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CASNOTE

**MANY FACTS, LITTLE LAW: CONFUSION REMAINS IN THE LAW OF
TAKINGS AFTER DEL MONTE DUNES**

*City of Monterey v. Del Monte Dunes at Monterey, Ltd.*¹

I. INTRODUCTION

The United States Supreme Court had the opportunity to resolve significant issues in the law of takings in its decision in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.* but declined to do so. Confusion still remains in the regulatory takings area of law.

II. FACTS AND HOLDING

The litigation involved began with attempts by the respondent, Del Monte Dunes, to develop a 37.6-acre oceanfront parcel within the zoning control of the petitioner, city of Monterey.² Over a period of five years the city rejected proposals to develop the property, each denial entailing stringent demands on the developers.³ Regulations included a demand for a public beach, a buffer zone next to a State Park, and preservation and restoration of the native buckwheat habitat.⁴ After the series of rejections, Del Monte Dunes concluded that the city would not allow development of the site under any circumstances.⁵

Del Monte Dunes brought suit in the United States District Court for the Northern District of California, under 42 U.S.C. §1983, alleging that the city made a regulatory taking without compensation or providing an adequate postdeprivation remedy for the loss of property.⁶ Respondent alleged that the taking without compensation or remedy was a violation of the Due Process and Equal Protection provisions of the Fourteenth Amendment and therefore the regulatory taking was unconstitutional.⁷

The District Court dismissed the claims as unripe on the grounds that no definitive decision on development allowed by the city was obtained.⁸ The Ninth Circuit Court of Appeals reversed and on remand the District Court submitted Del Monte Dunes' taking and equal protection claims to a jury.⁹ The jury was instructed to find for Del Monte Dunes if it found that Del Monte Dunes "had been denied all economically viable use of its property" and that the city's rejection of Del Monte Dunes' proposal "did not substantially advance a legitimate public purpose."¹⁰ The jury delivered a verdict favoring Del Monte Dunes on its equal protection claim, and a general verdict for its taking claim, and a damages award of

¹ *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 119 S.Ct. 1624 (1999).

² *Id.* at 1631.

³ *Id.* In the five-year period there were five formal decisions and 19 different site plans rejected. The original proposal was for 344 residential units on the parcel which was reduced over a series of proposals to the rejected final proposal of 190 units, even though the zoning requirements permitted development of more than 100 units for the parcel. *Id.* at 1632-33.

⁴ *Id.* Nonnative iceplant had been introduced by the previous landowner, which is destructive to the native habitat. Buckwheat habitat is the native habitat of the endangered Smith's Blue Butterfly, which lives for only one week and travels at most 200 feet. In a search of the property from 1981 through 1985, only one Smith's Blue Butterfly larva was found. *Id.* at 1632.

⁵ *Monterey*, 119 S.Ct. at 1633.

⁶ *Id.* at 1631. Del Monte Dunes contended that the city rejected the final proposal because the city had considered buying or encouraging the State to buy the property for a public use. This contention possibly had validity in light of The State of California's purchase of the property during litigation of this case. *Id.* at 1634.

⁷ *Id.* at 1633.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Monterey*, 119 S.Ct. at 1634. The jury instructions included examples of legitimate public interests: protecting the environment, preserving open space, protecting health and safety of its citizens, and regulating the quality of the community. *Id.*

\$1.45 million.¹¹

The Ninth Circuit court of Appeals affirmed.¹² Certiorari was granted by the United States Supreme Court, which addressed the questions presented in the city's petition: 1) whether issues of liability on Del Monte Dunes' regulatory takings claim were properly submitted to the jury, 2) whether the Court of Appeals erred in basing its decision on a standard that allowed the jury to "reweigh" the reasonableness of the city's decision, and 3) whether the Court of Appeals erred in using the rough-proportionality standard.¹³

The Supreme Court held that although the rough-proportionality standard is inappropriate in the case at hand, the Court of Appeals mention of proportionality was "unnecessary to sustain the jury's verdict" because the instructions given the jury made no mention of proportionality.¹⁴

In its petition to the Supreme Court, the city also challenged the Court of Appeals' decision that the jury could have found the city's rejection of the development plan not reasonably related to a legitimate public interest and that the Court of Appeals adopted a standard for regulatory takings liability that allows juries to "second-guess" city policy.¹⁵ The Supreme Court rejected this argument by the city because the city itself essentially proposed the instructions given to the jury and therefore the city could not argue that the instructions were not an accurate statement of the law.¹⁶

The final issue raised in the city's petition for certiorari was whether it was proper for the District Court to submit the question of liability on the regulatory taking claim to the jury.¹⁷ The Court recognized that the answer depended on whether Del Monte had a statutory or constitutional right to a jury trial, and if so, the extent of the right.¹⁸ The Court held that a §1983 suit seeking damages is an action of law within the meaning of the Seventh Amendment of the United States Constitution "because it sounded in tort and sought legal relief."¹⁹ The Court found that the action is analogous to tort actions of common law to recover damages for interference with property rights and therefore Del Monte would have a right to a trial by jury.²⁰ The Court held that the issue was properly submitted to the jury because the question was "essentially fact-bound in nature."²¹

The Supreme Court held that because this was a taking without compensation or remedy it was unconstitutional.²²

III. LEGAL BACKGROUND

The Fifth Amendment of the United States Constitution guarantees that private property shall not "be taken for public use, without just compensation."²³ Prior to 1922, courts generally approached the Takings Clause by applying it only to a "direct appropriation of property" or the "functional equivalent" of an ouster of [the owner's] possession.²⁴ In *Pennsylvania Coal Co. v. Mahon*,²⁵ Justice Holmes

¹¹ *Id.* The District Court ruled for the city of the due process claim, but stated that its ruling was not inconsistent with the jury's verdict. *Id.*

¹² *Id.* The Court of Appeals did not address the equal protection claim because the regulatory takings verdict was sufficient to support the award of damages. *Id.*

¹³ *Monterey*, 119 S.Ct. at 1635.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at 1636.

¹⁷ *Id.* at 1637.

¹⁸ *Id.*

¹⁹ *Monterey*, 119 S.Ct. at 1639.

²⁰ *Id.* at 1641.

²¹ *Id.* at 1644.

²² *Id.* at 1645.

²³ U.S. CONST. amend. V.

²⁴ *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1014 (1992). See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922); *Northern Transportation Co. v. Chicago*, 99 U.S. 635, 642 (1878). See also, *Gibson v. United States*, 166 U.S. 269, 275-76 (1897).

recognized that if protection against physical takings of private property was to be effectively enforced, the government's power to define the interests of ownership of property was "necessarily constrained by constitutional limits."²⁶

In *Mahon*, the claimant sold surface rights to parcels of property but expressly retained the underlying coal rights.²⁷ A Pennsylvania statute, enacted after the time of sale, forbade mining of coal that caused a house to sink unless the house was the property of the owner of the underlying coal.²⁸ The statute made it "commercially impracticable" to mine the coal and had essentially the same effect as the destruction of the rights of the claimant.²⁹ The United States Supreme Court held that the statute was invalid as a "taking."³⁰ Justice Holmes, in writing the opinion, stated that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."³¹

The Supreme Court had generally avoided any "set formula" for describing when a regulation goes "too far," but has described at least two categories of regulatory action which is compensable without case-by-case discussion of the public interest involved in the regulation.³² The first category includes regulations that force a property owner to suffer a "physical invasion" of his or her property.³³ The second category includes regulations that deny all economically beneficial or productive use of land.³⁴ One form of a taking is a regulatory taking, where government regulation "does not substantially advance legitimate state interest or denies an owner economically viable use of his land."³⁵ In *Lucas v. South Carolina Coastal Council*, the Court stated that supporting a compensation requirement is the fact that typically regulations that leave the property owner without any economically beneficial uses of land are done so by requiring land to be left substantially in its "natural state."³⁶ The regulations "carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm."³⁷

In *Lucas*, the owner of a beachfront property brought an action alleging the application of the South Carolina Beachfront Management Act to his property constituted a taking without just compensation.³⁸ The Act had the effect of barring Lucas from erecting any permanent habitable structures on his land.³⁹ The South Carolina Supreme Court ruled that under *Mugler v. Kansas*,⁴⁰ when a regulation's purpose is to prevent serious public harm then no compensation is owed under the Takings

²⁵ *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

²⁶ *Lucas*, 505 U.S. at 1014 (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414-15 (1922)).

²⁷ *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 412 (1922).

²⁸ *Id.*

²⁹ *Id.* at 414.

³⁰ *Id.*

³¹ *Id.* at 415.

³² *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992).

³³ *Id.* See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). (forcing landlords to submit to the placement of cable facilities in their apartment buildings constituted a taking even though the facilities occupied only 1 ½ cubic feet of landlord's property at most).

³⁴ *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992).

³⁵ *Agins v. Tiburon*, 447 U.S. 255, 257-60 (1978). In *Agins*, appellants acquired five acres of unimproved land. The city of Tiburon adopted a zoning ordinance with restrictions permitting between one and five single-family residences to be built on a tract of land the size of the appellant's. The appellants brought a taking without just compensation suit without having first sought approval for development. This was an important factor for the Court, which held that "[s]ince at this juncture appellants are free to pursue their reasonable investment expectations by submitting a development plan to the city, it cannot be said that the impact of the ordinances has denied them the 'justice and fairness' guaranteed by the Fifth and Fourteenth Amendments." *Id.* at 260.

³⁶ *Lucas*, 505 U.S. at 1018.

³⁷ *Id.* See *Annicelli v. South Kinston*, 463 A.2d 133, 140-41 (R.I. 1983) (prohibition on construction adjacent to beach justified on safety grounds and "conservation of open space"); *Morris County Land Improvement Co. v. Parsippany-Troy Hills Township*, 40 N.J. 539, 552-53 (1963) (prohibition on filling marshlands imposed in order to preserve region as water detention basin and create wildlife refuge).

³⁸ *Lucas*, 505 U.S. at 1009.

³⁹ *Id.*

⁴⁰ *Mugler v. Kansas*, 123 U.S. 623 (1887).

Clause regardless of the effect on the value of the owner's property.⁴¹ The United States Supreme Court reversed and remanded the decision.⁴²

In *Penn Central Transportation Company v. City of New York*:⁴³ there were three factors to help determine whether regulations deprive property owners of economically viable use of property: 1) the character of the government action, 2) the economic impact of the regulation, and 3) the extent to which the regulation interferes with reasonable investment-backed expectations.⁴⁴

In *Penn Central*, New York City enacted a Landmarks Law to protect historical landmarks and neighborhoods.⁴⁵ The appellant's plan to construct a multistory office building over the Grand Central Terminal was rejected and the appellant claimed that application of the Landmarks Law was a taking without just compensation in violation of the Fifth and Fourteenth Amendments.⁴⁶ The United States Supreme Court held that the Landmarks Law's restrictions were "substantially related to the promotion of the general welfare" and permit reasonable beneficial use of the Terminal.⁴⁷

In *Penn Central*, the court noted that the character of the government function was a factor and that government actions that may be characterized as "acquisitions of resources to permit or facilitate uniquely public functions" have often been held to constitute "takings."⁴⁸

The government may execute regulations that adversely affect economic values without taking in many situations such as when regulations are for promoting "health, safety, morals, or general welfare."⁴⁹ Restrictions that have served a "substantial public purpose have" been upheld against takings claims but statutes that frustrate a distinct investment-backed expectation can constitute a taking.⁵⁰

IV. INSTANT DECISION

A. The Court's Decision

In *City of Monterey v. Del Monte Dunes at Monterey*,⁵¹ the United States Supreme Court dealt with three issues: whether liability issues on Del Monte Dunes's regulatory takings claim were properly submitted to the jury, whether the Ninth Circuit Court of Appeals used an impermissible standard that allowed the jury to "reweigh" the reasonableness of the city's decision, and whether the Ninth Circuit Court of Appeals erred in holding that the *Dolan v. City of Tigard*⁵² rough-proportionality standard applied in the case.⁵³

The jury for the United States District Court for the Northern District of California awarded damages of \$1.45 million, a general verdict on Del Monte Dunes's takings claim, and a separate verdict for its equal protection claim.⁵⁴ The Ninth Circuit Court of Appeals affirmed, ruling that there was no error in allowing the takings claim to be tried by a jury and that sufficient evidence existed to support the jury's decision in Del Monte Dunes's favor.⁵⁵

⁴¹ *Lucas*, 505 U.S. at 1010. See *Mugler v. Kansas*, 123 U.S. 623 (1887).

⁴² *Lucas*, 505 U.S. at 1003.

⁴³ *Penn Central Transportation Company v. City of New York*, 438 U.S. 104 (1978).

⁴⁴ *Id.* at 125-128.

⁴⁵ *Id.* at 115-20.

⁴⁶ *Id.*

⁴⁷ *Id.* at 128.

⁴⁸ *Id.* See *Griggs v. Allegheny County*, 369 U.S. 84 (1962) (flights over property held a taking); *United States v. Cress*, 243 U.S. 316, (1917) (repeated flooding of land caused by water project is taking); *Portsmouth Co. v. United States*, 260 U.S. 327 (1922) (U.S. military installation's repeated firing of guns over claimant's property a taking).

⁴⁹ *Id.* at 125.

⁵⁰ *Id.* at 125-27.

⁵¹ *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 119 S.Ct. 1624 (1999).

⁵² *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

⁵³ *Monterey*, 119 S.Ct. at 1635.

⁵⁴ *Id.* at 1634.

⁵⁵ *Id.* The Court of Appeals did not address the equal protection claim because the regulatory takings verdict was sufficient to

The United States Supreme Court held that the rough-proportionality test of Dolan is not applicable beyond the context of exactions.⁵⁶ The Court held that the rough-proportionality test is not applicable in a case such as this where the landowner's suit is based on denial of development, not on excessive exactions.⁵⁷

The Court, however, affirmed the decision on grounds that the instructions given to the jury did not mention proportionality.⁵⁸ The Court held that the Court of Appeals's discussion of the rough-proportionality standard was irrelevant and unnecessary for affirming the jury's verdict.⁵⁹

On the second issue addressed by the Court, the city of Monterey challenged the standard used by the Court of Appeals, maintaining that the standard used for regulatory takings liability allows juries to second-guess the city's policies.⁶⁰ The Court held that the Court of Appeals did not adopt a rule that allowed "wholesale interference" by a judge or jury with municipal land-use policies or decisions.⁶¹ The Court also focused on the fact that the city itself proposed, in essence, the instructions given to the jury and made no objection to them.⁶² The Court also noted that the district court's instructions were consistent with prior discussions of liability in the regulatory takings context.⁶³ The Court rejected a claim of error on this issue.⁶⁴

The Supreme Court then addressed whether Del Monte Dunes' regulatory takings case should have gone to a jury.⁶⁵ The Court declined to find a statutory right under §1983 based only on an "action at law" and thus could not avoid a constitutional question.⁶⁶ The Seventh Amendment states that "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved...."⁶⁷ In determining if a jury trial is appropriate, the court asked whether the cause of action was "tried at law at the time of the founding or is at least analogous to one that was."⁶⁸ The Court held that a §1983 action creates a tort-like cause of action that is analogous to common-law tort actions.⁶⁹

The Supreme Court rejected the City's argument that the instant case was analogous to formal condemnation proceedings that the Court has held to have no constitutional right to a jury.⁷⁰ According to the Court, condemnation differs from a §1983 action because in condemnation proceedings, the issue is the determination of compensation; not liability.⁷¹

After designating Del Monte Dunes' §1983 suit an action at law, the Court discussed whether the particular issues of liability were proper for a jury to determine.⁷² The Court first looked to history to determine if a jury is appropriate.⁷³ The Court did not find a definitive answer because most regulatory takings cases are suits against the United States,⁷⁴ suits decided by state courts,⁷⁵ or those seeking only

support the award of damages. *Id.*

⁵⁶ *Id.* at 1635. Exactions are "land-use decisions conditioning approval of development on the dedication of property to public use." *Id.*

⁵⁷ *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 119 S.Ct. 1624, 1635 (1999).

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* at 1637.

⁶² *Id.*

⁶³ *Monterey*, 119 S.Ct. at 1636 (citing *Dolan*, 512 U.S. at 385; *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016 (1992); *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980)).

⁶⁴ *Monterey*, 119 S.Ct. at 1637.

⁶⁵ *Id.*

⁶⁶ *Id.* at 1637-38.

⁶⁷ U.S. CONST. amend. VII.

⁶⁸ *Monterey*, 119 S.Ct. at 1638 (quoting *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 376 (1996)).

⁶⁹ *Monterey*, 119 S.Ct. at 1639-41.

⁷⁰ *Id.* at 1639. The Court has held that there is "no constitutional right to a jury in eminent domain proceedings." (quoting *United States v. Reynolds*, 397 U.S. 14, 18 (1970)).

⁷¹ *Monterey*, 119 S.Ct. at 1639.

⁷² *Id.* at 1642. See generally *Markman v. Westview Instruments, Inc.*, 517 U.S. 370 (1996).

⁷³ *Monterey*, 119 S.Ct. at 1643.

⁷⁴ *Id.* See, e.g., *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985).

injunctive relief.⁷⁶ The Seventh Amendment does not apply in these situations.⁷⁷ The Court then turned to other considerations.⁷⁸

The Court held that the issue of whether a landowner has been deprived of all economic use of property to be a “predominately factual issue.”⁷⁹ The Court held the question of whether the city’s decision to reject Del Monte Dunes’ proposal as reasonably related to a public purpose was properly submitted to the jury because the issue was a “mixed question of fact and law.”⁸⁰

The Supreme Court affirmed the Court of Appeals’ decision and held that the issues were proper questions for the jury.⁸¹

B. Scalia’s Concurrence

While concurring that the issues were properly sent to the jury, Justice Scalia wrote separately on one part of the opinion.⁸² Unlike Justice Kennedy, Justice Scalia would treat all §1983 actions alike for the purposes of the Seventh Amendment jury trial.⁸³ Justice Scalia concluded that the right to a Seventh Amendment jury trial exists when monetary damages are sought.⁸⁴ He viewed §1983 as establishing a unique cause of action.⁸⁵ The question in *Del Monte Dunes* was not what common-law action was analogous to a regulatory taking without compensation, but rather what common-law action was analogous to a §1983 claim.⁸⁶ He followed the approach taken by the Court in *Wilson v. Garcia*.⁸⁷ Unlike the jury trial issue in the instant case, *Wilson* analogized §1983 actions to identifying the relevant statute of limitations.⁸⁸ In *Wilson*, “the Court concluded that all §1983 [claims] should be characterized as ‘tort action[s] for the recovery of damages for personal injuries.’”⁸⁹ Justice Scalia concluded that because a tort cause of action for damages could have a jury trial at common law, a §1983 cause of action for damages would likewise provide for a jury trial.⁹⁰ He concluded that the Seventh Amendment provided Del Monte Dunes a right to a jury trial, and that the District Court properly submitted the issues to the jury.⁹¹

C. Souter’s Dissent

Justices Souter, O’Connor, Ginsberg, and Breyer dissented on the jury trial issue.⁹² Justice Souter concluded that Del Monte Dunes had no right, either statutorily or constitutionally, to a jury trial.⁹³ He did not agree with the Court’s analogy between a §1983 claim and a tort action.⁹⁴ Justice Souter approved

⁷⁵ *Monterey*, 119 S.Ct. at 1643. See, e.g. *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

⁷⁶ *Monterey*, 119 S.Ct. at 1643. See, e.g. *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470 (1987).

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* at 1644.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Monterey*, 119 S.Ct. at 1645 (Scalia, J. concurring).

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at 1946. See *Wilson v. Garcia*, 471 U.S. 261 (1985).

⁸⁸ *Monterey*, 119 S.Ct. at 1646.

⁸⁹ *Id.* (quoting *Wilson*, 471 U.S. at 276).

⁹⁰ *Id.* at 1648-49. Justice Scalia did, however make clear that a §1983 claim would not be entitled to a jury trial on every issue, i.e. a §1983 action seeking equitable relief would not be eligible for a jury trial. *Id.* at 1649.

⁹¹ *Id.* at 1650.

⁹² *Id.*

⁹³ *Monterey*, 119 S.Ct. at 1650.

⁹⁴ *Id.*

of the city's analogy of a §1983 cause of action and direct condemnation proceedings.⁹⁵ Jury trials were not available for eminent domain proceedings at common law when the Seventh Amendment was adopted and therefore should not be for §1983 actions.⁹⁶ He found the Court's argument to be unpersuasive of direct condemnation proceedings being unlike takings without compensation because in a direct condemnation proceeding liability is conceded.⁹⁷ Justice Souter could not see a significant difference between the landowner that fights a condemnation proceeding and a landowner that fights for compensation.⁹⁸ Justice Souter and the other dissenting justices concluded that Del Monte Dunes's issues should not have gone to a jury.⁹⁹

V. COMMENT

From a fairness standpoint, the United States Supreme Court made the correct decision in affirming the Ninth Circuit Court of Appeals' judgment in favor of Del Monte Dunes. The developer jumped through many hoops to gain approval from the city, to no avail. The city of Monterey lost this case on the facts. There is evidence of this in the completely "pro-plaintiff" description of the facts by the Court.¹⁰⁰ Unfortunately, this case had many facts, but little law to support its holding.

Looking at this case from an Environmentalist's perspective, Del Monte Dunes has little discernable impact. The decision by the Supreme Court was not based on the ability of the city to place restrictions such as setting aside a public beach or restoration of natural habitat, but rather the ability of the city to effectively take the land without compensation or a forum for the landowner to protest. Del Monte Dunes did not protest the right of the city to place environmental and other restrictions on the property, merely the method used. In fact, the final development plan rejected by the city actually improved upon the condition of the environment from its previous state with the removal of the iceplant encroaching on the native buckwheat habitat.¹⁰¹

The only issue that could have a real impact on local government's environmental regulations was whether the failure of a regulation to advance a legitimate governmental purpose constitutes a takings claim.¹⁰² Justice Kennedy declared, "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...."¹⁰³ The Court has left this question to be answered in a future case.

The Court thoroughly discussed the jury issue, which will likely have little impact on future litigation. The *Del Monte Dunes* decision has no effect on takings actions against the United States. The nonavailability of a jury trial had long been settled.¹⁰⁴ It is possible that the decision will have no impact

⁹⁵ *Id.*

⁹⁶ *Id.* at 1652. Direct condemnation proceedings are "[s]uits at common law" under the Seventh Amendment but get no jury trial because in England and the colonies at the time the Amendment was adopted, no jury trial was allowed for condemnation proceedings. *Id.* See *Kohl v. United States*, 91 U.S. 367, 376 (1875); *Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n*, 430 U.S. 442, 458 (1977).

⁹⁷ *Monterey*, 119 S.Ct. at 1653-54. Occasionally a landowner will fight the condemnation and challenge the government's right to condemn. *Id.* at 1654. See *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 240 (1984).

⁹⁸ *Monterey*, 119 S.Ct. at 1655.

⁹⁹ *Id.* at 1650.

¹⁰⁰ Dwight H. Merriam, *Will This Mouse Roar? United States Supreme Court Takes a Takings Case*, SE18 ALI-ABA 297, 307 (1998). (Justice Scalia even went so far as to make references in the oral arguments of the landowner being "jerked around.") *Id.* at 308.

¹⁰¹ *Monterey*, 119 S.Ct. at 1632.

¹⁰² John D. Echeverria, *Reving the Engines in Neutral: City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 29 ELR 10682 (1999) (no page references available for this document).

¹⁰³ *Monterey*, 119 S.Ct. at 1636.

¹⁰⁴ *Echeverria, supra*, note 102, (no page references available). See *Minneapolis & St. Louis R.R. Co. v. Bobolis*, 241 U.S. 211 (1916).

in the future on similar §1983 actions against local governments in federal courts. In 1985, in *Williamson County Regional Planning Commission v. Hamilton Bank*, the Court ruled that a takings claim against local government is not "ripe" under the Fifth Amendment without pursuing available state procedures for the compensation.¹⁰⁵ All state courts must provide a forum for regulatory takings claims after the Supreme Court's holding in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*.¹⁰⁶

As it is unlikely that another case similar to *Del Monte Dunes* will arise in the same manner, it is somewhat puzzling as to why the court spent so much time on the issue: There are a limited number of situations where a jury trial for a §1983 takings claims will come into play. The right to a jury trial might not exist if there is a state forum available for the issue.¹⁰⁷ To gain the benefit of the holding in *Del Monte Dunes*, a plaintiff must first exhaust all state remedies as required in *Williamson*, but there is likely to be a question of whether raising the claim again in federal court is barred by claim or issue preclusion.¹⁰⁸

VI. CONCLUSION

It is uncertain what effect this case will have, if any, on future regulatory takings cases. The Court had the opportunity to clear up confusing issues, but the law of takings remains muddled instead.

KRISTIN KREBS

¹⁰⁵ *Echeverria, supra*, note 102, (no page references available) (citing *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985)).

¹⁰⁶ *Id.* (citing *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987)).

¹⁰⁷ *Echeverria, supra*, note 102, (no page references available).

¹⁰⁸ *Id.*