CHAPTER 8

DUE PROCESS AND TAKINGS: THE *AGINS* MEANS-END INQUIRY

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I. Introduction

Courts traditionally have reviewed the reasonableness of regulation under the Due Process Clause, using the doctrine of substantive due process. Since the demise of exacting scrutiny under *Lochner v. New York*, 198 U.S. 45 (1905), courts generally find that economic regulation is sufficiently reasonable under the Due Process Clause if it has any rational basis, *i.e.*, where any state of facts known, reasonably inferable, or even hypothetically assumed supports the legislative or administrative judgment. *See Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 488 (1955); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938). The Supreme Court has not invalidated economic regulation on substantive due process grounds in more than sixty years.

Because the substantive due process standard for economic regulation is so difficult for claimants to meet, they sometimes request courts to review the reasonableness of land use regulation under the Takings Clause in the hope of persuading the court to use a less deferential standard. These requests present one of the most vexing issues in takings jurisprudence: whether courts should examine the reasonableness of a regulation in determining whether it constitutes a compensable taking.

Much of the current confusion stems from *Agins v. City of Tiburon*, 447 U.S. 255 (1980), where the Court stated that a taking occurs where government action "does not substantially advance legitimate state interests." *Id.* at 260. *Agins* thus suggests that regulation effects a compensable taking where the government's goals are not legitimate or the chosen means do not sufficiently advance those ends. The Court has quoted the *Agins* "substantially advance" test in several subsequent takings cases, but it has never provided a reasoned explanation for why this test is properly employed under the Takings Clause. This chapter's task is to show that the *Agins* test has no appropriate role in takings jurisprudence, and that the reasonableness of land use regulation should be reviewed only under the Due Process Clause.[116]

This chapter is structured as a legal brief. It provides the arguments that government attorneys should present against the use of the *Agins* "substantially advance" test as an independent theory of takings liability.

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[116] Where a claimant argues that a land use control effects a taking and is *wholly* unrelated to a public use, the claim may also be examined under the Public Use Clause of the Takings Clause, which entails a standard of review comparable to that used under the Due Process Clause. *See* Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 241 (1984) (the Public Use Clause is satisfied where a taking "is rationally related to a conceivable public purpose"). Indeed, the Ninth Circuit has held that such a claim *must* be analyzed under the Public Use Clause, not the Due Process Clause. *See* Armendariz v. Penman, 75 F.3d 1311, 1318-24 (9th Cir. 1996) (en banc). The *Armendariz* court also concluded that the usual deference afforded to legislative determinations of public use is inappropriate where the claimant alleges "an uncompensated taking through a raw misuse of government power." *Id.* at 1321.

Before turning to the merits of the *Agins* means-end inquiry, two preliminary points are in order. First, *Agins* potentially has far broader application than the unique means-end tests imposed by *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1984). As discussed in Part III, *Nollan* and *Dolan* apply only to compelled dedications of property, and they are best viewed as an application of the special rules that govern unconstitutional conditions and permanent physical occupations of property. In contrast to *Nollan* and *Dolan*, *Agins* suggests that courts should examine the reasonableness and means-end fit of every regulation challenged under the Takings Clause to determine whether it constitutes a compensable taking.

Second, the amount of the claim may vary significantly depending on whether it is analyzed under the Takings Clause or the Due Process Clause. Due process claimants proceeding under 42 U.S.C. § 1983 generally seek invalidation and out-of-pocket expenses, whereas takings claimants seek the fair market value of the property interest taken. *See Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 197 (1985). The difference between these two theories of relief may be substantial, particularly where the government rescinds the offending regulation. If a regulation prohibits development and is then rescinded, the rescission might protect the landowner from serious out-of-pocket expenses (thereby resulting in only a small due process claim), but the landowner might still argue that the market value of the property interest temporarily taken is substantial (thereby resulting in a substantial takings claim). The significance of this distinction between the remedies under the Due Process and Takings Clauses is illustrated by *Tampa-Hillsborough County Expressway Auth. v. A.G.W.S. Corp.*, 640 So.2d 54 (Fla. 1994), discussed at greater length later in this chapter. Moreover, because state government defendants are not subject to damage awards under § 1983, a successful due process claim against a state government might result only in an injunction, whereas a successful takings claim would require compensation.

II. A Majority of the Supreme Court Has Backed Away from the *Agins* Means-End Inquiry as a Standard of Takings Liability.

Although the Supreme Court has not explicitly repudiated the *Agins* "substantially advance" test, a majority of the Court recently disavowed the test. Two cases — *Eastern Enterprises v. Apfel*, 524 U.S. 498, 529-37 (1998), and *City of Monterey v. Del Monte Dunes, Ltd.*, 119 S. Ct. 1624 (1999) — deserve close inspection.

In *Eastern Enterprises*, five Justices expressly retreated from the *Agins* means-end inquiry as a standard of takings liability. The case involved the constitutionality of the federal Coal Industry Retiree Health Benefit Act ("Coal Act"). A four-Justice plurality concluded that the Coal Act effected a taking because it imposed an extreme, retroactive financial burden on the claimant. *See Eastern Enters.*, 524 U.S. at 529-37.

Although the plurality did not discuss *Agins*, the other five Members of the Court expressly considered and rejected the *Agins* means-end inquiry as a theory of takings liability. Justice Kennedy wrote a separate opinion concurring in the judgment but dissenting from the plurality's takings analysis, which he characterized as "incorrect and quite unnecessary for decision of the case." *Id.* at 539 (Kennedy, J., concurring in the judgment and dissenting in part). He quoted *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 314-15 (1987), for the proposition that the Takings Clause presumes the reasonableness and validity of government action, and merely conditions otherwise permissible government action on the payment of compensation. *See Eastern Enters.*, 524 U.S. at 545. Justice Kennedy characterized the *Agins* means-end inquiry as being "in uneasy tension with our basic understanding of the Takings Clause, which has not been understood to be a substantive or absolute limit on the Government's power to act." *Id.* He candidly acknowledged that the *Agins* means-end inquiry results from "[t]he imprecision of our regulatory takings doctrine," not from any coherent explication of the Takings Clause. *Id.* Distinguishing two earlier cases that employed a means-end inquiry

under the Takings Clause, Justice Kennedy emphasized that neither case found a taking and one "prefaced the entire takings discussion with the admonition it would be surprising to discover that there had been a taking [under a means-end standard] in the instance where a due process attack had been rejected." *Id.* at 546. Finding these earlier cases to be "equivocal," Justice Kennedy concluded that to evaluate the reasonableness of legislative judgments, "the more appropriate constitutional analysis arises under general due process principles rather than the Takings Clause." *Id.* at 545.

Similarly, Justices Breyer, Stevens, Souter, and Ginsburg concluded in dissent that the reasonableness of the Coal Act is governed by the Due Process Clause, not the Takings Clause: "[T]he plurality views this case through the wrong legal lens. The Constitution's Takings Clause does not apply." *Id.* at 554. Agreeing with Justice Kennedy, these four Justices emphasized that "at the heart of the [Takings] Clause lies a concern, not with preventing arbitrary or unfair government action, but with providing *compensation* for legitimate government action that takes 'private property' to serve the 'public' good." *Id.* There was "no need to torture the Takings Clause to fit this case" because issues regarding the reasonableness of government action find "a natural home in the Due Process Clause, a Fifth Amendment neighbor." *Id.* at 556. The dissent stressed that the Due Process Clause, not the Takings Clause, "safeguards citizens from arbitrary or irrational legislation." *Id.* The Due Process Clause, not the Takings Clause, promotes the "*fair application of law*, which purpose hearkens back to the Magna Carta." *Id.* at 558.

To be sure, the fractured nature of the *Eastern Enterprises* ruling diminishes its precedential value. Moreover, Justice Kennedy and the four dissenting Justices based their rejection of the plurality's takings analysis in part on the absence of an identifiable property interest. *See id.* at 539-44 (Kennedy, J.); *id.* at 554-58 (Breyer, Stevens, Souter & Ginsburg, JJ., dissenting). The D.C. Circuit has concluded that perhaps the only binding aspect of the ruling is the Court's specific holding that the Coal Act is unconstitutional. *See Association of Bituminous Contrs., Inc. v. Apfel*, 156 F.3d 1246, 1255 (D.C. Cir.

1998). But even this court seemed to recognize that the five-Justice rejection of the takings claim broke new ground in takings jurisprudence. *See id.* at 1254 ("The only conceivable change in takings jurisprudence brought about by *Eastern Enterprises* is that the five dissenting justices (Justice Kennedy dissented from the takings portion of the plurality opinion) apparently believe that the imposition of liability alone is not a taking of property under the Fifth Amendment"). In addition, the Third Circuit concluded that the Kennedy-Breyer opinions in *Eastern Enterprises* are binding precedent. *Unity Real Estate Co. v. Hudson,* 178 F.3d 649, 658-59 (3d Cir. 1999) ("[t]here are five votes against the plurality's Takings Clause analysis," and lower courts "are bound to follow the five-four vote against the takings claim . . . .").

The *Agins* means-end inquiry resurfaced in the October 1998 Term in *Del Monte Dunes*. There, in a challenge to the denial of a land use permit, a jury awarded just compensation for a taking based on a jury instruction that included the *Agins* means-end inquiry. Various amici requested the Court to clarify whether this means-end inquiry is an appropriate part of takings jurisprudence, but the Court declined the invitation because the defendant had failed to challenge the jury instruction in question. *See id.* at 1636. In his opinion for the majority, however, Justice Kennedy candidly acknowledged that the Court has never given "a thorough explanation of the nature or applicability" of the role of the *Agins* test in takings jurisprudence. *Id.*

In a separate concurrence, Justice Scalia stressed that the Majority had declined to revisit the *Agins* means-end inquiry and that he too wished to "express no view as to its propriety." *Id.* at 1649 n.2 (Scalia, J., concurring). Justice Souter, joined by Justices O'Connor, Ginsburg, and Breyer in dissent, similarly refused to endorse *Agins*, stating: "I offer no opinion here on whether *Agins* was correct in assuming that this [means-end] prong of liability was properly cognizable as flowing from the Just Compensation Clause of the Fifth Amendment, as distinct from the Due Process Clauses of the Fifth and Fourteenth Amendments." *Id.* at 1660 n.12 (Souter, J., dissenting).

The irony of *Del Monte Dunes* is manifest. It stands as the first ruling in which the Supreme Court affirmed an award of just compensation for a regulatory taking in a land use case, and yet no Member of the Court was willing to embrace the means-end theory of liability included in the jury instruction that gave rise to the award.

Del Monte Dunes illustrates the need for municipal attorneys to argue against the application of the *Agins* means-end inquiry throughout takings litigation, including its proposed use as part of jury instructions. *Eastern Enterprises* provides a basis for doing so. Other arguments against the application of the *Agins* means-end inquiry are set forth below.

III. In the Twenty Years Since the *Agins* Ruling, The Supreme Court and Lower Courts Have Almost Never Found a Compensable Taking Based on the *Agins* Means-End Inquiry.

The recent disavowal of the *Agins* means-end inquiry by a majority of the Court follows nearly 20 years of judicial neglect of the inquiry. The Supreme Court has quoted the *Agins* "substantially advance" language in regulatory takings cases over the years. *E.g.*, *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992); *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 485 (1987). But it has never endorsed and applied the *Agins* means-end theory to affirm an award of compensation under the Takings Clause. (As noted above, the *Del Monte Dunes* Court affirmed a jury award based on instructions that included the *Agins* means-end inquiry, but most of the Justices expressly refused to endorse the inquiry, and the others refused to consider the validity of the jury instruction because it was not challenged at trial.)

Lower courts also have largely ignored the *Agins* means-end inquiry as a theory of compensation under the Takings Clause. The U.S. Claims Court — the court with jurisdiction over takings claims against the United States — canvassed the case law eight years after

the *Agins* ruling and concluded: "[N]o court has ever found that a taking has occurred solely because a legitimate state interest was not substantially advanced." *Loveladies Harbor, Inc. v. United States*, 15 Cl. Ct. 381, 390 (1988). Its successor, the U.S. Court of Federal Claims, recently refused to extend the *Agins*' means-end test beyond the *Nollan/Dolan* context of compelled dedications of property. *Bamber v. United States*, No. 98-605C, 1999 U.S. Claims LEXIS 258 (Fed. Cl. Oct. 29, 1999) (*Agins* means-end test "has not had a fruitful life" and is limited to regulations that "create public access to privately held real property" under *Nollan* and *Dolan*) (citing Justice Breyer's dissent in *Eastern Enters.*, 524 U.S. at 554); *see also Brunelle v. Town of South Kingston*, 700 A.2d 1075, 1083 n.5 (R.I. 1997) (the reasonableness of regulation should be examined under the due process clause, not the takings clause); *Mission Springs, Inc. v. City of Spokane*, 954 P.2d 250 (Wash. 1998) (same). To our knowledge, there is only one reported decision — clearly an outlier — that resulted in entry of a final judgment that awards compensation for a taking based on a means-end theory of liability. *See Whitehead Oil Co. v. City of Lincoln*, 515 N.W.2d 401, 407-08 (Neb. 1994).

Two courts, the Ninth Circuit and the New York Court of Appeals, have used a means-end theory under the Takings Clause to invalidate government action, but their failure to award compensation (as *First English* requires, *see* Text Block 13.1: The Availability of Equitable Remedies) simply highlights the awkwardness of using the Takings Clause to examine the reasonableness of government action.[117] These rulings confirm Justice Kennedy's

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[117] *See* Richardson v. City & County of Honolulu, 124 F.3d 1150, 1165-66 (9th Cir. 1997) (invalidating a rent control ordinance under the Takings Clause because it did not substantially advance a legitimate state interest), *cert. denied*, 525 U.S. 871 (1998); Carson Harbor Village Ltd. v. City of Carson, 37 F.3d 468, 473 n.4 (1994) (where land use regulation does not adequately advance a legitimate state interest, the remedy is not automatic compensation, but instead invalidation and actual damages), *overruled on other grounds*, WMX Techs., Inc. v. Miller, 104 F.3d 1133 (1997), *aff'd*, 197 F.3d 367 (9th Cir. 1999) (en banc); Manocherian v. Lenox Hill Hosp., 643 N.E.2d 479, 491-95 (N.Y. 1994) (invalidating a statute designed to protect hospital renewal leases); Seawall Assocs. v. City of New York, 542 N.E.2d 1059, 1068-71 (N.Y. 1989) (using a means-end inquiry as an alternative theory to invalidate a ban on the conversion of single occupancy rooms).

observation in *Eastern Enterprises* that the means-end inquiry stands "in uneasy tension" with the very purpose of the Takings Clause (524 U.S. at 545), which is "to secure *compensation* in the event of an otherwise proper interference" with property rights. *First English*, 482 U.S. at 314-15.

IV. The Text and History of the Takings Clause Preclude the Use of the *Agins* Means-End Inquiry as a Standard of Takings Liability.

The widespread disregard of the *Agins* mean-end inquiry in the lower courts and its recent repudiation by five Supreme Court Justices reflect its deep analytical flaws and fundamental inconsistency with the Takings Clause itself.

Agins is a terse, unanimous ruling that upheld the challenged government action against a takings challenge. For the first time, the Court stated that a taking occurs where government action fails substantially to advance a legitimate interest or denies a landowner economically viable use of the land. In articulating the "substantially advance" test, *Agins* did not rely on the Takings Clause or takings case law, but instead cited a single case decided under the Due Process Clause of the Fourteenth Amendment: *Nectow v. City of Cambridge*, 277 U.S. 183 (1928). *Nectow* made clear that the plaintiff in that case claimed that the regulation at issue "deprived him of his property without due process of law in contravention of the Fourteenth Amendment." *Id.* at 185. *Agins* provides no evidence that the Court desired to create an entirely new standard of takings liability. Although the actual language of the *Agins* opinion is imprecise, the Court appears to have been reciting the threshold test for the validity of land use regulation under the Due Process Clause (citing *Nectow*), immediately before articulating the "economically viable use" standard for compensation under the Takings Clause.

In *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 127 (1978), the Court similarly suggested that "a use restriction on real property may constitute a 'taking' if not reasonably necessary

to the effectuation of a substantial public purpose," but again the Court cited *Nectow* to support this proposition. The *Penn Central* Court also cited *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962), but *Goldblatt* involved claims under both the Takings and Due Process Clauses, and it too suffers from an unfortunate blurring of standards and phraseology. *See id.* at 591 (claimants contend an ordinance "takes their property without due process of law").

Not only does the *Agins* means-end inquiry derive from the Due Process Clause, but it also conflicts with the Takings Clause's requirement that a taking be for a "public use." *See generally* John Echeverria, *Does a Regulation that Fails to Advance a Legitimate Governmental Interest Result in a Regulatory Taking?*, 29 ENVTL. L. 853 (1999). In *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 241 (1984), the Court made clear that where a taking fails to advance the public interest, the proper remedy is invalidation for failing to meet the public use requirement. *See id.* at 245 ("[T]he Constitution forbids even a compensated taking of property when executed for no reason other than to confer a private benefit on a particular private party. A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void."). *Midkiff* further holds that the standard of judicial review of an asserted public purpose is equivalent to the highly deferential test used to evaluate substantive due process claims. *See id.* at 241 (a taking survives a challenge under the public use requirement where it is "rationally related to a conceivable public purpose").

It is flatly inconsistent with *Midkiff* and the Takings Clause's public use requirement to award compensation for a taking based solely on the failure of regulation to advance the public interest. From an analytical perspective, it would be anomalous in the extreme to consider a regulation's means-end "fit" *twice* under the same clause but using differently phrased standards, *i.e.*, first to determine if the regulation is rationally related to a conceivable public purpose under the Public Use Clause, and then to examine whether it substantially advances a legitimate interest to determine liability under *Agins*.

From a remedial perspective, it is illogical to invalidate a regulatory taking under *Midkiff* for failing to advance a public use, and yet deem the regulation to be a compensable taking under *Agins* for failing to advance a legitimate public interest. And from a policy perspective, it makes no sense to require taxpayers to pay "just compensation" to a property owner for government action that fails to advance the public interest in any way.

The *Agins* means-end inquiry also conflicts with the plain meaning of the word "take" and longstanding regulatory takings doctrine. As noted in Chapter 1, "take" denotes a physical appropriation of property, and the Court historically has used physical appropriation as the benchmark for determining regulatory takings liability. The Court's task is "to distinguish the point at which regulation becomes so onerous that it has the same effect as an appropriation of the property through eminent domain or physical possession." *Williamson County*, 473 U.S. at 199. Regulation that is objectionable only because it fails to advance a legitimate government interest is not the functional equivalent of an expropriation of land. A means-end standard of takings liability would apply to all manner of government action that has no similarity to expropriation, and would result in compensation awards whenever the government acted arbitrarily, no matter how insignificant the economic impact on the claimant.

Suppose, for example, a state agency issues a land use regulation that slightly reduces the value of thousands of parcels of land throughout the state. Suppose further that the regulation is based on a mistaken interpretation of the agency's authority. The affected property owners could, of course, seek invalidation of the ordinance as an unlawful exercise of the agency's power. But if a means-end inquiry were an appropriate standard of takings liability, they also could seek compensation for the time during which the restriction was in effect, arguing that the regulation failed to advance a legitimate state interest. Because the regulation exceeds the agency's legislatively conferred authority, by definition it fails to

Text Block 8.1

Summary of Arguments Against the *Agins* Means-End Inquiry

There are at least nine arguments available to government counsel to show that the *Agins* means-end inquiry is not a valid test of takings liability.

- The *Agins* inquiry is grounded in due process case law (*Nectow*) and should be conducted as a due process inquiry, not a takings inquiry. The confusion created by *Agins* stems from an era prior to *First English* in which courts failed to distinguish between due process and takings analysis because a violation of either Clause often resulted in invalidation of the offending regulation.

- The *Agins* inquiry is inconsistent with the fundamental notion that the Takings Clause does not serve as a substantive limit on governmental authority, but merely conditions otherwise valid government action on the payment of just compensation (*Eastern Enterprises*, *First English*).

- The *Agins* inquiry is inconsistent with the requirement in the Takings Clause that a compensable taking be for a public use.

- The *Agins* inquiry is inconsistent with the Court's use of physical appropriation as a benchmark for determining whether land use regulation constitutes a taking.

advance a legitimate legislative goal. But it would make no sense to allow the landowners to seek compensation for such a small reduction in the value of their property. The litigation floodgates would open whenever state or local government action, subsequently deemed by a court to be arbitrary or unauthorized, adversely affected property values, no matter how slight the economic impact.

This scenario is illustrated by *Joint Ventures, Inc. v. Department of Transportation*, 563 So.2d 622 (Fla. 1990). There, the Supreme Court of Florida invalidated state land use restrictions because they

- The *Agins* inquiry is unfair because it requires taxpayers to pay compensation even though they did not benefit from the challenged government action.

- Although the Supreme Court has not expressly repudiated the *Agins* means-end inquiry, five Justices disavowed it in *Eastern Enterprises*.

- *Del Monte Dunes* provides additional evidence that the *Agins*'s inquiry is in serious jeopardy. The majority opinion conceded that the Court has never given "a thorough explanation of the nature or applicability" of the test, and the concurring and dissenting opinions expressly declined to reaffirm its propriety.

- The Supreme Court has never squarely endorsed and applied the *Agins* means-end inquiry to find a compensable taking. Lower courts have largely ignored the test. Although the Supreme Court has repeated the "substantially advance" formulation in several cases, its severely limited application greatly diminishes its precedential value.

- Although *Nollan* and *Dolan* cite *Agins*, those cases are best read as grounded in the special rules that govern unconstitutional conditions and permanent physical occupations of property. They apply only to compelled dedications of property, and they do not justify a generalized means-end inquiry for all land use regulation. (*See* Part III below.)

were not a proper means to effectuate a legitimate state interest. *See id.* at 629 n.9. Many of the affected landowners then sued for compensation for a temporary taking for the period of time during which the statute had been in effect. Various lower courts sustained these compensation claims because they construed *Joint Ventures* as having found a taking. On appeal, however, the Supreme Court of Florida rejected the claims by distinguishing between due process and takings analysis. *See Tampa-Hillsborough County Expressway Auth. v. A.G.W.S. Corp.*, 640 So.2d 54 (Fla. 1994). After lamenting

the confusion caused by the failure to differentiate between the two Clauses, the court ruled that takings analysis should be reserved for allegations that a regulation has deprived the landowner of economically viable use of the land. *See id.* at 57. In contrast, the *Joint Ventures* "analysis with respect to whether the statutory subsections provided a proper means to a valid end exposes a standard due process inquiry." *Id.* at 58. *Tampa-Hillsborough* illustrates not only the risk of debilitating compensation claims that may result from conflating due process and takings analysis, but also the proper resolution of such claims by limiting means-end inquiries to the Due Process Clause.

Due to these and other conceptual defects in the *Agins* means-end inquiry, the Solicitor General of the United States similarly takes the position that land use regulation that fails adequately to advance a legitimate government interest "cannot be said (on that basis alone) to effect a compensable taking of property." Brief for the United States as Amicus Curiae Supporting Petitioner in Part, at 28 in *Del Monte Dunes*, 119 S. Ct. 1624 (No. 97-1235).

How is it that due process and takings analysis became confused? Before 1987, many commentators and courts believed that invalidation was a sufficient remedy under the Takings Clause for a taking of property without just compensation.[118] Thus, there often was little need to distinguish between due process and takings analyses because violations of both clauses led courts to strike down the offending law. The Supreme Court mixed the terminology of the clauses, referring to "a taking of property in violation of due

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[118] *E.g.*, N. Williams, et al., *The White River Junction Manifesto*, 9 Vt. L. Rev. 193 (1984) (invalidation is an adequate remedy for violations of the Takings Clause); Agins v. City of Tiburon, 598 P.2d 25, 29-32 (Cal. 1979) (landowner may not maintain an inverse condemnation suit for just compensation claiming a temporary taking during the time an invalidated regulation was in-effect), *aff'd on other grounds*, 447 U.S. 255, 255 (1980); Fred R. French Investing Co. v. City of New York, 350 N.E.2d 381, 384-89 (1976) (absent physical invasion or dispossession of property, unreasonable regulation is a non-compensable violation of due process, not a compensable taking).

process."[119] Justice Stevens has suggested that in the landmark *Euclid* ruling, the Court effectively combined takings and due process analysis into a single standard:

> [*Euclid*] fused the two express constitutional restrictions on any state interference with private property — that property shall not be taken without due process nor for a public purpose without just compensation — into a single standard: [Before] [a zoning] ordinance can be declared unconstitutional, [it must be shown to be] clearly arbitrary and unreasonable, *having no substantial relation to the public health, safety, morals, or general welfare.*

Moore v. City of East Cleveland, 431 U.S. 494, 514 (1977) (Stevens, J., concurring in the judgment) (quoting *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926)). To further confuse the issue, the Takings Clause applies to state and local governments through the Due Process Clause of the Fourteenth Amendment,[120] which similarly encourages a blurring of standards and phraseology.

In 1987, however, takings jurisprudence experienced a major shift with the Court's ruling in *First English.* The landmark *First English* ruling makes clear that the government must pay just compensation for a taking, regardless of whether the taking occurs directly through the power of eminent domain or inversely through regulation that denies land economically viable use. *See* 482 U.S. at 314-22. Although the government may limit its liability to temporary damages by rescinding the offending regulation, just compensation must be paid. *See id.* at 321. Since the *First English* ruling, it has

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[119] *E.g.*, Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 498 n.7 (1981) (plurality) (describing various claims as alleging "takings of property without due process"); Rostker v. Goldberg, 453 U.S. 57, 62 n.2 (1981) (same); *Goldblatt*, 369 U.S. at 591 (explaining that the ordinance "takes [the claimant's] property without due process of law).

[120] *E.g.*, *Dolan*, 512 U.S. at 383-84 & n.5 (1994) (citing *Penn Central*, 438 U.S. at 122, and Chicago, Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226, 239 (1897)).

become far more important to distinguish between due process and takings analysis. *Eastern Enterprises* constitutes the first express repudiation of the *Agins*-type due process analysis that crept into takings jurisprudence prior to *First English*.

V. What if a Court Applies *Agins* Anyway?

Suppose a court rejects the arguments described above and examines the reasonableness of a land use regulation under the Takings Clause. The claimant probably would argue that the standard of review under the Takings Clause — the *Agins* "substantially advance" test — is more exacting than the deferential standard used under the Due Process Clause. The claimant likely would cite footnote 3 in *Nollan*, which suggests that the Takings Clause might impose a more demanding standard because *Agins*' substantially advance formulation differs from the rational basis test under the Due Process Clause. *See Nollan*, 483 U.S. at 834 & n.3 (1987). Several responses are available.

First, *Nollan*'s footnote 3 is dicta. *Nollan* acknowledged that takings jurisprudence up to that point had not elaborated on "what type of connection between the regulation and the state interest satisfies the requirement that the former 'substantially advance' the latter." *Id.* at 834. More importantly, *Nollan* itself did not clarify the matter because the permit condition at issue failed to "meet even the most untailored standards." *Id.* at 838. Because *Nollan* expressly left open the issue of how close a means-end fit is required to satisfy the Takings Clause, the musings in footnote 3 are not binding.

Second, *Nollan* stated that the Court would place particular significance on the wording of the "substantially advance" test in cases involving compelled dedications of land. *See id.* at 841. Justice Scalia justified this special scrutiny for dedications because "in that context there is heightened risk that the purpose [of the dedication] is avoidance of the compensation requirement, rather than the stated police power objective." *Id.* This discussion suggests that

in typical land use cases that do not involve compelled dedications, a more deferential standard is appropriate. (*See* Text Block 11.2: *Nollan v. California Coastal Commission*: The Property Rights Revolution that Wasn't, for a discussion of the limitations of *Nollan*.)

Third, in *Del Monte Dunes* the trial court instructed the jury that government action substantially advances a legitimate purpose "if the action bears a reasonable relationship to that objective," a formulation similar to the rational basis test. 119 S. Ct. at 1634. The Supreme Court concluded that these instructions were consistent with *Agins* and its progeny. *See id.* at 1636. In affirming the jury award, the Supreme Court emphasized that "[t]he instructions did not ask the jury whether the city's zoning ordinances or policies were unreasonable" and "the jury was not given free rein to second-guess the city's land-use policies." *Id.* at 1636-37. Instead, the claimant introduced evidence of a tortuous permit application history, inconsistent positions by the city, and other evidence that the claimant "had been treated in an unfair and irrational manner." *Id.* at 1633-34. Emphasizing that the jury was asked to evaluate the permit denial at issue in light of this evidence, the Court concluded that the jury instructions and the award were proper. *See id.* at 1637.

Assuming *arguendo* that the *Agins* "substantially advance" inquiry has a legitimate role in takings jurisprudence, *Del Monte Dunes* strongly suggests that to prevail under that test, a claimant must show that the challenged government action is irrational, unfair, and bears no reasonable relationship whatsoever to a legitimate government interest. *Del Monte Dunes* provides little basis to argue that *Agins* requires heightened scrutiny of land use regulation. *See Bonnie Briar Syndicate, Inc. v. Town of Mamaroneck*, 721 N.E.2d 971, 976 (N.Y. 1999) (open space zoning ordinance "easily qualifies as a valid regulatory denial of development" under the substantially advance test used in *Agins* and *Del Monte Dunes*; the availability of less restrictive alternatives was irrelevant because "[s]o long as the method and solution the Board eventually chose substantially advances the public interest, it is not this Court's place to substitute its own judgment for that of the Zoning Board.").

Recommended Reading

John Echeverria, *Does a Regulation that Fails to Advance a Legitimate Governmental Interest Result in a Regulatory Taking?*, 29 ENVTL. L. 853 (1999).

John Echeverria & Sharon Dennis, *The Takings Issue and the Due Process Clause: A Way Out of a Doctrinal Confusion*, 17 VT. L. REV. 695 (1993).

Michael J. Davis & Robert L. Glickman, *To the Promised Land: A Century of Wandering and a Final Homeland for the Due Process and Takings Clauses*, 68 OR. L. REV. 393 (1989).

Patrick Wiseman, *When the End Justifies the Means: Understanding Takings Jurisprudence in a Legal System with Integrity*, 63 St. JOHN'S L. REV. 433 (1988).

Jan G. Laitos, *The Public Use Paradox and the Takings Clause*, 13 J. ENERGY NAT. RESOURCES & ENVTL. L. 9 (1993).

J. Peter Byrne, *Ten Arguments for the Abolition of the Regulatory Takings Doctrine*, 22 ECOLOGY L. Q. 89 (1995).

Jerold S. Kayden, *Land Use Regulations, Rationality, and Judicial Review: The RSVP in the* Nollan *Invitation (Part I)*, 23 URB. LAW. 301 (1991).