TAKINGS AND ERRORS

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I. INTRODUCTION

Does the government "take" when it errs? Today no other question about the interpretation of the Takings Clause[1] generates as much confusion and contradiction. The short answer to this question should be "no." If the government commits an error, the government or its representatives likely are (or should be) subject to suit on some legal theory. But there is no compensable taking within the meaning of the Fifth Amendment.

To put this topic in proper perspective, one must recognize that most takings suits proceed on the premise that government action—apart from the alleged taking—was entirely proper. Thus, the focus of a typical takings case is whether the government, in the pursuit of a lawful objective,[2] has either directly appropriated or physically invaded private property, or imposed a regulatory restriction that eliminates the property's economic value.[3] The basic claim in such litigation is that the government

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1. U.S. CONST. amend. V ("nor shall private property be taken for public use, without just compensation").

2. *See, e.g.*, Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1009 (1992)

> (Lucas did not take issue with the validity of the Coal Act as a lawful exercise of South Carolina's police power, but contended that the Act's complete extinguishment of his property's value entitled him to compensation regardless of whether the legislature had acted in furtherance of legitimate police power objectives.);

First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 326 (1987) ("In this case, the legitimacy of the county's interest in the enactment . . . is apparent from the face of the ordinance and has never been challenged.").

3. *See, e.g.*, *Lucas*, 505 U.S. 1003 (regulatory taking based on elimination of all economic value); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419

must pay the owner compensation for the value of the property as a condition of proceeding with its otherwise lawful plan.[4]

This Article addresses a relatively small but increasingly significant subset of cases in which owners seek compensation under the Takings Clause when the government action was or is alleged to be erroneous. This includes, for example, cases in which the government defendant exceeded its jurisdiction, violated some statute, infringed upon a federal or state constitutional right (other than the Takings Clause), or acted arbitrarily or capriciously.[5] In other words, the term "error" as used in this Article refers to essentially any type of illegality. Recent court decisions, including a number of Supreme Court decisions, provide contradictory answers to the questions or whether relatively novel claims present legitimate takings issues.[6]

(1982) (physical occupation); Kimball Laundry Co. v. United States, 338 U.S. 1 (1949) (direct appropriation). One hotly debated question is whether regulations that reduce but do not eliminate a property's economic value also effect a taking, *see* Florida Rock Indus., Inc. v. United States, 18 F.3d 1560 (Fed. Cir. 1994) (adopting "partial taking" theory), but most courts have rejected this view. *See, e.g.*, Front Royal & Warren County Indus. Park Corp. v. Town of Front Royal, 135 F.3d 275 (4th Cir. 1998) (rejecting partial takings theory); Midnight Sessions, Ltd. v. City of Phila., 945 F.2d 667 (3d Cir. 1991). *See generally* John Echeverria, *Is the Penn Central Three-Factor Test Ready for History's Dustbin?*, 52 LAND USE L. & ZONING DIG. 3 (2000) (arguing against partial takings theory).

4. *See* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) ("The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation.").

5. *See infra* cases cited in notes 11, 19 & 38.

6. The issue whether an error constitutes a taking arguably has even greater significance for the Court of Federal Claims, the sponsor of this symposium, than for other courts because the issue affects not only the scope of takings claims but also whether such claims are within the court's jurisdiction. 28 U.S.C. § 1491 provides that:

> The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

28 U.S.C. § 1491 (1994). The Takings Clause supports a direct monetary "claim against the United States" within the meaning of this provision, *see* Jacobs v. United States, 290 U.S. 13, 16 (1933), but the Due Process Clause, for example, does not. *See* Crocker v. United States, 125 F.3d 1475, 1476 (Fed. Cir. 1997). Thus, if the claims court is presented with a claim that a government error effected a taking, but in fact the allegation actually supports only a due process claim, not only does the takings claim fail on the merits, but the claims court must also dismiss the

There is an urgent need for a resolution of the controversy over the legitimacy of "erroneous" takings claims. The judicial confusion about this issue has exacerbated the unpredictability and inconsistency of the takings doctrine, to the detriment of all concerned. In addition, the notion that government errors should be challenged under the Takings Clause, rather than on some other basis, threatens to sweep away longstanding government immunity rules, increase the liability burdens on taxpayers at all levels of government, and seriously interfere with elected officials' good faith efforts to mediate competing social interests in the use and control of property.

This Article seeks to chart a clear course through the confusion. Section II describes in some detail the different, contradictory ways in which courts have addressed government errors in takings litigation. Section III then addresses the meaning of the phrase "public use" in the Takings Clause, describing the evolution of the interpretation of this phrase over time. Finally, Section IV critically examines the different options for treating errors in takings cases and seeks to identify the "best" option.

The conclusion of this Article is that alleged takings involving erroneous government actions are not compensable takings within the meaning of the Takings Clause. The Clause prescribes payment of just compensation in the event of a taking of private property for "public use." A government action that is erroneous, regardless of whether it otherwise meets the test for a taking, cannot be a compensable taking for "public use."[7] As ex-

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claim as outside of its jurisdiction.

7. Several scholars have recently explored the meaning of the "public use" requirement. *See* Mathew Zinn, Note, *Ultra Vires Takings*, 97 MICH. L. REV. 245 (1998) (arguing that ultra vires government actions are not takings, based in part on the "public use" requirement); Jed Rubenfeld, *Usings*, 102 YALE L.J. 1077 (1993) (arguing that the Takings Clause should be reinterpreted to emphasize that a compensable taking entails a "using" of private property). The thesis of this Article is consistent with, but broader than, the conclusion of Mr. Zinn. My views also are consistent with Professor Rubenfeld's "usings" theory insofar as he reads the "public use" requirement as a limitation on takings liability. *See* Rubenfeld, *supra*, at 1114 ("[I]f *all* the state does is to take away property rights—if there has been no taking *for public use*—what, after all, does the Compensation Clause have to do with it?"). However, to the extent that Professor Rubenfeld believes the central inquiry under the Takings Clause should be whether government has put private property to a "public use," his theory seems to me improperly to read the word "taking" out of the Takings Clause.

plained below, this interpretation of the Takings Clause is consistent with the history of the Clause, fundamental takings, principles, and sound legal policy. It also supports a coherent and internally consistent law of takings.

II. ALTERNATIVE WAYS OF ADDRESSING GOVERNMENT ERRORS UNDER THE TAKINGS CLAUSE

A. *The Three Options and Their Variants*

It is useful at the outset to describe the various different approaches for addressing government errors in cases brought under the Takings Clause. Different courts have embraced all three of the logical possibilities: Errors are takings; errors are irrelevant to takings analysis; and errors preclude the finding of a taking. As discussed below, courts also have described several variations under each of the different approaches. Remarkably, United States Supreme Court decisions can plausibly be cited to support every one of the different approaches.

Option One. The first option is to treat a government error as an independent basis for a finding of a taking. This option has obvious intuitive appeal: If government officials have erred and thereby caused an injury, should not the law afford a remedy? And if the resulting injury is to a property interest, why shouldn't the Takings Clause be interpreted to provide relief?

Several elements of current takings doctrine support this approach to government errors. Most importantly, in *Agins v. City of Tiburon*[8] and in numerous subsequent decisions,[9] the Supreme Court has said that government action "effects a taking" if it "does not substantially advance legitimate state interests."[10] This test is self evidently akin to means-ends analysis under the Due Process; in fact, as discussed below, this takings

8. 447 U.S. 255 (1980).

9. *See, e.g.*, Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1016 (1992); Nollan v. California Coastal Comm'n, 483 U.S. 825, 834 (1987). Prior to *Agins*, the Court in *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978), articulated a similar means-ends takings test: "[A] use restriction on real property may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial public purpose." *Penn. Central*, 438 U.S. at 127.

10. *Agins*, 447 U.S. at 260.

test was borrowed from due process cases.[11] Not surprisingly, given the language in recent Supreme Court decisions, some federal and state courts have held that government actions have resulted in takings because they were erroneous in the sense that they failed to "substantially advance legitimate state interests."[12]

The view that errors can establish takings liability is arguably supported as well by the Supreme Court's decisions in *Nollan v. California Coastal Commission*[13] and *Dolan v. City of Tigard*.[14] Both of these cases involved takings challenges to development permits requiring owners to grant members of the public access to their property. The Court ruled that the government could impose this type of "exaction" only upon a showing of (1) an "essential nexus" between the purpose of the exaction and a legitimate regulatory objective[15] and (2) a "rough proportionality" between the burdens imposed by the exaction and the projected impacts of development.[16] These tests, which the Court derived in part from the "substantially advance" language from *Agins*, are simply a specialized application of means-ends analysis. When these requirements are not satisfied a finding of a taking follows a finding of a takings follows. Exactions that result in takings are erroneous in the sense that they fail to meet the nexus and proportionality standards. According to some courts[17] and commentators,[18] the relatively demanding

11. *See infra* notes 42-44.

12. *See, e.g.*, Richardson v. City & County of Honolulu, 124 F.3d 1150, 1165 (9th Cir. 1997), *cert. denied*, 525 U.S. 871 (1998) (invalidating rent control ordinance as a taking because it did not "substantially further[] a legitimate government interest"); Seawall Assocs. v. City of New York, 542 N.E.2d 92, 111 (Ill. App.), *cert. denied*, 493 U.S. 976 (1989) (striking down ban on conversion of hotel units as a taking for lack of demonstration that ordinance "substantially advanced" goal of relieving homelessness). In only a few instances have courts actually awarded just compensation on this theory. *See, e.g.*, Whitehead Oil Co. v. City of Lincoln, 515 N.W.2d 401 (Neb. 1994); *see also* City of Monterey v. Del Montes Dunes at Monterey, Ltd., 526 U.S. 687 (1999) (upholding takings award based on "substantially advance" theory where city failed to object to jury instructions).

13. 483 U.S. 825 (1987).

14. 512 U.S. 374 (1994).

15. *Nollan*, 483 U.S. at 837; *Dolan*, 512 U.S. at 386.

16. *Nollan*, 483 U.S. at 838; *Dolan*, 512 U.S. at 386.

17. *See, e.g.*, Isla Verde Int'l Holdings, Inc v. City of Camas, 990 P.2d 429, 436 (Wash. App. 1999) (limiting "right to improve . . . property" as a "form of exaction" subject to review under *Dolan*); Del *Monte* Dunes at Monterey, Ltd. v. City of

Nollan/Dolan analysis should apply not only to land use exactions but also to other kinds of regulations and other government actions that affect private property interests.

Option Two. The second approach is to treat a government error as irrelevant to the takings question. As discussed, the more familiar test under the Takings Clause is whether the government has actually or effectively appropriated private property. It can be argued that courts should apply this traditional test without regard to whether the action was erroneous. This position has intuitive appeal as well. If the focus of regulatory takings analysis is the severity of the economic burden imposed by the regulation, what difference does it make if the regulation is substantively wrong as well? At a minimum, should not the government be just as likely to incur liability for the economic burdens it has imposed when it has made a mistake?[19] Again, not surprisingly, a number of lower federal and state courts have adopted this approach.[20]

Monterey, 95 F.3d 1422, 1432 (9th Cir. 1996), *aff'd on other grounds*, 526 U.S. 687 (1999) (upholding jury finding of a taking because evidence supported the "claim that the City's actions were disproportional to both the nature and extent of the impact of the proposed development").

18. *See, e.g.*, Jan G. Laitos, *Takings and Causation*, 5 WM. & MARY BILL RTS. J. 359 (1997).

19. It has been argued, for example, that the Court's decision in *First English* supports takings liability for temporary regulatory delay caused by an erroneous government decision because the Court referred to government liability to pay compensation based upon a law's "invalidation." First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 317 (1987). *See, e.g.*, Brief for Respondent, Landgate v. California Coastal Comm'n, 953 P.2d 1188 (Cal.), *cert. denied*, 525 U.S. 876 (1998) (No. 98-183). In context, it is obvious that the Court was referring to the "invalidation" of a government action as a taking under the Takings Clause, not to invalidation on some other legal basis. For the reasons discussed below, *First English* actually supports the conclusion that a government error precludes a finding of a taking.

20. *See, e.g.*, Corn v. City of Lauderdale Lakes, 904 F.2d 585 (11th Cir. 1990) (holding that a federal takings claim challenging a zoning restriction as a taking was not affected by a prior successful mandamus action leading to the invalidation of the zoning ordinance under state law); Eberle v. Dane County Bd. of Adjustment, 595 N.W.2d 730 (Wisc. 1999) (finding that a developer's temporary takings claim under Wisconsin Constitution was not precluded by the fact that the delay was produced by a board's improper denial of zoning variance); Tampa-Hillsborough County Expressway Auth. v. A.G.W.S. Corp., 640 So. 2d 54 (Fla. 1994) (holding that as applied takings challenges based on a Florida map reservation statute were not affected by a prior ruling that the statute violated the Due Process Clause of the U.S. Constitution); Steinbergh v. City of Cambridge, 604 N.E.2d 1269 (Mass. 1992)

A government error also can be viewed as irrelevant in a takings case under another, narrower analysis. Even if a finding that the government erred would ordinarily preclude a finding of a taking (see Option 3, below), a takings claimant could elect not to challenge the legitimacy of the government action and could proceed to pursue a takings claim *on the assumption* that the government action was legal. On its face, this appears to offer a practical approach. In actual takings litigation, the possibility that the government committed some type of error has operational significance only if someone raises the issue. What prevents an owner for suing for a taking, even on the assumption that there would be no taking if the plaintiff established that there was an error? If the only party wishing to raise the issue of error is the government, why should the government be allowed to benefit from its own mistake?

The Court of Federal Claims applied this reasoning in a recent case, *Osprey Pacific Corp. v. United States*.[21] The court said that a takings claimant can elect his or her remedies: He or she can either sue for a taking, even if the government action was in the abstract "substantively wrong,"[22] or he or she can sue for equitable or legal relief on some basis other than the Takings Clause. The owner cannot, however, do both, the court said. By suing for compensation under the Takings Clause, the "plaintiff waives any claim for any damages for tortious or arbitrary and capricious conduct or for any type of equitable relief."[23] However, the court said that the government does not possess a parallel right. If the government believes its action was erroneous and that the error could preclude a finding of a taking, it has no right to interject this issue into the takings litigation in order to defeat the claim. "It would be a bizarre consequence that would allow the government to profit from its own error,"[24] the court said.

There is yet another possible variant of this second option: A third party could establish that the government erred, for

(holding that a regulatory takings challenge to a city rent control ordinance could proceed notwithstanding a prior ruling that the ordinance was ultra vires).

21. 41 Fed. Cl. 150 (Fed. Cl. 1998).

22. *Osprey Pacific*, 41 Fed. Cl. at 158.

23. *Id.*

24. *Id.* at 157.

example, in an independent lawsuit presenting a facial challenge to a law or regulation. Under that scenario, can the government raise and must the court consider, in a separate takings suit, the fact that the government action has been determined to be erroneous?

Option Three. The third approach is that the government's error *precludes* a finding of a taking. The fact that the government action was erroneous, far from providing the basis for a finding of a taking, demonstrates that *no* taking occurred. Under this view, regardless of how the fact of government error is raised, a determination that the government action was erroneous bars an award of compensation under the Takings Clause.

This approach is supported by several different but not entirely consistent lines of analysis. First, it is supported by the idea that the government is permitted to exercise the eminent domain power, upon which the Takings Clause rests, only for lawful purposes. There is, in fact, substantial, longstanding authority to support the proposition that the eminent domain power cannot be deployed to effect an appropriation for illegal purposes.[25] Whether the government brings a direct condemna-

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25. A late nineteenth century treatise states:

> It is now almost universally held that an entry upon private property under color of the eminent domain power will be enjoined until the right to make such entry has been perfected by a full compliance with the constitution and the laws. If . . . the proceedings under which the right to enter is claimed are invalid for any reason, an entry will be enjoined.

JOHN LEWIS, A TREATISE ON THE LAW OF EMINENT DOMAIN 802-03 (1888) (citing numerous cases); *see also* 6 NICHOLS ON THE LAW OF EMINENT DOMAIN, § 26B.03[1] (3d ed. 1982 & Supp. 1999) (stating that generally, "any factor that questions the legality of the proposed taking may be alleged in the answer as a defense").

Early Supreme Court takings decisions generally supported this conclusion. *See* Tempel v. United States, 248 U.S. 121, 130 (1918) (finding that a challenge to government appropriation of private property based on an "unfounded" claim of right was not a valid claim for compensation under the Tucker Act); Langford v. United States, 101 U.S. 341, 345 (1879) (stating that the government was not liable for a taking based on "an unlawful act, done in violation of the legal rights of some one"); United States v. Lynah, 188 U.S. 445, 479 (1903) (Brown, J. concurring) ("[I]f property were seized or taken by officers of the government without authority of law, . . . there could be no recovery. . . . "). *But cf.* Great Falls Mfg. Co. v. Attorney General, 124 U.S. 581, 596 (1888)

> ([E]ven if it be true that some part of the land actually occupied by the Government is not within the survey and map, still the United States are under an obligation imposed by the Constitution to make just compensation for all that has been in fact taken and is retained for the proposed dam.);

tion action or a landowner brings a suit to compel the government to exercise the eminent domain power (i.e., an inverse condemnation action), the fundamental nature of the governmental power is the same.[26] Accordingly, the argument proceeds, the requirement that the eminent domain power be exercised for a lawful purpose should apply with equal force regardless of whether the exercise of eminent domain is initiated by the government or triggered by an "inverse" suit against the government. Consistent with this view, a number of federal and state court decisions have embraced the idea that "erroneous takings" are not takings at all.[27]

The law of agency supplies a second, narrower basis for the conclusion that the government is not liable for "erroneous takings" under the Takings Clause. Under this theory, the government should be liable for takings effected by government offi-

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see also City of Monterey v. Del Monte Dunes at Monterey, Ltd. 526 U.S. 687, 719 (1999) (Souter, J., concurring in part and dissenting in part) (collecting more recent cases supporting view that takings liability only flows from actions that are "entirely lawful").

26. First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 315 (1987) (quoting Jacobs v. United States, 290 U.S. 13, 16 (1933)).

> (The suits were based on the right to recover just compensation for property taken by the United States for public use in the exercise of its power of eminent domain. That right was guaranteed by the Constitution. The fact that condemnation proceedings were not instituted and that the right was asserted in suits by the owners did not change the essential nature of the claim.)

Customer Co. v. City of Sacramento, 895 P.2d 900, 905 n.4 (Cal. 1995) (quoting Breidert v. Southern Pac. Co., 394 P.2d 719, 721 n.1 (Cal. 1964)) ("The principles which affect the parties' rights in an inverse condemnation suit are the same as those in an eminent domain action."). *But cf. Del Monte Dunes*, 526 U.S. at 702 (stating that, at least for the purpose of resolving a Seventh Amendment jury issue, a direct condemnation "differs in important respects" from § 1983 regulatory takings claim).

27. *See, e.g.*, Florida Rock Indus., Inc. v. United States, 791 F.2d 893, 899 (Fed. Cir. 1986) (quoting Armijo v. United States, 663 F.2d 90, 93 (Ct. Cl. 1981)) (stating that "the characteristic feature [of takings compensation suits] is the defendant's use of *rightful* property, contract, or regulatory rights to control and prevent exercise of ownership rights") (emphasis supplied by Federal Circuit); Catellus Dev. Corp. v. United States, 31 Fed. Cl. 399, 408 n.9 (Fed. Cl. 1994) ("Illegal government actions do not result in takings."); Elkins-Swyers Office Equip. Co. v. County of Moniteau, 209 S.W.2d 127, 131 (Mo. 1948) ("The just compensation clause of the Constitution contemplates a lawful taking of private property for public use."); *see also Del Monte Dunes*, 526 U.S. at 720 (Souter, J., concurring in part and dissenting in part) (describing "modern view of acts effecting inverse condemnation as being entirely lawful").

cials acting within the scope of their authority. On the other hand, consistent with the rule that the principal generally is not liable for the agent's actions outside the scope of its authority, there is no taking by the government when the official's actions are unauthorized. The Supreme Court applied this reasoning in *Hooe v. United States*,[28] in which the Court rejected a takings claim based on the Civil Service Commission's occupation of a larger portion of the plaintiff's property than covered by a lease approved by Congress.[29] The Court said:

> The constitutional prohibition against taking private property for public use without just compensation is directed against the Government, and not against individual or public officers proceeding without the authority of legislative enactment. The taking of private property by an officer of the United States for public use, without being authorized, expressly or by necessary implication, to do so by some act of Congress, is not the act of the Government.[30]

Similarly, in *Hughes v. United States*,[31] the Court rejected a takings claim based on flood damage resulting from a government official's unauthorized dynamiting of a levee along the Mississippi River, stating that the action "cannot be held to be the act of the United States."[32] Again, a number of lower federal and state courts have followed this agency reasoning.[33]

Finally, some courts have concluded that erroneous govern-

28. 218 U.S. 322 (1910).

29. *Hooe*, 218 U.S. at 336.

30. *Id.* at 335-36.

31. 230 U.S. 24, 35 (1913).

32. *Hughes*, 230 U.S. at 25; *see also* Regional Rail Reorganization Act Cases, 419 U.S. 102, 127 n.16 (1974) (quoting *Hooe*, 218 U.S. at 336).

33. *See, e.g.*, Del-Rio Drilling Program, Inc. v. United States, 146 F.3d 1358 (Fed. Cir. 1998) (stating that ultra vires actions by agency officials cannot support a valid takings claim); Ramirez de Arellano v. Weinberger, 745 F.2d 1500, 1523 (D.C. Cir. 1984), *vacated on other grounds*, 471 U.S. 1113 (1985) (holding that the plaintiffs were entitled to injunction against an alleged seizure of lands in Honduras by U.S. military, based in part on the fact that the plaintiffs could not bring a suit for compensation under the Takings Clause based on "unauthorized" government action"); *cf.* Landgate v. California Coastal Comm'n, 953 P.2d 1188, 1201 n.7 (Cal.), *cert. denied*, 119 S. Ct. 179 (1998) (reserving question "whether the action of a government agency that exceeds its statutory authority can ever be a compensable taking"). The agency theory can also be conceptualized in terms of the Takings Clause's implicit "state action" requirement. *See* Zinn, *supra* note 7, at 250-55.

ment actions cannot support so-called "temporary" regulatory takings claims on the theory that any injury suffered by an owner during the period required to get the error corrected results from a "normal delay" as defined by the Supreme Court in *First English Evangelical Lutheran Church v. County of Los Angeles.*[34] *First English* addressed the issue of the appropriate remedy in a regulatory takings case, concluding that the government cannot simply rescind a regulation found to effect a taking but must pay financial compensation for the period that the restriction was in force.[35] The decision did not actually address the merits of the plaintiff's takings claim; rather, the case was decided on the assumption that the ordinance effected a taking by allegedly denying the owner "all use of its property."[36] The Court went out of its way to "limit [its] holding to the facts presented" and to say that it "of course [did] not deal with the quite different questions that would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like which are not before us."[37]

In the aftermath of *First English*, land owners, after successfully challenging the legal validity of regulations in court, have in some instances sought compensation on a "temporary taking" theory for the period that the invalid regulation was in place. Several courts, hewing closely to the language of *First English*, have rejected such claims on the ground that the process of getting a government error corrected, including pursuing necessary judicial relief, represents a "normal delay" within the meaning of *First English.*[38]

Implicit in the "normal delay" argument, at least in the view

34. 482 U.S. 304 (1987).

35. *First English*, 482 U.S. at 322.

36. *Id.* at 321.

37. *Id.*

38. *See, e.g., Landgate*, 953 P.2d at 1188 (rejecting a takings claim based on delay caused by commission's erroneous assertion of jurisdiction over development, based on *First English*); Chioofi v. City of Winooski, 676 A.2d 786 (Vt. 1996) (rejecting takings claim based on delay caused by city's erroneous denial of variance application, based on *First English*); *see also* Smith v. Town of Wolfeboro, 615 A.2d 1252 (N.H. 1992) (rejecting takings claim based on town's erroneous failure to certify buildable lot). *But see* Eberle v. Dane County Bd. of Adjustment, 595 N.W.2d 730 (Wisc. 1999) (rejecting, over strong dissent, argument that *First English* "normal delays" exception precluded finding a temporary taking where board improperly denied a special exception permit).

of some courts, is the thought that the government *may* be liable for a taking if the regulatory delay is "abnormal."[39] In other words, this alternative standard for determining when the government should *not* be liable for errors arguably points to circumstances in which government errors *should* give rise to takings liability. This theory of government non-liability for erroneous actions, like the agency theory, is narrower than the "public use" theory.

Reviewing the foregoing options, all of which have respectable case law support, reveals doctrinal confusion of astonishing proportions. Not only are the options very different, but they are also very contradictory. Based on the decisions discussed above, a court could plausibly rule that a government action results in a taking for the sole reason that government officials acted in an arbitrary fashion. Another court could issue an equally plausible ruling that the arbitrariness of the government action by itself precludes a finding of a taking. The need for the judiciary, and the United States Supreme Court in particular, to cut a clearer path through this legal thicket could not be more patent.

B. The Supreme Court on Errors and Takings

In its latest takings decisions, *Eastern Enterprises v. Apfel*,[40] issued in June 1998, and *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*,[41] issued in June 1999, the Court has provided decidedly confusing signals on how government error fits into a takings analysis. As discussed below, upon careful analysis, these decisions appear to most nearly endorse Option 3, the idea that government error precludes a finding of a taking. But this conclusion can hardly be gleaned from an explicit

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39. *See, e.g.*, Ali v. City of Los Angeles, 77 Cal. App. 4th 246, 254-55; 91 Cal. Rptr. 2d 458, 464 (Cal. Ct. App. 1999) (finding that an "arbitrary" and "unreasonable" one and one-half year delay in issuance of permit to demolish low-income housing, in violation of state law, was not a "normal delay" within the meaning of *First English* and therefore constituted a temporary regulatory taking).

40. 524 U.S. 498 (1998). For a comprehensive discussion of *Del Monte Dunes* and its implications for the takings doctrine, see John D. Echeverria, *Revving the Engines in Neutral*: City of Monterey v. Del Monte Dunes at Monterey Ltd., 29 EVNTL. L. REP. 10682 (1999).

41. 526 U.S. 687 (1999).

ruling on the issue in either case. To understand the apparent significance of these cases, some background is required.

Eastern Enterprises involved both due process and takings challenges to the Coal Industry Retiree Health Benefit Act ("Coal Act"). Four Justices, led by Justice O'Connor, concluded that the Coal Act effected a taking under the Fifth Amendment. Having resolved the case based on the takings claim, these justices found it unnecessary to address the due process claim.[42] Justice Kennedy, who cast the decisive vote in favor of the plaintiff, rejected the takings claim, but he concluded that the Coal Act violated the Due Process Clause.[43] Four dissenting Justices concluded that the Coal Act neither violated the Due Process Clause nor effected a taking.[44] Ironically, therefore, the outcome ultimately turned on Justice Kennedy's analysis of the due process claim, a ruling in which no other Justice joined. The only issue on which a majority of the Court agreed (other than that the Coal Act was unconstitutional) was that there was no taking.

Technically, *Eastern Enterprises* has no precedential value because the Court could not agree upon a single rationale for the result.[45] Moreover's the "majority" ruling rejecting the takings claim must be cobbled together from separate opinions by different Justices who reached opposite conclusions on the constitutionality of the Act. Nonetheless, the case reveals a majority of the Court endorsing the view that an erroneous government action cannot be a taking under the Fifth Amendment.

Justice Breyer stated that the Takings Clause did "not apply" because the Clause refers to the taking of "private property . . . for public use, without just compensation.'"[46] "As this language suggests," he said, "at the heart of the Clause lies a concern, not with preventing arbitrary or unfair government action, but with providing compensation for *legitimate* government

42. *Eastern Enters.*, 524 U.S. at 537-38.

43. *Id.* at 539 (Kennedy, J., concurring in part and dissenting in part).

44. *Id.* at 553 (Stevens, J., dissenting).

45. *See* Association of Bituminous Contractors, Inc. v. Apfel, 156 F.3d 1246, 1255 (D.C. Cir. 1998) ("[T]he only binding aspect of *Eastern Enterprises* is its specific result—holding the Coal Act unconstitutional as applied to Eastern Enterprises.").

46. *Eastern Enters.*, 524 U.S. at 554 (Breyer, J., dissenting) (quoting U.S. CONST. amend. X).

action that takes 'private property' to serve the 'public' good."[47] Thus, Breyer equated the term "public use" with a requirement that a taking be premised on a "legitimate" government action.[48] According to his view, a government action which is "arbitrary or unfair" is outside the scope of the Takings Clause because it cannot represent a taking for a "public use."

Justice Kennedy agreed with this analysis. He said that the case ultimately raised a question about the "*legitimacy*" of the Coal Act and therefore did not involve a viable takings claim.[49] He quoted in full the excerpt from *First English* quoted above (a claim of a taking for "public use" must be based on an "otherwise proper" government action) and said that the Court had to first resolve the question of the Coal Act's legitimacy, raised in this case in the form of the due process claim, "reserving takings analysis for cases where the governmental action is otherwise *permissible*."[50] Unless the government action is "legitimate" and "permissible," it cannot support a claim for compensation under the Takings Clause because it is not a taking for a "public use." Justice Kennedy frankly acknowledged that this understanding of the Takings Clause was in "uneasy tension" with the Court's often repeated statement that a government action effects a taking if it does not "substantially advance legitimate state interests."[51]

The way in which both Justice Kennedy and the dissenters addressed the relationship between the due process and takings claims confirms that they believe a government error precludes a finding of a taking. It is well established, of course, that one set of allegations can implicate more than one constitutional provision, and when the specific guarantees of more than one constitutional provision are implicated, "[t]he proper question is not which Amendment controls but whether either Amendment is violated."[52] If Justice Kennedy and the dissenters had viewed the due process and takings claims as independent of each other,

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47. *Id.* (emphasis added).
48. *Id.*
49. *Id.* at 545 (emphasis added).
50. *Id.* at 545-46 (emphasis added).
51. *Eastern Enters.*, 524 U.S. at 545 (quoting Agins v. City of Tiberon, 447 U.S. 755, 760 (1980)).
52. United States v. James Daniel Good Real Property, 510 U.S. 43, 50 (1993).

they would have addressed both claims before concluding that the plaintiff's case failed. They did not address the takings claim on the merits because, in their view, the allegation of a due process violation *negated* a necessary precondition for a viable takings claim, that is, that the taking be for a "public use." In Justice Breyer's words, in view of the plaintiff's assertion of a due process violation, the takings clause simply did "not apply" in this case.[53]

Following the decision in *Eastern Enterprises,* there was speculation that in the then pending case of *Del Monte Dunes,* which involved a similar takings challenge to allegedly arbitrary and unreasonable government action, the Court might resolve the place of government errors in takings analysis. While the Court's analysis in *Del Monte Dunes*[54] certainly demonstrates the Court's awareness of the importance of this issue, the Court declined the opportunity to definitively resolve the question.

An owner/developer filed suit alleging that the City of Monterey, California had blocked any development of its property, in part by imposing a series of pretextual and contradictory conditions on the proposed plan of development.[55] The Court, by a vote of five to four, upheld a takings award of $1.4 million.[56] Justice Kennedy, who cast the decisive vote against the takings claim in *Eastern Enterprises,* this time cast the decisive vote in favor of affirming the takings award.

The *Del Monte Dunes* Court based its decision on the theory that the city failed to "substantially advance a legitimate public purpose" making *Del Monte Dunes* the first Supreme Court decision to uphold a finding of a taking based on this theory outside of the *Nollan*[57]*/Dolan*[58] exactions context.[59] Thus, contrary to the reasoning of the majority in *Eastern Enterprises,* the *Del Monte Dunes* decision can be seen as endorsing the idea that a government error does support a finding of a taking. But this

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53. *Eastern Enters.,* 524 U.S. at 554 (Breyer, J., dissenting).

54. Remarkably, none of the opinions in *Del Monte Dunes* either discusses or even cites *Eastern Enterprises.*

55. *Del Monte Dunes,* 526 U.S. at 694.

56. *Id.* at 707-08.

57. Nollan v. California Coastal Comm'n 483 U.S. 825 (1987).

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

59. *Dolan,* 512 U.S. at 1644.

reading is contradicted by the fact that the Court expressly said it was not in fact addressing the legitimacy of the "substantially advance" takings test.[60] Given that the city had not objected to the jury instructions incorporating this test, the Court said that the plaintiff waived any possible objection to application of the test, leaving the Court with no reason to address the issue.[61] Moreover, a majority of the Court, including Justice Scalia, explicitly said that it was undecided whether the "substantially advance" test represents a legitimate takings test,[62] and four Justices specifically raised the question of whether this test involved a due process rather than a takings issue.[63] Thus, while the Court in *Del Monte Dunes* applied the "substantially advance" test, the decision cannot be read as endorsing this test. It is nevertheless striking that, just one year after a majority of the Court strongly implied that the "substantially advance" test was illegitimate, the Court, albeit a bare majority, relied on this test to uphold a finding of a taking.

Moreover, *Del Monte Dunes* arguably supports the notion that an error can establish a taking. In the course of explaining why it was appropriate to submit the takings claim to a jury under the Seventh Amendment, Justice Kennedy emphasized that the jury had not been asked to assess the reasonableness of the city's land use regulations, either in general or as applied in this case.[64] Rather, he said:

> [T]he theory argued and tried to the jury was that the city's denial of the final development permit was inconsistent not only with the city's general ordinances and policies but even with the shifting ad hoc restrictions previously imposed by the city. Del Monte Dunes' argument, in short, was not that the city had followed its zoning ordinances and policies but rather that it had not done so. As is often true in § 1983 actions, the disputed questions were

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60. *Del Monte Dunes*, 526 U.S. at 707.

61. *See id.* at 699; *see also id.* at 712 n.2 (Scalia, J., concurring).

62. *Id.* at 712 n.2 (Scalia, J., concurring); *see also id.* at 723 n.12 (Souter, J., concurring in part and dissenting in part).

63. *See Del Monte Dunes*, 526 U.S. at 723 n.12 ("I offer no opinion here on whether *Agins* was correct in assuming that this 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.").

64. *See id.* at 707-08.

whether the government had denied a constitutional right in acting outside the bounds of its authority. . . . [65]

Because Justice Kennedy emphasizes that the core of the case was the alleged illegality of the city's actions, his analysis appears to be consistent with the idea that government error can be an affirmative basis for a finding of a taking.[66]

Justice Kennedy made a similar point in the portion of his opinion, speaking for only a plurality of the Court, arguing that this § 1983[67] regulatory takings claim was properly submitted to a jury because it was analogous to a common law tort action for interference with property interests. Justice Kennedy stated that, at least when the government fails to provide a postdeprivation remedy for a taking,[68] a § 1983 regulatory takings claim "sounds in tort."[69] In a passage that is highly relevant to the interpretation of the phrase "public use," Justice Kennedy rejected the city's argument that because a taking must be for a "public use," the action cannot be "tortious or unlawful."[70] To the contrary, he said, when the government effects a taking and fails to provide a remedy, "the government's actions are not only unconstitutional but unlawful and tortious as well."[71]

Justice Souter in dissent, on behalf of himself and three other Justices, argued that the Seventh Amendment did not

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65. *Id.* at 708 (emphasis added).

66. In the same vein, Justice Kennedy also quoted with approval the court of appeals' following characterization of the takings claim: "Del Monte argued that the City's reasons for denying their application were invalid and that it unfairly intended to forestall any reasonable development of the [property]." *Del Monte Dunes*, 526 U.S. at 698 (quoting Del Monte Dunes at Monterey Ltd. v. City of Monterey, 95 F.3d 1422, 1431 (9th Cir. 1996)); *see also id.* at 694 (stating that the case was submitted to the jury on the "theory that the city effected a regulatory taking or otherwise injured the property by unlawful acts, without paying compensation or providing an adequate post-deprivation remedy").

67. 42 U.S.C. § 1983 (1994).

68. At the time Del Monte Dunes filed its suit, California courts had not yet recognized an owner's right to the compensation remedy under the Takings Clause. *See Del Monte Dunes*, 526 U.S. at 696. California courts, and most if not all other state courts, now recognize that compensation is the appropriate postdeprivation remedy for a taking. *See generally* First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987).

69. *Del Monte Dunes*, 526 U.S. at 704.

70. *Id.* at 705.

71. *Id.*

create a right to a jury trial in a § 1983 regulatory takings action and took a seemingly different view of the relevance of government error.[72] Disagreeing with Justice Kennedy's "tort analogy," he said that "th[e] very assumption that liability flows from wrongful or unauthorized conduct is at odds with the modern view of acts effecting inverse condemnation as being entirely lawful. Unlike damages to redress a wrong . . . , a damages award in an inverse condemnation action orders payment of the 'just compensation' required by the Constitution for payment of an obligation lawfully incurred."[73] This closely tracks the view expressed by both Justice Breyer and Kennedy in *Eastern Enterprises* that a valid takings claim presupposes the "legitimacy" of the government action. It is, to say the least, perplexing that Justice Kennedy apparently aligned himself on the opposite side of this debate in *Del Monte Dunes*.

Perhaps the most important point to emphasize is that Justice Kennedy's opinion is both narrow and qualified. All of the statements quoted above were made in the context of the question of the right to a jury, and did not directly address the substantive standard for takings liability. Furthermore, Justice Scalia declined to join in the portion of Justice Kennedy's opinion justifying a jury right based on the "tort analogy," meaning that this portion of Kennedy's opinion was only embraced by a plurality of the Court.[74] Finally, all of Justice Kennedy's statements concerning the jury right were based on the premise that the "substantially advance" takings test was properly applied in this case—but only because the city had waived any objection to the jury instructions incorporating this test.[75]

Upon further analysis, it becomes apparent that the majority opinion in *Del Monte Dunes* is not in fact in conflict with the conclusion by a majority in *Eastern Enterprises* that a valid taking claim rests on a "legitimate" government action. To understand why requires an examination of the fundamentals of takings law.

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72. *Id.* at 713.
73. *Id.* at 720.
74. *See Del Monte Dunes*, 526 U.S. at 708.
75. *Id.* at 700-08.

III. THE PUBLIC USE REQUIREMENT

As suggested by the foregoing discussion, the meaning of the phrase "public use" in the Takings Clause is likely to have particular significance in deciding how government error fits into takings analysis. This Section examines the public use requirement, focusing on the shifting judicial interpretations of this phrase over time. It also describes the Supreme Court's current interpretation of the public use requirement and concludes that this interpretation is consistent with the view that an erroneous government action cannot properly be viewed as a government action for a "public use" within the meaning of the Takings Clause.

A. The History of the Public Use Requirement

While the Framers' deliberations supply little direct evidence about the intended meaning of the public use requirement (or the Takings Clause as a whole), Theodore Sedgwick, an early commentator on the Constitution, emphasized that the Clause was "only intended to operate . . . where property is taken for objects of general necessity or convenience."[76] This accords with the views of the first takings scholar, Hugo Grotius, who wrote in the Seventeenth Century:

> A king may two ways deprive his subjects of their right, either by way of punishment or by virtue of the eminent power. But if he does it the last way, it must be for some public advantage, and then the subject ought to receive, if possible, a just satisfaction for the loss he suffers from the common stock.[77]

Early Americans apparently attached great importance to the idea that the eminent domain power should only be exercised to further a "public use."[78]

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76. THEODORE SEDGWICK, A TREATISE ON THE RULES WHICH GOVERN THE INTERPRETATION AND APPLICATION OF STATUTORY AND CONSTITUTIONAL LAW 501 (1857).

77. 2 HUGO GROTIUS, DE JURE BELLI ET PACIS, ch. 14, § 7 (1625).

78. William B. Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553, 589 (1972) (explaining that early commentators on eminent domain were more concerned about public use limitation than any other aspect of eminent domain law).

In the Nineteenth Century, judicial debate over the "public use" requirement focused on whether exercises of the eminent domain power involved a "private" or a "public" use.[79] This question typically arose from appropriations rather than regulations (to which the Takings Clause was originally thought not to apply at all), and the disputed issue was usually whether the purpose (to facilitate construction of a private railroad or canal, for example) was sufficiently "public" to justify use of the eminent domain power. If it was not, the government's attempted exercise of the eminent domain power was subject to an injunction, whether or not the government offered to pay "just compensation." In interpreting this provision, courts commonly applied "a use by the public" test, meaning that the public had to have a right to use the facility or service for which the property was being seized in order to justify use of eminent domain.[80]

In the now familiar story, in the twentieth century, as the goals and methods of progressive government multiplied, courts gradually expanded the range of uses of the eminent domain power that satisfied the public use requirement. This trend is generally viewed as having reached its apogee in two Supreme Court cases, *Berman v. Parker*[81] and *Hawaii Housing Authority v. Midkiff*.[82] In the first case, the Supreme Court rejected a "public use" challenge to the District of Columbia's exercise of eminent domain power to acquire land for an urban redevelopment project. The Court described the permissible uses of the eminent domain power as co-extensive with the legislature's legitimate exercises of the police power:

> The definition is essentially the product of legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition. Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh

79. *See* Stoebuck, Note, *The Public Use Limitation on Eminent Domain: An Advance Requiem*, 58 YALE L.J. 599 (1949).

80. *See* 2A NICHOLS ON THE LAW OF EMINENT DOMAIN § 7.01 to .03 (3d ed. 1982 & Supp. 1999) (discussing voluminous case law on the meaning of "public use").

81. 348 U.S. 26 (1954).

82. 467 U.S. 229 (1984).

conclusive.[83]

In *Midkiff*, the Court rejected a "public use" challenge to the use of eminent domain to diversify private land ownership and break up the land oligopoly in Hawaii. It reiterated that the "public use" requirement is "coterminous with the scope of a sovereign's police powers."[84]

Prior to *Berman* and *Midkiff*, government errors had been understood to provide a basis for enjoining appropriations of private property.[85] With *Berman* and *Midkiff* and the development of the modern understanding that eminent domain power stretches to the limits of government authority, this traditional limitation remained intact.[86] If a government action serves a public use and if the legislature has authorized it, it logically follows that an action which is not authorized by the legislature, or which is contrary to a legislative directive, cannot serve a public use. By like reasoning, a government action cannot serve a public use if it is unlawful in the sense that it violates some constitutional limitation (other than the Takings Clause), such as the Due Process Clause or the Equal Protection Clause. In short, defining public use as co-extensive with government authority made explicit what had always been implicit: Erroneous government actions cannot be viewed as serving a "public use."[87]

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83. *Berman*, 348 U.S. at 32.

84. *Midkiff*, 467 U.S. at 240; *see also* Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1014 (1984) (stating that the scope of the "public use" requirement of the Taking Clause is "coterminous with the scope of a sovereign's police powers" (quoting *Midkiff*, 467 U.S. at 240 (citing *Berman*, 348 U.S. at 33)).

85. *See supra* note 24.

86. Even prior to *Berman*, in *United States v. Welch*, 327 U.S. 546 (1946), the Supreme Court said that "the function of Congress [in exercising the eminent domain power is] to decide what type of taking is for a public use and that the agency authorized to do the taking may do so *to the full extent of its statutory authority*." *Welch*, 327 U.S. at 551-52 (emphasis added). This statement suggests that an exercise of eminent domain power would not be permissible if it were contrary to the statute governing an agency's actions. *See id.* at 552 (explaining that in Cincinnati v. Vester, 281 U.S. 439 (1930), the Court "denied the power to condemn 'excess' property on the ground that the state law had not authorized it").

87. *See* Stoebuck, *supra* note 79, at 588-89 ("[I]f no legislative body . . . has authorized a road from point *A* to point *B*, land for such a road may not be condemned. In such cases as these, then, it seems inevitable, even truistic, to say there is a public-purpose limitation on the exercise of the eminent power.").

B. *"Public Use" and Ethics*

In subsequent takings cases discussing the "public use" requirement, the Supreme Court has embraced the implication of *Berman* and *Parker* that erroneous government actions cannot result in compensable takings because they cannot be takings for "public use." For example, Justice Brennan articulated this position in his influential dissenting opinion in *San Diego Gas & Electric v. San Diego*.[88] He argued that the Takings Clause should be interpreted to provide a monetary remedy for "temporary" regulatory takings, a position later accepted by the Court in *First English Evangelical Lutheran Church v. Los Angeles County*.[89] At the same time, he distinguished the case of a lawful regulation from the "different case . . . where a police power regulation is not enacted in furtherance of the public health, safety, morals, or general welfare so that there may be no *'public use.'*"[90] According to Justice Brennan, government actions which are erroneous in the sense that they are arbitrary and capricious (for example, under administrative law principles or the Due Process Clause) cannot support takings claims because they serve no public use.[91]

In the same vein, but more explicitly, Chief Justice Rehnquist indicated a few years later in *First English* that only a "proper" government action can be a taking for a "public use."

> Consideration of the compensation question must begin with direct reference to the language of the Fifth Amendment, which provides in relevant part that 'private property [shall not] be taken for public use, without just compensation.' As its language indicates, and as the Court has frequently noted, this provision does not prohibit the taking of private property, but instead places a condition on the exercise of that power. . . . This basic under-

88. 450 U.S. 621 (1981).

89. 482 U.S. 304 (1987).

90. *San Diego Gas & Elec.*, 450 U.S. at 656 n.23 (emphasis added).

91. Another Court statement supportive of the view that a valid takings claim presupposes the validity of the government action appears in the decision in *United States v. Central Eureka Mining Co.*, 357 U.S. 155 (1958). The Court stated, albeit without specific reference to the "public use" requirement, that "[o]rdinarily the remedy for arbitrary governmental action is an injunction, rather than an action for just compensation." *Central Eureka Mining Co.*, 357 U.S. at 166, n.12.

> standing of the Amendment makes clear that it is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of *otherwise proper* interference amounting to a taking.[92]

It is obvious from this language that Justice Rehnquist intended to equate the term "proper" with "for public use." A compensable taking is "otherwise proper," according to Justice Rehnquist, in the sense that the interference is "improper" because it effects a taking, but it is "otherwise proper" because, apart from the taking, it is lawful. According to this view, to be a compensable taking, the taking must be for a lawful purpose.

In the Court's decision two years ago in *Eastern Enterprises v. Apfel*,[93] a majority of the Justices embraced their reading of the "public use" requirement once again. Justice Kennedy, along with Justice Breyer, on behalf of himself and three other Justices, concluded that the Takings Clause did "not apply" in that case because a takings claim presupposes a valid government action. "As th[e] language [of the Takings Clause] suggests," Justice Breyer said, specifically referring to the term "public use," "at the heart of the 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."[94] Unless the government action is "legitimate" and "permissible," the majority reasoned, it cannot support a claim for compensation under the Takings Clause because it is not a taking for a "public use."

The Court's decision in *Del Monte Dunes* the following year contains language that appears on the surface seems to contradict this interpretation of the term "public use." Upon analysis, however, the conflict turns out to be only apparent. Justice Kennedy in *Del Monte Dunes* rejected the city's argument that, if an alleged taking is "tortious or unlawful," there cannot be a taking for a "public use."[95] On its face, this position seems to conflict with Justice Kennedy's conclusion in *Eastern Enterprises* that a valid taking for a "public use" must rest on a "legitimate" and

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92. 482 U.S. at 314-15 (second emphasis added; internal citations omitted).
93. 524 U.S. 498 (1998).
94. *Eastern Enters.*, 524 U.S. at 554 (emphasis added).
95. 526 U.S. at 702.

"permissible" government for a "public use" action. But there is no contradiction once one recognizes that Justice Kennedy was using these terms for quite different purposes in each case. The question in *Eastern Enterprises* was whether the erroneousness of the underlying government action precludes a finding that the action effected a taking for a public use. The *Del Monte Dunes* Court was addressing a different question: Whether a § 1983 regulatory takings claim was properly tried to a jury? To address the latter question, applying conventional Seventh Amendment analysis, the Court asked whether the claim was analogous to a common law tort claim, which is jury triable. The plurality concluded that in the circumstances where a taking by a municipality and is alleged *and* where the state government fails to provide a post-deprivation remedy, a § 1983 regulatory takings suit in federal court challenges government action that is both "tortious and unlawful" and therefore is properly submitted to a jury.[96] However, that conclusion has no direct bearing on the different issue addressed in *Eastern Enterprises*: Whether, in determining if government action results in a taking in the first place, the action must itself be lawful. *Del Monte Dunes* and *Eastern Enterprises* are not in conflict because they address different questions.

As discussed in Section II, Justice Souter in dissent expressed the view that Justice Kennedy's "tort analogy" for the purpose of addressing the jury issue conflicted with "the modern view of acts effecting inverse condemnation as being entirely lawful."[97] While this criticism is probably accurate, Justice Souter was not suggesting that Justice Kennedy's approach to the jury question effectively repudiated the "modern view" of takings doctrine. Justice Kennedy simply said that an uncompensated taking is "unlawful and tortious" when the government

96. *Id.* at 701-02. Justice Kennedy's reasoning suggests that his characterization of the claim in *Del Monte Dunes* has very little, if any, relevance for future takings litigation. In particular, based on Justice Kennedy's reasoning, a takings claim against the United States could not be characterized as involving "tortious and unlawful" action because the Tucker Act provides a post-deprivation remedy. *See* 28 U.S.C. § 1346(b) (1994). Similarly, as long as the state courts recognize their obligation to provide compensation for a taking, *see supra* note 52, a future takings suit against a local government presumably could not properly be characterized in this manner either.

97. *Del Monte Dunes*, 526 U.S. at 720.

takes private property and provides no post-deprivation remedy.[98] Nothing in *Del Monte Dunes* indicates that Justice Kennedy altered his view expressed in *Eastern Enterprises* that, in order to establish a compensable taking in the first place, the government action must be "legitimate" and "permissible." While Justice Souter believed Justice Kennedy had failed to apply the implications of that viewpoint to the jury issue in *Del Monte Dunes,* his dissent cannot properly be read to imply that Justice Kennedy's analysis in *Del Monte Dunes* supplants his analysis in *Eastern Enterprises.* Certainly Justice Kennedy, who did not ever discuss his *Eastern Enterprises'* opinion in *Del Monte Dunes*, did not note any contradiction between his position in the two cases.

On the other hand, there is obviously a conflict between the thesis of this Article that a valid takings claim presupposes a legitimate government action from a "public use" and the ruling in *Del Monte Dunes* that the city effected a taking because its actions failed to "substantially advance [a] legitimate public interest."[99] However, the best view is that the Court's ruling on this issue is confined to the facts of the case and cannot be viewed as an actual endorsement of the "substantially advance," test. The *Del Monte Dunes* Court declined to address the legitimacy of the takings test applied by the lower courts because the city waived any objection to the jury instructions.[100] Moreover, a majority of the Court explicitly declined to endorse the "substantially advance" test, with four Justices specifically observing that this test may represent a due process rather than a takings issue.[101] *Del Monte Dunes* is an aberrational takings case which arose as a direct result of the confusing signals on takings and errors in the Court's prior takings decisions. At the end of the day, despite superficial indications to the contrary, *Del Monte Dunes* does not contradict the conclusion of the majority in *Eastern Enterprises* that an erroneous government action cannot result in a taking for "public use."

Armed with this understanding of the meaning of the term

98. *Id.* at 705.
99. *Id.* at 707-08.
100. *Id.*
101. *See id.* at 707.

"public use," what sense can one make of the three alternative approaches reflected in the case law for addressing government errors under the Takings Clause?

IV. EVALUATING THE OPTIONS

A. Errors as Takings

The first option is to treat the fact that the government erred as an affirmative, independent basis as a finding of a taking. For at least five different reasons, this option should be rejected. First, this theory is incompatible with the understanding of the "public use" requirement outlined above. Second, the Supreme Court's repeated statement that an action effects a taking if it fails to "substantially advance [a] legitimate public interest,"[102] which supports the idea that an error can lead to a taking, reflects a mistaken incorporation of due process thinking into the takings doctrine and does not represent a legitimate takings test. Third, the idea that a government error supports a finding of a taking is inconsistent with the language and original understanding of the Takings Clause. Fourth, the *Dolan* and *Nollan* decisions, which indirectly support the idea of errors-as-takings, do not support the application of the tests developed in those cases beyond the narrow context of development exactions. Finally, as a matter of legal policy, the theory that the government takes when it errs is objectionable because it would result in unfair windfalls to property owners at taxpayer expense. Each of these reasons is addressed below.

First, as demonstrated in Section III, the idea that a government error provides an independent basis for a finding of a taking is contradicted by the requirement that a taking be for a public use. A government action must be "legitimate," "proper" or "permissible" to be a taking for a "public use" within the meaning of the Takings Clause. Because the validity of government action is a *precondition* for a valid claim under the Takings Clause, the invalidity of a government action cannot itself be the basis for a finding of the taking. The Supreme Court's

102. *Supra* note 12.

understanding of the "public use" requirement precludes the error-as-taking theory of takings liability.

Second, while the Supreme Court has repeatedly stated in recent years that a government action results in a taking if it "fails to substantially advance a legitimate state interest," it is apparent upon analysis that this is not a legitimate, general takings test, as the Supreme Court itself apparently now recognizes.

At the outset, one might well wonder, given the understanding of the public use requirement outlined above, how it is even possible that the Court came to articulate the "substantially advance" theory of takings liability. The answer is that several decades ago, the Court, largely through inadvertence and apparently without considering the conflict with the "public use" language, imported this test into takings cases from due process doctrine.[103] In *Agins,*[104] the Court said that a government action "effects a taking" if it "does not substantially advance legitimate state interests."[105] But the primary authority that the Court relied upon to support this test was the decision in *Nectow v. City of Cambridge,*[106] which involved a due process—not a takings—claim. In addition, the portion of *Nectow* cited in *Agins* quotes from *Village of Euclid v. Ambler Realty Co.,*[107] another due process case.[108] The due process origins of the "substantially advance" test are obvious,[109] as numerous commentators have recognized.[110]

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103. As I have discussed elsewhere, *see* John D. Echeverria, *Does a Regulation That Fails to Advance a Legitimate Governmental Interest Result in a Regulatory Taking?*, 29 ENVTL. L. REP. 853 (1999), the Court's muddling of takings and due process thinking can be explained as a consequence of its uncertainty in the 1970s and 1980s about whether the Takings Clause supported any type of constitutional challenge to burdensome regulation or whether the Due Process Clause instead provided the appropriate vehicle for raising this type of claim.

104. Agins v. City of Tiburon, 447 U.S. 255 (1980).

105. *Agins*, 477 U.S. at 260.

106. 277 U.S. 183 (1928).

107. 272 U.S. 365 (1926).

108. *Agins*, 447 U.S. at 260.

109. Prior to *Agins*, in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978), the Court said that "a use restriction . . . may constitute a 'taking' if [it is] not reasonably necessary to the effectuation of a substantial public purpose." *Penn Central*, 438 U.S. at 127. But, again, the Court relied upon due process precedents to support this ostensible takings test, including *Nectow* and the discussion of due process in *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594 (1962).

110. *See* J. Peter Byrne, *Ten Arguments for the Abolition of the Regulatory Tak-*

The present Court apparently now recognizes that the "substantially advance" takings test was borrowed from due process cases. The Court applied the "substantially advance" test in *Del Monte Dunes*, but only because the city waived any objection to its validity, and a majority of the Court expressly reserved the question of whether this test stated a legitimate takings test.[111] Justice Souter said, "I offer no opinion here on whether *Agins* was correct in assuming that this 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."[112] Significantly, not a single Justice came to the defense of the "substantially advance" test as a legitimate takings test.[113]

While it might be contended that it is now too late in the day to reject the frequently recited "substantially advance" takings test, its roots in takings soil are actually quite shallow. The Supreme Court has never relied on this ostensible takings test to uphold a finding of a taking, except in several exceptional cases which lend no support to the idea that the "substantially advance" test represents an independent, general takings test. The Court's application of the test in *Del Monte Dunes* obviously sets no precedent because the Court's resolution of the case rests on the city's waiver. In addition, while the Court relied upon the "substantially advance" language in *Nollan* and *Dolan,* those decisions are explained by—and logically confined to—the exactions context, as explained below. The fact is, based on the actual outcomes of Supreme Court takings cases, there is no reason to believe that the "substantially advance" test is a legitimate,

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ings Doctrine, 22 ECOLOGY L.Q. 89, 104 (1995); Jerold Kayden, *Land Use Regulations, Rationality, and Judicial Review: The RSVP in the Nollan Invitation*, 23 URB. LAW. 301 (1991); Jan G. Laitos, *The Public Use Paradox and the Takings Clause,* 13 J. ENERGY NAT. RESOURCES & ENVT'L L. 9, 33 (1993); Jonathan Sullivan, Eastern Enterprises v. Apfel; *How* Lochner *Got it Right*, 60 OHIO ST. L.J. 1103, 1128 (1999); *see also* John Echeverria & Sharon Dennis, *The Takings Issue and the Due Process Clause: A Way Out of the Doctrinal Confusion*, 17 VT. L. REV. 695 (1993).

111. 526 U.S. 687, 713 n.2 (Scalia, J., concurring); *see also id.* at 713 n.12 (Souter, J., concurring in part and dissenting in part).

112. *Del Monte Dunes*, 526 U.S. at 713 n.12.

113. *See also* John D. Bristow, Eastern Enterprises v. Apfel: *Is the Court One Step Closer to Unraveling the Takings and Due Process*, 77 N.C. L. REV. 1575, 1577 (1999) (describing *Eastern Enterprises* as the "final step" in the direction of excising due process analysis from takings doctrine).

general takings test.

It could be contended that, even if the "substantially advance" test was originally a due process test and has only shallow roots in takings doctrine, there is no reason not to apply the same kind of means-analysis under both the Due Process and Takings Clauses. This approach, it could be argued, would simply provide comprehensive constitutional protection for private property owners. This contention ignores the differences in language between the Takings Clause and the Due Process Clause. When constitutional provisions use different language it is generally appropriate to assume that they have a different meaning, especially when the provisions are included in the same constitutional amendment.[114] Thus, the constitutional language contradicts the notion that the Takings Clause can be freely invested with the same meaning as the Due Process Clause.

In view of the foregoing, it is hardly remarkable, notwithstanding the language in various Supreme Court decisions supporting the "substantially advance" test, that the majority of lower federal and state courts that have considered the issue have rejected the idea that a failure to substantially advance a legitimate government interest provides an independent basis for a taking.[115] The United States Court of Federal Claims, in particular, has been skeptical about this ostensible takings test. In *Loveladies Harbor v. United States*,[116] the court stated that

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114. Harmelin v. Michigan, 501 U.S. 957, 978 n.9 (1991) ("When two parts of a [constitutional amendment] use different language to address the same or similar subject matter, a difference in meaning is assumed.").

115. *See e.g.*, Brunelle v. Town of South Kingston, 700 A.2d 1075, 1083 n.5 (R.I. 1997) ("[A] discussion of the arbitrariness or capriciousness of a particular state action is properly examined under the light of the Fourteenth Amendment due process clause and not the Fifth Amendment takings clause."); Mission Springs, Inc. v. City of Spokane, 954 P.2d 250, 258 (Wash. 1998) (finding that the city's allegedly "arbitrary" and "illegal" denial of a permit stated a claim under the Due Process Clause, but not under the Takings Clause); *see also* Santa Monica Beach, Ltd. v. Superior Court, 968 P.2d 993, 1012 (Cal. 1999) (Kennard, J. concurring) (upholding a rent control ordinance based on a deferential version of the "substantially advance" test but observing that there is a "more fundamental question" as to whether "a means-ends test [is] an appropriate measure of whether a regulatory taking has occurred"); Bonnie Briar Syndicate, Inc v. Town of Mamoroneck, 721 N.E.2d 971, 975-76 (N.Y. 1999) (construing the *Agins* "substantially advance" language, outside the exactions context, to require application of a "reasonable relation" standard indistinguishable from traditional due process analysis).

116. 15 Cl. Ct. 381 (1988), *aff'd*, 28 F.3d 1171 (Fed. Cir. 1994).

"no court has ever found a taking has occurred solely because a legitimate state interest was not substantially advanced,"[117] and the court has consistently ruled that this does not represent a legitimate test for a taking.[118]

The Court's ruling in *Del Monte Dunes* on the scope of the *Dolan/Nollan* rough proportionality/essential nexus tests (discussed below) reinforces the conclusion that the "substantially advance" test does not represent a legitimate general test for a taking. *Dolan* and *Nollan* have been the only cases in which the Supreme Court has suggested that the "substantially advance" language has any substantive significance in takings doctrine. While this language was hardly central to the Court's analysis, the Court relied upon it as support for the essential nexus and tough proportionality tests. As explained below, the decision in *Del Montes Dunes* establishes that the *Dolan* and *Nollan* tests are limited to the exactions context. By limiting *Dolan/Nollan* in this fashion, the *Del Monte Dunes* Court strongly suggests that the "substantially advance" language should, at a minimum, be confined to that context as well.[119]

Third, the language and original understanding of the Takings Clause, considered in their own terms, support the conclusion that a government error cannot establish a taking. Persuasive historical research demonstrates that the drafters of the

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117. *Loveladies Harbor*, 15 Cl. Ct. at 390.

118. *See* Florida Rock Indus., Inc. v. United States, 45 Fed. Cl. 21, 42 (1999) (adopting an expansive theory of "partial" regulatory takings but recognizing that takings claims should be limited to valid government actions: "The Takings Clause was designed to protect individuals and compensate them for very legitimate exercises of government power. The due process clause of the Fifth Amendment protects individuals from illegitimate exercises of such power."); *see also supra* cases cited at note 25; Bamber v. United States, 45 Fed. Cl. 162, 165 (1999) (observing that the "substantially advance" takings test "has not had a fruitful life"). The claims court's skepticism may be attributable to the fact that this ostensible test could so easily be used to evade the limits set by Congress on the court's jurisdiction. A claim for monetary relief from the United States based on the Due Process Clause does not fall within the court's jurisdiction because it is not a claim founded upon the Constitution within the meaning of the Tucker Act. *See supra* note 6. If a due process claim could be re-labeled as a takings claim simply by alleging that the government action "fails to substantially advance" a government interest, the limits in the Tucker Act would be obliterated.

119. *See also* Bamber v. United States, 45 Fed. Cl. 162, 165 (1999) (citing *Nollan* and *Dolan* as the "only examples" in which the substantially advance test "has clearly been outcome determinative").

Bill of Rights believed that the Takings Clause addressed direct physical appropriations of property and did not reach regulations at all.[120] As Justice Scalia stated in *Lucas v. South Carolina Coastal Council*,[121] prior to the early Twentieth Century, "it was generally thought that the Takings Clause reached only a 'direct appropriation' of property, or the functional equivalent of a 'practical ouster of [the owner's] possession'."[122] This evidence, along with the Clause's use of the word "taking," which appears to connote an actual appropriation, support the conclusion that takings doctrine, should only apply to regulations that have such drastic adverse effects on the value of private property that they are equivalent to appropriations. The Court's regulatory takings decisions, which have repeatedly emphasized that a taking can occur only when the economic impact is "extreme,"[123] are generally faithful to the text and the original understanding of the Clause.

By contrast, a test that permitted an owner to establish a taking based solely on the erroneousness of government action would authorize courts to find takings in many cases in which the economic impact of the government action is only modest. In other words, the theory that the invalidity of a government action can establish a taking would lead takings doctrine far afield from the kinds of direct appropriations that the drafters of the Takings Clause apparently had in mind. Thus, the language and original understanding of the Takings Clause also calls for rejection of the theory that an erroneous government action can lead to a taking.

Fourth, the Court's decisions in *Dolan* and *Nollan* do not

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120. *See* John F. Hart, *Colonial Land Use Law and its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252 (1996); Charles Fried, *Protecting Property–Law & Politics*, 13 HARV. J. L. & PUB. POL'Y 44 (1990); William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782 (1995); *see also* ROBERT BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 230 (1990), in which Robert Bork, referring to the idiosyncratic reading of constitutional history in RICHARD EPSTEIN, TAKINGS, PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985), stated, "My difficulty is not that Epstein's constitution would repeal much of the New Deal and the modern regulatory-welfare state but rather that these conclusions are not plausibly related to the original understanding of the takings clause."

121. 505 U.S. 1003 (1992).

122. *Lucas*, 505 U.S. at 1014.

123. United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 126 (1985).

support the idea that erroneous government actions should generally result in takings. As discussed in Section II, these decisions arguably establish that certain kinds of errors do result in takings, but they stand for this proposition only in a highly specialized context. Both cases involved takings challenges to land-use permits which included conditions requiring the permittees to grant the public access to their property. The Supreme Court has repeatedly said that forced physical occupations of private property require particularly stringent review under the Takings Clause.[124] The issue the Court faced in *Nollan* and *Dolan* was how to reconcile its traditionally expansive view of government authority to regulate land uses with its special concern about uncompensated physical occupations. The Court's resolution of this problem was to allow permitting decisions to impose uncompensated exactions, but only if there was a sufficiently close relationship between the exactions and the regulatory process itself. Thus, the "essential nexus" and "rough proportionality" tests in *Nollan* and *Dolan* are specifically adapted to the problem of determining whether a physical occupation compelled by a permit condition effects a taking. These decisions provide no logical support for a general nexus/proportionality review of regulatory restrictions or other government actions under the Takings Clause.

This reading of *Nollan* and *Dolan* is confirmed by the Court's recent decision in *Del Monte Dunes*. One of the issues in the case was whether the court of appeals had correctly affirmed the finding of a taking based on the theory that the city's refusal to approve a development application failed the *Dolan* "rough proportionality" test.[125] The court of appeals had said that "[e]ven if the City had a legitimate interest in denying Del Monte's development application, its action must be 'roughly proportional' to furthering that interest," that is, "the City's denial must be related 'both in nature and extent to the impact of the proposed development.'"[126] The Supreme Court rejected

124. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982) ("[W]e have long considered a physical intrusion by government to be a property restriction of an unusually serious character for purposes of the Takings Clause. Our cases further establish that when the physical intrusion reaches the extreme form of a permanent physical occupation, a taking has occurred.").

125. City of Monterey v. Del Monte Dunes, Ltd., 526 U.S. 687, 698 (1999).

126. Del Monte Dunes at Monterey Ltd. v. City of Monterey, 95 F.3d 1422, 1430

the Ninth Circuit's analysis, stating that "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."[127] The *Dolan* test, Justice Kennedy wrote, "was not designed to address, and is not readily applicable to, the much different questions arising where, as here, the landowner's challenge is based not on excessive exactions but on denial of development."[128] These statements confirm that the *Dolan* test (and, by implication, the *Nollan* test[129]) are limited to exactions. Thus, these decisions provide no support for the notion that the invalidity of a government action represents a legitimate test, general for a regulatory taking.

Fifth, the idea that a government error establishes a taking should be rejected because it would lead to unfair windfalls for property owners at public expense. Allowing property owners to pursue a takings claim based solely on the erroneousness of a government action would permit owners to sue over modest or even nominal injuries to property interests. Yet if a property owner establishes a taking on this basis, the claimant would presumably be entitled to seek not simply actual damages but full "just compensation" as guaranteed by the Takings Clause. For example, an owner might well claim the full rental value of property for the period it was subject to an erroneous restriction, even if the owner suffered little or no actual economic injury.[130] It is impossible to believe that the Bill of Rights mandates such an unfair and nonsensical result. There is, as discussed in Sec-

(9th Cir. 1996) (quoting Dolan v. City of Tigard, 512 U.S. 374, 390 (1994)).

127. *Del Monte Dunes*, 526 U.S. at 698.

128. *Id.*

129. The limitations the *Del Monte Dunes* Court placed on *Dolan* necessarily apply to *Nollan* as well. While the Court only discussed *Dolan* explicitly, the Court's reasoning that *Dolan* is limited to physical occupations logically extends to *Nollan* as well, which, like *Dolan*, involved a physical occupation of private property effected through a permit process. *See* John D. Echeverria, *Revving the Engines in Neutral*: City of Monterey v. Del Monte Dunes at Monterey, Ltd., 29 ENVTL. L. REP. 10,682, 10,692 (1999).

130. *See* Tampa-Hillsborough County Expressway Auth. v. A.G.W.S. Corp., 640 So. 2d 54 (Fla. 1994) (rejecting theory that state mapping statute effected a taking, in part because that theory would subject government to liability based on the rental value of property (and to an obligation to pay plaintiffs' attorneys fees), even though plaintiffs' injuries were only nominal).

tion II, an intuitive appeal to the notion that the law should afford a remedy for injuries that property owners suffer as a result of government errors. But property owners have no equitable claim, under the Takings Clause or on any other basis, to windfalls because of government mistakes. Yet that would be the result if an error were sufficient to establish a compensable taking under the Fifth Amendment.

At the end of the day, there is no support in logic or precedent for the idea that government action results in a taking because it is erroneous.

B. Errors Are Irrelevant to Takings Analysis

If a government error does not by itself establish a taking, should the courts recognize that an owner with an otherwise valid takings claim can pursue his or her claim regardless of whether the government action was erroneous? The answer is that this second option should be rejected as well.

Essentially for the reasons set forth above, this second approach is precluded by the Supreme Court's understanding of the public use requirement. Because the validity of the government action is a *precondition* for a taking for a "public use," the invalidity of the action cannot be treated as beside the point. Just as the public use requirement precludes the idea that a government error provides an affirmative basis for finding a taking, it also precludes the idea that government error can be ignored in takings analysis.

The logical implication of the Supreme Court's understanding of the "public use" requirement is made clear by the majority analysis in *Eastern Enterprises*.[131] If a government error were simply irrelevant in a takings analysis, the majority would have proceeded to address the takings claim on the merits despite the fact that the plaintiff also was asserting a separate due process claim. But because a government error precludes a finding of taking for "public use," the majority concluded that the claim that the law was arbitrary and unreasonable in violation of the Due Process Clause barred consideration of the takings

131. 524 U.S. 498 (1998).

claim.[132] The Takings Clause simply did "not apply" in these circumstances.

The conclusion that an error cannot be treated as irrelevant in a takings analysis is nonetheless not free from doubt. It is subject, in particular, to the intuitively appealing challenge that it would be illogical and unfair to deny compensation under the Takings Clause when compensation would be required if only the government had not erred. As Chief Judge Smith of the Court of Federal Claims expressed in *Osprey Pacific Corp. v. United States*,[133] "[i]t would be a bizarre consequence that would allow the government to profit from its own error."[134]

The *Osprey Pacific* case provides a useful touchstone for analyzing this argument. The case involved a takings suit brought by a corporation which operated a surplus Navy PT boat for charter and that claimed a taking when the General Services Administration ("GSA") required that the company return the boat to the government.[135] The United States later conceded that GSA had no legal authority under the federal surplus property rules to require the boat's return.[136] The court upheld the takings claim, and rejected the government's attempt to defend on the ground, among others, that GSA officials had acted illegally.[137] The court said there is no requirement that the government action be "legally supported" or otherwise "proper," and therefore the government could not defend against the takings claim on the ground that the GSA acted "contrary to law."[138] Instead, the GSA's admitted error simply required the plaintiff to elect its remedies: The plaintiff could seek "equitable relief" or "consequential damages" or, instead, sue for a taking and seek just compensation at "fair market value."[139]

While there is some force to the court's position in *Osprey Pacific*, it is ultimately not persuasive.[140] As an initial matter,

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132. *Eastern Enters.*, 524 U.S. at 546.

133. 41 Fed. Cl. 150, *appeal dismissed*, No. 99-5081, 1999 WL 594961 (Fed. Cir. July 15, 1999).

134. *Osprey Pacific*, 41 Fed. Cl. at 157.

135. *Id.* at 154.

136. *Id.* at 156.

137. *Id.* at 157.

138. *Id.*

139. *Osprey Pacific*, 41 Fed. Cl. at 157-58.

140. *Osprey Pacific* also appears to be in tension with Federal Circuit precedent

it is not accurate to say that the government would actually "profit from its own error" simply because the plaintiff could not sue under the Takings Clause. As the court acknowledged, the plaintiff could have challenged the government's error under other legal theories. The options included, in addition to a suit for equitable relief under the Administrative Procedures Act,[141] potential damages claims under some provision of the Constitution other than the Takings Clause[142] or under the Federal Tort Claims Act.[143] In general, of course, a plaintiff may pursue as many causes of action as he or she has available, and he or she cannot be barred from pursuing one claim because he or she may have pursued another instead. But, in response to the argument that fairness calls for a broad interpretation of the

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on this question. As the court acknowledged in *Osprey Pacific*, the Federal Circuit in *Florida Rock Industries, Inc. v. United States*, 791 F.2d 893, 898 (Fed. Cir. 1986), *cert. denied*, 479 U.S. 1053 (1987), stated that, "[t]he Tucker Act suit in the Claims Court is not, however, available to recover damages for unauthorized acts of government officials." *But cf.* Del-Rio Drilling Program, Inc. v. United States, 146 F.3d 1358 (Fed. Cir. 1998) (holding, based on an agency theory, that the government could potentially be liable for denying company access to oil and gas leases on public lands because the responsible officials' conduct, though contrary to statute, was not ultra vires); *see also* Commonwealth Edison Co. v. United States, 46 Fed. Cl. 158 (2000) (concluding that a challenge to Energy Policy Act as "unlawful" could not properly be brought under the Takings Clause).

141. 5 U.S.C. § 702 (1994).

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party.

Id.

142. The most likely alternative constitutional basis for challenging a government error would be the Due Process Clause. *See* U.S. CONST. amend V ("No person shall . . . be deprived of life, liberty or property, without due process of law"). A due process violation would support a claim for damages against federal officials under *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 389 (1971). *See* Davis v. Passman, 442 U.S. 228 (1979) (recognizing that the *Bivens* principle applies to due process claims against federal officials).

143. 28 U.S.C. § 1346 (b) (1994) (making the United States liable for States, if a private person would be liable to the claimant if the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United in accordance with the law of the place where the act or omission occurred).

Takings Clause, it is entirely appropriate to ask whether other legal remedies are available that would eliminate the apparent unfairness. While these alternative claims might well encounter certain obstacles, such as the official immunity doctrine[144] (the *Bivens* action)[145] or the "discretionary function" exception[146] (federal tort claim), these potential obstacles provide no justification for ignoring the possibility that legal challenges to erroneous government actions might more appropriately be allowed (if at all) on legal grounds other than the Takings Clause.

In addition, even on its own terms, the court's analysis of the problem of how to treat government errors under the Takings Clause appears flawed. If there is no requirement that the action must have been "legally supported" or "proper" in order to stake a valid takings claim, as the court asserts, there does not appear to be a justification for requiring the plaintiff to elect his or her remedies either. If the government's error is irrelevant to the takings issue, why did the plaintiff have to forgo pursuing other relief as a condition of pursuing the takings claim? In general, financial and equitable remedies each provide valuable forms of relief, and a plaintiff is normally entitled to pursue both. The court's requirement in *Osprey Pacific* that the takings claimant choose between these two remedies seems implicitly to acknowledge that the claimant must concede the validity of the government action. In short, the court's analysis appears to rest at bottom on the premise that a taking must be for a "public use."

As suggested in Section II, the issue of the merits of Option 2 would be thrown into even starker relief if some third party sued to establish the invalidity of a law or regulation which was also the basis for a pending takings claim in a separate lawsuit. If one court has declared the law invalid, can the takings claimant nonetheless "accept the legal reality of the taking,"[147] in the claims courts' words, and proceed with his or her indepen-

144. *See* Harlow v. Fitzgerald, 457 U.S. 800, 819 (1981) (holding that official immunity bars recovery for constitutional torts unless the defendant official violated "clearly established" law).

145. *Bivens*, 403 U.S. at 388.

146. *See* 28 U.S.C. § 2680(a) (1994) (creating no FTCA liability for harms caused in the course of performing a "discretionary function").

147. *Osprey Pacific*, 41 Fed. Cl. at 157.

dent suit under the Takings Clause? Or, does the judicial declaration of invalidity permit (or require) the government to raise the invalidity of the government action as a defense in the takings suit? If the public use requirement were freely waivable, a takings claimant would be able to pursue a claim for compensation even under these circumstances. According to the viewpoint in this Article, however, because a legitimate takings claim presupposes a taking for a "public use," the determination that the law or regulation is invalid should preclude the takings claim.

Finally, the court's analysis in *Osprey Pacific* is mistaken because it relies on a distorted view of the nature of the Takings Clause. The court addressed the plaintiff's takings suit in terms of the claims of a "rightful owner" vis-à-vis "a thief."[148] But it is not accurate to suggest that the Takings Clause supports treating government as a "thief" when government officials have adversely affected property interests in error.[149] The Takings Clause is, of course, a protection for the individual against the government. But the eminent domain power, upon which the Takings Clause rests, is an affirmative grant of authority to the government to also obtain private property without owner consent for "public use." The Takings Clause imposes an obligation to pay "just compensation"—not damages—because it is implicit in the Clause that the public is entitled to the benefit of the property it has purchased through the exercise of eminent domain. Just as an owner has the right under the Takings Clause to expect "just compensation" if his property is taken, so too does the public have the right to expect that it will obtain property

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148. *Id.*

149. The court's comparison of government to a "thief" is arguably mild compared to the court's recent description of government action as analogous to an assault or even murder. *See* Florida Rock Indus., Inc. v. United States, 45 Fed. Cl. 21, 23-24 (1994)

> (The notion that the government can take two thirds of your property and not compensate you but must compensate you if it takes 100% has a ring of irrationality, if not unfairness, about it. If the law said those injured by tortious conduct could only have their estates compensated if they were killed, but not themselves if they could still breathe no matter how seriously injured, we would certainly think it odd, if not barbaric. Yet in takings trials, we have the government trying to prove that the patient has a few breaths left, while the plaintiffs seek to prove, often at great expense, that the patient is dead.).

for "public use" when it has purchased the property by paying just compensation.[150] Treating the government defendant in a takings action as a "thief" obviously conflicts with the notion that the public is entitled to the benefit of a taking for a "public use."

The bilateral character of takings doctrine is reflected in the long-standing tradition of characterizing government liability under the Takings Clause as a species of contract liability. Over a hundred years ago in *United States v. Great Falls Manufacturing Co.*,[151] the Supreme Court described government liability for a taking in the following terms:

> [W]e are of [the] opinion that the United States, having by its agents, proceeding under the authority of an act of Congress, taken the property of the claimant for public use, are under an obligation, imposed by the Constitution, to make compensation. The law will imply a promise to make the required compensation, where property, to which the government asserts no title, is taken, pursuant to an act of Congress, as private property to be applied for public uses.[152]

Similarly, in *Portsmouth Harbor Land & Hotel Co. v. United States*,[153] the Court said, "[i]f the acts amounted to a taking, without assertion of an adverse right, a contract would be implied whether it was thought of or not."[154] While the Supreme Court now describes a takings claim as being founded simply on the Constitution,[155] the traditional contract reasoning supports

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150. *Cf.* Coniston Corp. v. Village of Hoffman Estates, 844 F.2d 461, 464 (7th Cir. 1988) (Posner, J.)

> (Rather than being viewed simply as a limitation on governmental power the takings clause could be viewed as the source of a governmental privilege: to take property for public use upon payment of the market value of that property, since 'just compensation' has been held to be satisfied by payment of market value.).

151. 112 U.S. 645 (1884).

152. *Great Falls*, 112 U.S. at 656-57.

153. 260 U.S. 327 (1922).

154. *Portsmouth Harbor*, 260 U.S. at 330.

155. *See* Jacobs v. United States, 290 U.S. 13, 16 (1933) (recognizing expressly, for the first time, that a takings claim represents a claim "founded upon the Constitution of the United States"). The Supreme Court's frequent invocation of contract language might be explained by the fact that the Court of Claims' jurisdiction originally included claims based on contract, *see* Court of Claims Act, 10 Stat. 612 (1855), but was not expanded to encompass claims "founded upon the Constitution of

the view that the Takings Clause, instead of imposing punishment on a "thief," rests on a concept of bilateral public and private rights.[156]

C. Errors Preclude Takings

Elimination of Options One and Two leaves Option Three. For the reasons already discussed, this last option comports with the Supreme Court's understanding of the public use require-

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the United States" until 1887. *See* Tucker Act, 24 Stat. 505 (1887). Perhaps the implied contract theory was simply a device used in the early years of the court's existence to justify its jurisdiction over takings claims. The fact that the Supreme Court continued to rely on the contract analogy for almost 50 years following passage of the Tucker Act indicates that something more substantive was at stake.

Prior to the recognition that a takings claim rests directly on the Takings Clause and alongside the tradition of treating a takings claim as analogous to a contract action, there also was a tradition of treating a takings claim as a variety of common law tort. *See, e.g.*, Richards v. Washington Terminal Co., 233 U.S. 546 (1914) (nuisance); Pumpelly v. Green Bay Co., 80 U.S. 166 (1871) (trespass). Under this approach, the Takings Clause entered the analysis, if at all, only to decide whether legislation authorizing the government action should be treated as providing a shield against tort liability. *See* Robert Brauneis, *The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law*, 52 VAND. L. REV. 57 (1999) (discussing state court cases). While these actions were prosecuted on the theory that the government actions were erroneous and hence tortious in the sense that the government failed to offer the just compensation allegedly due, they were generally not premised on the notion that the underlying government action was itself unlawful. *Id.* at 69-70. Indeed, a government official's violation of his lawful authority provided an additional potential ground for the government entity to defend against a tort claim. *Id.* at 76-77.

156. The notion that takings liability is grounded in contract principles also is reflected in the numerous decisions rejecting takings claims where the government destroyed private property for some public health or safety reason. For example, in Customer Co. v. City of Sacramento, 895 P.2d 900 (Cal. 1995), the California Supreme Court rejected a takings claim by a convenience store owner seeking to recover for damage to the store and its contents caused by police efforts to apprehend a criminal suspect. The court observed that the property damage for which the owner sought recovery "bears no relation to a 'public improvement' or 'public work' of any kind." *Customer Co.*, 895 P.2d at 909; *see also id.* at 921. (Kennard, J. concurring) ("The use requirement is a central part of the constitutional text. To ignore it is to turn the just compensation clause into a facially open-ended right to compensation for any government action that affects the value or use of private property."); United States v. Caltex Inc., 344 U.S. 149 (1952) (denying compensation for oil terminal facility destroyed by U.S. Army prior to Japanese invasion of Philippine Islands); Miller v. City of Palo Alto, 280 P.2d 108 (Cal. 1929) (rejecting takings claim against city officials for allegedly starting a fire which resulted in harm to private property, on the ground that the plaintiffs' property was not taken for a "public use").

ment. If the validity of the government action is a precondition for a legitimate takings claim, then an erroneous government action precludes a finding of a taking.[157] Borrowing language from the California Supreme Court, "in many circumstances it may appear 'fair' to require the government to compensate innocent persons for damage resulting" from government actions, but "inverse condemnation is an inappropriate vehicle for achieving this goal because it was not designed for such a purpose."[158] It only remains to address the possible objections to this conclusion.[159]

The first potential objection to this reading of the "public use" requirement is that it contradicts precedent indicating that merely erroneous actions—as opposed to ultra vires actions—can support takings liability. The answer to this objection is not that it is wrong but that it ignores the "public use" language. This alternative, narrower theory of government non-liability rests on agency law and the notion that the government should be liable for the actions of officials within the scope of their authority. Accepting the soundness of the agency theory, as far as it goes, it provides no basis for believing that an *infra vires* but erroneous action is for a "public use" within the meaning of the Takings Clause.

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157. This argument is distinct from the argument that the government should be immune from takings liability if the legislature has not specifically conferred eminent domain power on the agency. Courts have generally rejected this argument. *See, e.g.*, Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency, 911 F.2d 1331, 1341 (9th Cir. 1990); Baker v. Burbank-Glendale-Pasadena Airport Auth., 705 P.2d 866, 868-69 (Cal. 1985). If the government has effected a taking, it seems nonsensical to think that the government can escape liability simply by refusing to pay "just compensation." However, there is no logical inconsistency between rejection of this ostensible takings defense and the conclusion that an erroneous government action is not a taking for a "public use."

158. *Customer Co.*, 895 P.2d at 913-14.

159. An additional policy-based argument for why only a valid government action should support a finding of a taking is that this interpretation of the Takings Clause enhances Congress' ability to control expenditures from the public fisc. *See* Tabb Lakes Ltd. v. United States, 10 F.3d 796, 803 (Fed. Cir. 1993) (quoting NBH Land Co. v. United States, 576 F.2d 317, 319 (Ct. Cl. 1978) (holding that the requirement that a taking be for a lawful purpose "does not strip from Congress 'all control over the obligations of public funds by land takings without condemnation.'")); *see also infra* p. 1092 (observing that an expansive interpretation of the Takings Clause helps avoid frank discussion of the policies served by sovereign and official immunity doctrines).

The several leading decisions noted above[160] which embrace agency theory offer no justification for ignoring the "public use" language in the Takings Clause. In *Del-Rio Drilling Program, Inc. v. United States*,[161] and *Ramirez de Arrellano v. Weinberger*,[162] federal courts of appeal stated that the government could not be held liable under the Takings Clause for unauthorized actions but could be held liable for authorized actions which were legally erroneous. But neither the D.C. Circuit decision in *de Arrellano* nor the Federal Circuit decision in *Del Rio* specifically addresses the "public use" language. *de Arrellano* preceded the *First English* decision and the Chief Justice's affirmation that a taking must serve a "proper" purpose, and *Del Rio* did not consider *First English*. Equally important, both decisions preceded the indication by a majority of the Court in *Eastern Enterprises* that an action which allegedly violates the Due Process Clause cannot be said to serve a "public use." Thus, neither of these decisions provides persuasive grounds for adopting the agency theory and ignoring the public use requirement. As between these two theories, the public use theory, which is grounded in the actual language of the Takings Clause, as well as recent Supreme Court precedent,[163] is stronger.

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160. *See supra* notes 34-39.

161. 146 F.3d 1358 (Fed. Cir. 1998).

162. 745 F.2d 1500 (D.C. Cir. 1984), *vacated on other grounds*, 471 U.S. 1113 (1985).

163. *Del-Rio* and *de Arrellano* both relied extensively on the Supreme Court's decision in Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949), but that decision is hardly dispositive authority in favor of the agency theory. In *Larson*, a company sued the Administrator of the War Assets Administration over an alleged contract to sell surplus coal, seeking a declaration that the contract was valid and an injunction prohibiting the Administrator from selling the coal to a third party. 337 U.S. at 684. The Court addressed whether the suit was barred by the doctrine of sovereign immunity and, specifically, whether the allegation that the Administrator had violated the contract stripped the Administrator of the immunity. *Id.* at 703-05. Applying agency principles, the Court held the suit was barred even though the Administrator's actions were allegedly unlawful, but it suggested that the plaintiff could assert a takings claim and that such a claim could proceed despite the Administrator's alleged legal violation. *See id.* at 703 & n.23

Larson provides weak support for that proposition that erroneous but not ultra vires actions can effect a taking. Because the suit sought only injunctive and declaratory relief and did not involve a Fifth Amendment takings claim, the Court's comments on the possible circumstances under which takings liability might be found were dictum. *Id.* at 703. Moreover, the conclusion that a government official should be *immune* from suit for injunctive relief based on erroneous but not ultra vires

Another potential objection to the conclusion that a government error precludes a finding of a taking, is that government error should preclude a finding of a taking only if the process of getting the error corrected involves a "normal delay." If the delay is "normal," there is no taking; if the delay is "abnormal," there is a taking. But this ostensible test, which some courts have embraced,[164] is almost certainly incorrect, at least if "normal delay" is understood as the exclusive test for deciding whether an "erroneous taking" results in a compensable taking. As discussed in Section II, this test is derived from the Supreme Court's decision in *First English* and the Court's statement that it was not "deal[ing] with the quite different questions that would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like."[165] Fairly read, *First English* does not establish that "normal delay" represents an exclusive defense to a takings claim based on government error.

First, *First English* cannot properly be read to establish a new, substantive test for determining takings liability. *First English* addressed only the issue of the remedy for a regulatory taking. Thus, the language in *First English*, to the extent that it addresses liability issues at all, is *dictum*. Moreover, it appears clear from the context that the reference to "normal delays" was not intended to define a new standard for a regulatory taking. It was already obvious from prior Supreme Court decisions that

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action does not logically compel the conclusion, as the Court implied, that the government is necessarily *liable* under the same circumstances under the Takings Clause. In fact, the "public use" language, which the *Larson* Court did not consider, suggests just the opposite, that erroneous actions covered by the sovereign immunity doctrine would not support takings liability either. By focusing on the rules of attribution under the agency doctrine, the *Larson* Court obscured the critical significance of the words "public use."

164. *See* Landgate, Inc. v. California Coastal Comm'n, 953 P.2d 1188 (Cal. 1998) (finding that the delay entailed in plaintiff's successful challenge to the coastal commission's erroneous assertion of jurisdiction over development represents "normal" delay within the meaning of *First English*); *see also* Ali v. City of Los Angeles, 77 Cal. App. 4th 246, 254-55, 91 Cal. Rptr. 2d 458, 464 (Cal. Ct. App. 1999) (holding that an "arbitrary" and "unreasonable" one and one-half year delay in issuance of permit to demolish low-income housing, in violation of state law, was not a "normal delay" within the meaning of *First English* and therefore constituted a temporary regulatory taking).

165. *First English*, 482 U.S. at 321.

delays in the review of development proposals could not support valid takings claims.[166]

It is apparent from the Court's opinion that the Court restated that normal regulatory delays would not produce takings liability in order to assure local governments that the effects of the *First English* ruling would be limited. The decision does not support the idea that "abnormal delays" in the regulatory process represent an independent basis for a legitimate takings claim.

Second, the notion that a "normal delay" insulating government from liability can include the time needed for a property owner to successfully prosecute a lawsuit to reverse a legal error seems inconsistent with the reasoning underlying the central holding of *First English*. The decision establishes that the government cannot avoid liability to pay compensation for the period that a regulation resulting in a taking remained in effect. In adopting this rule, the Court rejected the argument that the government should not be held liable retrospectively for the period required to obtain a judicial determination on the takings question.[167] Given this conclusion, it is difficult to see how a similar amount of time required to prosecute a lawsuit to get a government error corrected could be excused as "mere delay" within the meaning of *First English*. While the "normal delay" language in *First English* is an obvious "hook" for government defendants to rely upon, it will bear little logical weight. By contrast, the theory that an erroneous government action cannot support a valid takings claim because it cannot be a taking for a "public use" provides a test that is far better grounded in the language of the Takings Clause and leading Supreme Court precedents.

It needs to be acknowledged that enforcing the "public use" requirement as proposed in this Article creates the possibility of

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166. *See* United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 126 (1985) ("[W]e have made it quite clear that the mere assertion of regulatory jurisdiction by a governmental body does not constitute a regulatory taking."); Agins v. City of Tiburon, 447 U.S. 255, 263 n.9 (1980) ("Mere fluctuations in value during the process of governmental decision making, absent extraordinary delay, are 'incidents of ownership . . . [and] cannot be considered as a "taking" in the constitutional sense.'").

167. *See First English*, 482 U.S. at 314 (describing the California Supreme Court's *Agins* rule).

some intuitively "hard" cases. One such scenario, as illustrated by the *Osprey Pacific* case, involves a case in which the claimant would have a perfectly viable takings claim but for the fact that the government erred. Equally difficult are physical appropriations cases in which government agents may have illegally occupied private property for a period of time but, under this view, the government should be immune from taking liability. In some case, such as those involving flooding, for example, it may be difficult if not impossible to restore the status *quo ante*.

Several considerations deserve attention in deciding whether these hard cases justify destroying the promise of doctrinal coherence and simplicity offered by consistent enforcement of the "public use" requirement. First, any argument that the Takings Clause needs to be interpreted to provide a remedy for injuries to property interests cannot sensibly be addressed without asking whether other constitutional, statutory or common law remedies are available.[168] Allegations that the government has erred, whether involving federal, state or local government action, might well support damages claims under some constitutional provision other than the Takings Clause[169] or under federal or state tort claims acts.[170] At a minimum, litigants urging courts to embrace novel takings claims in order to "do justice"

168. *See supra* text accompanying notes 143-48; *see also* Customer Co. v. City of Sacramento, 895 P.2d 900, 904 (Cal. 1995) (evaluating takings claim based on property damage caused by police law enforcement activities in light of plaintiff's "unusual" step of "abandon[ing] its cause of action for negligence under the Tort Claims Act" in favor of a takings theory).

169. Federal officials are potentially subject to *Bivens* damages actions. *See supra* note 128. Local governments and state officials are subject to damages actions under 42 U.S.C. § 1983 (1994) for constitutional violations. *See* Monell v. Department of Soc. Servs., 436 U.S. 658, 707-08 (1978) (stating that a municipality is a "person" within the meaning of § 1983); Maine v. Thiboutot, 448 U.S. 1, 5 (1980) (quoting Greenwood v. Peacock, 384 U.S. 808, 829-30 (1966) ("under § 1983 state 'officers may be made to respond in damages not only for violations of rights conferred by federal equal civil rights laws, but for violations of other federal constitutional and statutory rights as well.'")).

170. *See, e.g.*, Federal Tort Claims Act, 28 U.S.C. § 1346(b) (1994); California Tort Claims Act, CAL. GOV. CODE § 810 (West 1995). Professor Robert Brauneis' recent investigation of Nineteenth Century case law demonstrates that the common law forms of action formerly represented the exclusive mode of challenging government actions adversely affecting property owners. *See* Brauneis, *supra* note 155. Given this historical background, it is hardly revolutionary to suggest that certain claims now being asserted under the rubric of takings should more appropriately be viewed as involving common law torts.

have an obligation to demonstrate the unavailability of other possible avenues of relief. Even if pursuing these alternative claims may encounter some obstacles, such as immunity defenses, proponents of an expansive reading of the Takings Clause have an obligation to address potential alternatives.

Second, courts should be cautious about embracing interpretations of the Takings Clause that unthinkingly cut away at sovereign immunity and other immunity doctrines. In the federal system, the Tucker Act waives the sovereign immunity of the United States to the full extent of the government's liability under the Takings Clause.[171] As a result, judicial decisions expanding the scope of government liability under the Takings Clause simultaneously lower the shield of sovereign immunity, but without explicitly saying so. Expansive interpretations of the Takings Clause could serve as a way of avoiding discussion of immunity issues that other theories of government liability would naturally raise. The same issue arises in takings litigation at the state level.[172] This analytic embarrassment is particularly prominent in the case of "erroneous takings" claims, which might very naturally, if not more naturally, be framed as tort claims or due process claims. The point here is to not present a vigorous defense of immunity doctrines, though recent Supreme Court decisions would certainly lend support to such an effort.[173] It is sufficient for present purposes to observe that

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171. *See* 28 U.S.C. § 1346(b).

172. *See Customer Co.*, 895 P.2d at 906 (declining to adopt an expansive interpretation of takings liability, which would be "unamenable to legislative regulation," and instead relying on general tort principles, "principles that always have been understood to be subject to the control and regulation of the Legislature").

173. *See* Alden v. Maine, 119 S. Ct. 2240 (1999); College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 119 S. Ct. 2219 (1999). These recent decisions raise the interesting question whether states are immune from liability under the Takings Clause, in both federal and state court, under the doctrine of sovereign immunity. It is well established that the United States is liable to pay compensation under the Takings Clause only because the United States has waived its sovereign immunity in the Tucker Act. *See* Lynch v. United States, 292 U.S. 571 (1934); Schillinger v. United States, 155 U.S. 163 (1894); *see also* Webster v. Doe, 486 U.S. 592, 613 (1988) (Scalia, J., dissenting) ("No one would suggest that, if Congress had not passed the Tucker Act, 28 U.S.C. § 1491(a)(1), the courts would be able to order disbursements from the treasury to pay for property taken under lawful authority (and subsequently destroyed) without just compensation.") (citations omitted). If the states are sovereigns equal in dignity to the United States, as the Court's recent federalism decisions indicate, then a state apparently could be liable

re-labeling erroneous government actions as takings tends to avoid rather than encourage frank discussion of how to reconcile the intuition that there should generally be a remedy for erroneous government actions and the strong historical traditions supporting the various immunity doctrines.[174]

V. CONCLUSION

The question of how to treat erroneous government decisions in the context of takings litigation has confused courts across the country. There is a clear and ready answer: An erroneous government action is not a compensable taking because it is not a taking for "public use" within the meaning of the Fifth Amendment.

under the Takings Clause only if it has waived its immunity or Congress has passed valid legislation abrogating state immunity in takings cases. *See* Will v. Michigan Dept. of State Police, 491 U.S. 58 (1989) (finding that a state is not a "person" for the purpose of 42 U.S.C. § 1983); *see also* City of Monterey v. Del Monte Dunes at Monterey Ltd., 526 U.S. 687, 702 (1999) (Kennedy, J.) (acknowledging that the United States and the states may be immune from takings liability absent a valid waiver or abrogation, but stating that this defense would in any event be unavailable to a municipal defendant).

174. *Cf.* Cornelia T.L. Pillard, *Taking Fiction Seriously: The Strange Results of Public Officials' Individual Liability Under* Bivens, 88 GEO. L.J. 65 (1999) (discussing how, in a different context, judicial acceptance of the *Bivens* "fiction" that a suit against a federal officer is not a suit against the United States has permitted courts to avoid examining the justifications for the sovereign immunity doctrine).