The Current State of Regulatory Takings in Supreme Court Jurisprudence: A Look at City of Monterey v. Del Monte Dunes at Monterey, Ltd.

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THE CURRENT STATE OF REGULATORY TAKINGS IN
SUPREME COURT JURISPRUDENCE: A LOOK AT
CITY OF MONTEREY V. DEL MONTE DUNES
AT MONTEREY, LTD.

ROBERT S. PAYNE†

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The number of articles, books, and lectures on regulatory takings is legion, and this article adds itself to that formidable body of work. Instead of beginning with an analysis of the various theories of regulatory takings, this article will analyze the progression of one regulatory takings case, which traveled through the United States District Court for the Northern District of California twice, through the Ninth Circuit Court of Appeals twice, and has finally been ruled upon by the United States Supreme Court. In all, a judicial jour-
ney began in 1986 when the developer first brought suit and ended in May of 1999, when the Supreme Court held for the developer. The facts are compelling, and one of the attorneys before the Supreme Court was a persuasive soldier from the trenches of takings jurisprudence, Michael M. Berger, who successfully argued First English Evangelical Lutheran Church v. County of Los Angeles. The case is City of Monterey v. Del Monte Dunes at Monterey, Ltd. This is a regulatory takings case involving, in the words of the plaintiff, a taking "for the sake of a butterfly preserve in an area where there were no butterflies."

Some hoped and feared that this case might give "an opportunity for the Court to curb its expansion of takings doctrine, and to clarify some issues of procedure and proof. If wrongly decided, Del Monte Dunes could wreak havoc with state and local land use regulation." In the end, however, the Supreme Court neither clarified takings issues substantially, nor did it truly make claims more difficult to adjudicate. The opinion addressed three issues presented in the city's petition for certiorari, but the careful reader is left with

jury's verdict on the equal protection or takings claim. App. to Pet. For Cert. A-39. The court later denied the city's motions for a new trial or for judgment as a matter of law.

The Court of Appeals affirmed. 95 F.3d 1422 (C.A.9 1996). From this judgment, the city appealed to the Supreme Court of the United States. Id.

2. See id. (affirming the Ninth Circuit). For a discussion of the procedural history, see supra note 1 and accompanying text.

3. 482 U.S. 304, 322 (1987). First English stands for the proposition that under the Takings Clause, where government has taken property by land use regulation, the landowner may recover damages for the taking before it is finally determined that the regulation constitutes a taking of property. See id. In First English, the plaintiff/appellant brought action against the City of Los Angeles County under an inverse condemnation theory. See id. at 304. The cause of action arose after the County passed an ordinance prohibiting construction in an interim flood protection area. See id. This ordinance had the effect of denying First English Evangelical Lutheran Church the ability to use its land as it had prior to the enactment of the ordinance. See id. The California Court of Appeals held that the Takings Clause of the Fifth Amendment "did not require compensation as a remedy for 'temporary' regulatory takings." Id. The Supreme Court of the United States reversed and remanded. See id.


6. Philip Weinberg, Del Monte Dunes v. City of Monterey: Will the Supreme Court Stretch the Takings Clause Beyond the Breaking Point?, 26 B.C. ENVTL. AFF. L. REV. 315, 333 (1999). The author argues that the continual limitation of the government's ability to exercise its police powers has corrupted the original purpose of the Takings Clause. See id.

7. City of Monterey, 526 U.S. at 702. The three questions presented were:
the conclusion that the Court did not deal so much with takings issues as with section 1983 actions, raising a scholarly debate on the right to a jury trial in section 1983 actions generally. This article will address the section 1983 issues briefly, as the author's focus is on regulatory takings and the current issues surrounding regulatory takings claims. With this focus, City of Monterey will now be traced through its course in the courts.

A. The Facts

The property was a 37.6 acre parcel of land on the Pacific Ocean coast, which was used for many years as a Phillips Petroleum Co. oil terminal and tank farm. The land was mainly covered with a non-native ice plant that was planted in order to minimize erosion around the oil tanks. Buckwheat plants, which are the only known habitat for the endangered Smith's Blue Butterfly, were scattered throughout the land as well. The ice was slowly covering all the land, however, secreting a substance that forced out the buckwheat.

This land, best described as an abandoned industrial site, was zoned for multi-family residential use with up to twenty-nine units per acre — more than 1,000 homes for the entire parcel. Ponderosa Homes, the predecessor to Del Monte Dunes, owned the land

(1) whether issues of liability were properly submitted to the jury on Del Monte Dunes' regulatory takings claim,
(2) whether the Court of Appeals impermissibly based its decision on a standard that allowed the jury to reweigh the reasonableness of the city's land-use decision, and
(3) whether the Court of Appeals erred in assuming that the rough-proportionality standard of Dolan v. City of Tigard, 512 U.S. 374 (1994), applied to this case.

Id.

8. The Supreme Court of Wisconsin best described City of Monterey as “a § 1983 case [where] most of the discussion in the U.S. Supreme Court opinion involves the right to jury trial.” Eberle v. Dane County Bd. of Adjustment, 595 N.W. 2d 730, 748 (Wisc. 1999).

See also John de Angeli, U.S. Supreme Court Ruling on Takings: Issue Allowed to go Before a Jury, 221 N.Y.L.J. 3, 3 (1999) (stating “[u]nlike the Court's other takings rulings in the last 20 years, City of Monterey breaks little or no new ground in its analysis of what constitutes a taking”).

9. See City of Monterey, 526 U.S. at 694-95 (discussing use of land prior to taking).
10. See id.
11. See id. (discussing that land carried plants that are only known habitat for Smith's Blue Butterfly).
12. See id. (explaining impact of ice plant on buckwheat plants).
13. See City of Monterey, 526 U.S. at 694-95 (discussing use of land prior to regulatory taking).
and submitted an application to the City of Monterey ("City") for a 344-home development. This request was rejected by the City with the indication that a plan with only seven units per acre, or 264 units, "would be received favorably." A subsequent plan for the 264 units was submitted, and the City Planning Commission turned down the application, stating that a 224-unit proposal "would be received favorably." Another plan, for 224-homes, was denied, with directions to consider submitting a 190-unit development. Another plan was submitted, worked over, and finally, the City Council approved a 190-unit proposal. The 37.6 acres were, however, divided up into buildings and patios on only 5.1 acres, another 6.7 acres consisted of public and private streets, 17.9 acres in public open space, and the final 7.9 acres in landscaped acres. As this final application was pending, Del Monte Dunes purchased the property and pursued the application. The site plan was approved contingent upon the completion of fifteen conditions, and when these conditions were substantially met, "the planning commission acted against its professional staff's recommendation and denied the tentative map for the 190 units." On June 17, 1986, the City Council formally found that the design was "likely to cause substantial environmental damage and substantially injure the habitat of the endangered Smith's Blue Butterfly;" the City accordingly denied the map. At this point, the plaintiff brought action against the City with eight claims for relief, including: five substantive claims based on the Takings Clause of the Fifth Amendment

14. See id. (noting that Paradise Homes sought to develop land at issue).
15. See Del Monte Dunes at Monterey, Ltd. v. City of Monterey, 920 F.2d 1496, 1502 (9th Cir. 1990) [hereinafter "Del Monte I"].
16. See id. (discussing City Planning Commission's regulations with respect to land use).
17. See id. (noting that City Planning Commission again rejected plan and implied that more favorable plan would be better received).
18. See Respondent's Brief at 4, City of Monterey, 526 U.S. 687 (1999) (No. 97-1235) (asserting that final agreement was full of exactions, contrary to claims of City of Monterey).
19. See Del Monte I, 920 F.3d at 1499 (elaborating on Del Monte Dunes' acquisition of property).
20. Id. (pointing out that City's architectural review committee approved plan).
21. See id. at 1503 (highlighting that council found proposed plan was conceptually satisfactory and in conformance with previous decisions of council regarding density and number of units).
22. See U.S. Const. art. v. The Fifth Amendment to the United States Constitution states: "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V.
as incorporated in the Fourteenth Amendment;\textsuperscript{23} the Equal Protec-
tion and Due Process Clauses of the Fourteenth Amendment; the
common law principles of estoppel and unjust enrichment; and
three remaining claims identifying remedies for an injunction
against the City, relief under section 1983 of Title 42 of the United
States Code,\textsuperscript{24} and declaratory relief under Title 28, sections 2201
and 2202.\textsuperscript{25}

B. The Case History

Before discussing the subsequent case history, it is interesting
to note that no Smith’s Blue Butterfly has ever been seen on the
property.\textsuperscript{26} Although the City contended that the project would
threaten the habitat with total destruction, the project contained
plans to plant and preserve a buckwheat area, and “ironically, with-
out Del Monte’s project (that would remove all ice plant and sow

\textsuperscript{23} See U.S. Const. art. XIV, § 1. Section one of the Fourteenth Amendment
states, in part: “No State shall make or enforce any law which shall abridge the
privileges or immunities of citizens of the United States; nor shall any State deprive
any person of life, liberty, or property, without due process of law; nor deny to any
person within its jurisdiction the equal protection of the laws.” U.S. Const.
amend. XIV, § 1.

provides:

\textit{Civil action for deprivation of rights.}

Every person who, under color of any statute, ordinance, regulation,
custom, or usage, of any State or Territory or the District of Columbia,
subjects, or causes to be subjected, any citizen of the United States or
other person within the jurisdiction thereof to the deprivation 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, except that in any action brought
against a judicial officer for an act or omission taken in such officer’s
judicial capacity, injunctive relief shall not be granted unless a declaratory
decree was violated or declaratory relief was unavailable. For the pur-
poses of this section, any Act of Congress applicable exclusively to the
District of Columbia shall be considered to be a state of the District of
Columbia.

\textit{Id.}

\textsuperscript{25} 28 U.S.C. §§ 2201, 2202 (1994); see also Del Monte I, 921 F.2d at 150 (dis-
cussing claims for relief).

\textsuperscript{26} See Respondent’s Brief at 3, City of Monterey (no. 97-1235) states:
Although buckwheat is the natural habitat of the SBB, no eggs, larvae, or
adults of the species were found during extensive searches of this prop-
erty in 1981, 1982, 1983, and 1984; one SBB larva was found late in 1984;
none in 1985. The SBB lives for only one week, travels 200 feet (maxi-
mum) and must land on a mature, flowering buckwheat plant in order to
survive. The site is quite isolated from other possible SBB habitats, so
that travel to or from this property is unlikely, if not impossible (internal
citations omitted).

\textit{Id.}
additional buckwheat) the putative SBB habitat would have been overrun and eliminated by ice plant.”27 Upon hearing these facts, Justice Antonin Scalia is reported as saying, “[e]ven though there’s a reasonable explanation for the fifth denial, or the third denial, or the second denial, after a while, you begin to smell a rat.”28 During litigation, the property, considered unusable following the numerous application denials, was sold to the state of California for a public park for $800,000 more than the landowner had paid for the property.29

At trial, the constitutional claims were dismissed as not ripe for review, and the other claims were dismissed as well.30 On appeal, the Ninth Circuit held that the constitutional challenges were ripe for review and remanded the case to the trial court.31 Upon remand, the district court held that the “City’s actions denied Del Monte equal protection and resulted in an unconstitutional taking,” and the jury awarded $1,450,000 for the temporary taking.32 The district court also held that the City did not violate Del Monte’s substantive due process rights because valid regulatory reasons for denying the development application were asserted.33 The City appealed the district court’s denial of its motion for a new trial with respect to the equal protection and inverse condemnation claims.34

On appeal, the Ninth Circuit held that the inverse condemnation claim could properly be presented to a jury, the evidence supported the takings finding, and the award was not excessive.35 The

27. Id. (internal citations omitted) (arguing that developer’s plan would actually aid environment that had previously been used as pseudo trash dump by citizens).
28. Mark Helm, Butterfly at Center of High Court Battle, MILWAUKEE J. & SENI- NEL 9, Oct. 18, 1998, at 9 (reporting on oral argument proceedings before Supreme Court).
29. See Petitioner’s Brief at 3, Del Monte Dunes at Monterey, Ltd. v. City of Monte- rey, 95 F.2d 1422 (9th Cir. 1996) (No. 94-1284) (discussing compensation Del Monte Dunes received for property).
31. See Del Monte I, 920 F.2d at 1509 (discussing Ninth Circuit’s holding).
32. See Del Monte Dunes at Monterey, Ltd. v. City of Monterey, 95 F.3d 1422, 1425 (9th Cir. 1996) [hereinafter “Del Monte II”] (explaining district court found that City had valid regulatory reasons for denying Del Monte’s development plans and, therefore, City did not violate Del Monte’s substantive due process rights).
33. See Del Monte II, 95 F.3d at 1425 (discussing district court’s holding with respect to Del Monte’s substantive due process rights).
34. See id. (discussing City’s appeal from district court’s denial of motion for new trial with respect to equal protection and condemnation claims).
35. See City of Monterey, 526 U.S. at 701-02 (explaining Ninth Circuit’s holding).
City once more appealed, this time to the Supreme Court, and certiorari was granted. The case appeared to set itself up for creating no new or different regulatory takings standard, but instead it appeared that the holding would turn on the procedural issues of a jury trial in an inverse condemnation proceeding. The issues suggested by both Petitioner and Respondent were procedural in nature. As expected, the Supreme Court ruling did address takings issues when it affirmed the Ninth Circuit, but the core of the opinion dealt with section 1983 actions.


37. For a discussion of issues on appeal to the Supreme Court at the time the Court granted certiorari, see infra note 140 and accompanying text.

38. In the brief submitted to the Supreme Court, the Petitioner presented three questions:

1. Whether, in a regulatory takings action challenging a local land use decision, 42 U.S.C. § 1983 requires that all inverse condemnation liability issues be determined by the court rather than by a jury.

2. Whether liability for a regulatory taking can be based upon a standard that allows a jury or court to reweigh evidence concerning the reasonableness of the public entity's land use decision.

3. Whether the rough proportionality standard established by this Court in Dolan v. City of Tigard, 512 U.S. 374 (1994), in the context of property exactions was properly applied by the Ninth Circuit to an inverse condemnation claim based upon a regulatory denial.

Petitioner's Brief at *1, City of Monterey, 526 U.S. 687 (1999) (No. 97-1235).

The Respondent also presented three questions:

1. (a) When a citizen sues a local government agency for damages under 42 U.S.C. § 1983, for a violation of federally protected rights, may a jury decide whether the government is liable, whatever the substantive constitutional or statutory rights invaded? (b) May a municipal defendant in a § 1983 action for damages forbid a trial by jury?

2. In light of this Court's decisions in Nollan v. California Coastal Commn., 483 U.S. 825, 841 (1987), Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1031 (1992), and Dolan v. City of Tigard, 512 U.S. 374, 391, fn. 8 (1994), each of which concluded that purported "findings" made by state and local government agencies to support land use regulatory actions must be subjected to searching review to determine the validity of their bases, is it proper for the trier of fact in a regulatory taking case to review the reasonableness of such governmental action?

3. When local government regulates the use of land, must the extent of the regulatory restrictions imposed on the property be in proportion to the harm sought to be prevented?


39. See City of Monterey, 526 U.S. at 721-22 (discussing Supreme Court's holding that touches upon takings issues, but focuses upon section 1983 actions).
C. Analysis of Holdings

1. Del Monte I

a. Ripeness of Constitutional Claims

Now that the considerable number of facts have been presented, it is helpful to analyze the Ninth Circuit's holdings in both Del Monte I and II. In Del Monte I, the ripeness of the constitutional claims was contested, but the Ninth Circuit found the issue to be ripe. The constitutional claims challenged the application of the City's land-use regulations with an "as-applied challenge" where the landowner must show that: (1) the government has taken the property by imposing regulations that go too far; and (2) the government has done so without tendering just compensation. Both elements, the taking and the compensation, must be ripe for the claim to be justiciable.

(i) Ripeness of the Taking Element

With respect to the ripeness of the taking element, the as-applied claim is not ripe until the local government has issued a final decision on the application for the affected property. There are two components to the finality requirement: (1) there must be a rejection of development formally sought by the landowner; and (2) "the local government [must] determine authoritatively the type and intensity of development that land-use regulations will allow on the subject property" because this aids the court in evaluating whether the regulation is excessive. The Ninth Circuit

40. See id. at 1633 (dismissing Ninth Circuit's holding that constitutional claims were ripe).
41. See Del Monte I, 920 F.2d at 1500; see also Kinzli v. City of Santa Cruz, 818 F.2d 1449, 1453 (9th Cir. 1986), modified on other grounds, 830 F.2d 968 (9th Cir. 1987) (setting forth requirements necessary to bring constitutional Takings Clause challenge).
42. See Del Monte I, 920 F.2d at 1500; see also Austin v. City & County of Honolulu, 840 F.2d 678, 679-80 (9th Cir. 1988) (discussing ripeness requirements).
43. See Del Monte I, 920 F.2d at 1500.
44. See id. (discussing finality requirements; see also Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985) (noting that courts require two criteria be met before they will determine that final decision has been entered).
45. See Del Monte I, 920 F.2d at 1501 (citing Herrington v. County of Sonoma, 857 F.2d 567, 570 (9th Cir. 1988); Lai v. City & County of Honolulu, 841 F.2d 301, 303 (9th Cir. 1988)) (discussing finality requirements courts consider when ruling upon ripeness in takings cases).
recognizes a limited futility exception where resubmission of a plan or application may be excused if it would be futile.46

Four different possible standards can show futility and allow an exception to the finality requirement. First, the Supreme Court has acknowledged that the finality requirement does not force the landowner to "pursue a development application through piecemeal litigation or unfair procedures."47 Second, futility can be shown if the plaintiff can establish that further applications "would cause such excessive delay that the property would lose its beneficial use."48 Third, the Supreme Court has found a submission and rejection of two plans sufficient to ripen a takings claim.49 Fourth, the Ninth Circuit "excused as futile a landowner's failure to apply for a variance that the local government was powerless to grant."50 If the case meets any of these four example of futility, then the finality requirement can be excused.51

In Del Monte I, the City contended that "appellant's claim is not ripe until they submit enough proposals to enable the City to pinpoint all the features of an acceptable development project on the Dunes."52 This argument borders on the absurd. The hoops that Del Monte Dunes jumped through after the City denied the original 1981 application are best described as a "five-year odyssey through the administrative process, during which the City turned down five different plans for the property."53 This five-year odyssey, when analyzed under the four futility exceptions, shows that further applications and amendments would have been futile (Penn Central

46. See Del Monte I, 920 F.2d at 1501 (presenting futility exception); see also Herrington, 857 F.2d at 570 (noting that courts recognize futility exception); Shelter Creek Dev. Corp. v. City of Oxnard, 838 F.2d 375, 379 (9th Cir. 1988) (providing futility exception to finality requirement).
47. Del Monte I, 920 F.2d at 1501 (citing Macdonald, Somer & Frates v. County of Yolo, 477 U.S. 340, 350 n.7 (1986)) (discussing finality requirement).
48. Id. (citing Kinzli, 818 F.2d at 1454) (discussing Norco Construction, Inc. v. King County, 801 F.2d 1143, 1145 (9th Cir. 1986)).
50. Del Monte I, 920 F.2d at 1501 (citing Herrington, 857 F.2d at 570 & n.2) (noting that this is most recent standard set forth by Supreme Court).
51. See id. at 1501 (discussing four instances in which courts have excused finality requirement).
52. Id. at 1502 (reporting that City claimed that only when enough proposals were submitted could courts determine whether regulations had extended to taking).
Having decided that the taking component was ripe for review, the Ninth Circuit turned to an analysis of the ripeness of the compensation element, analyzing whether the plaintiff had actually requested and been denied just compensation after the taking. The importance of the compensation element stands out in the following statement by the *Williamson County Regional Planning Commission v. Hamilton Bank* Court: "[t]he Fifth Amendment does not proscribe the [mere] taking of property; it proscribes taking without just compensation." This quote helps clarify the entire takings concept, where the act of taking alone is not the violation of the Fifth Amendment, but the act coupled without compensation constitutes a takings violation. Following this reasoning, takings claims are not ripe for review until the government refuses to give compensation for the taking. Using this analysis, the district court concluded that the plaintiff "had shown nothing more than the uncertainty of California compensation procedures for regulatory tak-
However, upon review, the Ninth Circuit concluded that the district court had evaluated the compensation procedures at the wrong point in time, and the proper time frame would have been the time at which the actual taking had occurred — when the City rejected the plaintiff’s last development application. The court explained the need for analyzing the case at the time of the taking by noting that although *First English Evangelical Lutheran Church v. County of Los Angeles* could be applicable to the case at hand, where it expressly held that the Fifth Amendment requires compensation for regulatory takings,* *First English* came after the plaintiff filed this action. The requirement that the appropriate time period comes at the time of the taking was already well established in two Ninth Circuit decisions. The court also cited *Williamson County*, which stated, “all that is required is that a reasonable, certain and adequate provision for obtaining compensation exist at the time of the taking.” Since California law, at the time of the taking, did not provide for landowners to seek any compensation through an inverse condemnation action, the sole remedy was mandamus or injunctive relief. Because there were no compensation procedures, the “compensation procedures” were woefully inadequate, and the landowners had established the ripeness of their compensation element; the claims were ripe for review.

63. *Del Monte I*, 921 F.2d at 1507 (discussing district court’s holding that plaintiff’s claim was not ripe).

64. See id.


66. See *Del Monte I*, 921 F.2d at 1507 (noting that after appellants filed this action, Supreme Court expressly held that Fifth Amendment requires states to compensate regulatory takings).

67. See *Hoehne v. County of San Benito*, 870 F.2d 529, 533-34 (9th Cir. 1989) (noting appropriate time period for consideration of compensation in takings cases); *Sinaloa Lake Owners Ass’n v. City of Simi Valley*, 882 F.2d 1398, 1402 (9th Cir. 1989) (pointing out that appropriate time for determining whether compensation was adequate is at time of taking).

68. *Del Monte I*, 921 F.2d at 1507 (citing *Williamson County*, 473 U.S. at 194) (supporting assertion that appropriate period for measuring adequacy of state’s compensation procedures is at time of taking).


70. See id. (discussing ripeness of both takings and compensation elements).
When analyzing due process and equal protection claims for ripeness, the court applies the same final decision requirement as above in the regulatory takings claims. The due process claim can only be established where it is shown that the City's decision was arbitrary and irrational. Since this issue had originally been dismissed in a summary judgment motion, the Ninth Circuit reversed and sent it back to the trial court.

The landowners' equal protection claim was based on the fact that other properties surrounding the Dunes project had been developed into residential units without going through the painful application/denial process as in the case at hand. Unfortunately for the landowners, in an equal protection challenge, "such municipal 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." The landowners were able to demonstrate that this type of claim was recognized by Nollan v. California Coastal Commission. Accordingly, this claim was sent back to the trial court for further discussion, effectively reversing the trial court's summary judgment dismissal. Now the trial court had a number of claims to adjudicate.

The case raises some interesting factors after only analyzing the first review by the Ninth Circuit. First, the ripeness issue seems to be the single most important issue that allows the landowner her day in court. If the landowner cannot prove ripeness of the takings or compensation element, if the government actor can show that the administrative process has not been exhausted, if the com-

71. See id. (citing Hoehne, 879 F.2d at 532; Shelter Creek Dev. Corp. v. City of Oxnard, 838 F.2d 375, 379 (9th Cir. 1988); Kinzli v. City of Santa Cruz, 818 F.2d 1449, 1455-56 (9th Cir. 1987); and Norco Construction, Inc. v. King County, 801 F.2d 1143, 1145 (9th Cir. 1986)) (discussing final decision requirement in ripeness questions).

72. See id. at 1508 (citing Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976); Bateson v. Geisse, 857 F.2d 1300, 1303 (9th Cir. 1988); Barancik v. County of Marin, 872 F.2d 834, 836 (9th Cir. 1988)) (noting requirements for establishing due process claims).

73. See Del Monte I, 921 F.2d at 1509 (explaining remand of due process and equal protection claims).

74. See id. at 1508 (discussing rationale behind equal protection claim).

75. Id. (citing City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976); Boone v. Redevelopment Agency, 841 F.2d 886, 892 (9th Cir. 1988)).

76. See id. at 1509 (instructing remand of equal protection to trial court for further discussion).

77. See id. at 1500 (discussing importance of ripeness).
Compensation has not been requested, or that further non-trial action would not be futile, then the landowner cannot even obtain the court's aid, in the form of mandamus, injunction, or damages.\textsuperscript{78} Next, the due process and equal protection claims are heavily weighted in the government's favor, but, in this case, not weighted heavily enough to overcome the jury's decision in \textit{Del Monte II}.\textsuperscript{79} But it is best to wait on further discussion of this until the second appellate decision is discussed, where the jury found for the landowners.

2. \textit{Del Monte II}

Upon remand, the district court ordered the reinstated issues tried to the jury, with the exception of the substantive due process claims, which the court determined contained only legal issues.\textsuperscript{80} The jury awarded Del Monte $1,450,000 because it found that the City's actions denied Del Monte equal protection and caused an unconstitutional taking.\textsuperscript{81} The court, however, found that since the City asserted valid regulatory reasons for denying the permits, there was no substantive due process violation.\textsuperscript{82} Although both parties appealed, Del Monte's appeal was waived at oral argument, pending an affirmation of the district court's judgment.\textsuperscript{83} The City, on the other hand, appealed everything, contending that the court, not the jury should have decided equal protection and takings claims, that the City was entitled to a judgment as a matter of law, and even that a new trial for damages was necessary because of the erroneous admittance of evidence.\textsuperscript{84} What follows is an analysis of the Ninth Circuit's treatment of the City's claims, demonstrating that although the City, and any inverse condemnor, fears jury in-

\textsuperscript{78} See \textit{Del Monte I}, 921 F.2d at 1500-08 (discussing ripeness of plaintiff's claims). For further discussion of ripeness requirements for the takings and compensation element, see supra notes 43-70 and accompanying text.

\textsuperscript{79} For a discussion of the decision in \textit{Del Monte II}, see infra notes 86-135 and accompanying text.

\textsuperscript{80} See \textit{City of Monterey}, 526 U.S. at 699-700 (noting that district court reinstated issues).

\textsuperscript{81} See \textit{id}. (discussing jury verdict).

\textsuperscript{82} See \textit{id}. (discussing that its ruling for City with respect to substantive due process claim was not inconsistent with jury's verdict on other constitutional claims).

\textsuperscript{83} See \textit{Del Monte II}, 95 F.3d at 1425 (detailing issues appealed by both parties after decision entered by district court).

\textsuperscript{84} See \textit{id}. at 1425-26 (outlining issues on appeal).
volvement, there is a good argument for a jury trial in inverse condemnation/takings/equal protection claims. 85

   a. The Right to a Jury Trial for Inverse Condemnation Claims

   First, the court addressed the jury question with the issue "whether Del Monte was entitled to a jury trial pursuant to section 1983 before we consider whether the Seventh Amendment guarantees a jury trial under the present circumstances. 86 Since section 1983 permits persons deprived of rights to bring "an action at law, suit in equity, or other proper proceeding for redress," 87 but since the statute is silent as to whether these actions demand a right to jury trial, the court analyzed "whether Congress intended this statute to create a right to trial by jury." 88 "Action at law" has traditionally permitted a jury trial, so the court next asked whether the inverse condemnation claim could be compared to a suit at common law. 89

   Here was the major dispute between the City and Del Monte, both before the Ninth Circuit and in their briefs before the Supreme Court. The City argued that inverse condemnation actions are analogous to eminent domain actions. 90 The landowners argued that inverse condemnation actions are similar to all other 1983 actions. 91 The court decided that since Del Monte sought compensatory or "legal" damages, this was an action at law. 92 This was a predictably large and complex area which the Supreme Court later addressed, and it provides the material for many enterprising

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85. For a discussion of advantages of jury trial in inverse condemnation, takings and equal protection claims, see infra notes 86-106 and accompanying text.

86. Del Monte II, 95 F.3d at 1426 (referencing Lorillard v. Pons, 434 U.S. 575, 577 (1978)) (stating courts should avoid Seventh Amendment question if statute provides right to jury trial).


88. Del Monte II, 95 F.3d at 1427 (citing Lorillard, 434 U.S. at 580) (providing for rights of parties to bring actions under section 1983).

89. See id. (citing Spinelli v. Gaughan, 12 F.3d 853, 855 (9th Cir. 1993)) (stating where jury right is not solely limited to actions that existed at common law, right extends to actions that are analogous thereto).

90. See Petitioner's Brief, at 7-8, Del Monte II, (No. 97-1235) (arguing that eminent domain actions are similar to inverse condemnation proceedings).

91. See id. (stating "[a]ll § 1983 plaintiffs are entitled to be treated alike, as all are invoking the same statutory remedial scheme against local government entities and officials who violate federal constitutional or statutory guarantees, regardless of the nature of the violation").

92. See Del Monte II, 95 F.3d at 1427 (inquiring as to nature of claim and remedy sought and finding that, because legal rights were asserted and legal relief is available, Del Monte's action is "action at law").
This article will defer to latter scholars and leave the inverse condemnation-jury trial issue for another day.

Next, the court addressed the City's argument that a jury should not determine issues of liability in an inverse condemnation claim. Generally, to prevail on an inverse condemnation claim, Del Monte must show that the City's actions "(1) did not substantially advance a legitimate public purpose; or (2) denied it economically viable use of its property." The court also observed that throughout modern Supreme Court takings jurisprudence, the inverse condemnation claim is an "essentially ad hoc, factual inquiry." With this backdrop, the court asked if the existence of an economically viable use was essentially factual, and answered the question in the affirmative. If the existence of an economically viable use was factual, or even a mixed question of law and fact, then it was a proper question to submit to the jury. This was a sticking point for the City, and for any future condemnor, because juries may tend to find in favor of the burdened landowner, whereas a judge could view the question more dispassionately.

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93. See id. at 1428 (arguing that issues of liability are questions of law and should not be decided by jury, regardless of whether statute provides right to jury trial).

94. Id. (citing Nollan v. California Coastal Comm'n, 483 U.S. 825, 834 (1987)) (recognizing that land-use regulation is not taking if it "substantially advance[s] legitimate state interests" and does not "den[y] an owner economically viable use of his land"). The court held that the government has power to condition land use upon concession by an owner, so long as the condition furthers the same governmental purpose advanced as justification for prohibiting the use. See id.

95. See id. (citing Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015 (1992)) (stating that Court prefers case-by-case determination rather than fixed formula); see also Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 473-74 (1987) (finding that determination depends upon facts of each case); Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978) (relating Court's inability to develop an exact method to determine when public action requires compensation and resort to individual resolution); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922) (stating that question of compensation "depends on the particular facts").

96. See Del Monte II, 95 F.3d at 1427 (referencing Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 182-83 (1985)) (recognizing jury finding of no economically viable use); see also Yee v. City of Escondido, 503 U.S. 519, 523 (1992) (holding economically viable use inquiry "necessarily entails complex factual assessments"); Sadowsky v. City of New York, 732 F.2d 312, 317 (2d Cir. 1984) (finding whether taking has occurred is essentially factual inquiry).

97. See Del Monte II, 95 F.3d at 1429 (declaring that district court did not err by letting jury decide question, even though inquiry was mixed question of fact and law).

98. For a further discussion of the application of judicial scrutiny, see infra notes 104-06 and accompanying text.
After determining that the economically viable use question was proper for a jury, the court turned to the second theory of liability — whether the denial of the permits substantially advanced a legitimate public purpose.\(^{99}\) Although the City argued that this "substantially advanced a legitimate public purpose" test is analogous to substantive due process claims, which, it argued, must be decided by a court, the court simply stated that "our precedent does not provide a clear answer as to whether substantive due process claims are jury questions."\(^{100}\) The court instead analyzed the jury instructions to view which standard they presented to the jury.\(^{101}\) The instruction itself stated:

Public bodies, such as the city, have the authority to take actions which substantially advance legitimate public interest and legitimate public interest can include protecting the environment, preserving open space agriculture, protecting the health and safety of its citizens, and regulating the quality of the community by looking at development. So one of your jobs as jurors is to decide if the city's decision here substantially advanced any such legitimate public purpose. The regulatory actions of the city or any agency substantially advances a legitimate public purpose if the action bears a reasonable relationship to that objective.

Now, if the preponderance of the evidence establishes that there was no reasonable relationship between the city's denial of the claims proposal and legitimate public purpose, you should find in favor of the plaintiff. If you find that there existed a reasonable relationship between the city's decision and a legitimate public purpose, you should find in favor of the city. As long as the regulatory action by the city substantially advances their legiti-

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\(^{99}\) See Del Monte II, 95 F.3d at 1429 (analyzing second prong of test to determine inverse condemnation, deciding if question of whether actions advanced public purpose is properly decided by jury).

\(^{100}\) Id. The court compared Bateson v. Geisse, 857 F.2d 1300, 1302-03 (9th Cir. 1988) (reviewing de novo issue whether government actions were "arbitrary or capricious" for purposes of establishing substantive due process claim in takings context), with Hoeck v. City of Portland, 57 F.3d 781, 786 (9th Cir. 1995) (concluding that no reasonable jury could have found that government violated plaintiff's substantive due process rights in takings context). Without clear precedent, the court preferred to look at eminent domain and inverse condemnation cases. See Del Monte II, 95 F.3d at 1429.

\(^{101}\) See Del Monte II, 95 F.3d at 1429 (reasoning that uncontested framing of jury instruction was place to begin analysis of whether issue is factual).
mate public purpose, and its underlying motives and reasons are not to be inquired into. Now, in analyzing whether plaintiff's right to compensation has been violated, that is the property was taken, you are entitled to consider the [extent] to which the city, in its regulation, interfered with the plaintiff's reasonable distinct investment back[ed] expectations. So those are your instructions of the law with respect to the taking. . . claim.\textsuperscript{102}

Looking at this instruction, it seemed well-drawn, simple, and sufficient to allow the jury to determine an issue of liability. The jurors, after having listened carefully, were left with the simple reasonableness question: was the denial reasonably related to a legitimate public purpose?\textsuperscript{103}

The district judge did point out that "whether the issue of advancement of a legitimate public purpose is one for the jury or court is close,\textsuperscript{104} but the Ninth Circuit observed that this was a reasonableness inquiry, and "whether the government's actions are 'reasonable' is often a jury issue."\textsuperscript{105} The reasonableness issue was very fact-bound in this case, and the court concluded that this was a type of issue that could be put before the jury.\textsuperscript{106}

\textit{b. No Judgment Notwithstanding the Verdict — The Rough Proportionality Test}

Finally, the court weighed the evidence in the case and rejected the City's motion for a judgment notwithstanding the verdict

\textsuperscript{102} Id. at 1429 (instructing jury to find action advanced legitimate state interest if it found reasonable relationship between denial of permit and legitimate public purpose).

\textsuperscript{103} See id. (defining legitimate public purposes as "protecting. . . environment, preserving open space agriculture, protecting the health and safety of its citizens, and regulating the quality of the community by looking at development" and charging jury with determining whether reasonable relationship existed between city's action and any enumerated purpose).

\textsuperscript{104} Id. at 1430 (pointing out that most courts that have visited this issue determine that "reasonable" inquires go to juries).

\textsuperscript{105} Id. (citing Chew v. Gates, 27 F.3d 1492, 1443 (9th Cir. 1994) (examining whether release of police dog on individual was reasonable under Fourth Amendment is jury question); Hemphill v. Kincheloe, 987 F.2d 589, 593 (9th Cir. 1993) (stating whether prisoner searches are reasonably related to penological goal is jury question); Parks v. Watson, 716 F.2d 646, 654 n.4 (9th Cir. 1983) (finding whether city's action is rationally related to public purpose is question of fact)).

\textsuperscript{106} For a complete discussion of this topic, see \textit{City of Monterey}, 526 U.S. at 722-24.
regarding the inverse condemnation claim. Here was a straightforward takings analysis (with the evidence construed in the light most favorable to Del Monte). The court began its analysis by laying out the framework from *Lucas v. South Carolina Coastal Commission*, "the Fifth Amendment is violated when land-use regulation does not substantially advance legitimate state interests or denies an owner economically viable use of his land." And even if the City had a legitimate interest, that interest must be "roughly proportional" to furthering its interest. The court then laid out six points where the City failed these background standards. First, the City failed where evidence showed that the environmental impact of grading was not significant or was mitigated. Second, evidence showed that the City had already approved Del Monte’s environmental plan. Third, there was evidence that the City had required, in an earlier plan, that access be made through an adjoining property owner’s land. Fourth, a staff report to the City Planning Commission showed that the restoration plan satisfied the environmental conditions previously imposed in 1984. Fifth, the

107. *See Del Monte II*, 95 F.3d at 1432 (finding sufficient evidence to prove Del Monte’s claim and holding that rational juror could conclude that City’s action was not substantially related to legitimate public purpose).

108. *See id.* at 1430 (reviewing de novo district court’s denial of judgment notwithstanding verdict and taking on role of district court).

109. *Id.* (citing *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016 (1992)) (internal quotations and emphasis omitted) (reiterating that regulations “that compel the property owner to suffer a physical ‘invasion’ of his property” and regulations denying “all economically beneficial or productive use of land” are the two categories of regulatory action “compensable without case-specific inquiry into the public interest advanced in support of the restraint”).

110. *See id.* (citing *Dolan v. City of Tigard*, 512 U.S. 374 (1994)) (finding term “reasonable relationship” confusing and preferring term “rough proportionality,” Court said that “[n]o 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”).

111. *See id.* at 1430-31 (deciding Del Monte’s evidence sufficient to rebut each of City’s reasons for denying permit and finding incomplete nexus between City’s actions and interests).

112. *See Del Monte II*, 95 F.3d at 1431 (denying City’s claim that proposed development would create disruptions and have “significant environmental impacts”).

113. *See id.* (agreeing that Del Monte’s evidence of city approval and Del Monte’s assurances of unlikely environmental damage discredited City’s testimony that plan would negatively impact flora and fauna).

114. *See id.* (finding permit denial due to inadequate access improper because construction of access road by Del Monte required city action to condemn other properties not owned by Del Monte).

115. *See id.* The City claimed that the development would cause substantial injury to the habitat of the endangered Smith’s Blue Butterfly, but Del Monte’s environmental expert disproved the assertion, confirming the findings of the United States Fish and Wildlife Service. *See id.*
City had previously approved a larger plan but suddenly found more environmental impact with a smaller development. Sixth, the City only summarily stated that the project would have a "significant impact on the environment, and no demonstration of overriding considerations has been made which would support approval of this project." With these six factors, the court held that Del Monte had presented sufficient evidence to rebut the City's reasons for denial of the permit, and the jury could have found that the denial of Del Monte's application lacked a sufficient nexus with the City's objectives.

c. No Judgment Notwithstanding the Verdict — The Economically Viable Use Test

The City also lost the other takings argument, because "[t]he jury also could have found the City liable because it denied Del Monte all economically viable use of its property." Interestingly, "the term 'economically viable use' has yet to be defined with much precision." However, the existence of permissible uses helps in the determination of whether a development restriction has denied an owner of economically viable use, and the Supreme Court has justified this rule in Lucas, saying that "total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation." This clarifies the rule that compensation is required when regulations "leave the owner of land without economically beneficial or productive options for its use - typically . . . by requiring land to be left substantially in its natural state - [which suggests] that private property is being pressed into some

116. See id. (declaring City's denial unsubstantiated due to prior approval of plan identical to current proposal except that previous layout was even larger development; nothing but size of development changed between time of approval and denial).

117. Id. (finding generalized claim of environmental damage unsubstantiated and duplicative of previous reasons for disapproval based on destruction of butterfly's habitat and injury to flora and fauna).

118. See Del Monte II, 95 F.3d at 1431-32 (denying City's argument that no rational juror could have concluded that City's denial "lacked sufficient nexus with its stated objectives").

119. Id. at 1432 (finding that no inquiry into state's interests necessary where taking via denial of economic use is absolute).

120. See Outdoor Systems, Inc. v. City of Mesa, 997 F.2d 604, 616 (9th Cir. 1993) (recognizing Supreme Court has suggested owners only need to be partially deprived of economically viable uses).

121. See Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1017 (1992) (noting that Court has never set forth justification for rule that denial of economically beneficial use of land equals physical taking).
form of public service under the guise of mitigating serious public harm.  

The City argued that this test defeated the takings claim because Del Monte sold the property to the State of California for $800,000 more than it had paid. However, the court noted that "a government buy-out . . . would likely implicate the issue of just compensation." Instead of showing that the property was not taken, the government buy-out could show government coercion and a virtual condemnation that did not pay just compensation. This action would constitute a taking.

The fact that there was a buyer for the property was not helpful for the City's arguments, perhaps in light of the Second Circuit's adopted test which looks to "whether the property use allowed by the regulation is sufficiently desirable to permit property owners to sell the property to someone for that use." Here, the Ninth Circuit adopted a different test: "[where] government action relegates permissible uses of property to those consistent with leaving the property in its natural state (e.g., nature preserve or public space), and no competitive market exists for the property without the possibility of development, a taking may have occurred."

In applying this new test, the court found that the City had denied the ability to build on the western third of Del Monte's property, the City's viewshed restrictions denied the ability to build on the rest of the property, and although Del Monte had complied with the fifteen conditions imposed by the City in the 1984 resolution, the City still rejected the application, leading Del Monte to conclude that the property was no longer commercially marketa-

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122. Id. at 1018 (affirmatively supporting compensation requirement for deprivation of economic use and discussing "benefits flowing to the public from preservation of open space").

123. See Del Monte II, 95 F.3d at 1432 (arguing that economically viable uses must have existed if property could be sold for profit).

124. Id. (finding that landowner who thinks government bought out his property at unfairly low price might bring action for just compensation and receiving some payment for land would not prove as matter of law that economically viable use exists).

125. See id. (finding that government buy-out program would not necessarily "shield government from Takings Clause").

126. Id. at 1433 (citing Park Ave. Tower Assoc. v. City of New York, 746 F.2d 135, 139 (2d Cir. 1984)) (internal quotations omitted) (stating that existence of one buyer, particularly government buyer, does not defeat takings claim as matter of law).

127. Id. (modifying Second Circuit's test to emphasize that government regulation may amount to taking if no other players in market for open space except government buyer).
ble.\textsuperscript{128} With this test, the City failed its challenge to the takings holding.\textsuperscript{129} The court also reminded the City that the jury was not compelled to find that there was an economically viable use of the property, especially in light of the fact that "[a]s the land was zoned for multi-unit residential use, once the jury determined that it was unusable for that purpose, it was entitled to conclude that the City's actions had effected a taking."\textsuperscript{130} There was substantial evidence to support the jury's finding, and the City was not able to overcome that evidence on appeal.\textsuperscript{131}

d. The Damages Award

The City also moved for a new trial on the basis that the jury awarded Del Monte excessive damages.\textsuperscript{132} The court "must uphold the jury's finding unless the amount is grossly excessive... clearly not supported by the evidence, or based only on speculation or guesswork."\textsuperscript{133} This was a high hurdle for the City to overcome on appeal. The City challenged the jury's consideration of delay damages up to the date of trial, the expert opinions on the value of the property, and the assumption that there was a reasonable possibility that the California Coastal Commission would have approved the proposed development.\textsuperscript{134} The court held that there was sufficient evidence for the jury to make that determination, and the City lost on this point as well.\textsuperscript{135} Damages, or property valuation, are a common area of discontent in condemnation awards and in takings ac-

\textsuperscript{128}. See \textit{Del Monte II}, 95 F.3d at 1433-34 (finding that City's requirements of public beach use and access, "view corridors" and preservation of flora and fauna denied Del Monte's beneficial use of their property and rightfully produced conclusion that land was not marketable).

\textsuperscript{129}. See \textit{id.} at 1434 (analyzing City's requirements under new test and finding that City sufficiently deprived Del Monte of economic use, equivalent to taking).

\textsuperscript{130}. See \textit{id.} (finding that City requirements "made it impossible to design any plan for residential development" of property and that "jury could conclude that additional development applications would have been futile").

\textsuperscript{131}. See \textit{id.} (confirming holding of \textit{Del Monte I}, that Del Monte's evidence refuted City's arguments and jury could find that City's actions deprived Del Monte of beneficial use of land, effecting taking).

\textsuperscript{132}. See \textit{id.} at 1434-35 (arguing district court abused its discretion in denying new trial because jury award of $1,450,000 in damages is excessive).

\textsuperscript{133}. \textit{Del Monte II}, 95 F.3d at 1435 (citing \textit{Los Angeles Memorial Coliseum Comm'n} v. \textit{NFL}, 791 F.2d 1356, 1360 (9th Cir. 1986)) (allowing for "substantial deference," court held that amount of jury-awarded damages must be flagrantly exorbitant or "monstrous" in order to require new trial).

\textsuperscript{134}. See \textit{id.} (arguing that damages are excessive because period of delay damages was too long, Del Monte's expert opinions were contrary to weight of evidence and based upon erroneous assumptions).

\textsuperscript{135}. See \textit{id.} (finding that record disproves City's arguments and jury had ample evidence to reach its conclusions).
tions, but the hurdle on appeal, especially for a jury trial, appears too high to overcome for almost any appellant if there was any credible evidence to support the award. In essence, the City lost all of its appeal points, but certiorari was granted, and it seemed possible that the Supreme Court would see eye-to-eye with the City and its amici.

3. Lessons Learned

Before discussing the Supreme Court's opinion in City of Monterey, it is interesting to note that upon review, this case appears to be a blatant example of a city desiring to keep land undeveloped without having to condemn the land and pay just compensation. By tracing this case through the lower courts to the Supreme Court, some vital aspects of a takings claim become apparent. First, the claim is difficult to bring to court because of ripeness concerns; appeals through the administrative agencies can be long and painful, and a court will only hear a case prior to the exhaustion of remedies if the landowner can show the futility of further administrative appeal. Second, the ripeness issue can be extended to the elements of the taking itself, both the action creating the problem and the need for a denial of compensation. Third, an equal protection challenge to a taking, unless shown to involve either a fundamental right or a suspect classification, can be defeated by the defendant simply showing that its actions were rationally related to a legitimate state interest (a very low standard of scrutiny). Fourth, the due process claim in a takings action can be defeated unless the landowner can show that the government action was arbitrary and irrational, leaving a heavy burden on the plaintiff. Fifth, the section 1983 action may be an ace-in-the-hole for the plaintiff. This may permit a jury determination for issues of liability and damages, and a jury appears to have the potential for being more sympathetic to a burdened landowner than a judge well-versed in common state practices and constitutional law.

Overall, Del Monte I and II show that there is a remedy for a private landowner who feels that the government has taken her property without just compensation, but it is difficult to first enter court and plead the case, then it is difficult to overcome the balances weighed heavily in the defendant government's favor. As Michael M. Berger, the attorney for the plaintiffs, has written, "[p]eople who spend their lives working in this field and struggling to wrest coherence from the substantive and procedural goulash
prepared by our judicial system sometimes lose sight of the fact that the ultimate issue is protection of the individual."136

However, Del Monte I and II show that the property owner may win. The battle is long and furious, but there are cases where the landowner wins, and hopefully government actors will take note of this victory.

4. City of Monterey

Finally, although the case had languished in various lower courts for almost ten years, the Supreme Court would make a final decision. The decision was by no means unanimous.137 The end result, however, was clear, "the judgment of the Court of Appeals is affirmed."138 The Court held that this particular section 1983 suit was an action at law and that the jury issues were properly submitted to the jury, addressing three issues but focusing on the section 1983 jury aspect in great detail.139

136. Michael M. Berger, Property Owners Have Rights; Lower Courts Need to Protect Them, in After Lucas: Land Use Regulation and the Taking of Property Without Compensation 47 (David L. Callies ed. ABA Press 1993) (stating that rights of property owners are entitled to protection and suggesting that in future courts should provide more protection to individual rights).

137. See City of Monterey, 526 U.S. at 691. The Syllabus description of majority, concurring, and dissenting opinions reads like an algebraic equation:

KENNEDY, J., announced the judgment of the Court and delivered the opinion for a unanimous Court with respect to Parts I and II, the opinion of the Court with respect to Parts III, IV-A-1, IV-B, IV-C, and V, in which REHNQUIST, C.J., and STEVENS, SCALIA, and THOMAS, J.J., joined, and an opinion with respect to Part IV-A-2, in which REHNQUIST, C.J., and STEVENS and THOMAS, J.J., joined. SCALIA, J., filed an opinion concurring in part and concurring in the judgment. SOUTER, J., filed an opinion concurring in part and dissenting in part, in which O'CONNOR, GINSBURG, and BREYER, J.J., joined.

Id.

138. See City of Monterey, 526 U.S. at 723 (overcoming considerable division among members of Court to uphold judgment of Ninth Circuit).

139. See id. at 702. The three questions presented for the Court were:
(1) whether issues of liability were properly submitted to the jury on Del Monte Dunes' regulatory takings claim,
(2) whether the Court of Appeals impermissibly based its decision on a standard that allowed the jury to reweigh the reasonableness of the city's land-use decision, and
(3) whether the Court of Appeals erred in assuming that the rough-proportionality standard of Dolan v. City of Tigard, 512 U.S. 374, 114 S. Ct. 2309, 129 L.Ed.2d 304 (1994), applied to this case.

Id.
First, the Court addressed the three issues in reverse order.\textsuperscript{140} Section II makes short work of \emph{Dolan v. City of Tigard}. The Court stated that “we have not extended the rough-proportionality test of \emph{Dolan} beyond the special context of exactions.”\textsuperscript{141} Limiting \emph{Dolan} to the special category of exactions does not change the face of takings to any great degree, especially in light of the Court’s statement in the sentence before that “in a general sense concerns for proportionality animate the Takings Clause.”\textsuperscript{142} However, the \emph{Dolan} test was “inapposite to a case such as this one” since the Court of Appeals gave an unnecessary discussion of rough proportionality after holding that “the City has incorrectly argued that no rational juror could conclude that the City’s denial of Del Monte’s application lacked a sufficient nexus with its stated objectives.”\textsuperscript{143} In other words, rough proportionality from \emph{Dolan} had no bearing on the case at hand, and the Court found it an unnecessary part of the final decision.\textsuperscript{144}

\textbf{b. Land-Use Policies and Judicial Scrutiny}

Next, Section III addressed the City’s challenge to judicial scrutiny of the City’s land-use decisions.\textsuperscript{145} Before giving a legal discussion of the issue, one can read the issue and see that when a city claims its land-use decisions are above judicial scrutiny, especially when making this statement before a judge or body of judges, the city is going to have problems in defending its claim. When the Court begins describing the issue as “somewhat obscure,” it effec-

\textsuperscript{140} See id. (beginning with question of appropriateness of application of rough proportionality standard, then considering whether reasonableness of City’s action was matter for jury to decide, ending with whether liability issue was proper question for jury to decide).

\textsuperscript{141} Id. (limiting holding of \emph{Dolan} to “land-use decisions conditioning approval of development on the dedication of property to public use”).

\textsuperscript{142} See id. (citing Armstrong v. United States, 364 U.S. 40, 49 (1960)) (“The Fifth Amendment’s guarantee . . . was designed to bar the Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”).

\textsuperscript{143} \emph{Del Monte II}, 95 F.3d at 1432 (finding that sufficient evidence supported Del Monte’s claims and rational juror could have decided against City).

\textsuperscript{144} See \emph{City of Monterey}, 526 U.S. at 703 (determining that Ninth Circuit’s discussion of rough proportionality “was unnecessary to its decision to sustain . . . jury’s verdict,” and is irrelevant to Court’s disposition of case because jury instructions did not mention proportionality).

\textsuperscript{145} See id. (arguing that whether City’s actions were reasonably related to legitimate public interest is not question for jury to decide).
tively sets the tone for further discussion. The Court refused to revisit takings precedents, as urged by amici to the Court. The discussion covered what instructions the City actually proposed and what the jury actually decided upon, with the Court summarizing by stating, “In short, the question submitted to the jury on this issue was confined to whether, in light of all the history and the context of the case, the City's particular decision to deny Del Monte Dune's final development proposal was reasonably related to the City's proffered justifications.” The jury issue itself was set aside to Section IV of the opinion and the Court concluded that “To the extent the city argues that, as a matter of law, its land-use decisions are immune from judicial scrutiny under all circumstances, its position is contrary to settled regulatory takings principles. We reject this claim of error.” The second issue had been resolved, leaving the Court with the major issue of juries and section 1983 actions in regulatory takings claims.

c. Submission to the Jury

Section IV constitutes the bulk of the opinion, the material most commentators will cover, and is also the section which makes takings only a side issue in City of Monterey. Simply stated, the issue was “whether it was proper for the District Court to submit the question of liability on Del Monte Dunes' regulatory takings claim to the jury.” The discussion that follows (in the opinion) will delight and horrify constitutional scholars, who will focus on the tort/condemnation arguments and the questions of law and fact areas. This article, however, only addresses the regulatory takings issues raised

146. See id. (characterizing City's argument that “Court of Appeals adopted a legal standard for regulatory takings liability that allows juries to second-guess public land-use policy”).

147. See id. (declining to reconsider takings precedents because “city did not challenge below the applicability or continued viability of the general test for regulatory takings liability”).

148. Id. at 706-07 (examining jury instruction proposed by City and finding it “clear that the Court of Appeals did not adopt a rule of takings law allowing wholesale interference by judge or jury with municipal land-use policies, laws, or routine regulatory decisions”).

149. Id. Note the Court's use of “under all circumstances;” the Court did not think highly of the City's argument. See id.

150. See City of Monterey, 526 U.S. at 706 (resolving question of appropriateness of application of rough proportionality standard and whether reasonableness of City's action was matter for jury to decide, Court next addressed last issue, whether liability issue is proper question to submit to jury).

151. Id. (recognizing that “answer depends on whether Del Monte Dunes had a statutory or constitutional right to a jury trial, and, if it did, the nature and extent of the right”).
by the Court. The major topics of *City of Monterey* are tangential to the takings standards the author discusses here. With this disclaimer in mind, the jury issue must be analyzed.

First, there was a healthy analysis on whether section 1983 confers a jury right on takings claimants, focusing on whether this was an "action at law" and whether there was "legal relief" being sought.\(^{152}\) In essence, the Court held that "a § 1983 suit seeking legal relief is an action at law within the meaning of the Seventh Amendment."\(^{153}\) Del Monte's action sought relief "[e]ven when viewed as a simple suit for just compensation."\(^{154}\) This was legal relief because "[j]ust compensation... differs from equitable restitution and other monetary remedies available in equity, for in determining just compensation, 'the question is what has the owner lost, not what has the taker gained.'"\(^{155}\) Putting these pieces together, "[b]ecause Del Monte Dunes' statutory suit sounded in tort and sought legal relief, it was an action at law."\(^{156}\) By giving an analysis that showed Del Monte Dunes' claim to be sounded in tort, seeking legal relief, and an action at law, the Court had laid the groundwork for a jury case.\(^{157}\) Justice Scalia disagrees with this analysis since he would allow jury trials for all section 1983 claimants instead of only allowing jury trials for those seeking actions for

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152. See id. at 706-717 (going through statutory, constitutional, and historical analysis and finding Del Monte's suit to be action at law seeking "essentially legal relief").

153. Id. at 709 (citing Curtis v. Loether, 415 U.S. 189, 195-96 (1974)) (finding that Seventh Amendment jury guarantee extends to "statutory claims unknown to the common law, so long as the claims can be said to 'soun[d] basically in tort,' and seek legal relief").

154. Id. at 710 (citing Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 352 (1998)) (recognizing "'general rule' that monetary relief is legal" and, therefore, suit for just compensation seeks legal relief).

155. *City of Monterey*, 526 U.S. at 710 (citing Boston Chamber of Commerce v. Boston, 217 U.S. 189, 195 (1910)) (determining "just compensation is, like ordinary money damages, a compensatory remedy").

156. Id. at 710 (reaffirming holding of *Curtis*, that jury guarantee of Seventh Amendment extend to statutory claims sounding in tort and seeking legal remedy).

157. See id. at 708-09 (summarizing historical analysis set forth in Markman v. Westview Instruments, Inc., 517 U.S. 370, 376 (1996)). The Supreme Court has explained that "[w]e ask, first, whether we are dealing with a cause of action that either was tried at law at the time of the founding or is at least analogous to one that was." *Markman*, 517 U.S. at 376. Under this analysis, "[i]f the action in question belongs in the law category, we then ask whether the particular trial decision must fall to the jury in order to preserve the substance of the common-law right as it existed in 1791." Id. Thus, once a party shows its claim to be sounded in tort and seeking legal relief, it is an action at law and may properly be submitted to the jury for deliberation. See id.
torts.\textsuperscript{158} However, his persuasive arguments for jury trials in all section 1983 actions did not carry the majority here.

Next, the Court distinguished takings from condemnation cases.\textsuperscript{159} It was important to distinguish the two categories of claims because “there is no constitutional right to a jury in eminent domain proceedings.”\textsuperscript{160} The City attempted to analogize the takings claim with formal condemnation proceedings, arguing that there was no jury right for Del Monte Dunes.\textsuperscript{161} However, the Court showed that the analogy was inappropriate, for “[w]hen the government takes property without initiating condemnation proceedings, it ‘shifts to the landowner the burden to discover the encroachment and to take affirmative action to recover just compensation.’”\textsuperscript{162} Justice Souter disagreed with this, but his argument did not carry the Court.\textsuperscript{163} In essence, Del Monte Dunes’ “cause of action sounds in tort and is most analogous to the various actions that lay at common law to recover damages for interference with property interests.”\textsuperscript{164}

Another argument was that normally, the government may take property for public use, and therefore the taking “cannot be tortious or unlawful.”\textsuperscript{165} The Court soundly rejected this argument, clarifying that when the government takes property, it has a duty to provide just compensation, and when it does not “it violates the Constitution. In those circumstances the government’s actions are

\begin{itemize}
  \item \textsuperscript{158} See City of Monterey, 526 U.S. at 724-25 (Scalia, J., concurring in part and concurring in judgment) (stating his view that, where Seventh Amendment right to jury trial is at issue, all § 1983 actions should be treated alike).
  \item \textsuperscript{159} See id. at 711-12 (finding that “a condemnation action differs in important respects from a section 1983 action to redress an uncompensated taking”). Unlike claims involving a taking, in condemnation proceedings, liability is not an issue in determining just compensation. The Court stated that “[a]s a result, even if condemnation proceedings were an appropriate analogy, condemnation practice would provide little guidance on the specific question whether Del Monte Dunes was entitled to a jury determination of liability.” Id.
  \item \textsuperscript{160} See United States v. Reynolds, 397 U.S. 14, 18 (1970) (holding that issue of land taken for recreational facilities that had been within original scope of project was to be determined by court and not jury).
  \item \textsuperscript{161} See City of Monterey, 526 U.S. at 711 (explaining City’s contention that “the analogy to formal condemnation proceedings is controlling, so that there is no jury right here”).
  \item \textsuperscript{162} Id. at 712 (citing United States v. Clarke, 445 U.S. 253, 257 (1980)) (explaining that analogy is not only “unhelpful but also inapposite”).
  \item \textsuperscript{163} See id. at 732-55 (Souter, J., dissenting) (arguing that it is unusual to charge jury with duty to assess constitutional legitimacy of statutory scheme).
  \item \textsuperscript{164} Id. at 715. The Court explained that this “conclusion is consistent with the original understanding of the Takings Clause and with historical practice.” Id.
  \item \textsuperscript{165} Id. at 718. The decision explained that because a taking by the government is permissible, it cannot be tortious. See id.
\end{itemize}
not only unconstitutional but unlawful and tortious as well." Examples were given from Supreme Court cases and English Common Law cases showing tort actions dealing with real property throughout legal history. The Court was definite in its logic that Del Monte Dunes' action lay in tort.

Having set the logical framework, the Court now dealt with the jury. With no exact analogy to the current suit, the Court looked "to history to determine whether the particular issues, or analogous ones, were decided by judge or by jury in suits at common law at the time the Seventh Amendment was adopted. Where history does not provide a clear answer, we look to precedent and functional considerations." The Court must sift through a great deal of cases in order to view the jury issue in regulatory takings cases. In the words of the Court, there is no "definitive answer." By analyzing the plethora of cases before City of Monterey, the Court worked through its former decisions to determine fact and law based issues, finally holding that "the issue whether a landowner has been deprived of all economically viable use of his property is a predominantly factual question. . . [t]his question is for the jury."

"This question is for the jury" may be a sentence that strikes fear in the hearts of government entities across the nation. This may allow impassioned juries, in contrast to cold-hearted, calculating judges, to decide the simple factual issue of whether a landowner has lost all economic value in a piece of property, but this

166. City of Monterey, 526 U.S. at 717 (citing Jacobs v. United States, 290 U.S. 13, 16 (1933)).
167. See id. at 715 (citing Lindsay v. East Bay Street Commissioners, 2 Bay 38, 61 (S.C. 1796)) (asking "[b]ut suppose they could sue, what would be the nature of the action? It could not be founded on contract, for there was none. It must then be on a tort; it must be an action of trespass, in which the jury would give a reparation in damages. Is not this acknowledging that the act of the legislature [in authorizing uncompensated takings] is a tortuous act?").
168. See id. at 715-16 (finding support for Court's conclusion and consistency with historical understanding and practice).
169. See id. (referring to Markman, 517 U.S. at 384) (satisfying first part of Markman analysis, whether claim is action at law, Court addressed whether submission to jury was proper).
170. Id. at 718 (citing Markman, 517 U.S. at 384) (looking to history to determine when issue is to be given to jury).
171. City of Monterey, 526 U.S. at 720 (stating that most of Court's decisions regarding regulatory takings have reviewed suits against United States).
172. See id. at 719 (explaining that while history and precedent are suggestive, answer remains undetermined).
173. Id. at 720 (holding that issues suggested by Del Monte were disputed questions for jury).
should cause no fear.\textsuperscript{174} Our legal system is organized so that juries may decide issues; it is fundamental to the United States legal system. This pronouncement from the Supreme Court should make no change in takings trials. Juries are competent to decide this issue of fact.

Finally, the Court frankly admitted a more difficult question regarding "[t]he jury's role in determining whether a land-use decision substantially advances legitimate public interests within the meaning of our regulatory takings doctrine."\textsuperscript{175} The only clear guidance from the Court was encapsulated in its statement that the jury's role is "probably best understood as a mixed question of fact and law."\textsuperscript{176} Nothing else. The Court permitted a jury determination here, only because of the incredibly limiting circumstances of the protracted history, context, narrowness, and the very factbound situation in \textit{City of Monterey}.\textsuperscript{177}

The final subsection of the case, IV C, represented the Court limiting this decision in as many ways as possible.\textsuperscript{178} "[N]ote the limitations of our Seventh Amendment holding."\textsuperscript{179} The Court did not address "ordinary" inverse condemnation suits, takings claims under §1983 before complete denial of adequate postdeprivation remedies, did not give new elements of a temporary regulatory takings claim, and did not give a "precise demarcation of the respective provinces of judge and jury."\textsuperscript{180} More limitations were given in the following sentences of the opinion, but in the end, the reader is left with the distinct impression that no new ground has been covered, and no new or different rights have been created, with the

\textsuperscript{174} This statement is made with tongue-in-cheek. Judges may have passion and juries may be calculating, but those are the topics for other articles by other authors.

\textsuperscript{175} \textit{City of Monterey}, 526 U.S. at 1721 (finding issue of jury's role difficult question).

\textsuperscript{176} \textit{See id.} (explaining that this formulation "substantially advances legitimate public interests within . . . meaning of . . . regulatory takings doctrine").

\textsuperscript{177} \textit{See id.} (concluding that under described situation, it was proper to submit questions to jury).

\textsuperscript{178} \textit{See id.} (stating that federal court "cannot entertain . . . takings claim under section 1983 unless or until . . . complaining landowner has been denied an adequate postdeprivation remedy" and that "posture of the case does not present an appropriate occasion to define with precision the elements of a temporary regulatory takings claim").

\textsuperscript{179} \textit{Id.} at 721 (explaining limited role of federal court according to section 1983).

\textsuperscript{180} \textit{See City of Monterey}, 526 U.S. at 722 (describing limitations of applicability of holdings).
possible exception of allowing juries to determine completely factually based "loss of all economic value" issues.181

The Court of Appeals decision was affirmed, and nothing really changes.182

D. The Effect of City of Monterey

Before looking at the cases which have cited City of Monterey, it is interesting to view the media reaction to the opinion. Some authors and commentators have determined that City of Monterey will have a definite impact on future regulatory takings litigation. John Armentano, a lawyer dealing in zoning, land use, and environmental matters, has stated that one thing is clear:

[j]ury trials are coming to regulatory takings cases brought under section 1983. The practical ramifications will be significant, and will affect the way these cases are prepared and tried . . . . In essence, then, the very nature of the way these cases are tried and prepared likely will change. Those interested in regulatory takings issues should closely monitor how these cases are litigated in the future.183

Professor Martin A. Schwartz feels that City of Monterey "strongly supports the right to trial by jury in any federal court § 1983 action seeking monetary relief."184 Attorneys Lewis Goldshore and Marsha Wolf list some reactions to the decision, giving comments from attorneys such as, "providing a jury trial in the takings, Civil Rights Act, context will be of substantial assistance to landowners," and "the question of whether or not there has been a taking would be a

181. See City of Monterey, 526 U.S. at 722. The Court severely limits its holding in City of Monterey. See id. This restriction confines the reach of the Court’s decision and would not cover a “broad challenge to the constitutionality of the city’s general land-use ordinances or policies.” Id. The Court stated that “[i]n such a context, the determination whether the statutory purposes were legitimate, or whether the purposes, though legitimate, were furthered by the law or general policy, might well fall within the province of the judge.” Id. The Court, therefore, provided little guidance for future claims arising out of similar but not identical circumstances.

182. See id. at 722. This may be a gross exaggeration, but the following section regarding the effect of City of Monterey seems to support the hypothesis that nothing has changed.

183. John Armentano, Regulatory Takings; Jury Trials Will Create Significant Impact on Litigation, N.Y.L.J., Nov. 24, 1999, at 5 (concluding that Court’s decision in City of Monterey leaves many questions unresolved and only time and litigation will provide definitive answers).

question for the court, and not the jury, under New Jersey Law," and "[l]itigants should think twice before commencing a Civil Rights Act suit just to obtain a jury trial on the taking issues."185 Looking at only the three citations listed above, it appears that the reaction is mixed.

As of the writing of this article, 17 cases have cited to City of Monterey.186 None of these cases applied City of Monterey to provide a right to jury trial, and the two that dealt with juries did not permit juries to resolve any issues.187 The evidence is small to date, but it appears that City of Monterey had no substantial effect.

Looking at the media reaction, the effect is mixed. Looking at the caselaw, there appears to be no change in general takings issues as a result of City of Monterey. It will take years to judge the true effect, but as for now, takings jurisprudence seems to be the same complex, multi-faceted constitutional arena, just as it was before Del Monte Dunes began its suit.

185. See Lewis Goldshore and Marsha Wolf, Revisiting the Taking Issue Supreme Court Throws a Bone to Aggrieved Landowners in Del Monte Dunes, N.J.L.J., July 5, 1999, at 4 (finding that Court's decision enables landowners to present claims to jury but that it remains to be seen how it will be applied and what portion of claimants will realize benefit from ruling).

186. See infra note 187.

II. A SUMMARY OF CURRENT REGULATORY TAKINGS STANDARDS

No major change may have occurred as a result of City of Monterey, but careful review of City of Monterey, and its Del Monte progenitors, shows that there are various takings standards which may or may not mesh with one another. This section of the article will now give a short discussion of each takings standard. The difficulty in writing a short, clean summary of takings jurisprudence is immense; there are too many valid decisions and possible standards that can be applied. It is even difficult to define the word. However, for purposes of this paper, a taking will be defined as a governmental action that appropriates property for public use without just compensation. In the area of takings, the scholars even disagree on the types and numbers of categories involved in the takings concept.

188. The Black's Law Dictionary defines "taking":
There is a "taking" of property when government action directly interferes with or substantially disturbs the owner's use and enjoyment of the property. To constitute a "taking," within constitutional limitation, it is not essential that there be physical seizure or appropriation, and any actual or material interference with private property rights constitutes a taking. ... Also "taking" of property is affected if application of zoning law denies property owner of economically viable use of his land, which can consist of preventing best use of land or extinguishing [a] fundamental attribute of ownership.
BLACK'S LAW DICTIONARY 1014 (6th ed. 1991). Also, a legal scholar points out that "[t]he phrase 'regulatory taking' seems at first blush to be an oxymoron, since a valid police power regulation is not a 'taking,' and an invalid regulation may be struck as such." STEVEN J. EAGLE, REGULATORY TAKINGS 3 (1996).

In Williamson County Regional Planning Commission v. Hamilton Bank, the Court stated that "[t]he Fifth Amendment does not proscribe the [mere] taking of property; it proscribes taking without just compensation." 473 U.S. 172, 194 (1985). This analysis demonstrates that a taking may be the concept of uncompensated control of private property, instead of simply the control of the property. See id.

189. See DANIEL R. MANDELKER, LAND USE LAW (4th ed. 1997) (listing takings as facial or as-applied, with Chapter two breaking down at least eight different variations on as-applied takings, including delay as a taking). Other scholars have recognized three types of regulatory takings: physical, title, and economic. See Robert H. Freilich & Elizabeth A. Garvin, Takings after Lucas: Growth Management, Planning, and Regulatory Implementation Will Work Better Than Before, AFTER LUCAS: LAND USE REGULATION AND THE TAKING OF PROPERTY WITHOUT COMPENSATION, at 54 (David L. Callies ed., ABA Press 1993). Physical taking is self-evident. Title taking is defined as where the "government acquires incidents of ownership or title to the property or an exaction in lieu of the dedication of the land." Id. Economic taking is where "governmental action interferes with the property owner's viable economic interests in the property." Id. at 55.

Another legal commentary states that "[t]he Supreme Court had developed two per se takings tests: permanent physical occupation and denial of all economically viable use." PETER W. SALSICH, JR. & TIMOTHY J. TRYNECKI, LAND USE REGULATION 67 (1998). Along with the two per se takings were takings involving violation of the Due Process Clauses of the Fifth and Fourteenth Amendments and the Equal Protection Clause of the Fourteenth Amendment. See id. at 89.
This section of the article will only focus on regulatory takings, and for purposes of this article, I will adopt the three standards set forth in Stuart Miller's work: the statutory, the categorical, and the balancing standards. These three standards blend too much to satisfy a purist, but an attempt to draw three distinct lines helps in understanding the basic takings standards. In discussing these standards, the facts of the cases will be ignored or given short shrift, and quotations will be ripped from their cases without much, if any, contextual discussion.

A. The Statutory Standard

The statutory standard is a simple facial challenge to the statute or regulation, asking whether the regulation is a legitimate exercise of the state's police power or the analogous regulatory power of the federal government. According to the Supreme Court in Nollan v. California Coastal Commission, for takings cases with due process elements, the due process claims are treated distinctly, and the standard appears to be "whether the State could rationally have decided the measure adopted might achieve the State's objective." For the actual takings claims, the regulation "must substan-

In a review article that challenges some common takings concepts, Stuart Miller argues that there are five categories of takings: being eminent domain, occupation, and the three regulatory takings under the standards of categorical, statutory, and balancing. See generally Stuart Miller, Triple Ways to Take: The Evolution and Meaning of the Supreme Court's Three Regulatory Taking Standards, 71 TEMP. L. REV. 243 (1998).

There are numerous other interpretations, but these four works give a good sampling of the various concepts in this field.


During 1992, "regulatory takings" was used in at least 36 federal and 45 state cases, 25 law review articles and 152 other publications, and the docket of annual filings of U.S. Court of Claims doubled for regulatory takings (over the past decade). See J. Carlton, "Takings" Cases Don't Always Favor Takers, WALL ST. J., Nov. 10, 1992, at B1 (discussing definition of "regulatory takings").

191. See generally Miller, supra note 189 (discussing categories of takings challenging traditional takings concepts).

192. See Dolan v. City of Tigard, 512 U.S. 374, 385 (1994) (stating that land use regulation does not amount to taking if it advances legitimate interests and does not deny an owner economically viable use of his land).


194. See id. at 834-35 n.3 (emphasis omitted) (noting that "broad range" of governmental purposes and regulations satisfies these requirements).
tially advance the legitimate state interest sought to be achieved."

This standard gives some deference to state legislatures, but the standard has been affected adversely for the legislatures.

*Lucas v. South Carolina Coastal Commission* changes the statutory standard, with the Supreme Court rejecting historic deference to statements of legislative goals and "emphasize[s] that to win its case [on remand,] South Carolina must do more than proffer the legislature's declaration that the uses Lucas desires are inconsistent with the public interest, or the conclusory assertion that they violate a common-law maxim." This language from *Lucas* seems to favor the landowner, and it makes it more difficult for a legislature to show that its statute represents a legitimate state interest.

*Dolan v. City of Tigard* also seems to favor the private landowner, stating:

> In evaluating most generally applicable zoning regulations, the burden properly rests on the party challenging the regulation to prove that it constitutes an arbitrary regulation of property rights. Here, by contrast, the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel. In this situation, the burden properly rests on the city.

*Nollan* sets the standard to attack a statute facially, and *Lucas* and *Dolan* seem to tilt the scales in favor of the private landowner in challenging that statute. The landowner must challenge the stat-

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195. Id. at 834 n.3 (citations omitted) (discussing standard of review for actual takings claim).

196. See *Dolan*, 512 U.S. at 389-90 (comparing different requirements in various states wherein some courts exercise more deference to legislatures than others).


198. Id. at 1031 (stating that common law principles "rarely support prohibition of . . . essential use of land").

199. See *Lucas*, SOS U.S. at 1046 (Blackmun, J., dissenting). Justice Blackmun commented on the Court's sudden antipathy toward state legislatures:

> The Court decides the State has the burden to convince the courts that its legislative judgments are correct. Despite Lucas' complete failure to contest the legislature's findings of serious harm to life and property if a permanent structure is built, the Court decides that the legislative findings are not sufficient to justify the use prohibition. Instead, the Court "emphasize[s]" the State must do more than merely proffer its legislative judgments to avoid invalidating its law. In this case, apparently, the State now has the burden of showing the regulation is not a taking. The Court offers no justification for its sudden hostility toward state legislators.

Id. (citation omitted).


201. See *supra* notes 195-200 and accompanying text (discussing burdens applied to government entities).
ute and show that it does not "substantially advance" a "legitimate state interest," two phrases that require a great deal of work, but with *Lucas* and *Dolan* rejecting statements of state interest, the challenge may have been made a little easier for a burdened landowner.\footnote{202. See generally *Dolan*, 512 U.S. 374; *Lucas*, 505 U.S. 1003.}

*City of Monterey* may further support the property owner by holding that the substantial advancement/legitimate state interest question may be one heard by juries as a mixed question of fact and law.\footnote{203. See *City of Monterey*, 526 U.S. at 720-21 (explaining that inquiry involves both factual and legal components). However, *City of Monterey* is so limited, and so specific, following a specific context and history of actions between the City and Del Monte Dunes, that the jury determination of substantial advancement will be limited to a very select few cases.\footnote{204. See id. (stating that question submitted to 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 .... Under these circumstances, we hold that is was proper to submit this narrow, factbound question to the jury").}

B. The Categorical Standard

The categorical standard refers to those cases where the Supreme Court has said that there is always a taking.\footnote{205. See *Lucas*, 505 U.S. at 1015 (stating that no matter how small intrusion or "weighty" public interest, compensation is required).} This standard is arguably a subset of the balancing test, but as will be shown, this is different from the balancing test where the essential fairness of the regulation is at issue.\footnote{206. See *Nollan*, 483 U.S. at 834 (discussing when appropriate to balance individual's interests by government's interest).} *Lucas* refers to "two discrete categories of regulatory action as compensable without case-specific inquiry into the public interest advanced in support of the restraint."\footnote{207. *Lucas*, 505 U.S. at 1015 (stating that regulation is compensable without case specific inquiry in two instances).} The two categories are: (1) regulations that compel the landowner to suffer a physical invasion on his property,\footnote{208. See, e.g., *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (finding New York law requires landlords to allow television cable companies to place cable facilities in apartment buildings); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) (discussing imposition of navigation servitude on private marina); *United States v. Causby*, 328 U.S. 256 (1946) (examining physical invasions of airspace).} and (2) "where regulation denies all economically beneficial or productive use of
land." These categories are quite straightforward, but there is one exception, known as the "Nuisance Exception:"

All property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community. . . . [T]he police power extends, at least, to the protection of the lives, the health, and the property of the community against the injurious exercise by any citizen of his own rights.

The Nuisance Exception further states that "[a] prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit." In other words, private property is held under the understanding that the landowner may not create or continue a public nuisance emanating from the property. Because a landowner holds property under this understanding, "[c]ourts have consistently held that a State need not provide compensation when it diminishes or destroys the value of property by stopping illegal activity or abating a public nuisance." This nuisance exception may seem exceptionally friendly to the government, but defining the term "public nuisance" has always been difficult, and there are more parts to the categorical standard which limit the government's effectiveness.

Another part of the categorical standard deals with the category of exactions, matching the condition to the restriction. In Nollan, the language reads that there must be a "nexus between the condition [the easement] and the original purpose of the building


210. Mugler v. Kansas, 123 U.S. 623, 665-66 (1887) (holding Kansas law preventing manufacture of certain products because they were considered nuisance violated Constitution).

211. Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 491 (1987); see also Mugler, 123 U.S. at 668-69 (stating that law in question crossed line between regulation and confiscation).

212. See Keystone Bituminous Coal Ass'n, 480 U.S. at 491 (stating that public as whole is benefited by restrictions on land use).

213. Id. at 492 n.22 (stating that because it is assumed that people will not use their property in way that harms community, Takings Clause does not require compensation when states enforce such principles).

214. See Nollan, 483 U.S. at 837 (describing government's burden in support of restriction).
restriction [the permit requirement]."215 In Dolan, there must be a reasonable relationship between the dedication/exaction and the projected impact, best termed as a "rough proportionality [which] best encapsulates what we hold to be the requirement of the Fifth Amendment."216 Both the nexus and the rough proportionality show that if the relationship between the requirement and the property's impact is not adequately proportionate, a taking has occurred.217 The Supreme Court took care, however, to again point out that Dolan applies only in the case of exactions.218 In City of Monterey, the Court states, "we have not extended the rough-proportionality test of Dolan beyond the special context of exactions—land-use decisions conditioning approval of development on the dedication of property to public use."219 However, the category of exactions is, in itself, a healthy area for takings jurisprudence.

The categorical standard for takings also recognizes the concept of temporary takings.220 The Supreme Court explained that "where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of its duty to provide compensation for the period during which the taking was effective."221 The concept of temporary takings gives more ammunition to the landowner in a takings action against the government.222 Along with the "nexus between the condition and the permit," the "rough proportionality" of the same, the physical invasion, and the denial of "all economically beneficial

215. Id. In Nollan, the Supreme Court specifically required an essential nexus between the government condition attached to a permit and the purpose of the regulation. See id.


217. See Ehrlich v. City of Culver County, 911 P.2d 429, 440 (Cal. 1996) (finding "cash exaction" case, where discretionary monetary fees imposed on individualized basis must meet Dolan "rough proportionality" test).

218. See City of Monterey, 526 U.S. at 703 (stating that Dolan test, rough-proportionality, is limited in application to exactions).

219. Id. The Supreme Court noted the absence of a definitive statement regarding the proper standard of review for a case involving a temporary regulatory taking. See id.

220. Lucas, 505 U.S. at 1015 (stating that no matter how small intrusion, compensation may be required, "at least with regard to permanent intrusions," leaving door open for compensation in temporary restrictions).

221. Id. The Court held that once a regulatory taking has occurred, the government must provide compensation - which in turn benefits the land owner as it requires compensation without regard to the public interest - in the case of a physical taking. See id.

222. See id. (stating that once regulatory taking has occurred, government must provide compensation).
or productive use,” there are sufficient arguments for the landowner to possibly prevail in a categorical takings claim.223

In City of Monterey, the Court bluntly stated that “this Court has provided neither a definitive statement of the elements of a claim for a temporary regulatory taking nor a thorough explanation of the nature or applicability of the requirement that a regulation substantially advance legitimate public interests outside the context of required dedications or exactions.”224 The Court goes on to refuse revisiting any takings standards but simply states that in City of Monterey, “the trial court’s instructions are consistent with our previous general discussions of regulatory takings liability.”225 In other words, the Court has neither changed nor clarified the standards in the newest case City of Monterey.

City of Monterey also seems to allow a jury to determine the simple factual issue of whether all economic value has been lost.226 This is no great milestone for private property advocates, though, because this simple factual question should be clear to both judges and juries. No greater protection is offered by City of Monterey.227 However, when categorical takings fail in court, there is one more standard which the landowner may apply.

C. The Balancing Standard

The balancing standard is an ad hoc attempt to evaluate all the factors of a case to determine essential fairness.228 Pennsylvania Coal Co. v. Mahon gives the basic formulation for this test: “[t]he general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking.”229 With this kind of loose standard, a court may actually weigh the equities to determine whether a taking has, in fact, occurred. The factors to be weighed are numerous, and are well-

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223. See id. at 1015-16 (summarizing categorical standards).
224. City of Monterey, 526 U.S. at 704. In City of Monterey, the Court declared that the past standards of review were inapplicable to the current facts. See id.
225. Id. Furthermore, the Court refused to delineate a standard of review. See id.
226. See id. at 721 (leaving determination of economic loss up to jury).
227. For a discussion of City of Monterey, see supra notes 137-82 and accompanying text.
228. See generally Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).
229. Id. at 415. Pennsylvania Coal involved a dispute over the mining of property that may cause subsidence of surface and house due to the removal of support by mining activity. See id.
sprinkled throughout various court decisions. Two major factors from the Supreme Court are: (1) the reciprocity of advantage from *Pennsylvania Coal* and (2) the extent to which regulation interferes with a property owner’s “distinct investment-backed expectations” or the “reasonable, investment-backed expectation.” The effect of *Lucas* has been to give more balancing factors, listed under a “total taking” inquiry:

The “total taking” inquiry we require today will ordinarily entail (as the application of state nuisance law ordinarily entails) analysis of, among other things, the degree of harm to public lands and resources, or adjacent private property, posed by the claimant’s proposed activities, see, e.g., Restatement (Second) of Torts §§ 826, 827, the social value of the claimant’s activities and their suitability to the locality in question, see, e.g., id., §§ 828(a) and (b), 831, and the relative ease with which the alleged harm can be avoided through measures taken by the claimant and the government (or adjacent private landowners) alike, see, e.g., id., §§ 827 (e), 828(c), 830.

Although these factors are listed under the “total taking” inquiry of the categorical standard, they are now listed in a Supreme Court opinion that could arguably be used to show the inequities of a taking under the balancing standard. The balancing standard is

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230. Some scholars argue that states use case-specific analysis balancing the following factors:

- a. the character of the government action
- b. the impact of the regulation on the landowner
- c. interference with investment-backed expectations
- d. the nuisance exception
- e. capitalization of the threat of a regulation in to the sale price of the land
- f. existence of an essential nexus
- g. whether the regulation singles-out the landowner.


231. *See Pennsylvania Coal*, 260 U.S. at 415 (looking at advantage or benefit conferred on regulated parties by regulation).

232. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 127 (1978). The Court explained that the owners had not established a taking merely by showing that they had been denied the right to exploit super adjacent airspace. *See id.*

233. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984). *Ruckelshaus* stands for the proposition that to the extent the registrant of pesticides had an interest in health, safety and environmental data as a trade secret under Missouri law, it is a property right protected by the Fifth Amendment. *See id.*

the most broad of the three standards, and it permits the landowner to argue that the government action simply is not fair. The argument will be backed by substantial evidence, but it boils down to simply calling "foul" and pleading for equity before a court.

D. The Effectiveness of the Three Takings Standards

Looking at the three standards, it appears that the statutory standard is the most difficult to argue, because the landowner must overcome a showing of legitimate state interest, and notwithstanding potentially helpful language in *Lucas* and *Dolan*, this is the most difficult fight. The categorical standard is the simplest to argue, if its effect is clear. If the property truly has no value, or if there is a physical occupation, then the case should be deemed a taking. However, if there is an exaction question, it looks more like a balancing dilemma, arguing that the exaction is not proportional to the landowner's development. There is also the denominator problem, arguing over whether the taking applies as a total taking to the one affected parcel of land, or if the taking only devalues the entire property with respect to the singular parcel. Finally, the balancing standard seems like the standard that would appeal most to a zealous advocate who truly wants to argue the equities of a takings case.

However, the balancing argument has not had a very high success rate. In fact, none of the arguments have had much success in the state or federal Supreme Courts, according to extensive research by authors Thomas J. Miceli and Kathleen Segerson. Out of five state supreme courts analyzed between the years of 1990-1995, only five of the fifty-two (5/52) takings cases resulted in the finding of a government taking. In the United States Supreme Court, from the period 1979-1994, out of fifteen total cases, five were deemed to be takings (5/15). This works out to a 9.6% success rate for private property plaintiffs in state courts and a 33.3% success rate in the United States Supreme Court.

235. See id. at 1015-16 (stating circumstances in which taking occurs and compensation is mandated).

236. See *Dolan*, 512 U.S. at 391 (stating that discretionary monetary fees imposed on individualized basis must meet "rough proportionality" test).


238. See id.

239. There is an excellent table listing which constitutional argument had the highest success rate for showing a taking. In the state supreme courts, impact on
The numbers are even worse for wetlands and floodplain regulation cases at the state and local level, where, as of 1994, there were over 400 cases at state level with only about thirty resulting in the finding of a taking.\textsuperscript{240} From these numbers, it looks like takings arguments do not do very well at trial. However well this conclusion may be justified, it does ignore the fact that governments may generally compensate adequately or even more-than-adequately for most condemnation actions, with only the fringe cases ever reaching litigation, and only the most severe of those reaching the appellate and Supreme Court level.\textsuperscript{241} This is speculation, and it is best suited to another article, at another time.

III. CONCLUSION

There are various standards that a landowner may use when he feels that his property is "taken" by government action.\textsuperscript{242} The success rate may not be high, and the legal battle may be difficult, but not impossible. It is interesting to note that states seem to be reacting to this low success rate by passing more protective legislation for the private property owner; there has been a rise in state legislation

\begin{itemize}
  \item the landowner accounted for 4 takings out of 31 cases, 4/31, the intent of the regulation rate was 0/6, landowner expectations 2/8, the "essential nexus" 0/0, ripeness 0/19, and "other" 1/3. At the United States Supreme Court level, impact on landowner 3/6, intent of regulation 1/3, landowner expectations 0/2, "essential nexus" 2/2, ripeness 0/5, and "other" 0/2. See id.
  \item \textsuperscript{240}. See id. at 189 (discussing futility of challenging a wetland or floodplain regulation).
  \item \textsuperscript{241}. On an interesting note, the fringe cases also make excellent topics for pursuing, in the words of Paul Harvey, "the rest of the story." The best example is in \textit{Lucas}, where, after the case was remanded to the South Carolina courts, the government settled the case and bought the two lots for $425,000 each (with interest and costs about a $1.5 million settlement). The government, which had previously wanted to allow Lucas only a 144-square-foot viewing platform and landscaping, sold the property to a private individual for development so that it could recoup its purchase price. The attorney for the Coastal Council and South Carolina, Bachman S. Smith, III, was reported as saying, "The state also considered keeping the lots open, but with a house to either side and in between the lots, it is reasonable and prudent to allow houses to be built." H. Jane Lehman, \textit{Accord Ends Fight Over Use of Land}, \textit{WASH. POST}, July 17, 1993, at E-1 (Real Estate). In response to that state's action, John Echeverria, chief counsel for the National Audubon Society, said this decision "opens the state to charges of hypocrisy when it is willing to have an economic burden fall on an individual but not when the funds have to come out of an agency's budget." \textit{Id.}; see also \textit{William A. Fischel, Regulatory Takings: Law, Economics, and Politics} 61 (1995) (commenting on state's action by saying that "when its own money was on the table, the state was unwilling to forgo $77,500 to preserve one of the lots whose previous value of $600,000 to the owner it had denied was a compensable loss").
  \item \textsuperscript{242}. For a discussion of takings standards, see supra notes 188-234 and accompanying text.
\end{itemize}
dealing with private property owner rights, with more proposed takings legislation in almost every state. Takings have received much attention in books, law review articles, and the courts. There is a movement for requiring government to compensate individuals for costs which arguably should be borne by the public in general. The author is not competent to comment on the future of takings, but it appears that the landowner may stand a chance.

To keep the reality of takings in focus, it is best to close with a quotation used earlier, "[p]eople who spend their lives working in this field and struggling to wrest coherence from the substantive and procedural goulash prepared by our judicial system sometimes lose sight of the fact that the ultimate issue is protection of the individual." The ultimate issue should be protection of the individual. When considering this ultimate issue in the light of City of Monterey, the author hopes that the Supreme Court will give more guidance in how to protect the interest of burdened landowners.


244. See Cordes, supra note 243, at n.17 (explaining "[i]n . . . first two years of the takings legislation movement, 1992 and 1993, thirty-nine states considered takings legislation, with thirty-two states considering legislation in 1993 alone."); see also State Takings Legislation: A Resource Book for Activists 5-7 (National Audubon Society, 1993) (discussing proposed takings regulations).

245. Berger, supra note 53, at 27. This scholar explained that the ultimate issue in land use regulations is the protection of the individual. See id.