Strategic Litigating in Land Use Cases: Del Monte Dunes v. City of Monterey

Karena C. Anderson

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Strategic Litigating In Land Use Cases: *Del Monte Dunes v. City of Monterey*

*Karena C. Anderson*

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INTRODUCTION

Landowner plaintiffs frequently seek compensation from governmental entities for unconstitutionally “taking” their property in violation of the Fifth Amendment—for example, when a land use agency denies a requested development permit. In presenting these claims in the Ninth Circuit, plaintiffs commonly pursue one of two related strategies: either they combine their takings claims with challenges under alternative constitutional theories, such as substantive due process, procedural due process, and equal protection; or they opt simply to pursue one or more of these other constitutional claims, in place of a

1. The Takings Clause of the Fifth Amendment provides, in relevant part, “nor shall private property be taken for public use, without just compensation.” U.S. CONST. amend. V.

2. A survey of Ninth Circuit decisions is illustrative. See, e.g., Richardson v. City and County of Honolulu, 124 F.3d 1150 (9th Cir. 1997) (takings, substantive due process, equal protection); Sinclair Oil Corp. v. County of Santa Barbara, 96 F.3d 401 (9th Cir. 1996) (takings, substantive due process); Hoeck v. City of Portland, 57 F.3d 781 (9th Cir. 1995) (state takings, substantive due process); Del Monte Dunes v. City of Monterey, 920 F.2d 1496 (9th Cir. 1990) (Del Monte Dunes I) (takings, substantive due process, equal protection); Bateson v. Geisse, 857 F.2d 1300 (9th Cir. 1988) (takings, substantive due process, procedural due process); Herrington v. County of Sonoma, 834 F.2d 1488 (9th Cir. 1988) (as amended) (substantive due process, procedural due process, equal protection; takings claim dropped on appeal); McMillan v. Goleta Water District, 792 F.2d 1453 (9th Cir. 1986) (takings, substantive due process, equal protection); Picard v. Bay Area Regional Transit District, 823 F. Supp. 1519 (N.D. Cal. 1993) (takings, substantive due process, procedural due process, equal protection); Zilber v. Town of Moraga, 692 F. Supp. 1195 (N.D. Cal. 1988) (takings, substantive due process).
takings claim, in factual settings more typically addressed under takings analysis.³ Often, no matter what combination of claims is filed, the various allegations are supported with identical facts and proof. In other words, it is difficult, if not impossible, to isolate the particular facts that support one theory of recovery over another. The plaintiffs hope simply to prevail on some theory.⁴

The significance of this strategy lies in the tenuous boundary between the claims being asserted—in particular, between takings and substantive due process claims. Theoretically, a plaintiff can prove a taking on one of at least three grounds: the government has physically occupied or appropriated her property;⁵ a government regulation denies her all economically viable use of her property; or a government regulation fails to substantially advance a legitimate state interest.⁶ This third ground precisely mirrors the means-ends style of review typical of due process analysis. Indeed, this component of the takings inquiry derives historically from due process cases. However, the blending of the analytical standards for these constitutional theories does not fit comfortably within any existing doctrinal framework. The protection of the Takings Clause addresses legitimate exercises of the police power that, because of impacts on landowners, require the government to provide compensation in order to proceed. By contrast, the protection of the Due Process Clause focuses on government conduct that is itself invalid and cannot be cured simply by payment of compensation.

Perhaps most importantly, the resulting confusion has bred uncertainty concerning the appropriate level of judicial scrutiny applicable to claims pursued under the “means-ends” branch of takings analysis. Since the demise of the “Lochner Era,” substantive due process claims have triggered only minimal judicial scrutiny of social and

³. Again, one can see this pattern in several Ninth Circuit cases. See, e.g., Armendariz v. Penman, 75 F.3d 1311 (9th Cir. 1996) (en banc) (substantive due process, equal protection); Halverson v. Skagit County, 42 F.3d 1257 (9th Cir. 1995) (as amended) (substantive due process, procedural due process); Kawaoka v. City of Arroyo Grande, 17 F.3d 1227 (9th Cir. 1994) (substantive due process, equal protection); Sinaloa Lake Owners Ass'n v. City of Simi Valley, 882 F.2d 1398 (9th Cir. 1989) (as amended) (substantive due process, procedural due process); Besaro Mobile Home Park v. City of Fremont, No. C97-02106 CW, 1997 WL 818584 (N.D. Cal. Dec. 19, 1997) (substantive due process, equal protection); Tyson v. City of Sunnyvale, 920 F. Supp. 1054 (N.D. Cal. 1996) (substantive due process, procedural due process, equal protection); Arroyo Vista Partners v. County of Santa Barbara, 732 F. Supp. 1046 (C.D. Cal. 1990) (substantive due process, equal protection); Stubblefield Constr. Co. v. City of San Bernardino, 38 Cal. Rptr. 2d 413 (Cal. Ct. App. 1995) (substantive due process, equal protection).

⁴. Although one may observe the same strategies in play in other state and federal jurisdictions, my analysis concentrates on the Ninth Circuit, and to some extent California, in order to provide context to and limit the scope of the project.


economic regulation. Yet, recent takings cases arising in the context of property exactions indicate a movement toward higher levels of scrutiny, with courts demanding an "essential nexus" and "rough proportionality" between the means imposed by government and the ends they are designed to serve. These cases may constitute distinct exceptions to minimal scrutiny, as their circumstances more closely approximate physical takings than pure regulatory takings. However, certain language in the Supreme Court opinions has strongly implied that the takings context somehow countenances more exacting means-ends analysis than the due process context. The Court has not yet ruled directly on this matter, leaving the interplay of these doctrines in a state of flux. The question remains: will the Court permit, under the auspices of the Takings Clause, the rebirth of heightened judicial scrutiny of economic and social regulations, long since repudiated in the substantive due process context?

In the meantime, the commonly observed practice of combining or substituting constitutional claims in the land use context has produced doctrinal inconsistency and troubling uncertainty for both landowner plaintiffs and government defendants. It is therefore important to examine whether the practice corresponds to a purposeful litigation tactic. In other words, what, if any, advantages do the litigants expect to gain by combining or substituting claims? Of course, the practice may represent no distinct strategy on the part of litigants. For example, it could simply illustrate the desire of cautious attorneys to increase their odds of success by including all plausible claims in a given proceeding. On the other hand, "lumping" the claims together, or substituting other constitutional claims for takings claims, may reflect deliberate litigation strategies.

A recent Ninth Circuit decision supports the relevance of these tactical considerations in the framing and filing of land use lawsuits. In Del Monte Dunes v. City of Monterey, the court considered takings, substantive due process, and equal protection as alternative theories of recovery arising from the same factual context: protracted negotiations over oceanfront property that resulted in the city's denial of a development permit. In particular, at least two of the court's pivotal determinations—its affirrnance of the decision to send the takings liability question to a jury and its importation of heightened scrutiny from the context of development exactions into a pure permit denial scenario—represented a substantial deviation from prior decisions in

9. 95 F.3d 1422 (9th Cir. 1996).
the Ninth Circuit and beyond. Significantly, the deviation proved quite favorable to the developer plaintiff in that instance.

It is unclear whether the court’s conclusions in *Del Monte Dunes* followed directly from the developer’s strategic presentation of combined constitutional claims, rather than from the court’s simple misinterpretation of the law or the court’s intentional expansion of the law in order to liberalize judicial review of land use regulations. In any event, the outcome deserves careful attention. In several respects, the Ninth Circuit’s decision further confounds an already confused and inconsistent area of the law. As such, the case leaves lower courts, landowner litigants, and government entities responsible for land use decisions more uncertain than ever. The case also illustrates the potential impact of litigation tactics on both procedural and substantive results.

On March 30, 1998, the United States Supreme Court granted certiorari in *Del Monte Dunes*. While the grant of certiorari does not specify what issues the Court will review, the city of Monterey provided several possible theories supporting reversal, including the inappropriate submission of the takings liability question to the jury and the improper application of heightened scrutiny to the context of a pure regulatory action. Thus, *Del Monte Dunes* offers the Supreme Court an opportunity to address and clarify this important area of land use law. Perhaps the Court will articulate doctrinal boundaries between takings and substantive due process, clarifying the nature of the protection and the corresponding level of scrutiny that each claim provides. Such a decision would provide litigants and lower courts with much-needed guidance concerning when various claims are available and how to properly resolve them.

In the analysis that follows, I develop, from the vantage point of a strategic litigant, some possible explanations for commonly observed land use litigation practices in the Ninth Circuit. The explanations fall logically into two broad categories: (1) *procedural*, including ripeness requirements, available remedies, and jury trial rights; and (2) *substantive*, relating to the standards applied by reviewing courts. Significantly, *Del Monte Dunes* illustrates the importance of both jury trial rights and substantive standards of review as strategic considerations.

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12. The plaintiffs in *Del Monte Dunes* could, of course, also have been influenced by the ripeness and remedy issues discussed below.
My analysis throughout this Comment emphasizes the interplay of substantive due process claims with takings claims because the former are the challenges most frequently coupled with or substituted for takings allegations. Moreover, these claims are the most difficult, and therefore the most necessary, to distinguish from takings claims. Much of the analysis, however, applies with equal force to alleged violations of procedural due process and equal protection in the land use context. In Part I, I present the tactical considerations that may be motivating observed litigation strategies in land use cases such as Del Monte Dunes. In particular, I emphasize the relevant doctrinal and policy characteristics that support the influence of perceived tactics. In Part II, I consider whether, in light of recent Ninth Circuit case law, any strategy of combining or substituting claims remains available to landowner litigants. Finally, I conclude that, although no consistent advantage emerges from the operation of these strategies, the enormous potential benefits, as reflected in Del Monte Dunes, may provide a significant incentive for plaintiffs to combine or substitute constitutional claims when structuring land use lawsuits.

I. WHY DO LITIGANTS COMMONLY CHOOSE TO COMBINE OR SUBSTITUTE TAKINGS CLAIMS WITH SUBSTANTIVE DUE PROCESS CLAIMS?

A. Procedural Considerations That Influence Litigation Strategies

Assuming that a plaintiff has viable claims under alternative constitutional theories, several practical considerations may influence or even dictate her choice of how to proceed in a given case. In the sections that follow, I discuss the most significant of these considerations: ripeness, available remedies, and the right to trial by jury. After addressing these threshold considerations, I turn to the more substantive issues that are reflected in these litigation strategies.

13. By “procedural,” I intend simply to differentiate these considerations from those relating to the substantive standard of review applied by a court. However, ripeness, remedies, and jury trial issues can all be significantly tied into and affect the substance of a given claim.

I. Ripeness Issues

(a) Federal Jurisdictional Requirements

While federal courts have subject matter jurisdiction over both substantive due process and takings claims, particularly stringent ripeness criteria apply to the latter. Therefore, ripeness concerns may bear importantly on a litigant’s strategic choice of constitutional theories.

In *Williamson County Regional Planning Comm’n v. Hamilton Bank of Johnson City*, the Supreme Court articulated a two-prong test that a takings plaintiff must satisfy in order to ripen her takings claim for federal court review. The test consists of a finality prong and a just compensation prong. First, a landowner must obtain a final decision from the relevant government entity regarding permissible uses of her land under the challenged regulation. This requirement addresses several prudential interests supporting ripeness as a jurisdictional limitation. These interests include: developing a factual record that properly reflects the particular decisionmaking process, ascertaining the extent of economic injury in order to fashion an appropriate remedy, preventing claims of only speculative future harm, respecting the proper sphere of local officials in making land use decisions, and guarding judicial resources against unnecessary or inappropriate litigation of numerous fact intensive disputes.

15. All of a takings plaintiff’s federal constitutional claims are, by definition, “federal questions” for the purposes of establishing federal court jurisdiction. Title 28 U.S.C. § 1331 provides for general federal question jurisdiction over “all civil actions arising under the Constitution, laws, or treaties of the United States.” This jurisdictional grant assumes that a plaintiff adequately pleads the federal claims in her complaint. See, e.g., *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149 (1908). In addition, these claims are frequently brought pursuant to 42 U.S.C. § 1983 (the federal civil rights statute). Thus, landowners enjoy the right to seek redress within the federal court system for both substantive due process and takings claims. See infra, Part II.A.2.b. (discussing 42 U.S.C. § 1983, over which state and federal courts share concurrent jurisdiction). See also *Maine v. Thiboutot*, 448 U.S. 1 (1980); Stuart Minor Benjamin, *The Applicability of Just Compensation to Substantive Due Process Claims*, 100 YALE L.J. 2667, 2677 (1991).

16. Robert Best, President of the Pacific Legal Foundation (a nonprofit organization that represents property owners in takings litigation), described the Supreme Court’s takings jurisprudence as creating a new “brand” of ripeness doctrine unique to land use cases. Moreover, he suggested that this creation is unwarranted and simply encourages the government to pursue a “meaningless game” of proposing numerous permutations on potential projects in order to avoid achieving a “final decision.” Personal communication. See infra Part I.A.1. discussing ripeness requirements.


18. See id. at 190-94.

Second, the landowner must pursue available state avenues for obtaining compensation.\(^{20}\) This requirement is premised more fundamentally on the nature of a takings claim. In other words, the Fifth Amendment does not proscribe takings; it proscribes takings without just compensation.\(^{21}\) Thus, a plaintiff cannot establish a violation until she has established the state's refusal to compensate her.

The Williamson County Court did not expressly hold that alternative, non-Takings Clause, constitutional claims challenging the same conduct are subject to identical requirements. Thus, the various federal courts of appeal have adopted different approaches to ripeness of substantive due process claims that arise out the same facts as a takings claim.\(^{22}\) Consistent with the first prong of the Williamson County test, courts generally consider substantive due process claims premature until the relevant agency has issued a final decision.\(^{23}\) However, the precise means of fulfilling this requirement vary from circuit to circuit.\(^{24}\) In the Ninth Circuit, a landowner must ordinarily make an initial permit application to the appropriate agency, followed by an application for a variance.\(^{25}\) If both attempts fail, the landowner may pursue a substantive due process challenge in federal court.\(^{26}\) Other circuits do not consistently require a landowner to seek a variance; still others require that the landowner reapply an additional time.\(^{27}\) Nevertheless, federal courts require a landowner to obtain a final de-
cision, in some form, before bringing a substantive due process challenge.\textsuperscript{28}

Application of the second prong of the \textit{Williamson County} test to non-takings claims has produced less consistency among the lower federal courts.\textsuperscript{29} In \textit{Williamson County} itself, the Supreme Court intimated that the requirement of seeking just compensation through available state channels followed directly from the nature of the claim at issue.\textsuperscript{30} Unlike the Takings Clause, the Due Process Clause does not constitutionally mandate any particular remedy. Indeed, because a due process violation cannot be corrected by payment of compensation, such a violation can presumably occur whether or not a landowner has been offered compensation. Thus, the Ninth Circuit, for example, has held that the second \textit{Williamson County} requirement does not apply to a substantive due process claim.\textsuperscript{31} Other courts, however, have concluded that the “compensation” component of ripeness applies to both takings and substantive due process claims.\textsuperscript{32}

Although ripeness rules ostensibly limit only the timing of an action in federal court, they may also prevent access altogether. \textit{Williamson County}’s compensation requirement could have tremendous practical ramifications by effectively “relegating” most takings claims to state court.\textsuperscript{33} While the requirement has been interpreted to apply only to available claims under state substantive law, such as inverse condemnation,\textsuperscript{34} most state courts treat their compensation proceed-

\textsuperscript{28} See Stone & Seymour, \textit{supra} note 14, at 1235.
\textsuperscript{29} An additional, complicating factor results from the fact that landowner litigants frequently allege that the same set of facts has established both substantive due process and takings violations.
\textsuperscript{30} See \textit{Williamson County}, 473 U.S. at 194-95; see also Mendel, \textit{supra} note 19, at 502 n.42 (“The Supreme Court, by focusing on the unique language of the Just Compensation Clause, seemed to imply that the requirement of a state proceeding applied only to takings claims.”).
\textsuperscript{31} See Sinaloa Lake Owners Ass’n v. City of Simi Valley, 882 F.2d 1398, 1404 (9th Cir. 1989) (holding that the just compensation ripeness requirement “has no application to other types of constitutional claims, even where those claims arise out of facts that also give rise to a taking claim”), overruled by Armendariz v. Penman, 75 F.3d 1311 (9th Cir. 1996) (en banc); Bateson v. Geisse, 857 F.2d 1300, 1303 (9th Cir. 1988) (“Bateson was not required to seek ‘just compensation’ from state entities before bringing this substantive due process claim, and therefore this claim is ripe for adjudication.”); Herrington, 834 F.2d at 1499 n.10 (citing Cassettari v. County of Nevada, 824 F.2d 735, 738 (9th Cir. 1987)).
\textsuperscript{32} See Culebras Enterprises Corp. v. Rivera Rios, 813 F.2d 506, 516 (1st Cir. 1987) (holding that “there can be no violation of substantive due process . . . until the state inverse condemnation proceeding is resolved”); Ochoa Realty Corp. v. Faria, 815 F.2d 812, 817 n.4 (1st Cir. 1987).
\textsuperscript{33} See Stone & Seymour, \textit{supra} note 14, at 1233.
\textsuperscript{34} See Dodd v. Hood River County, 59 F.3d 852, 859-60 (9th Cir. 1995) (holding that plaintiffs need not actually bring a federal takings claim in state court in order to ripen it because the compensation element is satisfied if plaintiffs pursue remedies available under state law). The \textit{Dodd} court captured the concern with such a requirement: “Reduced to its essence, to hold that a taking plaintiff must first present a Fifth Amendment claim to the
ings as trials on the underlying constitutional claims. Even if a plaintiff can reserve her federal claims for future litigation in order to avoid the claim-preclusive consequences of the earlier state proceeding, matters addressed in the state proceeding will have issue-preclusive effect in subsequent litigation. Thus, the availability of less exhaustive ripeness prerequisites for a substantive due process claim could prove determinative to a litigant’s choice of forum: a landowner plaintiff who particularly desires a federal forum for her claim may be limited to a substantive due process theory of recovery.

Cases in the Ninth Circuit, where the compensation requirement does not apply to substantive due process claims, demonstrate that ripeness concerns have influenced the litigation strategies of landowner plaintiffs. For example, in Arroyo Vista Partners v. County of Santa Barbara, a developer “carefully avoided alleging a federal taking claim” and brought only a substantive due process challenge as a strategic response to federal ripeness requirements “imposed on takings claims, but not explicitly required of substantive due process claims . . . .” Moreover, at least one Ninth Circuit plaintiff benefited from this strategy when the court granted judgment in his favor on a substantive due process claim but dismissed his takings claim as unripe.

The Ninth Circuit, discussing an earlier case, appeared to have precisely this strategy in mind when it ruled that litigants with possible takings claims cannot bring substantive due process claims on the same facts:

state court system as a condition precedent to seeking relief in a federal court would be to deny a federal forum to every takings claimant.” Id. at 860. Although not strictly required, the same result may follow simply by operation of principles of res judicata and collateral estoppel.

35. See Benjamin, supra note 15, at 2676 n.52.
36. See Dodd, 59 F.3d at 863, 868; Palomar Mobilehome Park Ass’n v. City of San Marcos, 989 F.2d 362, 364 (9th Cir. 1993); Roberts & Shearer, supra note 8, at 841 (describing the second Williamson County prong as the “death knell for lower federal courts hearing takings claims”); Id. at 842 (“The idea that [Williamson County] somehow abrogated the doctrines of res judicata and collateral estoppel has been rejected.”); see also Benjamin, supra note 15, at 2676 (suggesting, based on preclusion issues, that substantive due process claims should not be subject to the compensation requirement because “by the time a plaintiff’s claim is perfected, it may also be precluded”). For a general overview of the principles of res judicata (claim preclusion) and collateral estoppel (issue preclusion), see Dodd, 59 F.3d at 863 (quoting Allen v. McCurry, 449 U.S. 90, 94 (1980)).
37. Note, however, that a recent Ninth Circuit opinion limits the availability of substantive due process as a theory of recovery for the alleged over-regulation of land. See infra, Part III.B. for a discussion of Armendariz v. Penman, 75 F.3d 1311 (9th Cir. 1996) (en banc).
40. See Bateson, 857 F.2d at 1303, 1306.
The soundness of the logic underlying the Graham rule [limiting the availability of a substantive due process claim] is best displayed by examining what occurred when we disregarded the rule in Sinaloa: The plaintiffs were able to present what was essentially a takings claim without exhausting their state remedies, thereby escaping a critical prerequisite to ordinary Fifth Amendment takings claims.\(^{41}\)

The Ninth Circuit’s attempt to limit the use of such tactical maneuvers implies that the litigants did indeed pursue such a strategy.

Just how far this strategy can take a landowner plaintiff remains questionable. On the one hand, by alleging a denial of substantive due process, a landowner may confront fewer hurdles in seeking access to a federal forum. Indeed, a landowner may be able to obtain federal court review only by pursuing this approach. On the other hand, the landowner will be left with only her substantive due process claim—a claim that is at least arguably harder to prove than a takings claim.\(^{42}\) Thus, she may ultimately gain little to nothing by employing this strategy.\(^{43}\) Accordingly, in Herrington v. County of Sonoma,\(^{44}\) the court recognized that “[t]akings claims and substantive due process claims are not fungible” and concluded that exempting substantive due process claims from the Williamson County compensation requirement would not undermine the strict ripeness requirements established for takings claims.\(^{45}\)

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41. Armendariz, 75 F.3d at 1325 (citing Williamson County Regional Planning Comm’n v. Hamilton Bank, 473 U.S. 172 (1985)).

42. See Sinaloa, 882 F.2d at 1407 (“To establish a violation of substantive due process, the plaintiffs must prove that the government’s action was ‘clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.’” (quoting Village of Euclid v. Ambler Realty, 272 U.S. 365, 395 (1926)); Halverson v. Skagit County, 42 F.3d 1257, 1262 (9th Cir. 1995) (referring to plaintiffs’ “heavy burden” in choosing to pursue their claim under substantive due process theory); Del Monte Dunes I, 920 F.2d 1496, 1508 (9th Cir. 1990) (stating that local government development decisions are “presumptively constitutional and, therefore, need only be rationally related to a legitimate state interest, unless the distinctive treatment of the party involves either a fundamental right or a suspect classification”). Practically speaking, preclusion laws may obviate whichever claim the plaintiff does not file first, assuming they arise out of the same context. Therefore, if the plaintiff has a better chance of succeeding under the takings theory, it does not really help her if she can get into court earlier on a substantive due process theory.

43. See Ronald J. Krotoszynski, Jr., Fundamental Property Rights, 85 GEO. L.J. 555, 571-72 (1997). The author notes:

One could argue that if a plaintiff suffering the loss of property can proceed simply by alleging a denial of substantive due process, Williamson County would be rendered useless. However, would-be plaintiffs cannot escape Williamson County so easily: under Judge Kozinski’s parsing of substantive due process [in Sinaloa], a government agency can easily defeat the substantive due process claim unless it has acted in an utterly arbitrary fashion. This is a substantially more difficult test than a plaintiff would face under the Takings Clause. Thus, substantive due process claims are not interchangeable with Takings Clause claims.

Id. (footnotes omitted).

44. 834 F.2d 1488 (9th Cir. 1988).

45. Id. at 1498 n.7.
(b) State Exhaustion Requirements

Another procedural mechanism, although not strictly a matter of federal ripeness doctrine, restricts access to the court system altogether. Recall that the *Williamson County* compensation factor requires a plaintiff to challenge a land use decision—effectively by filing her takings claim—in state court before going to federal court. State court exhaustion requirements then compel litigants to perfect takings claims prior to filing, imposing yet another obstacle to judicial review of land use decisions. For example, California law requires a plaintiff to file a writ of mandamus in superior court prior to or in conjunction with filing a takings claim.\(^{46}\) Thus, regardless of the merits, plaintiffs filing inverse condemnation claims must essentially challenge the validity of the regulation in question before they may bring the takings claim.\(^{47}\) A substantive due process claim offers at least one such means of challenging a regulation’s validity. Because a plaintiff must challenge the validity of the regulation whether or not this is the claim she ultimately seeks to bring, this requirement encourages her to join a substantive due process claim with her takings claim.\(^{48}\)

Both federal and California courts impose particularly rigorous limitations on the timeliness of takings claims, perhaps as a means of avoiding unnecessary intrusions into government land use decisions. These considerations will therefore factor into a plaintiff’s litigation strategies and may ultimately weigh in favor of combining or substituting constitutional claims.

2. Available Remedies

(a) Preliminary Considerations

The remedies available under alternative constitutional theories may also significantly influence which theories a plaintiff will pursue in a given case. Theoretically, successful suits under a takings theory produce a very different outcome than those filed under a due process

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\(^{47}\) See *CAL. CIV. PROC. CODE § 1094.5* (West 1998).

\(^{48}\) In this regard, Robert Best, President of the Pacific Legal Foundation, referred to the writ proceeding as imposing a requirement that plaintiffs file what amounts to a “sham” lawsuit. For example, a plaintiff might willingly acknowledge that a government action is *valid*, yet still contend that it amounts to a taking unless compensation is paid. However, California law requires them to nonetheless challenge the validity of a government action simply to proceed with their inverse condemnation claim. The requirement becomes particularly problematic if determinations in the writ proceeding are preclusive concerning issues that might subsequently be raised in the takings case itself.
or equal protection theory.\textsuperscript{49} The remedy in the former case is compensation, ordinarily the fair market value of the property "taken."\textsuperscript{50} The remedy in the latter case is invalidation of the offending regulation as applied to the complainant's property and possibly damages for interim harm.\textsuperscript{51}

Until quite recently, courts tended to blur this distinction, frequently invalidating regulations deemed to constitute takings. However, in \textit{First English Evangelical Lutheran Church v. City of Glendale}, the Supreme Court held that the takings proscription is actually self executing—the term "compensation" imposes a constitutionally mandated remedy for violations of the Fifth Amendment.\textsuperscript{52} \textit{First English} does not, however, dictate that every taking will produce money damages in lieu of injunctive relief; rather the opinion vests that option in the defendant. A governmental entity can either invalidate the offending regulation as applied to the plaintiff and pay any interim compensation due, or it can continue the force of the regulation and pay compensation for a permanent taking.\textsuperscript{53}

Under either constitutional theory of recovery, plaintiffs may desire an additional or alternative remedy to the one applied in a paradigmatic case. Indeed, perhaps ironically, \textit{First English} did not represent an unqualified victory for all landowners.\textsuperscript{54} The built-in remedy of the Takings Clause operates on the legal fiction that money and property are fungible.\textsuperscript{55} Thus, a potential constitutional violation

\textsuperscript{49} Because, as noted above, the substantive due process claim is most frequently coupled with the takings claim and more likely to succeed than an equal protection claim, and because the procedural due process claim is properly rooted in entirely distinct facts, I will focus my analysis on a comparison of takings and substantive due process remedies. However, much of the discussion also applies to both equal protection and procedural due process claims.

\textsuperscript{50} See Stone & Seymour, supra note 14, at 1241.

\textsuperscript{51} See Benjamin, supra note 15, at 2669.

\textsuperscript{52} 482 U.S. 304, 315 (1987). Ever since the \textit{First English} case, discussed \textit{infra}, the Court has been somewhat inconsistent regarding available remedies under a takings theory. For example, in \textit{Nollan v. California Coastal Comm'n}, 483 U.S. 825 (1987), the Court granted the plaintiffs' requested injunction against enforcement of a permit condition that was deemed to be a taking. See John D. Echeverria & Sharon Dennis, \textit{The Takings Issue and the Due Process Clause: A Way Out of a Doctrinal Confusion}, 17 VT. L. REV. 695, 706-07 (1993). Interestingly, this result may reflect the broader doctrinal confusion that characterizes the intersection of takings and substantive due process. Specifically, the Nollans succeeded on a takings claim, but they did so under a due process style, means-ends standard, and they received a due process style remedy of invalidation.

\textsuperscript{53} See \textit{First English}, 482 U.S. at 317, 321. Note that the latter option essentially tells the government that, if it wishes to maintain the offending regulation, it must exercise its power of eminent domain and compensate the landowner accordingly.

\textsuperscript{54} One might expect landowners to favor the payment of compensation in many cases, whereas government entities, more concerned with conserving their coffers, will more frequently opt to invalidate offending measures.

\textsuperscript{55} Personal correspondence with Robert Best, President of the Pacific Legal Foundation.
can be averted by payment of compensation. Imagine, however, that
an aging couple has spent years searching out a parcel of land on
which to build a retirement home—the perfect view, the desired lo-
cation, the ideal proximity to grandchildren. If a land use regulation
subsequently prevented the couple from building this home, compen-
sation in the form of "fair market value" would not even closely ap-
proximate the couple's loss. The couple would prefer to have the
regulation's application to its property invalidated and thereby retain
the full panoply of interests in that particular piece of property. How-
ever, at least under a takings theory, that choice would rest with the
government.

Similarly, a plaintiff who succeeds under a substantive due pro-
cess theory may not be satisfied by mere invalidation of the ordinance. She
may desire damages for harm incurred while the offending regula-
tion remained in force or even takings-style compensation for the fair
market value of her land. However, a regulation that violates due
process cannot be cured by payment of compensation; rather, it is nec-
essarily invalid. Absent a statutory remedy, this plaintiff is limited to
those remedies available in suits filed directly under the Constitution:
invalidation and the possibility of damages for interim harm. Thus,
both the takings and substantive due process plaintiffs might deem
their available remedies somewhat "imperfect" and might attempt to
boost their recovery by pursuing other claims.

(b) The § 1983 Suit in the Land Use Context

The emergence of the federal civil rights statute, § 1983, as a
vehicle for redressing constitutional violations in the land use con-
text transforms the paradigm scenario. Until 1978, two factors limited
landowners to direct constitutional suits for redress of constitutional
violations by local governments. First, the majority of prospective
defendants were immune from suit under the federal civil rights stat-

56. 42 U.S.C. §1983 provides, in relevant part:

   Every person who, under color of any statute, ordinance, regulation, custom, or
   usage, of any State or Territory ... subjects, or causes to be subjected, any citizen
   of the United States or other person within the jurisdiction thereof to the depriva-
   tion of any rights, privileges, or immunities secured by the Constitution and laws,
   shall be liable to the party injured in an action at law, suit in equity, or other
   proper proceeding for redress.

57. Section 1983 itself confers no substantive rights. See generally Michael S. Bogren,
Municipal Liability Under § 1983, in SWORD & SHIELD REVISITED: A PRACTICAL AP-

58. See Nicholas Rockwell, Constitutional Violations in Zoning: The Emerging Section
ute, and second, courts had simply not interpreted § 1983 to extend protection to property interests.59

In 1978, the Supreme Court lifted the first barrier, holding local government entities susceptible to suit for the infringement of federal rights resulting from an official policy of the defendant entity.60 In the intervening years, the second obstacle similarly dissolved as courts increasingly found § 1983 to be an appropriate vehicle for suits alleging constitutional violations in the land use context. Indeed, some courts, including the Ninth Circuit, have held that, where it is available, § 1983 offers litigants the exclusive mechanism of recovery for unconstitutional takings in violation of the Fifth Amendment.61 Although the Eleventh Amendment shields the state itself from suit under § 1983,62 litigants today commonly bring both takings and substantive due process claims against local governments pursuant to § 1983.63

(c) Amount of Recovery Under Takings and Substantive Due Process Theories

The availability of § 1983 relief "levels the playing field" by making damages available to litigants suing under either constitutional theory. The statute is modeled on traditional tort law principles and, thus, opens the door to a broad spectrum of tort-style damages. Most importantly, these may include consequential damages, punitive damages, and attorneys' fees—presumably none of which are available under a direct Fifth or Fourteenth Amendment suit. In the sections

59. See Rockwell, supra note 58, at 177 n.69; Steven H. Steinglass, An Introduction to State Court § 1983 Litigation, in SWORD & SHIELD 85.

60. See Monell v. Department of Social Services, 436 U.S. 658, 690 (1978) (holding that local governments qualify as "persons" within the meaning of § 1983); see also Jane K. Swanson, Procedural Guide to § 1983 Litigation in Federal Court, in SWORD & SHIELD 14, 24-27.

61. See Azul-Pacifico, Inc. v. City of Los Angeles, 973 F.2d 704, 705 (9th Cir. 1992) (holding that, where a plaintiff alleging a constitutional violation has an available suit under § 1983, the "[p]laintiff has no cause of action directly under the United States Constitution"); see also Bieneman v. City of Chicago, 662 F. Supp. 1297, 1300 (N.D. Ill. 1987); J. Margaret Tretbar, Calculating Compensation for Temporary Regulatory Takings, 42 U. KAN. L. REV. 201, 236 (1993). Holdings that require litigants to bring takings claims under § 1983 follow from the Supreme Court's determination that property rights are civil rights protected under that statute. See Lynch v. Household Fin. Co., 405 U.S. 538, 552 (1972).

62. See Quern v. Jordan, 440 U.S. 332, 345 (1979) (holding that Congress did not abrogate the states' Eleventh Amendment immunity when it passed § 1983). The Eleventh Amendment protects states and state agencies from suit in federal court but does not extend to local government entities. See also Bogren, supra note 57, at 219.

63. See Benjamin, supra note 15, at 2669. But see Richard G. Carlisle, The Section 1983 Land Use Case, in SWORD & SHIELD 416, 416. ("Notwithstanding Monell, . . . the Fifth Amendment remains the primary vehicle for challenging land use cases."). This observation may reflect the immunities that still protect many government entities from suit under § 1983, discussed supra note 65.

that follow, I compare the recovery of consequential and punitive damages available to plaintiffs who pursue takings or substantive due process claims under § 1983.65

State tort law provides the “starting point” for determining the elements of and requirements for recovery under § 1983.66 Thus, to the extent that it differs from equivalent federal standards, state law governing damages and attorneys’ fees may influence a plaintiff’s choice of which claims to plead.67 However, in order to provide some nationwide uniformity for the redress of important federal rights, state courts generally incorporate federal policy considerations in determining damage awards under § 1983.68 Moreover, state courts also tend to follow federal standards in assessing attorneys’ fees.69 The uncertainty concerning when state courts will follow federal policy creates at least a potential for inconsistent results among different state courts, although the rights at stake derive from federal law.

(1) Consequential or Compensatory Damages

Courts will not award purely speculative damages in either a takings or a substantive due process suit filed under § 1983.70 Beyond that limitation, the approaches diverge widely. Some courts simply equate the two claims, determining that the same relief applies to over-regulation of land notwithstanding the theory of recovery.71 Others recognize important differences.72 For example, one court noted that “the appropriate damages award may be lower” under a

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65. I do not specifically discuss attorneys’ fees, although they may be an important—even determinative—concern to litigants. This is because, absent a specific state law limiting attorneys’ fees in either type of action, this element of recovery should not vary as significantly with the theory of recovery pursued.

66. Swanson, supra note 60, at 79.

67. See Stone & Seymour, supra note 14, at 1244. For example, California law specifically provides for recovery of attorneys’ fees in inverse condemnation actions. CAL. CIV. PROC. CODE § 1036. Unlike § 1988, California law does not leave the award of attorneys’ fees to the discretion of the court; only the amount of the award is discretionary. See, e.g., Landgate v. California Coastal Comm’n, 61 Cal. Rptr. 2d 196, 207 (Cal. Ct. App. 1997), rev’d on other grounds, 73 Cal. Rptr. 2d 841 (Cal. 1998). The California provision is therefore at least arguably more generous than § 1988.


69. See id. at 159.

70. See Stone & Seymour, supra note 14, at 1243.

71. See, e.g., Wheeler v. City of Pleasant Grove, 833 F.2d 267, 270 n.3 (11th Cir. 1987) (noting that “the measure of damages to which the aggrieved landowner is entitled is the same” under a takings or substantive due process theory); Herrington v. County of Sonoma, 790 F. Supp. 909, 913 (N.D. Cal. 1991), aff’d, 12 F.3d 901 (9th Cir. 1993) (assuming that damages analysis in substantive due process context would be equally relevant to takings case).

72. See, e.g., Echeverria & Dennis, supra note 52, at 708 (“The measure of damages is presumably different in each case—‘just compensation’ in the taking case, and actual damages in the due process case . . . .”).
substantive due process theory than under a takings theory "because the property owner may not be able to obtain compensation for denial of all use of the property during the period of the violation." Yet others have noted that a substantive due process theory may provide more flexibility in assessing damages, thereby possibly increasing potential awards.

Regardless of which theory a plaintiff pursues, her relief under § 1983 may dramatically differ from that under a direct constitutional theory. For instance, under a direct takings challenge, courts limit recoverable damages to strict compensation for the value of property interests taken. This recovery would not include such consequential damages as lost profits, lost opportunities, attorneys' fees, relocation costs, or loss of good will. Nor would it include "special use" values. On the other hand, a direct Fifth Amendment claim would probably not require proof of actual damages because the Takings Clause compensates for the property value, not for the landowner's injury. Thus, to require demonstration of actual loss would "ignore[ ] the self-executing character of the Fifth Amendment" relied upon by the First English Court.

By contrast, § 1983 provides many types of relief under the tort law principle of fully restoring an injured party to her pre-injured state. Thus, any variety of consequential or incidental damages is at least arguably available to a § 1983 takings plaintiff. However, the underlying tort origins of the § 1983 remedy compel an analogous premise of actual injury in order to receive damages. Whereas a plaintiff may recover fair market value as "just compensation" under a direct constitutional approach, a § 1983 takings plaintiff might, at least theoretically, recover nothing until she demonstrates actual harm incurred from the allegedly unconstitutional regulation. Such injury may be particularly hard to establish in situations where the property at issue was not actually in use at the time an allegedly unconstitutional

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73. Herrington, 834 F.2d at 1498 n.7.
74. See Stone & Seymour, supra note 14, at 1243 ("Under due process, damages need not be measured by the fair market value of the affected property interest, but by the actual economic damage inflicted by the regulation.").
75. See Herrington, 834 F.2d at 1505 n.21 (noting that "in taking cases, damages for lost profits are generally considered excessively speculative").
76. See Herrington, 790 F. Supp. 909, 915 (N.D. Cal. 1991); Stone & Seymour, supra note 14, at 1241-42 (noting that, in takings cases, "[c]onsequential damages . . . may not be awarded absent some independent statutory basis for recovery.").
77. Stone & Seymour, supra note 14, at 1242.
78. See Tretbar, supra note 61, at 237-38. This principle is rooted in eminent domain law.
79. Tretbar, supra note 61, at 238.
80. See discussion infra of potential problems with accepting this proposition.
81. See Tretbar, supra note 61, at 237.
tional regulation was enacted. Thus, despite the broader potential scope of damages under § 1983, actual recovery under the statutory approach could prove lower than that under the direct constitutional approach.82

Of course, a takings claim provides the unique context of a constitutionally mandated remedy. Thus, the extent to which invocation of § 1983 can influence the ultimate remedy is relatively unclear. For example, it seems hard to believe that a takings plaintiff would be required to pursue a statutory vehicle that offers her less recovery than the Constitution purportedly mandates. Yet that may be just the result if the direct constitutional action is not available83 and proof of actual injury is required as a prerequisite to recovery.84 As a corollary, the § 1983 approach may substantially increase the recovery of a takings plaintiff by offering damages above and beyond mere “compensation.” If one interprets the constitutional mandate as both a ceiling and a floor on recovery for takings, then results under § 1983 potentially conflict with the self-executing character of the Takings Clause.

(2) Punitive Damages

The availability of punitive damages may particularly influence the litigation strategy of a plaintiff. Although punitive damages are not available against municipalities,85 they may be available against individual local officials in § 1983 cases involving “evil motive or intent” or particularly egregious violations.86 However, punitive damages are only available under substantive due process or equal protection theories and, according to some, are “clearly inapplicable” to inverse condemnation actions.87

Section 1983 does not explicitly differentiate between takings and substantive due process theories concerning the availability of puni-

82. See Robert Meltz et al., The Takings Issue: Constitutional Limits on Land Use Control and Environmental Regulation, ch. 30 (forthcoming Oct. 1998).
83. See Azul-Pacifico, 973 F.2d at 705, discussed supra note 63.
84. See Tretbar, supra note 61, at 237. Note that this result is particularly problematic because the state and federal governments are not susceptible to suit under § 1983. Thus, substantially different recovery would be available depending upon the character of the governmental takings defendant. Although the additional sources of recovery available under a § 1983 approach achieve this same discrepancy to some degree, the result is not as troubling as if a § 1983 claim produced less than the constitutionally-prescribed remedy.
85. See Mendel, supra note 19, at 515 n.86.
86. See Stone & Seymour, supra note 14, at 1243; Davis v. Mason County, 927 F.2d 1473, 1485 (9th Cir. 1991); Steinglass, supra note 59, at 148-49; Tretbar, supra note 61, at 239.
87. Tretbar, supra note 61, at 238-39. But see Benjamin, supra note 15, at 2670-71 (“[T]he same rules for punitive damages and attorneys’ fees apply to both takings and substantive due process claims . . . .”).
tive damages. However, the fundamentally distinct nature of the claims supports the different result. In particular, a plaintiff's allegation of a taking at least arguably presupposes the legitimate exercise of a police power function by a governmental entity or official.\textsuperscript{88} The concern addressed by the Takings Clause relates to the \textit{impact} of that action on a given landowner. By contrast, an action that violates substantive due process or equal protection is per se invalid. Moreover, the concern that gives rise to those sources of constitutional protection lies in the nature of the governmental \textit{conduct}. Thus, a remedy that depends on proof of intent, motive, or otherwise egregious conduct necessarily corresponds with the latter theory. Assuming that the theories are interchangeable on a given set of facts,\textsuperscript{89} a landowner plaintiff would probably prefer at least the opportunity to dramatically increase her recovery by alleging a substantive due process or equal protection violation.

\textbf{(d) Summary}

Even if one can determine precisely which elements of recovery will be available under these alternative constitutional theories, it is not possible in the abstract to determine which will yield a larger award.\textsuperscript{90} Neither theory standing alone will produce a universally acceptable remedy. Some plaintiffs may prefer money, others invalidation. Importantly, the substantive due process claim holds more promise of offering both forms of remedy. If a plaintiff wants more

\textsuperscript{88} This formulation—which draws a distinction based on the validity of governmental action—corresponds with both the history and doctrinal underpinnings of takings and due process analysis. See, e.g., \textit{First English Evangelical Lutheran Church v. County of Los Angeles}, 482 U.S. 304, 314 ("As its language indicates, and as the Court has frequently noted, [the Takings Clause] does not prohibit the taking of private property, but instead places a condition on the exercise of that power."). However, despite the appeal of this approach, the Supreme Court does not appear to have fully adopted it as a framework for takings analysis. For example, in \textit{Nollan v. California Coastal Comm'n}, 483 U.S. 825, 839 (1987), the Court held that a permit condition requiring public access to property was an unconstitutional taking. In setting forth the requirement of an "essential nexus," the Court stated that "unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use . . . ." \textit{Id.} at 837. This conclusion indicates that the Court considered the same action that amounted to a taking to be invalid. The \textit{Nollan} Court could have simply required the government to pay compensation, thereby achieving the result the government could have obtained through the exercise of its eminent domain power. Instead, the Court enjoined enforcement of the permit condition, thereby achieving the result that was presumably preferable to the Nollans, who did not want to provide public access to their property. \textit{Id.} at 839. Ironically, the \textit{Nollan} case itself perhaps embodies some of the current uncertainty and confusion surrounding the interplay of due process style review with takings analysis and the appropriate level of scrutiny of government land use decisions. See discussion infra, Part I.B.2.b.

\textsuperscript{89} As discussed infra, the theories, while arguably not interchangeable, are commonly treated as such by courts deciding land use cases.

\textsuperscript{90} See Echeverria & Dennis, supra note 52, at 708; Benjamin, supra note 15, at 2670.
than invalidation, she will have to pursue her substantive due process claim under a statutory mechanism. Section 1983 offers just that—a viable source of damage recovery. By contrast, a plaintiff pursuing a takings claim will ostensibly receive some form of monetary compensation under either a direct constitutional or § 1983 approach but risks no recovery if the governmental entity in question opts to invalidate the offending regulation. Thus, a plaintiff might strategically choose to substitute or supplement a takings claim with a substantive due process or equal protection claim in order to increase the potential scope of her recovery to include invalidation of the regulation and a wider array of consequential or punitive damages.

3. Right to Jury Trial

A third "procedural" factor that might influence a landowner plaintiff's litigation strategy is whether she will be entitled to present her claims before a jury. Substantive due process claims typically present questions of law or mixed questions of law and fact for a judge.91 Similarly, the traditional practice for takings claims has involved submitting the liability issue to a judge and impaneling a jury only for a compensation determination if it proves necessary.92 However, in *Del Monte Dunes v. City of Monterey*, the Ninth Circuit recognized the right to a jury trial of takings liability, at least for claims brought pursuant to § 1983.93 Thus, although the jury trial factor may not explain past strategic behavior, it may—depending on how the Supreme Court rules on this question—presage future litigation tactics on the part of those plaintiffs who believe that a jury determination will prove more favorable to them. Rather than prompting a litigant to combine or replace her takings claims with other constitutional claims, a right to trial by jury for takings liability might encourage a plaintiff simply to pursue her takings claim, regardless of other potential claims.94

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91. *See* Bateson v. Geisse, 857 F.2d 1300 (9th Cir. 1988). Richard Frank, an attorney with the California Attorney General's Office, made the same observation. Telephone Interview.


93. 95 F.3d 1422 (9th Cir. 1996).

94. Recall that a plaintiff, at least in California, may be required to bring some challenge to the validity of a government action as a precondition to her takings claim. *See supra*, Part I.A.1.b. However, this challenge need not necessarily arise in the form of a substantive due process claim. Even if it does, moreover, the plaintiff's strategy would not change: she would simply present *both* her takings and her substantive due process claims, hoping that at least the former claim would get her before a jury. Thus, as a strategic matter, this tactic militates against merely filing a substantive due process claim in lieu of a takings claim. A plaintiff may gain no particular jury trial benefit by combining claims, but she will probably lose nothing by doing this either.
This strategy, whether deliberate or inadvertent, apparently succeeded for the plaintiffs in *Del Monte Dunes*. There, a Ninth Circuit panel affirmed the district judge's decision to submit the question of takings liability to a jury while reserving the question of substantive due process liability for the court.95 Perhaps most importantly, under what arguably should have been the same standard,96 the judge found no liability on the substantive due process question, but the jury found the city liable on takings grounds.97 This case therefore illustrates both how a plaintiff might get her takings claim before a jury and why she might want to do so.

Somewhat surprisingly, very few courts have directly addressed the existence of a constitutional or statutory right to a jury determination of takings liability. In petitioning the Supreme Court for review of this decision, the city of Monterey characterized the Ninth Circuit's ruling as "depart[ing] sharply from the accepted procedure for litigating such claims in both federal and state courts."98 Monterey argued that the fact that the "federal courts have rarely been called upon to expressly address the issue" reflects that the practice of resolution by the court is accepted.99 Perhaps the dearth of case law reflects precisely the "settled procedure" on which Monterey has relied—the question simply does not exist, the strategy is not available, and the Ninth Circuit was led astray in an isolated case. Alternatively, however, the absence of relevant precedent could indicate an area of uncertainty in the law due to the relative youth of the regulatory takings claim as a viable cause of action.

Regardless of the source of the ambiguity, the Supreme Court's resolution of the jury trial question will bear significantly on the character of future land use litigation in the Ninth Circuit and beyond. Moreover, the question is not one of abstract uncertainty in the law but has led to a direct split in the circuits. The Ninth Circuit's ruling in *Del Monte Dunes* followed less than one week after the Eleventh Circuit flatly rejected an asserted right to a jury determination of takings liability in *New Port Largo v. Monroe County*.100

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95. 95 F.3d at 1428-30.

96. Although any form of means-ends review fits uncomfortably within takings doctrine, *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980), apparently adopted this style of analysis with its "substantially advance" test. Because the *Agins* Court borrowed this standard from due process cases, it is hard to imagine why the takings version of the test would differ in rigor from the due process version.

97. The appellate court affirmed this outcome under a questionable interpretation of the standards applicable to these claims. See infra, Part I.B.1.b.


99. Id. at 9.

100. 95 F.3d 1084 (11th Cir. 1996).
Del Monte Dunes presents the Supreme Court with the challenge of reconciling years of practice with a paucity of precedent on the question of whether a plaintiff is entitled to a jury trial of takings liability. In the sections that follow, I present four of the major issues that emerge from the relevant opinions and the arguments advanced by the parties to the case. First, does the Seventh Amendment guarantee a jury trial in takings cases? Second, do alternative, statutory sources of authority confer such a right? Third, assuming a right does exist, what is the proper allocation of underlying issues between judge and jury? Finally, to what extent are conflicting rules and practices regarding jury trial rights in state court relevant to this analysis? These issues, for the most part, expose areas of unsettled legal doctrine. However, they provide useful vehicles for exploring the considerations that may influence the Supreme Court in Del Monte Dunes and, thus, also for assessing whether jury trial rights will become a factor that might influence litigation strategies pursued in land use cases.

(a) The Seventh Amendment Right to Jury Trial

The Seventh Amendment provides a logical starting point for an analysis of the right to a jury trial in federal court. This constitutional guarantee does not create any rights to have a jury hear one’s case; instead, it merely preserves such rights as they existed at common law in 1791. Entirely irrespective of jury issues, the notion of inverse condemnation itself did not exist in 1791. Indeed, historical evidence suggests that the Takings Clause was originally intended to address cases of direct condemnation through governmental exercise of eminent domain. In 1922, in Pennsylvania Coal Co. v. Mahon, Justice Holmes first opined that a regulation could “go[] too far.” Thus, the Supreme Court apparently invented the idea that pure regul-
latory action could unconstitutionally "take" property long after the Seventh Amendment was enacted.105

Where a claim itself did not exist at common law in 1791, courts turn instead to the existence of an analogous claim at that time and any entitlement to a jury thereunder. An alternative course of analysis would produce the odd result that no causes of action not recognized in 1791 could confer a constitutional right to jury trial.

In Del Monte Dunes, the city of Monterey identified eminent domain, which existed at common law, as the appropriate analogy for inverse condemnation. The shared constitutional source of these claims supports this argument.106 Moreover, the Supreme Court has frequently portrayed inverse condemnation claims as no more than eminent domain proceedings initiated by property owners instead of the government.107 The reasoning behind the recognition of an inverse condemnation claim—that the government has achieved the same result by regulation as it would by direct acquisition and must therefore compensate the injured landowner accordingly—supports a characterization of the claims as "two sides of the same constitutional coin."108

No Seventh Amendment right to jury trial exists in direct condemnation claims for the determination of compensation or other fac-

105. See Brief of the State of California as Amicus Curiae in Support of Defendant/Appellant City of Monterey at 15, Del Monte Dunes v. City of Monterey, 95 F.3d 1422 (9th Cir. 1996) (No. 94-16248) (tracing to Pennsylvania Coal the "notion that the government's mere regulatory conduct may trigger a requirement for compensation under the Fifth Amendment").

106. See Amicus Curiae Brief of the City and County of San Francisco in Support of City of Monterey's Petition for Rehearing and Suggestion for Rehearing En Banc at 13, Del Monte Dunes v. City of Monterey, 95 F.3d 1422 (9th Cir. 1996) (No. 94-16248) (stating that, like direct condemnation, "[i]nverse condemnation arises directly out of the self-executing character of the Takings Clause of the Fifth Amendment"); see also Eric Grant, A Revolutionary View of the Seventh Amendment and the Just Compensation Clause, 91 Nw. U. L. Rev. 144, 149 (1996) (arguing that the right to jury trial exists in eminent domain proceedings, and commenting that this right "does not depend on who files the lawsuit; that is, condemnation and inverse condemnation are equivalents as far as the Seventh Amendment is concerned").

107. See First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 315 (1987); Agins v. City of Tiburon, 447 U.S. 255, 258 n.2 (1980); Armstrong v. United States, 364 U.S. 40, 49 (1960); Jacobs v. United States, 290 U.S. 13, 16 (1933) ("The fact that condemnation proceedings were not instituted and that the right was asserted in suits by the owners did not change the essential nature of the claim. The form of remedy did not qualify the right. It rested upon the Fifth Amendment."). But see Appellees' Opposition Brief and Cross-Brief at 17, Del Monte Dunes v. City of Monterey, 95 F.3d 1422 (9th Cir. 1996) (No. 94-16248 and No. 94-16313) (contrasting eminent domain proceeding brought by the government with "civil rights action" brought by a property owner).

108. Brief of Amicus Curiae for the State of California in Support for Petition for Rehearing at 10, Del Monte Dunes v. City of Monterey, 95 F.3d 1422 (9th Cir. 1996) (No. 94-16248 and No. 94-16313).
tual issues.\textsuperscript{109} No such right existed at common law in 1791, and none has been created since then. Thus, if eminent domain provides the appropriate analogy for inverse condemnation, no constitutional right to jury trial should be found to exist for the latter.

Where no constitutional right controls the outcome, Congress may promulgate determinative rules or statutes. In the context of eminent domain, Federal Rule of Civil Procedure 71A assumes no Seventh Amendment jury right and simply governs what issues a jury may hear upon request by a party and at the discretion of the court.\textsuperscript{110} Rule 71A(h) permits the trial court to submit to a jury the determination of the proper amount of compensation. The Supreme Court relied on Rule 71A in an eminent domain proceeding to conclude: "except for the single issue of just compensation, the trial judge is to decide all issues, legal and factual, that may be presented."\textsuperscript{111} Thus, the jury was "confined to the performance of a single narrow but important function—the determination of a compensation award within ground rules established by the trial judge."\textsuperscript{112}

Practice in the Court of Federal Claims supports the notion that the Seventh Amendment does not guarantee the right to a jury trial of inverse condemnation liability. Takings claims against the federal government are primarily litigated in that forum, which has historically allocated all fact finding functions to judges.\textsuperscript{113} Moreover, even where takings claims against the federal government are filed in district court, the controlling statute precludes jury trial.\textsuperscript{114} The rule in the context of a federal defendant may not pertain in all takings cases, as the applicable immunities and appropriate trial procedures may vary. However, the rule reflects clearly that the Seventh Amendment does not control when a property owner sues the federal government for an alleged taking. It would be odd if the Seventh Amendment did not control in that circumstance, yet mandated a jury trial when the landowner sued a state or federal entity. Thus, it is unlikely that the Constitution confers the right to a jury determination of takings liability.

\textsuperscript{109} See United States v. Reynolds, 397 U.S. 14, 18 (1970) ("[I]t has long been settled that there is no constitutional right to a jury in eminent domain proceedings."); Bauman v. Ross, 167 U.S. 548, 593 (1897) (holding that there is no right to a jury trial in eminent domain proceedings to estimate compensation).

\textsuperscript{110} See Grant, supra note 106, at 160 ("Rule 71A(h) denies a property owner a jury trial as of right: the availability of trial by jury depends on the grace of Congress or the discretion of the district judge.")

\textsuperscript{111} Reynolds, 397 U.S. at 19.

\textsuperscript{112} Id. at 20.

\textsuperscript{113} See Grant, supra note 106, at 161.

\textsuperscript{114} See id. at 161 n.73 (citing the Tucker Act, 28 U.S.C. § 2402 (1994) ("Any action against the United States under § 1346 shall be tried by the court without a jury . . . .").
(b) Statutory Right to Jury Trial Under § 1983

As mentioned above, in the absence of a Seventh Amendment right, statutory sources may create a right to have a jury hear claims pursued thereunder. The Del Monte Dunes court found a right to jury trial in § 1983, which offers plaintiffs a vehicle for redressing constitutional violations by local government entities and officials. Section 1983, however, does not expressly indicate whether the recovery mechanism it provides includes the right to jury trial. Moreover, the Supreme Court has not yet ruled on the existence of such a right under § 1983.115 In the meantime, competing considerations potentially favor different conclusions.

On the one hand, § 1983 does not create any substantive rights; it simply furnishes a remedy for the violation of other federal rights.116 The relevance of this factor depends upon whether the right to a jury trial is part of the substantive rights included in a given claim. If so, the existence of a right to jury trial would depend simply upon whether that right exists for the underlying federal right. If not, the availability of a jury would depend upon applicable procedures in the relevant state or federal court in which a claim is filed. The Supreme Court has provided some indication of the extent to which jury trial rights attach to substantive claims by its approach to Federal Employers Liability Act (FELA) litigation in state courts. In that context, jury unanimity requirements do not carry into state court, whereas the basic allocation of responsibility between judge and jury does carry into state court.117 This analysis suggests that § 1983 does not necessarily entitle a plaintiff to trial by jury, but that the right depends instead on the underlying constitutional or statutory right being asserted—here, inverse condemnation pursuant to the Fifth Amendment.118

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118. In Del Monte Dunes, the city argued that a landowner plaintiff should not be able to create a right to jury trial where one did not previously exist by the "simple expedient of repackaging its inverse condemnation claim as a section 1983 action." Reply Brief of Appellant and Response to Cross-Appeal at 4, Del Monte Dunes v. City of Monterey, 95 F.3d 1422 (9th Cir. 1996) (No. 94-16248 and No. 94-16313).
On the other hand, many actions brought under § 1983 seek damages as a remedy, and the statute itself is modeled on tort principles. Thus, at least one commentator argues that:

Although there is no explicit trial by jury provision in § 1983, it is likely that Congress contemplated that juries would hear such cases. The language in § 1 of the Civil Rights Act of 1871 providing that defendants shall "be liable to the party injured in any action at law" suggests that Congress was thinking about legal actions to which the jury trial guarantee attached.\(^\text{119}\) This analysis equates a basic § 1983 action seeking monetary recovery with an action to which a jury trial right existed at common law in 1791.\(^\text{120}\) As a result, the Seventh Amendment itself would confer the right to trial by jury in § 1983 actions.

In Del Monte Dunes, the developer, and ultimately the Ninth Circuit panel, adopted this line of analysis, concluding that §1983 confers a blanket right to jury trial for actions "at law." Indeed, Del Monte Dunes characterized Monterey's contention to the contrary as "[flying] in the face of well established section 1983 jurisprudence that juries generally decide question[s] of violations of constitutional rights."\(^\text{121}\) However, in support of that "well established" principle, Del Monte Dunes cited only Jett v. Dallas Independent School District,\(^\text{122}\) maintaining that Jett "foreordained the conclusion reached by the Ninth Circuit in upholding the jury's right to decide liability in civil rights actions seeking damages."\(^\text{123}\)

The precise claims at issue in Jett do not necessitate such a broad conclusion. Specifically, the plaintiff there raised claims of wrongful employment termination based on racial discrimination—claims that, although deriving from federal protection, are analogous to state law tort and contract actions that "were triable by a jury at common law."\(^\text{124}\) Thus, consistent with the first line of analysis mentioned

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119. Steven H. Steinglass, supra note 59, at 151 (emphasis in original) (footnote omitted); see also Stephen J. Shapiro, Section 1983 Claims to Redress Discrimination in Public Employment: Are They Preempted by Title VII?, 35 Am. U. L. Rev. 93, 102 n.64 (1985) ("Plaintiffs in a section 1983 suit seeking damages are entitled to a jury trial.").

120. See, e.g., Steinglass, supra note 59, at 151 (quoting Cong. Globe, 42d Cong., 1st Sess. 804 (1871) (statement of Rep. Poland) ("[I]n response to a question about how to measure damages under a different section of the 1871 act, a member of the House responded as follows: 'Precisely the same as you do in an action of tort. The question of damages is a question in the sound discretion of the jury.'").

121. Appellees' Opposition Brief and Cross-Brief at 15, Del Monte Dunes v. City of Monterey, 95 F.3d 1422 (9th Cir. 1996) (No. 94-16248 and No. 94-16313).


124. Reply Brief of Appellant and Response to Cross-Appeal at 5, Del Monte Dunes v. City of Monterey, 95 F.3d 1422 (9th Cir. 1996) (No. 94-16248 and No. 94-16313).
above, one could persuasively argue that the right to jury trial applied in *Jett* only because it was supported by the underlying claim asserted.

This argument reinforces the notion that the right to a jury attaches to substantive claims and is therefore only available in certain § 1983 actions. Del Monte Dunes maintained that this approach would create an untenable and unconstitutional hierarchy among civil rights litigants. On the contrary, the argument is simply bolstered by the breadth of the designation, "civil rights." Where such an all encompassing vehicle exists for seeking relief from a wide array of constitutional and statutory violations, the same right to jury trial need not necessarily pertain to every case. Indeed, the justifications for the right—the relative sympathies and qualifications of judge and jury—certainly would not apply equally to the different contexts potentially implicated under the § 1983 designation of "civil rights."

(c) Judge-Jury Division

Assuming that the right to trial by jury exists for an inverse condemnation claim, it may extend only to the question of compensation. The proper allocation of responsibility between judge and jury in a given case depends on the nature of the particular issues presented. A judge will ordinarily decide legal matters, whereas a jury will decide factual questions. Thus, if legal matters pervade an actual liability determination, a theoretical right to jury may mean nothing in practice because the judge will determine liability.

Courts have generally treated the question of inverse condemnation liability as a mixed question of law and fact, as reflected in the *de novo* standard applied to the review of lower court rulings. Accordingly, the Ninth Circuit ruled, in the context of a substantive due process claim, that challenges to land use decisions are mixed questions of law and fact. This ruling is particularly significant because the means-ends component of the takings analysis—the requirement that regulations must "substantially advance" a "legitimate state inter-

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125. Appellees' Opposition Brief and Cross-Brief at 18, Del Monte Dunes v. City of Monterey, 95 F.3d 1422 (9th Cir. 1996) (No. 94-16248 and No. 94-16313).
126. The law/fact distinction in this context should be distinguished from the law/equity distinction alluded to in the earlier discussion of "actions at law," and largely obviated by the merger of the two systems.
127. *See*, e.g., *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978). A *de novo* standard of review accords no deference to lower court determinations because the matters decided were legal or predominantly legal—in other words, of a character that does not benefit from the original fact finder's superior access to evidence and testimony. *Cf.* Kopetzke v. County of San Mateo, 396 F. Supp. 1004, 1007 (N.D. Cal. 1975) (characterizing as a question of law the "ultimate question as to whether the County, acting through the Board and its employees, took plaintiffs' private property for public use without just compensation within the meaning of the Fifth Amendment").
128. *See* Bateson v. Geisse, 857 F.2d 1300 (9th Cir. 1988).
est"—derives from substantive due process principles and arguably implicates the identical analysis. Moreover, the Ninth Circuit has recognized that mixed questions of law and fact ordinarily present matters for the court to decide, and will be subject to de novo review.

However, other sources reflect the fundamentally factual nature of the takings inquiry; the analysis has been described as "case-by-case" and "ad hoc." Both the district and circuit courts in Del Monte Dunes relied on these characterizations in submitting questions underlying the determination of inverse condemnation liability to the jury. Thus, assuming the theoretical availability of a jury, a takings case in practice is likely to present factual questions appropriately resolved by that jury.

(d) Possible Conflict With State Courts

Finally, although the Seventh Amendment does not apply in state court, the jury trial practices of state forums may be relevant for two reasons. First, those practices may more generally reflect either interpretations of statutory rights or traditional understandings of appropriate judge and jury roles. Second, and more significantly, where state practices diverge from those followed in federal court, they may confuse litigants and produce inconsistent results.

In the typical litigation context, different jury rules in state versus federal court, even for the same claim, might not present a particular

129. See infra Part I.B.2.
130. See United States v. McConney, 728 F.2d 1195 (9th Cir. 1984).
131. See, e.g., Penn Central, 438 U.S. at 124; see also Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979) (noting that regulatory takings analysis requires an "essentially ad hoc, factual inquiry").
132. The court in New Port Largo v. Monroe County, 95 F.3d 1084, 1092 (11th Cir. 1996), did not determine that no factual questions were presented by the inverse condemnation liability issue; rather, the court simply ruled that both legal and factual issues pertaining to whether a taking has occurred are appropriately decided by the court.
133. See, e.g., Brief of the State of California as Amicus Curiae in Support of Defendant/Appellant City of Monterey at 14, Del Monte Dunes v. City of Monterey, 95 F.3d 1422 (9th Cir. 1996) (No. 94-16248) (explaining the reasoning behind California's long-standing rule that the court decides the question of takings liability as "readily apparent" and equally applicable to federal court proceedings—namely, "the question of whether a government regulation has triggered an unconstitutional taking of private property entails a complex set of mixed questions of law and fact").
134. See, e.g., Reply Brief of Appellant and Response to Cross-Appeal at 4, Del Monte Dunes v. City of Monterey, 95 F.3d 1422 (9th Cir. 1996) (No. 94-16248 and No. 94-16313) (arguing that different jury rules in state and federal courts will produce "anomalous results"); Petition for a Writ of Certiorari in the Supreme Court of the United States at 11, City of Monterey v. Del Monte Dunes, __ U.S. ___, 118 S. Ct. 1359 (1998) (No. 97-1235) (noting that, because state courts generally do not recognize a right to jury trial on inverse condemnation liability, such recognition in federal courts would create a "risk of confusion and inconsistency between state and federal treatment of § 1983 claims.").
problem. Assuming either forum is available, a litigant would simply choose among them, considering that factor among other potential differences. However, as discussed above, federal ripeness requirements create a unique dilemma for takings plaintiffs seeking redress in a federal forum. A landowner litigant must essentially file her takings claim, or some equivalent, in state court as a pre-condition of obtaining the federal forum. Moreover, matters resolved in the state proceeding will have issue-preclusive effect on subsequent federal litigation.

If the state court does not permit trial by jury, any such federal "right" is abrogated. For example, in California, a takings plaintiff has no right to trial by jury on the question of inverse condemnation liability.\(^{135}\) Thus, a non-jury determination on crucial factual matters will resolve those matters as to that claim. In its briefs, Monterey argued that, "[u]nder the circumstances, it makes no sense to construe section 1983 to provide a federal right to jury trial of issues that will ordinarily be resolved in state court by state judges."\(^{136}\) Del Monte Dunes contended that, "[i]f the City's arguments were adopted, federal district courts would be governed by state law, and a civil rights plaintiff would receive jury trial in some states and not others . . . undermin[ing] the national uniformity of the civil rights act.\(^{137}\)

Ultimately, the application of any right to jury trial in both state and federal court will depend upon the source of that right and whether it attaches to underlying substantive rights or simply to the remedial mechanism provided by § 1983. Of course, as noted above, the Seventh Amendment does not apply in state court. But if the Supreme Court determines that § 1983 guarantees a right to trial by jury in all actions brought thereunder, this will supersede contrary state law, such as that of California.

(e) Summary

Preliminary analysis suggests that plaintiffs probably possess no right to jury trial of takings liability pursuant to the Seventh Amend-
ment or § 1983. However, should such a right exist, takings cases tend to present factual issues that could be properly presented to a jury. Moreover, in the event that the Supreme Court recognizes such a right, California might be compelled to address, perhaps legislatively, the potential inconsistencies between its jury rules and those attaching to federal rights decided by its courts. 138

Because of the potential impact of the Del Monte Dunes outcome on land use litigation within the Ninth Circuit and beyond, the Supreme Court's resolution of the jury trial issue will prove particularly significant. As suggested above, this resolution may dictate the strategies pursued by plaintiffs who believe that a jury would be more likely to support them than a judge. In particular, if the high court affirms the Ninth Circuit, the resolution would favor the inclusion of takings claims where they are available because substantive due process claims are more commonly reserved for determination by a judge.

II. SUBSTANTIVE CONSIDERATIONS THAT INFLUENCE LITIGATION STRATEGIES

Aside from the procedural considerations discussed above, a landowner plaintiff's choice to supplement or replace her takings claim with other constitutional challenges implicates a more substantive concern—namely, the standard of analysis under which a court will review her claim. By combining a substantive due process claim with a takings allegation, a litigant may be seeking, albeit subtly, to influence a court's substantive analysis of her claims in a manner that will increase the level of judicial scrutiny applied and thereby increase her likelihood of recovery.

This strategy might be superficially dismissed as implausible given courts' substantial deference to legislative judgments in economic and social regulation since the demise of the Lochner era. 139 However, landowner litigants in the current regulatory takings environment appear to possess considerable potential to play with what many commentators have referred to as a "doctrinal mess." 140 Neither courts nor litigants nor academics has satisfactorily explained the analytical and practical distinctions between takings and substantive due process

138. As suggested above, supra Part I.A.3.b., the extent of this compulsion depends on whether a plaintiff has a right to a jury trial under § 1983 and if so, whether that right is considered part of the substantive rights conferred by that statute.

139. See infra Part II.B.2.b.

challenges in the land use realm. As demonstrated below, this difficulty arises principally from the historic conflation of the doctrines stemming from the original articulation of regulatory takings in *Pennsylvania Coal Co. v. Mahon* and the importation of due process style, means-ends review into takings law that began with *Penn Central Transportation Co. v. City of New York* and *Agins v. City of Tiburon*. The Supreme Court's grant of certiorari in *Del Monte Dunes* reflects the importance of resolving this confusion and creates an opportunity to clarify the muddle and provide lower courts with guidance.


1. Premises of the Strategy

The advantages of combining or substituting takings claims with substantive due process challenges in order to achieve more exacting judicial scrutiny of governmental land use decisions should depend on at least one of two premises. First, courts may naturally assume that the standards applicable to claims brought under the alternative theories differ in some respect. Second, the poorly-defined and potentially inclusive nature of the substantive due process standard itself gives courts greater flexibility in reviewing land use regulations. I develop each of these premises briefly and then examine how they play out when plaintiffs attempt to capitalize on them in pursuing more favorable (less deferential) review by courts. In particular, I discuss a troubling development in *Del Monte Dunes* that was conceivably influenced by the operation of the substantive strategies suggested herein.

First, by filing both substantive due process and takings claims arising out of identical factual contexts, litigants may at least arguably suggest that some different standard of analysis must apply. Assume, for example, that a plaintiff challenges the asserted governmental purpose for a given land use ordinance. Because current doctrine incorporates a means-end component into both due process and takings analysis, a court’s scrutiny of these claims would be indistinguishable unless a different standard applied. Assuming for the moment that

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141. See infra Part I.B.2.a.
142. 260 U.S. 393 (1922). In *Pennsylvania Coal*, Justice Holmes announced for the first time that a taking may occur even where the government does not physically appropriate property.
145. Of course, this is not the case for a plaintiff alleging a taking by virtue of denial of all economically viable use of her property; that presents an entirely distinct analysis.
the remedies for these two violations were identical, filing both claims would be entirely useless. If one failed, they would both fail; if one succeeded, they would both succeed. This paradox has led courts to search long and hard for principled distinctions between the claims. Moreover, heightened scrutiny of economic or social regulation under the rubric of substantive due process was specifically rejected in the post-Lochner era. Thus, unless identical standards apply—as I have just suggested a court is unlikely to think—some higher degree of scrutiny will, almost by default, apply to takings claims. This is precisely the outcome observed in recent regulatory takings jurisprudence.

It is important to note that the same facts may give rise to multiple constitutional violations. However, in the vast majority of cases, a plaintiff simply lists the two claims, among others, as alternative grounds for recovery stemming from identical factual assertions. The unique aspect of alleging both due process and takings violations arises directly from the language of the Constitution. Specifically, the two claims rely on clauses contained within the same constitutional amendment. It is quite possible, and indeed likely, that the use of two different clauses indicates an intent to address distinct types of governmental infringements of property rights. At a minimum, then, violations of the two clauses should result from different aspects of the same factual context. Cases in which this is not true present the courts with the paradox described above.

146. This may not in fact prove to be the case. See supra Part II.A.2.
147. See infra Part II.B.2 (discussing the approaches taken in the Eleventh Circuit); infra Part II.B.3 (discussing the state courts of Washington); see also Roberts, Milner & McMurry, supra note 140, at 766 (“While Fifth Amendment takings law often carries labels such as confused and complex, one doctrinal mess that goes beyond those terms into the realm of the truly maddening is the jumbled distinction between Fifth Amendment takings claims and Fourteenth Amendment substantive due process claims.”).
148. See, e.g., Williamson v. Lee Optical, Inc., 348 U.S. 483, 488 (1955) (“The day is gone when the Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.”).
149. See Benjamin, supra note 15, at 2671 (“Takings and substantive due process claims also usually have the same factual bases: many plaintiffs allege that a given government action constitutes both a taking and a deprivation of due process.”).
150. See Echeverria & Dennis, supra note 52, at 709 (“The difference in language between the Due Process and Takings Clauses strongly suggest that each clause has a different scope and meaning.”); Michael J. Davis & Robert L. Glicksman, To the Promised Land: A Century of Wandering and a Final Homeland for the Due Process and Taking Clauses, 68 Or. L. Rev. 393, 394 n.4 (“If there were no difference, the takings prohibition could be viewed as redundant.”); see also Bickerstaff Clay Products Co. v. Harris County, 89 F.3d 1481, 1490 (11th Cir. 1996) (holding, in the context of a challenge to a zoning classification, that the landowner's "Takings Clause claim subsumes its substantive due process claim unless it can be said that the Framers of the Bill of Rights, in addition to providing the substantive rights contained in the Takings Clause, meant to replicate by implication those same rights in the Due Process Clause.")
The second premise on which litigants may rely in pursuing a strategy of combining or substituting claims relates simply to the nature and history of due process jurisprudence. Specifically, litigants may be relying on substantive due process as a doctrine whose scope and definition has fluctuated over the years, thereby possibly leaving courts with some flexibility to review governmental conduct under a higher or lower level of scrutiny. Litigants would thus seek invalidation under the malleable substantive due process framework, rather than attempting the more subtle influence described above to achieve heightened scrutiny under the takings doctrine. Significantly, therefore, this premise corresponds more accurately with a litigation tactic by which plaintiffs bring a due process claim in lieu of, rather than in addition to, a takings claim. The latter simply becomes unnecessary.

2. Operation of the Strategy

Del Monte Dunes presents an instance in which the plaintiffs were "successful," assuming that they were in fact operating under the first premise suggested above. In Del Monte Dunes, a three-judge panel of the Ninth Circuit upheld a jury's determination that the City's denial of a development permit was a taking. The Court's unprecedented approach extended the "rough proportionality" requirement articulated by the Supreme Court to the unique context of property exactions, resulting in a departure from the traditional test for regulatory takings.

151. See, e.g., Ross A. Macfarlane, Testing the Constitutional Validity of Land Use Regulations: Substantive Due Process as a Superior Alternative to Takings Analysis, 57 WASH. L. REV. 715, 742-43 (1982). Richard Frank, an attorney with the California Attorney General's Office, commented that because substantive due process is more "standardless" than takings, it encourages judges to make policy judgments (which, depending upon that judge's views of property rights, may advantage the landowner plaintiff). Telephone interview.

152. 95 F.3d 1422, 1429-30, 1432 (9th Cir. 1996).

153. See Dolan, 512 U.S. 374 (expanding on the "essential nexus" requirement articulated in Nollan, 483 U.S. 835); see also Ehrlich v. City of Culver City, 911 P.2d 429 (Cal. 1996). In holding that Dolan is limited to exactions of land or money that are imposed on individuals, the Ehrlich court stated:

It is the imposition of land use conditions in individual cases, authorized by a permit scheme which by its nature allows for both the discretionary deployment of the police power and an enhanced potential for its abuse, that constitutes the sine qua non for application of the intermediate standard of scrutiny formulated by the Court in Nollan and Dolan.

Id. at 439; see also Clajon Production Corp. v. Petera, 70 F.3d 1566, 1578 (10th Cir. 1995) ("Based on a close reading of Nollan and Dolan, we conclude that those cases (and the tests outlined therein) are limited to the context of development exactions where there is a physical taking or its equivalent."). Exactions are requirements that are imposed on a land developer as a condition of permit approval. The relevant government agency may require land dedication or purely monetary fees.

This departure may in fact embody precisely the result that the plaintiffs in that case were seeking—namely, the heightened level of scrutiny discredited more than fifty years earlier in the context of economic and social regulations.155 The plaintiffs in Del Monte Dunes did not articulate this goal, but their aims may be much more subtly reflected in their litigation tactics: by filing both substantive due process and takings claims, they at least implied that different analyses pertain.

In any event, the plaintiffs in Del Monte Dunes succeeded in obtaining different analyses of the two claims. As mentioned earlier, the trial court chose to send the issue of takings liability to a jury, while reserving for itself the question of substantive due process liability.156 The appellate court upheld this division and the jury's finding of liability, even though the trial judge concluded, as a matter of law, that the permit denial at issue advanced a legitimate government interest for substantive due process purposes.157

This conclusion was particularly significant because it revealed the court's belief that different levels of scrutiny were applicable to the different claims. Indeed, in upholding the jury's verdict on the takings claim, the appellate court, relying on Dolan, stated that "[s]ignificant evidence supports Del Monte's claim that the City's actions were disproportional to both the nature and extent of the impact of the proposed development."158 Yet the requirement of rough pro-

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155. Indeed, the President of the Pacific Legal Foundation, characterized one aspect of the group's "mission" as expanding heightened scrutiny beyond the limited context of exactions. Therefore, from the standpoint of property rights advocates, Del Monte Dunes represents a potentially enormous "success." However, it remains to be seen whether the standard in this case is simply an anomaly produced by the procedural posture of the decision, or whether it represents an actual expansion of heightened scrutiny in the realm of regulatory takings.

156. See supra Part I.A.3.

157. See Petition for Rehearing with Suggestion for Rehearing En Banc at 11, Del Monte Dunes v. City of Monterey, 95 F.3d 1422 (9th Cir. 1996) (No. 94-16248) ("The extraordinary result of the panel's application of this new standard is made stark by comparing the panel's review of the jury's decision with the district court's decision on the analogous substantive due process claim. Based upon the same evidence considered by the jury, the district court concluded that the City had not acted arbitrarily ... ."); see also Del Monte Dunes, Transcript of Trial Proceedings, No. C-86-5042 CAL at 7 (N.D. Cal. Mar. 4, 1994).

158. Del Monte Dunes, 95 F.3d at 1432 (citing Dolan, 512 U.S. 374). The trial court, in originally letting the jury verdict stand, relied in part on the alternative theory of a taking on which the jury may have based its decision—namely, the denial of all economically viable use. Transcript of Trial Proceedings, No. C-86-5042 CAL at 4. By contrast, because the jury did not return special verdicts indicating the grounds for its decision, the appellate
portionality between a permit condition and the governmental interest that supports it arose in the unique context of exactions. This heightened scrutiny for exactions is rooted in concerns over government agencies "leveraging" their police powers in order to obtain concessions from landowners, who desire development permits, without having to pay compensation.\(^{159}\) In *Dolan*, the city had required an actual dedication of land, which was arguably a physical taking\(^ {160}\) and certainly distinct from the purely regulatory taking alleged in *Del Monte Dunes*. Thus, although it is too soon to determine whether *Del Monte Dunes* represents an anomaly or a drastic doctrinal change, the case at least potentially demonstrates a move in the direction of heightened scrutiny in takings cases—a move that could reflect "success" for the strategy of combining constitutional claims. The Supreme Court will now have an opportunity to shed some light in this area.

Land use cases also support the influence of the second premise noted above—namely, the malleability of the substantive due process standard. Thus, some litigants opt to pursue only, or to rely more heavily on, a due process theory. Indeed, in *Armendariz v. Penman*, the Ninth Circuit perceived that just such a strategy had been driving the litigation approach of the plaintiffs in *Sinaloa Lake Owners Ass'n v. City of Simi Valley*.\(^ {161}\) The court commented that:

> Because the plaintiffs' substantive due process claim challenges the same conduct as any potential Fourth and Fifth Amendment claims, the plaintiffs may have decided to pursue only the former, believing the 'scarce and open-ended' standards of substantive due process to be more favorable than the standards required under the Fourth and Fifth Amendments.\(^ {162}\)

The essential difference in the nature of takings and substantive due process claims further reinforces this explanation of strategic behavior. Specifically, a means-ends style of review represents a traditional component of substantive due process analysis. By contrast, its relevance to takings doctrine is dubious because the latter analysis

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\(^{159}\) See *Nollan*, 483 U.S. at 841-42.

\(^{160}\) The Court in *Nollan* articulated the fine line between exactions as permit conditions and physical, per se, takings: "Had California simply required the Nollans to make an easement across their beachfront available to the public on a permanent basis in order to increase public access to the beach, rather than conditioning their permit to rebuild their house on their agreeing to do so, we have no doubt there would have been a taking." *Id.* at 831.

\(^{161}\) 882 F.2d 1398 (9th Cir. 1989).

\(^{162}\) *Armendariz v. Penman*, 75 F.3d 1311, 1324 n.9 (9th Cir. 1996) (en banc).
presupposes a legitimate exercise of government powers—in other words, one not subject to invalidation for failure to advance a public purpose. Where the origin of takings rules lies in the physical occupation or confiscation of property—a virtually impossible standard for a plaintiff to meet in the context of pure regulations—the history of due process doctrine includes a period of liberal invalidation of government regulations. Thus, the substantive due process standard is arguably more susceptible to expansion or relaxation without sacrificing doctrinal consistency.

However, this is not to suggest that a landowner plaintiff will achieve easy success under this strategy. On the contrary, the plaintiff faces two significant obstacles. First, as discussed below, the Supreme Court has explicitly repudiated the substantive due process jurisprudence of the Lochner era. Therefore, although the framework of analysis may be relatively "loose," the applicable standard today is very deferential to state and local governments. Second, in some jurisdictions, including the Ninth Circuit, a landowner plaintiff may no longer bring a substantive due process challenge in cases where she has a cognizable claim under a takings theory. As a result, this strategy may be ultimately thwarted.

B. Why the Strategy Might Work: Historic Blurring of Takings and Due Process Analysis

In the above analysis, I explained why litigants might—intentionally, subconsciously, or even by default—combine or substitute takings claims with substantive due process claims in order to obtain more favorable review by courts. In this section, I briefly outline the doctrinal history that provides the fundamental underpinnings on which the success of these litigation strategies depends. The central feature of this history is the courts' uncertain treatment of the relationship between substantive due process and takings.

163. See infra Part I.B.2.a.
164. Macfarlane, supra note 151, at 743-44.
165. See infra Part I.B.2.b.
166. See infra Part II.A.
168. See, e.g., Stone & Seymour, supra note 14, at 1229 ("The relationship between takings analysis and substantive due process analysis is less than clear in the existing case law."); Lawrence Berger, Public Use, Substantive Due Process and Takings—An Integration, 74 NEB. L. REV. 843, 844 (1995) ("[T]he Court has failed to maintain clear lines of demarcation between the substantive due process and takings rules and has introduced some unnecessary overlap and confusion in their application."); Summers, supra note 167, at 838 ("The failure of jurists and academics to keep the respective roles of the Due Process and Takings Clauses in proper perspective has contributed to what is best described as the 'blending' of due process analysis into takings jurisprudence."); Macfarlane, supra note
1. Importation of Due Process Principles Into Takings Doctrine

What one commentator terms "the modern merger of takings and due process" might be traceable to the landmark case of *Penn Central Transportation Co. v. City of New York*. In *Penn Central*, the Court for the first time considered the legitimacy of government means and ends—an analysis traditionally associated with due process—in the context of a takings challenge. In fact, in holding that application of the city's landmark preservation law to the plaintiff's property and proposed development did not constitute a taking, the *Penn Central* Court cited for support, without distinguishing between them, both due process and takings cases. Most significantly, the Court did so without engaging in principled analysis or providing a "reasoned explanation" for its novel approach.

*Penn Central* may simply have been an early warning sign of the Court's later incorporation of due process analysis into takings review. Indeed, today *Penn Central* is cited for the principle of ad hoc inquiry into whether a taking has occurred. The Court articulated three factors particularly relevant to this analysis: the character of the government action, the extent to which the action interferes with investment-backed expectations, and the economic impact (or diminution in value) worked by the action.

No matter where its precise roots, the step taken by the Court did not simply flow from a logical progression in the development of takings law. The original function of takings rules was to ensure compensation to individuals whose property was taken, either implicitly or through physical possession, by the government. The doctrine thus emphasized "the weight of government impositions" and the fairness

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151, at 715 ("This confusion has resulted in disparate results as well as in conflicting analysis.") (footnote omitted).


171. See Berger, supra note 168, at 864 ("The *Penn Central* case was an opening wedge in what became the final rejection of the noxious use doctrine by the Court and its replacement in takings analysis by what is very difficult to distinguish from a substantive due process standard . . . ."); Echeverria & Dennis, supra note 52, at 696 ("Paradoxically, in the course of developing the Takings Clause as a substantive constraint on property regulation, the Court, in an ad hoc fashion, has incorporated into its takings analysis standards the Court formerly utilized exclusively in its review of regulatory activities under the Due Process Clause."). Specifically, the *Penn Central* Court cited to precedent for the implicit proposition that "a use restriction on real property may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial public purpose . . . ." 438 U.S. at 127 (citations omitted).

172. 438 U.S. at 125 (citing Nectow v. Cambridge, 277 U.S. 183, 188 (1928)).

173. Echeverria & Dennis, supra note 52, at 699.


175. See Berger, supra note 168, at 853, 860; Echeverria & Dennis, supra note 52, at 696.
of saddling an individual with a burden more appropriately borne by the public as a whole.\textsuperscript{176} Because the Takings Clause proscribes the taking of private property "for public use and without compensation," this analysis at least arguably assumes the legitimacy of the government action at issue.\textsuperscript{177} According to the \textit{First English} Court,

The Takings Clause does not prohibit the taking of private property, but instead places a condition on the exercise of that power. This basic understanding of the Amendment makes clear that it is designed not to limit the governmental interference with property rights per se, but rather to secure compensation in the event of otherwise proper interference amounting to a taking.\textsuperscript{178}

In sharp contrast, due process protection at its core questions the legitimacy of both government objectives and the means used to implement those objectives.\textsuperscript{179} A government action that violates due process is invalid, and no amount of compensation can cure that defect.\textsuperscript{180} Thus, the takings and due process protections should implicate distinct constitutional analyses.

Notwithstanding the different policies underlying the Due Process and Takings Clauses,\textsuperscript{181} the step initiated in \textit{Penn Central} has

\begin{itemize}
\item \textsuperscript{176} Berger, \textit{supra} note 168, at 863. For a classic articulation of the policy supporting the Takings Clause, see \textit{Armstrong v. United States}, 364 U.S. 40, 49 (1960) (noting that the Takings Clause is properly concerned with people who should not be forced "alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.").
\item \textsuperscript{177} See \textit{Eastern Enterprises v. Apfel}, No. 97-42, 1998 U.S. LEXIS 4213 (June 25, 1998). Justice Kennedy, whose concurrence on substantive due process grounds provided the necessary fifth vote for invalidating the statute at issue, commented that:

\begin{quote}
[N]ormative considerations about the wisdom of government decisions [is a style of analysis that] is in uneasy tension with our basic understanding of the Takings Clause, which has not been understood to be a substantive or absolute limit on the Government's power to act. The Clause operates as a conditional limitation, permitting the government to do what it wants so long as it pays the charge.
\end{quote}

\textit{Id.} at *112-13 (citation omitted) (Kennedy, J., concurring in the judgment and dissenting in part); see also Stone & Seymour, \textit{supra} note 14, at 1230 ("Arguably, takings analysis should not address the propriety of governmental regulations at all, but merely whether the damage is sufficient to amount to a taking."); Krotoszynski, \textit{supra} note 43, at 572 ("The Takings Clause does not address itself to irrational government action; to the contrary, its text speaks directly to occasions of presumptively rational government behavior: the taking of private property for a public purpose."); Davis & Glicksman, \textit{supra} note 150, at 397.
\item \textsuperscript{178} 482 U.S. at 314-15 (emphasis added).
\item \textsuperscript{179} See Berger, \textit{supra} note 168, at 863. For a regulation to be invalidated on due process grounds, it must be "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926).
\item \textsuperscript{180} See Roberts, Milner & McMurry, \textit{supra} note 140, at 769.
\item \textsuperscript{181} See Echeverria & Dennis, \textit{supra} note 52, at 696 (arguing that the Court must square the relationship between the doctrines by recognizing the "distinctive language and constitutional function" from which they derive); Davis & Glicksman, \textit{supra} note 150, at 443-44 ("The merging of the two limitations ... glosses over the distinct functions served by each... . These distinct functions reflect the Court's historic focus in substantive due
since become more firmly entrenched in takings jurisprudence. In *Agins v. City of Tiburon*, the Court, again relying "indiscriminately" on due process and takings precedent, announced the rule that "[t]he application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests . . . or denies an owner economically viable use of his land." More recently, in *Nollan v. California Coastal Commission*, the Court solidified the component of takings law that is drawn from due process by declaring, "[w]e have long recognized that land-use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests' . . . ." The Court supported this "long recognized principle" with two cases: *Penn Central* and *Agins*. Thus, a relatively unreasoned judicial innovation has become "part of the firmament of takings doctrine."

2. Applicable Level of Scrutiny

The blurring of doctrinal boundaries between takings and substantive due process is not simply academic. In fact, it has enormous practical consequences that, as suggested earlier, might influence a landowner plaintiff's choice of which claim(s) to pursue in a given case. Most significantly, the Court's incorporation of "due process thinking" into the takings analysis has led it to adopt "an ambiguous and sometimes contradictory posture on whether, and to what extent, the courts should defer to the judgments of the political branches of government in reviewing property regulation . . . ." This, in turn,
has allowed the potential re-emergence, under a new label, of *Lochner* era judicial scrutiny of economic and social regulations.\textsuperscript{188}

The test for substantive due process is, at least superficially, identical to that articulated in the first prong of the *Agins* test;\textsuperscript{189} it essentially considers whether governmental means are rationally related to legitimate ends. However, precisely what level of scrutiny this test countenances has changed dramatically over time. Early in this century, courts frequently employed substantive due process analysis to strike down state economic regulations. For example, in *Lochner*, the case that has since become emblematic of an era of judicial overreaching, the Court invalidated a statute that prohibited bakery employees from working more than ten hours a day or 60 hours a week.\textsuperscript{190}

Beginning around the time of the New Deal, the doctrine of substantive due process fell into increasing disfavor, as economic disaster and progressive goals supported more deference to state autonomy in confronting economic and social issues. In a well-known series of cases,\textsuperscript{191} the Court completely discredited the doctrine of substantive due process and rejected all substantive scrutiny of economic regulation.\textsuperscript{192} Although the doctrine has experienced limited rebirth in the realm of "fundamental" personal rights, it supports only highly deferential review of legislative determinations in the realm of economic and social interests.\textsuperscript{193}

*Village of Euclid*, the primary case on which the *Penn Central* and *Agins* Courts relied in drawing due process principles into the takings arena, stands for a broad presumption of the constitutionality of state economic and social regulation.\textsuperscript{194} Yet in recent years, courts have

\textsuperscript{188} See Summers, supra note 167, at 839 ("Although heightened 'ends' or 'means-end' scrutiny may promise greater protection of private property rights, it may also ultimately doom takings jurisprudence to the same fate as *Lochner*-style substantive due process.") (footnote omitted).

\textsuperscript{189} See Stone & Seymour, supra note 14, at 1224-25.

\textsuperscript{190} *Lochner* v. New York, 198 U.S. 45 (1905).

\textsuperscript{191} See, e.g., Nebbia v. New York, 291 U.S. 502 (1934). An extensive, if not exhaustive, academic literature explores the issues surrounding *Lochner* style judicial review and its ultimate rejection. Such an in-depth examination of this topic is beyond the scope of the present Comment. Instead, I briefly outline the history in order to demonstrate the changes over time in the doctrine of substantive due process and the nature of the analysis it entails.

\textsuperscript{192} See, e.g., Berger, supra note 168, at 850; Macfarlane, supra note 151, at 720.

\textsuperscript{193} See Summers, supra note 167, at 877.

\textsuperscript{194} Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); see Roberts, Milner & McMurry, supra note 140, at 768 ("As the *Euclid* Court said years ago, if the most that can be said is that how land is zoned is fairly debatable, the ordinance is to be upheld."); see also *Nollan*, 483 U.S. at 843 (Brennan, J., dissenting) ("It is . . . commonplace that this Court's review of the rationality of a State's exercise of its police power demands only that the State 'could rationally have decided' that the measure adopted might achieve the State's objective.") (citation omitted).
issued opinions that appear to extend something more than mere "rational basis" protection to private property rights.\textsuperscript{195} Indeed, in \textit{Del Monte Dunes}, the Ninth Circuit offered possible indications that the presumption of validity is fading into increased distrust of government and a concomitant desire to extend a higher level of scrutiny to ordinary land use regulation.\textsuperscript{196}

Recent Supreme Court holdings in the context of development exactions\textsuperscript{197} may represent such a step in the direction of heightened scrutiny.\textsuperscript{198} In \textit{Nollan}, the Court for the first time struck down a land use action that failed means-ends review as a taking, rather than a due process violation.\textsuperscript{199} In so doing, the Court strongly suggested, albeit in dictum, that the takings inquiry corresponds with less deference to legislative determinations than does the substantive due process inquiry.\textsuperscript{200} However, the Court offered no explanation for the proposition that, while the means-ends component of the takings inquiry derived directly from due process precedent, it demands more rigorous judicial review.\textsuperscript{201} Furthermore, \textit{Nollan} did not involve an ordi-

\begin{itemize}
\item \textsuperscript{195} See Krotoszynski, supra note 43, at 564.
\item \textsuperscript{196} Comments of Fran Layton, a land use attorney with the firm of Shute, Mihaly & Weinberger in San Francisco, California, who often represents local governments in takings cases. Personal communication.
\item \textsuperscript{198} See, e.g., Molly S. McUsic, \textit{The Ghost of Lochner: Modern Takings Doctrine and Its Impact on Economic Legislation}, 76 B.U. L. REV. 605, 607 (1996). The author suggests that the modern Court has "adopted the methodology of the Lochner-era Supreme Court" insofar as it applies greater scrutiny to regulations under takings analysis. However, she concludes that "[d]espite reserving itself the necessary doctrinal tools, the Court has not used those tools to provide the same property protection as did its 1920s forerunner." \textit{Id.} at 608.
\item \textsuperscript{199} The incorporation of due process principles into takings law occurred over a series of cases in which the challenged regulations were actually upheld. \textit{See Penn Central}, 438 U.S. 104; \textit{Agins}, 447 U.S. 255.
\item \textsuperscript{200} Justice Scalia, writing for the majority, stated that: [O]ur opinions do not establish that [the takings] standards are the same as those applied to due process or equal protection claims. To the contrary, our verbal formulations in the takings field have generally been quite different. We have required that the regulation "substantially advance" the "legitimate state interest" sought to be achieved, not that "the State 'could rationally have decided' that the measure adopted might achieve the State's objective .... [T]here is no reason to believe (and the language of our cases gives some reason to disbelieve) that so long as the regulation of property is at issue the standards for takings challenges, due process challenges, and equal protection challenges are identical. 483 U.S. at 836 n.3 (citations omitted). Ironically, while Justice Scalia focuses on the language used to describe takings and due process scrutiny, he ignores the fact that the "substantially advance" test itself derives from due process cases. \textit{See Agins}, 447 U.S. at 260.
\item \textsuperscript{201} Indeed, in arguing that a different, less deferential, standard applied to takings analysis, Justice Scalia cited \textit{Agins} for the "substantially" language; \textit{Agins}, in turn, had simply adopted this language from the due process cases on which it relied. \textit{See Summers}, supra note 167, at 870; \textit{see also} Echeverria & Dennis, supra note 52, at 700; Jerold S. Kayden, \textit{Land-Use Regulations, Rationality, and Judicial Review: The RSVP in the Nollan Invitation (Part I)}, 23 URB. LAW. 301, 316 (1991). However, courts have interpreted \textit{Nollan} as, at the least, suggesting that the takings reasonableness standard is less deferential than
\end{itemize}
nary land use regulation, but rather, a permit condition requiring dedication of a public easement across private property,\textsuperscript{202} itself arguably a physical taking.

The Court's puzzling statement in \textit{Nollan} is dictum because the majority actually concluded that the challenged permit condition did not even satisfy traditional (deferential) rational basis review.\textsuperscript{203} Nonetheless, the majority's language appeared to alarm Justice Brennan, who responded in dissent by criticizing the Court's imposition of "a standard of precision for the exercise of a State's police power that has been discredited for the better part of this century."\textsuperscript{204} Although recognizing that the inquiries under the doctrines of substantive due process and takings may diverge at some point, Justice Brennan argued that the standard for the threshold issue—the rationality of the challenged government action—is uniform, regardless of the ultimate claim asserted.\textsuperscript{205}

Despite Justice Brennan's efforts to preserve doctrinal consistency in this area, seven years later, in \textit{Dolan v. City of Tigard}, the Court expressly abandoned minimal scrutiny of means-ends for takings.\textsuperscript{206} The Court held that the Fifth Amendment demands "rough proportionality" between the means imposed (the permit condition) and the ends they are designed to serve (mitigating the impact of the proposed development). Although \textit{Dolan}, like \textit{Nollan}, arose in the unique context of individualized land dedication requirements, it may portend a dramatic change in the level of scrutiny generally implicated by takings analysis.\textsuperscript{207}

\textsuperscript{202} 483 U.S. at 828.
\textsuperscript{203} See id. at 838-39.
\textsuperscript{204} Id. at 842 (Brennan, J., dissenting).
\textsuperscript{205} Id. at 845 n.1 (Brennan, J., dissenting) (noting that, while "[o]ur phraseology may differ slightly from case to case . . . [t]hese minor differences cannot . . . obscure the fact that the inquiry in each case is the same").
\textsuperscript{206} 512 U.S. 374 (1994).
\textsuperscript{207} But see Clajon Prod. Corp. v. Petera, 70 F.3d 1566, 1578 (10th Cir. 1995) ("Based on a close reading of \textit{Nollan} and \textit{Dolan}, we conclude that those cases (and the tests outlined therein) are limited to the context of development exactions where there is a physical taking or its equivalent."); Sintra, Inc. v. City of Seattle (\textit{Sintra II}), 935 P.2d 555, 571 (Wash. 1997) (finding that \textit{Nollan} and \textit{Dolan} "represent a subspecies of takings cases which usually involve physical invasions of private property" and "do not inform the doctrine of regulatory takings, which is concerned with overly burdensome restrictions on the use of private property"). \textit{Nollan} and \textit{Dolan} have also been distinguished on the grounds that they involved very individualized ("adjudicative") decisions, as opposed to broadly applicable ("legislative") decisions.
Clearly, the doctrine is still in flux. Indeed, the Supreme Court’s most recent takings opinion both illustrates and further contributes to the disharmony that characterizes this area of the law. Although not a land use case, *Eastern Enterprises v. Apfel* implicates the appropriate boundary and concomitant treatment of takings and due process claims. There, the Court struck down as unconstitutional the Coal Industry Retiree Health Benefit Act, which imposes pension contribution requirements on existing and former coal companies in order to ensure retirement benefits for employees of defunct companies. A plurality of the Court found that, “applying the three factors that traditionally have informed our regulatory takings analysis,” the Act constituted a taking. However, relying primarily on the Act’s retroactive impact, Justice Kennedy cast the deciding vote on substantive due process, rather than takings, grounds.

Dissenting for four, Justice Breyer agreed that the question was properly analyzed as a due process issue, but disagreed on the result, finding a sufficient means-ends relationship to survive “the Constitution’s fundamental fairness test.” Ironically, then, a majority of justices actually perceived the issue as a due process one and simply disagreed on the outcome. This left the Court with the bizarre result that the statute is unconstitutional but on no clear grounds, again indicating a basic discord concerning the source of constitutional protec-

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209. For example, Eastern Enterprises submitted briefs in the Supreme Court suggesting that *Nollan* and *Dollan* should govern, yet the case involved no dedication of property. A number of California cities and counties responded with an amicus brief arguing that the *Nollan/Dollan* standard is inapposite outside of the exactions context, and further, that means-ends review is simply irrelevant to takings analysis. See Brief Amicus Curiae of California Cities and Counties in Support of Respondents at 12, Eastern Enterprises v. Apfel, 1998 U.S. LEXIS 4213 (1998) (No. 97-42).

[T]he validity of a governmental action—as opposed to whether the public must pay “just compensation” as a condition of proceeding with the action—does not fit comfortably with traditional just compensation analysis under the taking clause. At the distinctive core of takings analysis is the presumption that the means and ends government has selected are valid . . . .

*Id.*
212. 1998 U.S. LEXIS 4213, at *113-14 (Kennedy, J. concurring and dissenting) (“Given that the constitutionality of the Coal Act appears to turn on the legitimacy of Congress’ judgment rather than on the availability of compensation . . . the more appropriate constitutional analysis arises under general due process principles rather than under the Takings Clause.”) (citation omitted).
213. *Id.* at *83, *87 (Breyer, J., dissenting).
214. *Id.* at *88
tion against certain government actions.\textsuperscript{215} Thus, it remains uncertain whether \textit{Nollan} will translate into heightened scrutiny for takings in general, presaging an effective rebirth of \textit{Lochner}-style review in the context of land use regulation.\textsuperscript{216} What is certain is that the present doctrinal muddle stems directly from the unexplained importation of due process-style analysis into takings rules. Moreover, assuming the same mode of inquiry into the validity of government action, the only way to differentiate the standards applied under the two doctrines is to elevate the level of scrutiny applied in takings cases.\textsuperscript{217} Thus, a landowner plaintiff may have an opportunity—whether pursued systematically or simply based on some "sense" that the law is confused in this area—to achieve more demanding review of regulations that affect the use of her property by presenting substantive due process arguments in a takings context.

\section*{C. Some Judicial Attempts to Reconcile the Doctrines}

The experiences in two jurisdictions—one federal and one state—show the practical implications of the historic "blurring" described above. In this section, I briefly discuss the approaches taken by the Eleventh Circuit and Washington State courts to define the relationship of and delineate the appropriate roles for takings and substantive due process claims.

\subsection*{1. The Eleventh Circuit Approach}

The Eleventh Circuit’s treatment of the due process/takings interplay in \textit{Eide v. Sarasota County}\textsuperscript{218} illustrates the continued doctrinal confusion and uncertainty that characterize this realm of land use law. Until 1990, that circuit recognized four alternative claims available to a landowner challenging government regulation of her property.\textsuperscript{219} First, a regulation "takes" property without just compensation if it

\begin{footnotesize}
\textsuperscript{215} The remedy of invalidation is also somewhat ironic, given that, if the statute was in fact a taking, \textit{compensation} would have been the proper constitutional remedy. \textit{See} First English Evangelical Lutheran Church \textit{v.} County of Los Angeles, 482 U.S. 304, 315 (1987).

\textsuperscript{216} \textit{See} Stone & Seymour, \textit{supra} note 15, at 1233 (concluding that it may still be "too early to tell whether the dicta of \textit{Nollan}'s footnote three will blossom into a new standard of review distinguishing takings and substantive due process claims"); \textit{Echeverria \& Dennis, supra} note 52, at 704 (suggesting that it remains an unanswered question whether, "[i]f the Supreme Court has thoroughly melded due process standards with takings doctrine, has the Court also incorporated the attitude of legislative deference?"); Summers, \textit{supra} note 167, at 868-69 ("[\textit{Nollan}] provides a modern illustration of how elements of substantive due process continue to be brought back to life under the rubric of the Takings Clause."); \textit{McUsic, supra} note 198, at 633-36.

\textsuperscript{217} \textit{See} Summers, \textit{supra} note 167, at 872 ("If the Court is now unhappy with the level of means-ends scrutiny provided by due process, it should correct this problem at the source, rather than by making an end-run around due process via the Takings Clause.").

\textsuperscript{218} 908 F.2d 716 (11th Cir. 1990)

\textsuperscript{219} \textit{Id.} at 720.
\end{footnotesize}
"goes too far." Second, a regulation amounts to a "due process taking" if it destroys the value of the property in question "to such an extent that it has the same effect as a taking by eminent domain." Third, a regulation gives rise to an "arbitrary and capricious due process" claim if it does not "bear a substantial relation to the public health, safety, morals, or general welfare." And finally, a regulation denies equal protection if it distinguishes among parties on the basis of a suspect classification, interferes with a fundamental right, or is not rationally related to a legitimate government purpose.

While articulating these claims as distinct, the *Eide* court noted that "[c]ourts have confused the standards for the first three claims . . . and often one cannot tell which claim has been brought or which standard is being applied." Perhaps the most unique aspect of the Eleventh Circuit's approach was its recognition of a "due process taking" claim, which apparently fell somewhere between a taking and a due process violation. The *Eide* court's articulation essentially equates a due process taking with a classic so-called "regulatory taking." This vaguely defined judicial creation illustrates the ambiguous constitutional source of protection against such regulatory takings. Indeed, the name, "due process taking," obfuscates which Fifth Amendment protection—the Due Process Clause or the Takings Clause—provides the basis for the limitation on government action, thus highlighting the fundamental confusion in this area. This manifestation of the confusion supports the above explanation of plaintiffs' litigation tactics by illustrating the relative disorder produced by one court's effort to distinguish, in a principled manner, among the claims and applicable standards that may apply to land use regulations.

In 1997, the Eleventh Circuit repudiated its earlier reasoning, finding "that if a challenge to a regulatory taking states a claim upon which relief may be granted at all, it is a cause of action under the Takings Clause." The *Villas of Lake Jackson* court specifically read

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220. *Id.*
221. *Id.* at 721.
222. *Id.* at 721-22.
223. *Id.* at 722.
224. *Id.*
225. See, e.g., Roberts & Shearer, *supra* note 8, at 835 (characterizing the "due process taking" claim as "a claim, premised solely on the Fourteenth Amendment, that a regulation has so excessively regulated property that it has the effect of a taking or deprivation of property without due process") (footnote omitted).
226. *Villas of Lake Jackson*, Ltd. v. Leon County, 121 F.3d 610, 612 (11th Cir. 1997). It is noteworthy that the analyses of available claims in both *Eide* and *Villas of Lake Jackson* arose in the context of ripeness determinations, illustrating the relevance of the particular claim asserted to the timing at which it is ripe for judicial review. *See supra* Part I.A.1.
both *First English*\(^{227}\) and *Lucas v. South Carolina Coastal Council*\(^{228}\) to "firmly place all the constitutional constraints on regulatory takings . . . under the Takings Clause alone."\(^{229}\)

The evolution of available claims within the Eleventh Circuit reflects the broader doctrinal discord in this realm.\(^{230}\) Although *Villas of Lake Jackson* took one step toward relieving that circuit's confusion, it appears merely to have brought the circuit into line with the many others that are still struggling to reconcile and define appropriate roles for the doctrines of takings and substantive due process. The invention of a "due process taking" claim simply illustrates the unsatisfying doctrinal underpinnings of regulatory takings law and the need for consistent and comprehensive Supreme Court treatment. Much room remains for clarification and illumination.

2. The Washington State Approach

The state courts of Washington were also among the first to actively tackle the takings/substantive due process interface and attempt to articulate a principled distinction between the claims and their appropriate roles in evaluating regulations. The experience in that state therefore provides another perspective on the issue.

Several recent opinions of the Washington Supreme Court capture the state's innovative approach. The court first established its analytical framework in *Orion Corp. v. State*\(^{231}\) and *Presbytery of Seattle v. King County*.\(^{232}\) As set forth, the framework permits a plaintiff to challenge a land use regulation on either substantive due process or takings grounds, or both. However, it also imposes an "insulation doctrine," which demands a threshold inquiry to determine whether the regulation is susceptible to a takings challenge based on its purpose and effect.\(^{233}\) Under this initial inquiry, the court asks whether

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\(^{228}\) 505 U.S. 1003 (1992).

\(^{229}\) *Villas of Lake Jackson*, 121 F.3d at 613. The court therefore concluded, in the context of zoning regulations, that only the following constitutional claims are available to aggrieved landowners: a procedural due process challenge to "the procedures by which the regulation was adopted"; a substantive due process challenge "based upon the arbitrary and capricious action of the government in adopting the regulation"; a Takings Clause challenge seeking "not only just compensation, if the regulation amounts to a taking, but [seeking] invalidation and injunctive relief if the regulation exceeds what the government body may do under the Takings Clause of the Constitution"; and challenges under other explicit constitutional provisions "not specifically involved with the real property right itself," such as equal protection claims. *Id.* at 615.

\(^{230}\) Ironically, the Sixth Circuit had previously adopted the Eleventh Circuit's categories in order to "promote much-needed uniformity among the federal courts on this subject." *Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1215 (6th Cir. 1992).

\(^{231}\) 747 P.2d 1062 (Wash. 1987).


\(^{233}\) *Id.* at 913.
the challenged regulation does not safeguard the public interest and whether it destroys any of the fundamental attributes of property ownership. If so, the court proceeds with the takings review. If the challenged regulation protects the public health, safety, or welfare, or if it does not destroy a basic element of property ownership, then it is not a taking. If the regulation is not susceptible to takings analysis, or does not amount to a taking, then the court undertakes a substantive due process analysis. The consequence of this threshold test is to favor substantive due process analysis over takings analysis for challenged regulations. Indeed, the court apparently intended this result due to the nature of the remedies implicated. "[M]ere invalidation" did not concern the court as much as monetary damages in terms of the likely impact on the government’s ability to regulate in the public interest.

In two 1992 cases dealing with the city of Seattle’s housing preservation ordinance, the Washington court modified its original framework slightly to address challenges brought pursuant to § 1983. While recognizing that § 1983 might obviate any distinction in the form of available remedies, the court determined that an award of these additional remedies demands a higher standard of proof over similar state claims.

Finally, in Guimont v. Clarke, the court further refined its framework, re-ordering the threshold inquiry in order to accommodate the categorical takings claims defined in Lucas v. South Carolina.

234. Id. at 912-13.
235. Id. Under Orion, the court will find a taking if the regulation does not substantially advance legitimate state interests, or if the regulation imposes an economic burden on the landowner that outweighs any public interest served by the regulation. 747 P.2d at 1080.
236. Presbytery, 787 P.2d at 912-13. The Washington court’s substantive due process inquiry involves a three-prong test: (1) whether the regulation aims to achieve a legitimate public purpose; (2) whether it employs means that are reasonably necessary to achieve that purpose; and (3) whether it is unduly oppressive on the landowner. Id. at 913.
238. Orion, 747 P.2d at 1081 n.26; see also id. at 1077 ("Undoubtedly, the specter of strict financial liability will intimidate legislative bodies from making the difficult, but necessary choices presented by the most sensitive environmental land-use problems."); Stephanie E. Marshall, Refining the Constitutional Limits on Governmental Regulation of Private Property, 30 WILLAMETTE L. REV. 817, 828 (1994).
241. See Sintra, 829 P.2d at 777 (holding that, when a plaintiff seeks money damages pursuant to §1983, she must demonstrate that conduct violating substantive due process was invidious or irrational); Robinson, 830 P.2d at 334 (holding same).
Coastal Council. The court determined that case specific analysis of the legitimacy of the state's interests or the purpose of the regulation no longer pertained to claims alleging either a physical taking or a total deprivation of property value. Otherwise, the basic framework survived.

The Washington Supreme Court's effort to develop a cohesive regulatory takings framework has been criticized as inconsistent with federal doctrine and Supreme Court precedent. In fact, the analysis may ultimately prove flawed in several respects. Perhaps most significantly, it attempts to insulated many regulations from takings review, while failing satisfactorily to articulate a distinction between the means-ends components of its takings and due process analyses. Thus, for example, it commonly invalidates regulations under the prong of its substantive due process test that relates to impacts on landowners, a prong that may actually accord more consistently with review of a regulation as a taking. Moreover, the court's insulation doctrine produces an ironic result—namely, "when a landowner challenges a . . . valid police power regulation, the landowner is limited to the due process remedy of invalidation of the offending regulation."

The Washington court may simply have further exacerbated an already muddled doctrine. However, its efforts clearly reflect a desire for a clear, articulated body of takings law and a response to the United States Supreme Court's failure to reconcile the conflicting precedents of its modern regulatory takings doctrine.

243. Id. at 8-12 (citing Lucas, 505 U.S. 1003 passim (1992)).
245. See Marshall, supra note 238, at 847-49.
246. See, e.g., Guimont, 854 P.2d at 16 ("We conclude the Act is unduly oppressive and violates substantive due process."); Sintra, 829 P.2d at 776 ("The oppressive nature of the regulation is itself violative of due process.").
247. Guimont, 854 P.2d at 18 (Utter, J., concurring). This rule is clearly intended to ensure that the price of potential takings liability does not thwart important regulation to protect the public interest. However, it produces a result that is inconsistent with the basic premise that, whereas takings analysis presupposes valid regulation and simply demands compensation where the impacts are too great, substantive due process analysis addresses regulations that are alleged to be invalid and cannot be cured by compensation. See supra Part II.B.2.a.
248. See Marshall, supra note 238, at 847.
III.
CAN LITIGANTS BRING BOTH CLAIMS?

A. A Substantial Limitation: Armendariz v. Penman

In the above analysis, I have attempted to determine the strategic considerations that might explain the frequent choice of litigants to combine substantive due process (and other constitutional) claims with their Fifth Amendment takings claims. I have suggested at least four possible interests driving this litigation strategy on the part of landowner plaintiffs: the possibility of gaining earlier access to the federal courts, the availability of a broader range of damages, the opportunity to submit issues to a jury, and the prospect of obtaining a more favorable substantive review standard. Moreover, I have demonstrated the operation of these tactics in recent cases, such as Del Monte Dunes.

That analysis, however, may prove purely academic, at least in the Ninth Circuit. In Armendariz v. Penman, an en banc panel of that circuit ruled that a property owner’s substantive due process claim was preempted by other constitutional claims deriving from explicit textual sources of protection. In particular, the court read the Supreme Court’s holdings in Graham v. Connor and Albright v. Oliver to preclude a substantive due process claim where a plaintiff complained of conduct that could be challenged under the Takings Clause.

Under the Armendariz rule, the court first asks whether the right asserted is one that courts have recognized under the Takings Clause. "The answer to [that] question determines whether the constitutional right that the plaintiffs are seeking to vindicate is a spe-

249. 75 F.3d 1311 (9th Cir. 1996).
250. Armendariz overruled that portion of the reasoning in Sinaloa Lake Owners Ass’n v. Simi Valley, 882 F.2d 1398 (9th Cir. 1989) (as amended), cert. denied, 494 U.S. 1019 (1990), that permitted the property owners to assert a substantive due process claim. See Armendariz, 75 F.3d at 1326.
251. 490 U.S. 386, 395 (1989) (holding for a claim of excessive force that, “[b]ecause the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that Amendment, not the more generalized notion of ‘substantive due process,’ must be the guide for analyzing these claims”).
252. 510 U.S. 266 (1994) (plurality opinion) (reaffirming the reasoning and result of Graham).
253. The property owner’s procedural due process and equal protection claims were still available because, like the protection against takings, these interests derive from explicit sources of constitutional protection—the Fifth and Fourteenth Amendments.
254. 75 F.3d at 1322; see also Besaro Mobile Home Park v. City of Fremont, No. c97-02106 CW, 1997 WL 818884, at *5 (N.D. Cal. Dec. 19, 1997) (finding the Armendariz rule applicable to preclude a substantive due process claim because “[c]ourts have consistently analyzed rent control ordinances to determine if they are regulatory takings under the Takings Clause . . .”).
cifically enumerated right, barring any resort to substantive due process under *Graham* and *Albright*, or whether that right is itself a substantive due process right." 255 While recognizing the ambiguous source of constitutional protection against the alleged "private taking,"256 the *Armendariz* court concluded that it rested in the Takings Clause, rather than the Due Process Clause or another constitutional provision.257 As a result of this broad reading of both Supreme Court precedent and takings doctrine, the plaintiff's substantive due process claim was precluded.

The Supreme Court has not considered the Ninth Circuit's far-reaching ruling, but other federal circuits throughout the country have also explored the issue with conflicting results.258 In the meantime, *Armendariz* binds the federal courts of the Ninth circuit259 and pro-

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255. 75 F.3d at 1322.

256. In *Armendariz*, the owners of low-income housing units alleged that purported housing code enforcement activities, which rendered some owners financially incapable of maintaining possession of their buildings, actually concealed pretextual motives on the part of the city—namely, the desire to rid the city of "undesirable" tenants and to enable a prospective commercial developer to purchase contiguous property. *Id.* at 1314-15. The plaintiffs challenged the city's conduct, claiming that it violated procedural due process, substantive due process, and equal protection because it was for "no legitimate governmental purpose." *Id.* at 1319. The plaintiffs did not allege a taking. *Id.* at 1324.

The court characterized the plaintiffs' claim as alleging a "private taking," which presents a particularly difficult question in terms of the constitutional source of the bar. The language of the Takings Clause prohibits the government from taking private property for public use without just compensation. At least one entirely plausible reading of this clause would find that it applies only to property taken for public use—in other words, circumstances in which the government must pay compensation. By contrast, private takings are simply never permitted, whether or not the government pays compensation. Therefore, private takings may be more appropriately treated under a substantive due process, rather than a just compensation, analysis. See, e.g., Berger, *supra* note 168, at 883.

Additional confusion in the area of private takings derives from the absence of the Takings Clause language in the Fourteenth Amendment. The prohibition against takings was incorporated as a prohibition against the states via that amendment's Due Process Clause. *Chicago B. & Q.R. Co. v. Chicago*, 166 U.S. 226, 235 (1897). Thus, a reference to the Fourteenth Amendment's Due Process Clause may refer to either its due process component or its takings component.

257. 75 F.3d at 1323.

258. See *Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1214 (6th Cir. 1992) ("Our research . . . reveals the circuits to be deeply divided concerning the theories to be employed in federal court cases challenging zoning."). Compare *Pearson*, 961 F.2d at 1214 (rejecting the notion that all federal challenges to zoning decisions must be brought as takings claims and adopting the categories of claims then available in the Eleventh Circuit, pre-*Villas of Lake Jackson*, with *Miller v. Campbell County*, 945 F.2d 348, 352 (10th Cir. 1991) (adopting an approach more consistent with the Ninth Circuit's, and holding that, in "a factual situation that falls squarely within [the Takings Clause] . . . [i]t is appropriate . . . to subsume the more generalized Fourteenth Amendment due process protections within the more particularized protections of the Just Compensation Clause").

259. See *Macri v. King County*, 126 F.3d 1125, 1128-29 (9th Cir. 1997) (as amended) (explaining that *Armendariz* announced an exception to the general principle that plaintiffs can seek relief under multiple constitutional theories due to a "well-placed reluctance to expand the concept of substantive due process", and holding that plaintiffs "cannot side-
vides persuasive, if not binding, authority for state courts that sit within the circuit.\textsuperscript{260} This suggests that, at least insofar as the claims derive from identical factual contexts,\textsuperscript{261} plaintiffs in that circuit can no longer pursue any strategic advantages that may lie in combining takings claims with substantive due process claims.

\textbf{B. A Possible Limiting Principle}

The Ninth Circuit's broad interpretation and application of Supreme Court precedent prompts the need for a limiting principle. Notwithstanding the historical conflation of substantive due process and takings standards,\textsuperscript{262} it is possible to divine a principled distinction in the origins and purposes of the doctrines. As noted above, whereas a due process inquiry focuses on the government \textit{conduct} at issue, a takings analysis should scrutinize the \textit{impact} of otherwise legal conduct on the complaining party.\textsuperscript{263} Thus, conduct that violates due pro-

\textsuperscript{260} See Sintra, Inc. v. City of Seattle (Sintra II), 935 P.2d at 577 (dissenting opinion) (criticizing the majority for recognizing a substantive due process claim and citing \textit{Armendariz} for "[a] more accurate statement" of federal law, which "virtually reject[s] the application of substantive due process to land use claims under \[§ 1983\], requiring instead that such claims be based on a specific constitutional provision such as the takings clause of the Fifth Amendment"); \textit{see also} Clark v. City of Hermosa Beach, 56 Cal. Rptr. 2d 223, 243 (Cal. Ct. App. 1996) (acknowledging the potential implications of \textit{Armendariz}, but avoiding a conclusive interpretation of its effect by finding that, even assuming the plaintiff was entitled to bring both takings and substantive due process claims, the substantive due process claim in that case would fail).

\textsuperscript{261} It is presumably possible that some aspect of a given factual context would give rise to a viable substantive due process claim, while not presenting a plausible takings claim. It is, as yet, unclear whether the \textit{Armendariz} rule would apply with equal force in those contexts. Indeed, although the \textit{Armendariz} court explicitly rejected any argument that a plaintiff's takings claim need actually be successful to preempt her substantive due process claim, 75 F.3d at 1325, the court's analysis may leave open a limiting principle for the scenario described above—namely, where some aspect of a plaintiff's factual allegations simply support no possible takings claim. \textit{See infra} Part III.B.

\textsuperscript{262} \textit{See supra} Part II.B.2.a.

\textsuperscript{263} \textit{See, e.g.,} Krotoszynski, \textit{supra} note 43, at 572 ("The \textit{Armendariz} court failed to appreciate the gravamen of a substantive due process action for the arbitrary deprivation of property. It is not the loss of property that justifies the claim, but rather the arbitrary and irrational nature of the government's conduct."). The author argues that:

\textit{[Supreme Court precedent] should not be read to preclude all substantive due process protection for property interests. A would-be \$1983 plaintiff should be permitted to bring a claim for an utterly arbitrary deprivation of a property interest because the government's action in such a case goes well beyond the compass of the Takings Clause. A plaintiff should not be barred from relying on the protections afforded by substantive due process simply because she may also possess a claim—based on different facts and proofs—under the Takings Clause.}

\textit{Id.} at 573. (emphasis added).
cess is invalid, but a valid action challenged as a taking can withstand constitutional review provided the government pays compensation.

Assuming this distinction, there might be circumstances in which property is involved but a takings claim is simply not available, leaving the property owner with a viable substantive due process claim. For example, a land use decision based on irrational agency conduct may give rise to substantive due process liability. However, if the decision does not deny the landowner all economically viable use of her land, or if she is in fact compensated for any financial impact of the decision, then no taking has occurred. This example demonstrates the logical order in which to consider substantive due process and takings claims. Because just compensation presupposes a valid exercise of government powers, the inquiry into validity—i.e., the substantive due process analysis—should precede any inquiry into impacts as a taking. Thus, an appropriate limiting principle would restrict the availability of substantive due process protection where it is invoked as simply a litigation tactic on a claim that is, at its core, a takings challenge. By contrast, however, plaintiffs would remain free to claim a substantive due process violation where that claim is rooted in and relies on proof of different facts, or at least different aspects of those facts.

As mentioned earlier, the considerable majority of land use cases invoking multiple constitutional challenges simply lump the claims together as alternative theories of liability based on identical factual contexts. As such, they offer little insight into the potential operation of the limiting principle just articulated. However, in at least one case, the Ninth Circuit explicitly differentiated among the claims as pleaded by the plaintiffs. Herrington v. County of Sonoma involved a challenge by property owners to the county's denial of their subdivision application and subsequent down-zoning of their property. The property owners filed four claims, each purportedly rooted in distinct facts and proof. With regard to the takings and substantive due process claims, the plaintiffs alleged: first, that the county's decisions

264. See Eastern Enterprises v. Apfel, No. 97-42, 1998 U.S. LEXIS 4213, at *115 (June 25, 1998) (Kennedy, J., concurring in the judgment and dissenting in part) ("[W]e should proceed first to general due process principles, reserving takings analysis for cases where the governmental action is otherwise permissible.").

265. See, e.g., Roberts & Shearer, supra note 8, at 837 ("Claims that are premised on arbitrary state action, asserting that the act is an invalid police power control, ought to be distinguished from claims that a regulation is excessive. The former ought to survive as independent causes of action despite the Fifth Amendment, even if the latter are barred by Graham-Whitley.").

266. For examples of cases in which the Ninth Circuit specifically separated factual allegations giving rise to a plaintiff's alternative constitutional theories, see McMillan v. Goleta Water District, 792 F.2d 1453, 1454 (9th Cir. 1986).

267. 834 F.2d 1488, 1490 (9th Cir. 1988) (as amended).
denied them all economically viable use of their land, amounting to a
taking without just compensation; and second, that the decisions were
irrational, arbitrary, and capricious because unsupported by relevant
evidence, resulting in a substantive due process violation. By artic-268ulating the distinct factual bases of these claims, Herrington thus sup-
ports the existence of some parameters to circumscribe the breadth of
the Armendariz prohibition.

However, on its face, Armendariz appears to leave no room for
this outcome. Indeed, the opinion is not only broadly worded, but
adopts a questionable reading of the Takings Clause in order to find
the substantive due process claim precluded. In overruling the ear-
erlier case of Sinaloa Lake Owners Ass'n v. City of Simi Valley, which
had permitted a litigant to bring both claims, the Armendariz court
did not address whether the panel in that case might have been deal-
ing with the type of scenario described above. Yet one subsequent
court has characterized Sinaloa as simply finding that, in that case, the
challenged conduct "went beyond the penumbra of the Just Compen-
sation Clause." This opinion suggests that the Armendariz court
would apply its broad rule to any set of facts even conceivably cogni-
zable under the Takings Clause. Under that approach, if property is
involved, a takings claim appears to be the litigant's only option, re-

gardless of whether she challenges the government's action as an invalid
exercise of the police power or as a valid exercise that is

nonetheless unconstitutional because of the burden it imposes on her.

268. Id. The plaintiffs also alleged a procedural due process violation based on inad-
quate notice and opportunity to be heard concerning some of the county's decisions, and
an equal protection violation based on the county's subsequent approval of subdivisions on
agricultural land alleged to be physically identical to the plaintiffs' land. Id.

269. See Krotoszynski, supra note 43, at 574 ("Graham and Albright will not significantly advance the clarity of constitutional law if these decisions mean that federal appellate courts should tear constitutional provisions free of their textual moorings in order to shoehorn generalized claims into specific constitutional guarantees."). Id. at 606 ("To apply the Takings Clause to a government action without a public purpose is to read the 'public purpose' limitation entirely out of the clause."). See supra note 253, for discussion.

270. Indeed, Armendariz not only possibly obviates the strategies discussed above, but appears to intend that result. The court specifically supported its conclusion in part by suggesting that Sinaloa had allowed an unfortunate outcome. Armendariz, 75 F.3d at 1329. By doing so, the court clearly demonstrated that it did not want to let plaintiffs use substantive due process tactically—either to escape federal court ripeness constraints or to obtain an additional "chance" when the claim fails under the appropriate theory.

271. 882 F.2d 1398 (9th Cir. 1989).

272. Miller v. Campbell County, 945 F.2d 348, 353 (10th Cir. 1991); see also Sinaloa, 882 F.2d at 1408 n.10 (holding that, notwithstanding Graham, "[a] plaintiff may still state a claim for violation of substantive due process where it is alleged that the government has used its power in an abusive, irrational or malicious way in a setting not encompassed by some other enumerated right").
CONCLUSION

Despite Armendariz’s potential bar, this Comment presents four possible explanations for the commonly observed practice of litigants combining or substituting takings claims with substantive due process or other constitutional allegations. These explanations are both procedural—ripeness, remedies, and jury trial rights—and substantive—standard of review. In each instance, no consistent advantage appears to flow readily from the hypothesized “strategy.” In some cases, the desired goal, such as earlier access to federal court, might favor inclusion of a substantive due process claim; in others, a different objective, such as the right to submit liability issues to a jury, will countenance pursuit of a takings claim; and in still others, no measurable advantage will result from a strategy rooted in combining constitutional claims. One might argue that this result favors the theory that litigants are simply cautious and therefore tend to pursue every conceivable cause of action. However, notwithstanding the lack of consistency, the considerations discussed in this paper are neither negligible nor immaterial. In a given case—on the right facts and under the right theories—a litigant may actually get into court earlier, be able to present her claims to a jury, obtain a higher recovery, and achieve a more favorable standard of substantive review. Indeed, the Del Monte Dunes case demonstrates how these strategies may operate to achieve enormous benefits for landowner plaintiffs. With these potential advantages at stake—in addition to any inherent caution—a plaintiff has everything to gain and very little to lose by combining, or in certain circumstances substituting, her claims. At least until the Supreme Court addresses these issues, the strategic interests deduced in this Comment should continue to influence observed litigation practices in land use cases.

As I have argued throughout, much room remains for the Supreme Court to articulate principled doctrinal boundaries and thereby circumscribe the appropriate roles for claims alleging constitutional violations in the land use context. Properly defined, substantive due process analysis should provide an initial inquiry into the validity of a regulation. If the regulation survives means-ends scrutiny on those grounds, takings doctrine would then address whether the regulation is nonetheless unconstitutional due to the impact or economic burden it imposes on the complaining landowner. This delineation would eliminate much confusion in this important realm of land use law and prevent future decisions like Del Monte Dunes, which so clearly reflect doctrinal disharmony.