is artificial to view deductions of a percentage of a monetary award as physical appropriations of property. Unlike real or personal property, money is fungible ... Such a rule would be an extravagant extension of *Loretto*.").

130. Professor Bosselman has observed that the majority's conclusion in *Eastern Enterprises* that the Takings Clause applies only to the taking of a specific property interest, and not to a demand for the payment of money, supports the conclusion that monetary exactions are completely immune from challenge under the Takings Clause. See Fred Bosselman, *Dolan's Mysteries Explained?*, 51 Land Use L. & Zoning Dig. 3 (1999).

131. 119 S. Ct. at 1637, 29 ELR at 21136.

132. *Id.* at 1660, 29 ELR at 21146.

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

134. Given the fact that the district court had rejected the due process claim in *Del Monte Dunes*, Justice Kennedy did not have the option of relying on the Due Process Clause, rather than the Takings Clause, to rule in favor of the plaintiff, as he did in *Eastern Enterprises*. His reliance on the Takings Clause in *Del Monte Dunes* could therefore be viewed as possibly serendipitous. From another perspective, however, the crucial point may be that in both *Del Monte Dunes* and *Eastern Enterprises*, Justice Kennedy found that the government had violated constitutionally protected property rights in some fashion.

135. 118 S. Ct. 2131, 2155 (1998).

136. 119 S. Ct. at 1650 n.2, 29 ELR at 21142.

137. *Id.* at 1636, 29 ELR at 21136.

138. See *supra* note 128.

139. This point is obviously related to Prof. William M. Treanor's thesis that "process concerns" are and should be a central theme of regulatory takings doctrine. See William M. Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 96 Colum. L. Rev. 782 (1995).

140. 119 S. Ct. at 1645, 29 ELR at 21140.

141. *Id.*

142. *Id.*

143. 118 S. Ct. at 2158 (Kennedy, J., dissenting).

144. *Id.* at 2157.

145. *Id.* at 2157-58.

146. *Del Monte Dunes*, 119 S. Ct. at 1654, 29 ELR at 21144.

147. *Id.* at 1660, 29 ELR at 21146.