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City of Monterey v. Del Monte Dunes

Charles J. Higley*

In City of Monterey v. Del Monte Dunes, the Supreme Court passed up the opportunity to untangle takings law from substantive due process. Its decision allowed an improper act of government to stand simply by requiring payment to a landowner. By removing the substantive due process-like language and test from Agins v. City of Tiburon from the law of takings, the Court could have separated the issues of government propriety and compensation. In so doing, validity according to the Due Process Clause would become a threshold question for reaching the issue of compensation for a taking. The two areas of law, then, could function as separate, free-standing constitutional doctrines.

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INTRODUCTION

The Supreme Court's decision in City of Monterey v. Del Monte Dunes\(^1\) shows its ongoing reluctance to clarify the distinction between takings law and substantive due process. On one hand, the Court affirmed a jury's determination that the city council of Monterey acted outside its authority in denying a development permit to a landowner—a due process determination. On the other hand, responding as if the jury had found a takings, the Court allowed that invalid act to stand, but required the City to pay the landowner "just compensation." This outcome suggests a fundamental misapplication of takings law. Takings law does not allow an *ultra vires* act on behalf of the government to become legally acceptable simply through payment to the harmed party. Rather, takings law requires compensation for an *otherwise proper* act of government.\(^2\)

This Note argues that by removing substantive due process language from takings doctrine, the Court can separate the issues of government propriety and compensation. Because a takings claim for just compensation presumes that the government has acted legitimately, any claim suggesting otherwise should be brought under the due process clause and decided according to well established substantive due process standards. Validity according to the due process clause, then, would become a threshold question for reaching the issue of compensation for a taking. This leaves the jury, to the extent that *Del Monte Dunes* proclaims the existence of a jury right,\(^3\) to decide only the question of whether the landowner should receive compensation.

Part I begins with a background summary of the *Del Monte Dunes* case. Part II, then, argues for untangling takings and substantive due process, leaving two logical, freestanding constitutional doctrines.

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A. Factual and Procedural History

Property owners Del Monte Dunes, Inc. sought to develop a beachfront parcel in the City of Monterey for multi-family residential use.\(^4\) Industrial and commercial development bordered the property to the southeast and a state park lay to the northeast. At one time the parcel had been the site of an oil exchange tank farm. Along with a variety of industrial litter, the oil company left behind a non-native plant that had begun to supplant the native buckwheat grass on the site.\(^5\)

Between 1981 and 1984, Del Monte Dunes submitted a series of development proposals to the city's zoning commission. Each of the plans was rejected with suggestions for ways the project might be improved.\(^6\) In 1984 the city conditionally approved a plan for a 190-unit development, contingent on a few specific changes, and granted an 18-month conditional-use permit.\(^7\)

A 1984 search of the property resulted in the discovery of a larva of the endangered Smith's Blue Butterfly whose natural habitat is the buckwheat plant.\(^8\) In order to survive, the Smith's Blue must land on a mature, flowering buckwheat plant, the likes of which could be found on the property in question. Though the land was far from pristine natural habitat, it did appear to support the type of environment necessary for the Smith's Blue.\(^9\)

In June of 1986, the city council denied Del Monte Dunes' final development plan. In support of its decision, the council stated that the plan did not provide adequate access to the development and that the development would damage the environment and disturb the habitat of the endangered Smith's Blue Butterfly.\(^10\)

Concluding that no amount of alteration would make its plan acceptable, Del Monte Dunes brought an action in the District Court for the Northern District of California under 42

\(^4\) See 526 U.S. at 694.
\(^5\) See id.
\(^6\) See id. at 695-96.
\(^7\) See id. at 696.
\(^8\) See id. at 695.
\(^9\) See id.
\(^10\) See id. at 697-98.
U.S.C. § 1983, claiming that the city had violated the Due Process and Equal Protection clauses of the Fourteenth Amendment and had taken the company's property without compensation.\(^{11}\) The district court dismissed the claim as unripe, stating that the plaintiff had neither obtained a final decision as to what the city would accept nor sought just compensation in state court.\(^{12}\) The Court of Appeals for the Ninth Circuit reversed noting that, in light of the case's history, to require the plaintiff to submit additional proposals would be repetitious and unfair. Furthermore, because the State of California provided no post-deprivation remedy in state court, an action under Section 1983 was appropriate.\(^ {13}\)

On remand, the district court submitted the takings and equal protection issues to the jury but kept for itself the substantive due process claim.\(^{14}\) The court instructed the jurors that they should find in favor of Del Monte Dunes if they found that the regulations put forth by the city denied Del Monte Dunes all economically viable use of the land, or if they determined that the city's decision to deny the plan failed to "substantially advance a legitimate public purpose."\(^{15}\) The court then limited these instructions somewhat by telling the jury that serious economic loss was not sufficient to render a property economically useless, and that protection of the environment, of

\(^{11}\) See id. at 698.

\(^{12}\) According to Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, 473 U.S. 172, 173 (1985), in order for a takings claim to be ripe, a claimant must have: (1) obtained a final decision regarding the application of a regulation or status of a development permit from the appropriate government agency; and (2) the claimant must have sought a remedy from the state for just compensation where such remedy exists.

\(^{13}\) Since the litigation in Del Monte Dunes commenced, California has adopted a procedure for receiving just compensation. In Breneric Associates v. City of Del Mar, 69 Cal. App. 4th 166 (Cal. Ct. App. 1998), the court summarized the procedure for ripening a claim in the state by emphasizing that,

California provides a procedure for an applicant to seek just compensation for alleged injuries from regulatory takings. The aggrieved applicant may file an action for administrative mandamus under Code of Civil Procedure section 1094.5 to determine whether the agency's regulatory restrictions constituted an impermissible taking rather than a valid exercise of its police powers; the applicant can seek damages if a taking is found either under Code of Civil Procedure section 1095 or, if the plaintiff wishes to preserve his right to a jury trial, by an action for inverse condemnation. [citation] Only after those avenues have been pursued and fail to yield just compensation for the alleged regulatory taking is a Section 1983 claim ripe for adjudication.

\(^{14}\) See 526 U.S. at 699.

\(^{15}\) See id.
public health and safety, and of the quality of the community by regulating development were all legitimate public purposes.\textsuperscript{16}

The jury found in favor of Del Monte Dunes on both the takings claim and the equal protection claim, awarding $1.45 million in damages. The district court judge ruled against Del Monte Dunes on the substantive due process claim.\textsuperscript{17}

The City of Monterey appealed the decision to the Court of Appeals for the Ninth Circuit, claiming that the question of liability had been improperly submitted to a jury.\textsuperscript{18} The court of appeals affirmed, holding that the takings question was appropriately sent to a jury for decision and that the jury could have reasonably arrived at its decisions.\textsuperscript{19} In reaching its decision, the court of appeals stated that the "rough proportionality" test set forth in \textit{Dolan v. City of Tigard}\textsuperscript{20} provided the appropriate standard for the jury to use in determining whether the city's action substantially advanced a legitimate government interest.\textsuperscript{21} \textit{Dolan} states that in order for an exaction\textsuperscript{22} to go uncompensated, it must be rationally related to the state's proffered interest in both nature and degree. This standard is generally considered stricter than the "substantially advances" test used to determine the jury instructions at trial;\textsuperscript{23} it has never been applied outside the context of exactions.

\textsuperscript{16.} See id. These limiting instructions meant, in essence, that the city did have a legitimate purpose and that the real question was whether the city's decision to deny approval of the plan rationally related to that purpose. Justice Kennedy acknowledged this limiting effect in determining whether the question was an issue of law or an issue of fact, saying: "In this case, the narrow question submitted to the jury was whether, when viewed in light of the context and protracted history of the development application process, the city's decision to reject a particular development plan bore a reasonable relationship to its proffered justifications." Id. at 721.

\textsuperscript{17.} See id. at 701.

\textsuperscript{18.} See City of Monterey v. Del Monte Dunes, 95 F.3d 1422, 1425 (9th Cir. 1996).

\textsuperscript{19.} See 526 U.S. at 701-02.


\textsuperscript{21.} See 526 U.S. at 702.

\textsuperscript{22.} Local governments frequently require the dedication of land for public use as a condition for granting a development permit. These conditions are often called "exactions." The theory is that the development will impact the community in a certain way, and the developer, in exchange for the right to develop a particular parcel, should contribute to the alleviation of that impact. See ROBERT MELTZ ET AL., THE TAKINGS ISSUE: CONSTITUTIONAL LIMITS ON LAND-USE CONTROL AND ENVIRONMENTAL REGULATIONS, 241-61 (1999).

\textsuperscript{23.} The trial court relied on numerous cases, including \textit{Agins v. City of Tiburon}, 447 U.S. 255 (1980), to support the jury instructions. See 526 U.S. at 704. See infra, p. 616 (describing the "substantially advances" test).
Although the court did not directly apply the "rough proportionality" test, its reference to the test as the controlling law raised the question whether *Dolan* was applicable in determining non-exaction takings claims.\(^{24}\)

Monterey petitioned the Supreme Court for review, asking: (1) whether the Ninth Circuit erred in assuming that the rough-proportionality standard of *Dolan* applied to this case; (2) whether the "court impermissibly based its decision on a standard that allowed the jury to reweigh the reasonableness of the city's land-use decision;" and (3) whether issues of liability were properly submitted to the jury concerning Del Monte Dunes' regulatory takings claim.\(^{25}\) The Supreme Court granted certiorari on March 30, 1998.\(^{26}\)

### B. Supreme Court Decision

In *Del Monte Dunes v. City of Monterey*, the Supreme Court unanimously held that the "rough proportionality" test did not extend "beyond the special context of exactions—land-use decisions conditioning approval of development on the dedication of property to public use."\(^{27}\) Justice Kennedy, writing for the Court, said the case at bar dealt not with exactions, but with the denial of a development permit, thus making the *Dolan* test inapplicable.\(^{28}\)

Next, in a 5-4 decision, the Court found that a jury right existed for takings claims brought under 42 U.S.C. § 1983. Justice Kennedy first determined that Section 1983 itself did not confer a jury right. The Court then looked to the Seventh Amendment. Applying the "historical test" for determining jury rights,\(^{29}\) Justice Kennedy found that a Section 1983 claim most

\[^{24}\text{See 526 U.S. at 702-03.}\]
\[^{25}\text{Id. at 702.}\]
\[^{26}\text{See 523 U.S. 1045 (1998).}\]
\[^{27}\text{526 U.S. at 702.}\]
\[^{28}\text{Id. at 703. An in-depth analysis of the Court's decision in this important area of takings doctrine is beyond the scope of this Note, but a brief mention of its effects are necessary here. In refusing to extend the "rough proportionality" standard to cases involving the approval, or lack thereof, of a development permit, the Court seems to have signaled an unwillingness to continue its recent expansion of landowners' ability to challenge governmental regulation. Extending the "rough proportionality" test would have made common government regulatory devices, such as development fees and zoning regulation, subject to close scrutiny by the courts. The Court seems to be drawing a line, albeit not particularly bright, beyond which it will not go in questioning the decisions of local elected officials. Local governments surely were relieved to retain this amount of autonomy in land use decisionmaking.}\]
closely resembles a tort action for damages and, therefore, is an action "at law" for the purpose of the Seventh Amendment. But Justice Kennedy could find no common law analog sufficiently similar to the takings claim to require "preservation" of the jury right. To settle the question, he asked whether the specific questions presented to the jury were predominantly factual and thus deserved a jury right. The question of whether a land use decision substantially advances legitimate public interests, he said, "is probably best understood as a mixed question of fact and law." In finding that a jury right does exist, Kennedy stated:

In this case, the narrow question submitted to the jury was whether, when viewed in light of the context and protracted history of the development application process, the city's decision to reject a particular development plan bore a reasonable relationship to its proffered justifications. As the Court of Appeals recognized, this question was 'essentially fact-bound [in] nature.' Under these circumstances, we hold that it was proper to submit this narrow, factbound question to the jury. (citations omitted)

Justice Scalia wrote a separate concurring opinion in which he argued that a jury right exists for all Section 1983 claims regardless of the nature of the underlying constitutional claim. In applying the historical test to a Section 1983 claim, Justice Scalia argued that the Court must look at the statute itself to determine whether the action is one "at law." Citing Wilson v. Garcia for the proposition that all Section 1983 claims should

Baltimore & Carolina Line, Inc. v. Redman, 295 U.S. 654 (1935); Dimick v. Schiedt, 293 U.S. 474 (1935); John C. McCoId, II, Procedural Reform and the Right to Jury Trial: A Study of Beacon Theatres, Inc. v. Westover, 116 U. PA. L. REV. 1, 6 (1967). Basically, the "historical test" requires the Court to first determine whether the claim, or an analogous claim, is one that was tried "at law" at the time of the founding of the Seventh Amendment to the Constitution (1791). If so, the Court must make a second inquiry—whether "the particular trial decision must fall to the jury in order to preserve the substance of the common-law right as it existed in 1791." 517 U.S. at 376. In the absence of an analogous claim existing in 1791, the Court, in answering the second prong of the test, must determine whether the question at hand is predominantly an issue of fact or of law. Factual questions generally go to a jury, while the Court reserves the disposition of legal questions for itself.

30. See 526 U.S. at 709.
31. See id. at 721.
32. Id.
33. See id. at 726 (Scalia, J., dissenting).
34. See id. at 724.
35. 471 U.S. 261, 278 (1985) (holding, in relevant part, that all Section 1983 claims should be treated the same for the purpose of assigning the proper statute of limitations).
be characterized as "tort action[s] for the recovery of damages for personal injuries." 36 Scalia found that a jury right should exist for all such statutory claims. 37

36. 526 U.S. at 726 (citing 471 U.S. at 276).

37. For a thorough discussion on the various approaches espoused by the separate opinions in Del Monte Dunes, see Note, Leading Cases in Constitutional Law, Section 1983 – Seventh Amendment Right to Jury Trial, 113 HARV. L. REV. 296 (1999). Although not addressed by this Note, the jury-right decision potentially seriously affects the practice of takings law. Litigating before a jury, certainly, poses some differences in the way attorneys will approach a takings claim. Language in the opinion, however, suggests that the scope of the jury right is very limited. Besides determining that the factual nature of the inquiry depended heavily on the "protracted history of the development application process," 526 U.S. at 721, the Court also outlined a number of other limits and exceptions to its decision. For instance, the Court noted that the new jury rule is only applicable to takings challenges brought under 42 U.S.C. § 1983, not to takings claims brought directly under the Fifth Amendment to the Constitution. See 526 U.S. at 722. The court also explicitly refused to extend its holding to cases in which a claimant brings a facial challenge to a city's general land use ordinances, explaining that Del Monte Dunes did not claim the city's ordinances were invalid, but, rather, that the "denial of the final development permit was inconsistent not only with the city's general ordinances and policies but even with the shifting ad hoc restrictions previously imposed by the city." Id.

The most significant limitation on the holding in Del Monte Dunes is that a takings question only becomes ripe for review by a federal court after following the process set out in Williamson County v. Hamilton Bank, 473 U.S. 374 (1985) (announcing a two prong test requiring: first, that a government entity must have reached a final decision regarding the application of a regulation or status of a permit to the land in question; and second, that a landowner must seek a remedy from the state for just compensation, where an adequate remedy exists. Since every state in the Union now has a post-deprivation remedy for inverse condemnation, a litigant may only gain a federal forum for her takings claim after exhausting that claim in state court, or in the case where a defendant removes the case from state court to federal district court. See 28 U.S.C. § 1441. Where the claim has been tried in state court, however, issue preclusion will prohibit a takings claimant from bringing the already decided issue into federal court. This particular limitation seems to render the jury question holding of Del Monte Dunes almost meaningless, at least for the time being. If a litigant is unable to access the federal courts, the question of whether a jury is available becomes purely academic. Unless or until the courts provide some way to access the federal courts, or Congress passes legislation requiring access, the Del Monte Dunes jury decision may have little practical effect on takings law. For a thorough discussion of the ripeness question and the practice of takings law, see Karena C. Anderson, Strategic Litigating in Land Use Cases: Del Monte Dunes v. City of Monterey, 25 ECOLOGY L.Q. 465 (1998).

Furthermore, the first case to interpret Del Monte Dunes in the Ninth Circuit confirms the potentially limited application of the Court's jury decision. In Buckles v. King County, 191 F.3d 1127 (9th Cir. 1999), the court found that plaintiffs had no right to jury trial with respect to takings liability. After acknowledging the difficulty in applying Del Monte Dunes, the court distinguished Buckles on several grounds. First, it echoed the Supreme Court in advising that the facts of Del Monte Dunes were extreme. See id. at 1141. Next, it found that the appellant's "as-applied" takings claim was outside the scope of the Del Monte Dunes decision. See id. It then pointed out that the appellant's claim was a stand-alone constitutional challenge and that Del Monte Dunes only applies to claims brought under 42 U.S.C. § 1983. See id. at
Finally, Justice Kennedy, writing for the majority, refused to decide whether the district court had properly asked the jury to decide the takings issue by applying the "substantially advances" test. Because the city itself had proffered the jury instructions in question, the Court held that it could not question their validity on certiori. Using language suggesting that the Court may be willing to restrict the "substantially advances" test in subsequent takings cases, Justice Kennedy stated:

although this Court has provided neither a definitive statement of the elements of a claim for temporary regulatory taking nor a thorough explanation of the nature or applicability of the requirement that a regulation substantially advance legitimate public interests outside the context of required dedications or exactions (citation), we note that the trial court's instructions are consistent with our previous general discussions of regulatory takings liability. Nevertheless, in declining to address the propriety of the "substantially advances" test, the Court insured that takings doctrine will remain confused and will continue to produce aberrant results.

II
THE CONTINUED CONFUSION OF TAKINGS AND SUBSTANTIVE DUE PROCESS

Though the Court ruled on a number of important questions, perhaps the most notable issue raised by the disposition of the Del Monte Dunes case was the Court's failure, once again, to address the continued confusion of takings and substantive due process. Specifically, the Court's holding allows a jury to decide takings liability via the Agins v. City of Tiburon "substantially advances" standard, a means-ends due process test of questionable validity in the context of takings. Despite the pleas of amici, including that of the Solicitor General of the United States, the Court refused to rule on the propriety of the Agins test, thereby ensuring ongoing befuddlement for takings litigants.

1142. In sum, "the net result of the distinctions between Del Monte Dunes and this case is that it was within the province of the district court to determine whether the county advanced a substantial interest." Id. If Buckles is any indication of the way subsequent courts will treat Del Monte Dunes, the jury right may indeed be narrow.

38. See 526 U.S. at 732.
39. 526 U.S. at 704.
40. 447 U.S. at 260.
The Court could have clarified the muddy waters of takings doctrine had it simply ruled that the Agins test poses an improper question for determining takings liability. The Takings Clause requires that government provide compensation when it takes property for public use. The Clause does not require, however, that the government's action in taking a certain parcel be rational. Means-ends tests to determine the validity or, conversely, the arbitrariness of government action are therefore irrelevant to the question of whether a taking has occurred; instead, such tests allow a court to determine whether a governmental entity has violated the Fifth and Fourteenth Amendment due process clauses. In allowing the continued use of the Agins means-end test, the Court perpetuates this confusion between takings and substantive due process.

Furthermore, because compensation under the Takings Clause presumes the validity of the government action, such compensation cannot provide the proper remedy for those harmed by an illegitimate act of government. Instead, plaintiffs should seek damages for an invalid or arbitrary government action through a 42 U.S.C. § 1983 claim alleging a violation of due process. Though the difference between compensation under the Takings Clause and damages under the Due Process Clause may appear semantic, it has real consequences. In the present case, if the Court had found the city's act illegitimate as a matter of substantive due process law, Del Monte Dunes could have gone ahead with plans to develop the property. On the other hand, if the city's decision did not rise to the level of a due process violation, then the decision would have stood and no compensation would have been required.

A. Doctrinal History

A brief history of the confused nature of takings and substantive due process will illuminate the discussion that follows. The Due Process Clauses of the Fifth and Fourteenth Amendments provide that "no person shall be deprived of life, liberty or property without due process of law." Due process requires that governments follow acceptable procedures in their actions: governments must provide processes that are due to

42. See infra Part II.B, p. 616.
43. The judge at trial found that the city's decision did not violate due process. See 526 U.S. at 701.
44. For an excellent overview of takings jurisprudence, see MELTZ, supra note 22.
citizens and other participants in government actions.\textsuperscript{45} Due process has also, however, been interpreted to require a certain level of substance in government action. Substantive due process, as it is called, requires that government actions pursue legitimate governmental ends and use means that are reasonably related to achieving those ends.\textsuperscript{46} The requirements are not stringent; generally, a governmental action that is minimally rational will survive due process scrutiny.\textsuperscript{47}

The Takings Clause of the Fifth Amendment of the United States Constitution reads, "private property shall not be taken for public use, without just compensation." Rather than imposing a means-end rationality on governmental action, the Takings Clause constrains the means government may use in pursuing its goals. By requiring compensation to those whose property is taken, the clause works to prevent government from imposing the cost of a shared public benefit on any single individual.\textsuperscript{48} Although early cases required a physical appropriation of private property in order to sustain a takings claim,\textsuperscript{49} the Court has applied the Takings Clause in this century to encompass "regulatory takings," where regulation becomes so onerous as to approximate an appropriation of property.

In its landmark decision in \textit{Pennsylvania Coal Co. v. Mahon},\textsuperscript{50} the Court ushered in the era of "regulatory takings" by finding a state land use regulation unconstitutional under the Takings Clause. Writing for the majority in \textit{Mahon}, Justice Holmes stated, "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it

\textsuperscript{45} See Witkin, \textit{7 Summary of California Law} § 481, 668-69 (9th ed. 1988).
\textsuperscript{46} See id.
\textsuperscript{47} Notably, the Equal Protection Clause imposes a higher means-end standard in certain contexts than is used in typical due process analysis. A government adopting a law that discriminates based on race must show that the use of race is necessary to achieve a compelling governmental end. \textit{See, e.g., Korematsu v. U.S.}, 323 U.S. 214, 216 (1944) (upholding the exclusion of a person of Japanese ancestry from a military area due to pressing public necessity to secure the United States against espionage and sabotage); \textit{Loving v. Virginia}, 388 U.S. 1, 11 (1967) (declaring a state ban on interracial marriages unconstitutional because it served no rational purpose). Similarly, a government discriminating on gender lines must show that the use of gender is substantially related to an important governmental end. \textit{See Craig v. Boren}, 429 U.S. 190, 197 (1976) (holding that gender based classification regarding sale of alcohol must serve important governmental objective).
\textsuperscript{49} See \textit{Mugler v. Kansas}, 123 U.S. 623, 668-69 (1887) (denying compensation to a brewery owner whose pre-existing business was rendered useless by a state law prohibiting the manufacture or sale of alcohol).
\textsuperscript{50} 260 U.S. 393 (1922).
will be recognized as a taking."\textsuperscript{51} This notoriously vague test that afforded the courts great discretion in deciding exactly when a regulation went "too far" served for nearly fifty years before the Court reopened the discussion of the regulatory takings issue.

*Penn Central Transportation Co. v. New York City*\textsuperscript{52} marked the first real shift in takings doctrine since *Mahon*. Justice Brennan, writing for the majority, attempted to define the factors the courts should use in determining whether regulation affects a taking without just compensation. First, a court should examine the economic impact of the regulation on the claimant; if the regulation severely affects the value of the plaintiff's property, the court is more likely to find a taking.\textsuperscript{53} Next the court should look at the "extent to which the regulation has interfered with distinct investment backed expectations."\textsuperscript{54} A plaintiff subjected to unexpected restrictions may well have suffered a taking. Finally, the court must consider the "character of the government action."\textsuperscript{55} The less like a general exercise of police power a regulation appears, the more likely a court is to find a taking. This three-factor balancing test provides the foundation of the Court's modern takings analysis.

Just two years after *Penn Central*, the Supreme Court decided *Agins v. City of Tiburon*\textsuperscript{56} and, with it, greatly muddled the already nebulous doctrine defined by the *Penn Central* test. Without discussing its scope or applicability, and without stating whether the decision was to supplement or replace the *Penn Central* test, the Court articulated a new test for regulatory takings: "The 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."\textsuperscript{57}

Notably, in crafting this means-end "substantially advances" test for takings, the court cited as its authority *Nectow v. Cambridge*,\textsuperscript{58} a case that did not address the issue of takings or just compensation. *Nectow* was a land use case in which the

\textsuperscript{51} Id. at 415.
\textsuperscript{52} 438 U.S. 104 (1978).
\textsuperscript{53} See id. at 124.
\textsuperscript{54} Id.
\textsuperscript{55} Id. Justice Brennan points out that a per se takings, in which the government has physically invaded the property of a landowner, may be easier to spot than "when the interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." Id.
\textsuperscript{56} 447 U.S. 255 (1980).
\textsuperscript{57} Id. at 260.
\textsuperscript{58} 277 U.S. 183 (1928).
plaintiff claimed that a comprehensive zoning ordinance, as applied to his property, deprived him of his property without due process of law in accordance with the Fourteenth Amendment. The remedy sought was not compensation, but, rather, injunctive relief. In adopting Nectow as guidance for a takings determination, the Agins Court failed to provide any analysis of the boundaries between takings and due process.

The Court further blurred the line between takings and substantive due process in Nollan v. California Coastal Commission. The majority, per Justice Scalia, confirmed Agins, saying that the Court “ha[s] long recognized that land-use regulation does not effect a taking if it ‘substantially advance[s] legitimate state interests.’” Justice Scalia went on to suggest that the takings analysis requires a higher level of scrutiny than the very similar substantive due process inquiry. Employing this heightened scrutiny, the Court adopted the “essential nexus test,” which requires the nature of an exaction to be related to the purpose for which it was taken.

In Dolan v. City of Tigard, the Supreme Court again heightened the level of scrutiny it used in its means-end review. Building upon the Nollan “essential nexus” test, the Court in Dolan required not only that there be a relation between the demanded exaction and the proffered state interest, but also that there be a relationship between the degree of the exaction and the projected impact of the proposed development; the Court held that the exaction should impose a burden on the landowner that is “roughly proportional” to the impact of the development. In articulating this “rough proportionality” standard, the Court said, “No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.” Although the Court

59. See id. at 185.
60. See id. at 186.
62. Id. at 834.
63. See id. at 836, n.3. Acknowledging the similarities between the test for substantive due process and the means-end test for takings, Justice Scalia wrote: “But there is no reason to believe (and the language of our cases gives some reason to disbelieve) that so long as the regulation of property is at issue the standards for takings challenges, due process challenges, and equal protection challenges are identical . . . .” Id.
64. 483 U.S. at 836-38.
66. Id. at 386.
67. Id. at 391. In adopting the phrase “rough proportionality,” the Court
retained the means-end test, characteristic of substantive due process, it again elevated the scrutiny above the minimal rationality test applied in traditional due process analysis.

B. “Substantially Advances” Test Should Be Removed as a Test for Takings Liability

The “substantially advances” standard explained in *Agins* unnecessarily confuses substantive due process and takings doctrines. The *Agins* test inappropriately uses a mean-ends test—a test designed to assess the validity or invalidity of a government action—to determine whether a government must pay compensation for taking a particular action that has affected property—an action that is otherwise a valid exercise of governmental power. By simply removing the “substantially advances” test as a standard of liability for takings, the Court could significantly clear up an area of law that has become very confused in recent years.

Numerous critics have identified the fundamental problem in the Court’s use of *Nectow*, a substantive due process case, as the basis for the *Agins* takings test. Specifically, scholars argue that the *Agins* test confuses substantive due process functions with takings law. Substantive due process is meant to invalidate government action that is constitutionally improper, whereas the takings clause is meant to compensate landowners when the government takes their property under a regulatory action that is otherwise proper. Justice Kennedy expressed this view unequivocally in a recent dissenting opinion in *Eastern Enterprises v. Apfel*. Kennedy said, “at the heart of the [Takings] Clause lies a concern, not with preventing arbitrary or unfair government action, but with providing compensation for legitimate government action that takes ‘private property’ to serve the ‘public’ good.” Similarly, the Solicitor General, in his

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69. *See id.*

70. *See 482 U.S. at 314-15.*


72. *Id.* at 554.
amicus brief in *Del Monte Dunes*, stated:

Thus, the constitutional requirement that just compensation be paid in order for a taking to be lawful is not intended to prevent or deter the government from adopting irrational regulatory schemes. Rather, the just compensation requirement addresses the quite different concern that the costs of legitimate public programs not be concentrated unfairly on discrete individuals.... [A] claim that government regulation fails substantially to advance legitimate state interests has no logical relevance to the question whether the burdens of that regulation have been unfairly concentrated on particular individuals.73

Indeed, the result of the Court's decision in *Del Monte Dunes* makes little sense when viewed in the context of the principles behind the Takings Clause. The jury ostensibly found that the city's action was irrational and unacceptable. Rather than strike down that irrational government act, however, the court awarded money damages but allowed the city to persist in its prohibition on development of Del Monte Dunes' property.74 While the case applies the proper remedy for a successful takings claim, the jury actually found that Monterey had acted irrationally.75 Thus, the Court in *Del Monte Dunes* awarded money damages for an action because it was improper. This action perverts the purpose of the Takings Clause.

C. Validity under Due Process Should Be a Threshold Question for a Takings Claim

A much clearer, simpler treatment of the relationship between the Due Process and Takings Clauses would require the Court to determine that a government action is valid according to the Due Process Clause before reaching the takings question.76 Because the Takings Clause 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," the action affecting the plaintiff's property must be "proper."77 An action that fails to substantially advance a legitimate government interest is ultra vires and cannot be sustained even with the payment of

74. See 526 U.S. at 732.
75. See id.
76. In the absence of a challenge by the plaintiff to the validity of the government action, such action may be presumed valid.
compensation. Government cannot buy the right to act outside of its proper sphere of power. Means-end evaluation, then, should be applied in the context of substantive due process challenges under the Fifth and Fourteenth Amendments.

If the government action survives due process scrutiny, then the court can ascertain whether a taking has occurred using the other traditional tests for determining whether a regulation has gone "too far," thus requiring just compensation. That is, the court may find that the otherwise proper regulation deprives the claimant of "all economically beneficial or productive use of the land," or apply the *Penn Central* balancing test to draw the line between a compensable and noncompensable regulation.

If, on the other hand, the regulation does not survive due process scrutiny, the action should be invalidated as a violation of the Due Process Clause. The aggrieved claimant may still get money damages by suing the government under 42 U.S.C. § 1983 for damages associated with a violation of due process rights. Thus, the claimant may recover losses for injuries sustained as a result of irrational government action. The measure of "irrational," though, would be consistent with due process standards. As mentioned before, courts rarely find government acts irrational under the deferential standard of substantive due process. More important, takings analysis would focus, as it should, on the boundary between compensable and noncompensable regulations, rather than serve as a vehicle for covert attacks on the acceptable sphere of governmental action.

These simple changes could go a long way toward straightening out the mess the Court has created by confusing takings and substantive due process doctrines. Notably, in addressing the plaintiff's substantive due process claim, the district court judge in *Del Monte Dunes* found that the City of Monterey's decision to deny development was rationally related to a legitimate public interest, even while the jury reached the opposite conclusion on the same question for takings liability. Had the Court proceeded according to the procedure outlined

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78. See supra Part II.A, p. 612.

79. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1004 (1992). This test mimics the first part of the jury instructions given to the jury in *Del Monte Dunes*. Incidentally, the Court, in its discussion of the right to a jury trial, found that a jury right may easily be found to determine this purely factual question. See 526 U.S. at 720-21.


81. See 526 U.S. at 701.
above, it could have avoided this illogical and contradictory result.

CONCLUSION

The Court's current treatment of takings doctrine unnecessarily muddles what could easily be much clearer. The Court's reluctance to clarify the distinction between takings law and substantive due process is producing aberrant results, such as the one in Del Monte Dunes. With any luck, the Court will incorporate some of the suggestions made in this Note and simplify an area of law that has become needlessly complicated in recent years.