

Opinion of SOUTER, J.

SUPREME COURT OF THE UNITED STATES

No. 97–1235

CITY OF MONTEREY, PETITIONER v. DEL MONTE
DUNES AT MONTEREY, LTD., AND MONTEREY-
DEL MONTE DUNES CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

[May 24, 1999]

JUSTICE SOUTER, with whom JUSTICE O’CONNOR, JUSTICE GINSBURG, and JUSTICE BREYER join, concurring in part and dissenting in part.

A federal court commits error by submitting an issue to a jury over objection, unless the party seeking the jury determination has a right to a jury trial on the issue. Fed. Rule Civ. Proc. 39(a)(2). In this action under Rev. Stat. §1979, 42 U. S. C. §1983, the city unsuccessfully objected to submitting respondents’ regulatory taking (or inverse condemnation) claim to a jury. Respondents had no right to a jury trial either by statute or under the Constitution; the District Court thus erred in submitting their claim to a jury. In holding to the contrary, that such a right does exist under the Seventh Amendment, the Court misconceives a taking claim under §1983 and draws a false analogy between such a claim and a tort action. I respectfully dissent from the erroneous Parts III and IV of the Court’s opinion.

I

I see eye to eye with the Court on some of the preliminary issues. I agree in rejecting extension of “rough proportionality” as a standard for reviewing land-use regulations generally and so join Parts I and II of the majority

opinion. I also join the Court in thinking the statutory language “an action at law” insufficient to provide a jury right under 42 U. S. C. §1983, *ante*, at 16, with the consequence that *Markman v. Westview Instruments, Inc.*, 517 U. S. 370 (1996), must provide the appropriate questions in passing on the issue of a constitutional guarantee of jury trial: “whether we are dealing with a cause of action that either was tried at law at the time of the founding or is at least analogous to one that was”; and, if so, “whether the particular trial decision must fall to the jury in order to preserve the substance of the common-law right as it existed in 1791.” *Ante*, at 16–17 (quoting *Markman, supra*, at 376). The Court soundly concedes that at the adoption of the Seventh Amendment there was no action like the modern inverse condemnation suit for obtaining just compensation when the government took property without invoking formal condemnation procedures. Like the Court, I am accordingly remitted to a search for any analogy that may exist and a consideration of any implication going to the substance of the jury right that the results of that enquiry may raise. But this common launching ground is where our agreement ends.

II

The city’s proposed analogy of inverse condemnation proceedings to direct ones is intuitively sensible, given their common Fifth Amendment constitutional source and link to the sovereign’s power of eminent domain. Accord, *e.g.*, *New Port Largo, Inc. v. Monroe County*, 95 F. 3d 1084, 1092 (CA11 1996) (“We have discovered no indication that the rule in regulatory takings cases differs from the general eminent domain framework”); *Northglenn v. Grynberg*, 846 P. 2d 175, 178 (Colo. 1993) (“Because an inverse condemnation action is based on the ‘takings’ clause of our constitution, it is to be tried as if it were an eminent domain proceeding”). See Grant, A Revolutionary View of

Opinion of SOUTER, J.

the Seventh Amendment and the Just Compensation Clause, 91 Nw. U. L. Rev. 144, 191–205 (1996).

The intuition is borne out by closer analysis of the respective proceedings. The ultimate issue is identical in both direct and inverse condemnation actions: a determination of “the fair market value of the property [taken] on the date it is appropriated,” as the measure of compensation required by the Fifth Amendment. *Kirby Forest Industries, Inc. v. United States*, 467 U. S. 1, 10 (1984). It follows, as Justice Brandeis said in *Hurley v. Kincaid*, 285 U. S. 95 (1932), that “[t]he compensation which [a property owner] may obtain in [an inverse condemnation] proceeding will be the same as that which he might have been awarded had the [government] instituted . . . condemnation proceedings,” *id.*, at 104. This, indeed, has been our settled understanding, in cases before *Hurley* and after *Kirby Forest Industries*, which have emphasized the common underlying nature of direct and inverse condemnation cases; the commencement of inverse condemnation actions by property owners, and direct condemnation proceedings by the government, does not go to the substance of either. As we said in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U. S. 304 (1987):

“The fact that condemnation proceedings were not instituted and that the right was asserted in suits by the owners d[oes] not change the essential nature of the claim. The form of the remedy did not qualify the right. It rested upon the Fifth Amendment.” *Id.*, at 315 (quoting *Jacobs v. United States*, 290 U. S. 13, 16 (1933)).

Accord, *Boom Co. v. Patterson*, 98 U. S. 403, 407 (1879) (“The point in issue [in the inverse condemnation proceeding] was the compensation to be made to the owner of the land; in other words, the value of the property taken. . . . The case would have been in no essential particular differ-

ent had the State authorized the company by statute to appropriate the particular property in question, and the owners to bring suit against the company in the courts of law for its value”). It is presumably for this reason that this Court has described inverse condemnation actions as it might speak of eminent domain proceedings brought by property owners instead of the government. See *Agins v. City of Tiburon*, 447 U. S. 255, 258, n. 2 (1980) (“Inverse condemnation is a shorthand description of the manner in which a landowner recovers just compensation for a taking of his property when condemnation proceedings have not been instituted”) (quoting *United States v. Clarke*, 445 U. S. 253, 257 (1980)). See also *Armstrong v. United States*, 364 U. S. 40, 49 (1960); Grant, *supra*, at 192–193 (“The difference between condemnation and inverse condemnation inheres precisely in the character of the former as *United States v. Landowner* and the latter as *Landowner v. United States*”). Thus, the analogy between direct and inverse condemnation is apparent whether we focus on the underlying Fifth Amendment right or the common remedy of just compensation.

The strength of the analogy is fatal to respondents’ claim to a jury trial as a matter of right. Reaffirming what was already a well-established principle, the Court explained over a century ago that “the estimate of the just compensation for property taken for the public use, under the right of eminent domain, is not required to be made by a jury,” *Bauman v. Ross*, 167 U. S. 548, 593 (1897) (citing, *inter alia*, *Custiss v. Georgetown & Alexandria Turnpike Co.*, 6 Cranch 233 (1810); *United States v. Jones*, 109 U. S. 513, 519 (1883); and *Shoemaker v. United States*, 147 U. S. 282, 300, 301 (1893)),¹ and we have since then thought it

— — — — —
¹In *Bauman*, the Court upheld a statute (providing for condemnation of land for streets) that contemplated a form of jury “differing from an

Opinion of SOUTER, J.

“long . . . settled that there is no constitutional right to a jury in eminent domain proceedings.” *United States v. Reynolds*, 397 U. S. 14, 18 (1970).² See 12 C. Wright, A. Miller, & R. Marcus, *Federal Practice and Procedure* §3051, p. 224 (1997) (“It is absolutely settled that there is no constitutional right to a trial by jury in compensation cases”).

The reason that direct condemnation proceedings carry no jury right is not that they fail to qualify as “Suits at common-law” within the meaning of the Seventh Amendment’s guarantee, for we may assume that they are indeed

— — — — —

ordinary jury in consisting of less than twelve persons, and in not being required to act with unanimity,” and stated that the just compensation determination “may be entrusted by Congress to commissioners appointed by a court or by the executive, or to an inquest consisting of more or fewer men than an ordinary jury.” 167 U. S., at 593. The Court relied upon prior cases that had assumed the absence of a constitutional right to a jury determination of just compensation. See, e.g., *Shoemaker*, 147 U. S., at 301–302, 304–305 (upholding statute providing for ascertainment of the value of condemned land by three presidentially appointed commissioners); *Jones*, 109 U. S., at 519 (“The proceeding for the ascertainment of the value of the property and consequent compensation to be made, is merely an inquisition to establish a particular fact as a preliminary to the taking; and it may be prosecuted before commissioners or special boards or the courts, with or without the intervention of a jury, as the legislative power may designate”). See also *Kohl v. United States*, 91 U. S. 367, 376 (1876) (“That [the right of eminent domain] was not enforced through the agency of a jury is immaterial; for many civil as well as criminal proceedings at common law were without a jury”); *Crane v. Hahlo*, 258 U. S. 142, 147 (1922) (“[T]he reference of such a question [determining the amount of compensation], especially in eminent domain proceedings, to a commission, or board, or sheriff’s jury, or other non-judicial tribunal, was so common in England and in this country prior to the adoption of the Federal Constitution that it has been held repeatedly that it is a form of procedure within the power of the State to provide”).

²Similarly, the Due Process Clause of the Fourteenth Amendment does not require a jury trial in state condemnation proceedings. See, e.g., *Long Island Water Supply Co. v. Brooklyn*, 166 U. S. 685, 694 (1897); *Crane, supra*, at 147; *Dohany v. Rogers*, 281 U. S. 362, 369 (1930).

common law proceedings,³ see *Kohl v. United States*, 91 U. S. 367, 376 (1876) (“The right of eminent domain always was a right at common law”); *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U. S. 25, 28 (1959) (“[A]n eminent domain proceeding is deemed for certain purposes of legal classification a suit at common law”). The reason there is no right to jury trial, rather, is that the Seventh Amendment “preserve[s]” the common law right where it existed at the time of the framing, but does not create a right where none existed then. See U. S. Const., Amdt. 7 (“In Suits at common law . . . the right of trial by jury shall be preserved”). See also 5 J. Moore, J. Lucas, & J. Wicker, *Moore’s Federal Practice* ¶38.32[1], p. 38–268 (2d ed. 1996) (“[T]he Seventh Amendment does not guarantee a jury trial in all common law actions in the federal courts; [instead] it preserves the right of jury trial as at common law”). There is no jury right, then, because condemnation proceedings carried “no uniform and established right to a common law jury trial in England or the colonies at the time . . . the Seventh Amendment was

— — — — —

³Several commentators and courts have advanced theories that a condemnation proceeding is not an action at law, but rather is either some sort of special proceeding, or else an equitable proceeding. See, e.g., H. Mills & A. Abbott, *Mills on Law of Eminent Domain* §84, p. 225 (2d ed. 1888); *id.*, §91, at 239 (“Condemnation is not an action at law, but an inquisition on the part of the state for the ascertainment of a particular fact, and may be conducted without the intervention of a jury”); 1A J. Sackman, *Nichols on Eminent Domain* §4.105[1], p. 4–137 (rev. 3d ed. 1998) (“Condemnation proceedings are not suits at common law”). There is some accumulated support for the idea that condemnation proceedings derive from the writ *ad quod damnum*, which was issued by the courts of equity to the sheriff to conduct an inquest into the amount of damages incurred by a landowner as a result of the taking. Nonetheless, since *Kohl v. United States*, *supra*, at 376 the first case involving the Federal Government’s exercise of its power of eminent domain, this Court has classified condemnation proceedings as suits at common law.

Opinion of SOUTER, J.

adopted.” *Ibid.* See, e.g., *Atlas Roofing Co. v. Occupational Safety and Health Review Commission*, 430 U. S. 442, 458 (1977) (“Condemnation was a suit at common law but constitutionally could be tried without a jury”). The statement in *Reynolds* indeed expressly rested on these considerations, as shown in the Court’s quotation of Professor Moore’s statement that “[t]he practice in England and in the colonies prior to the adoption in 1791 of the Seventh Amendment, the position taken by Congress contemporaneously with, and subsequent to, the adoption of the Amendment, and the position taken by the Supreme Court and nearly all of the lower federal courts lead to the conclusion that there is no constitutional right to jury trial in the federal courts in an action for the condemnation of property under the power of eminent domain.” *Reynolds*, *supra*, at 18 (quoting 5 J. Moore, *Federal Practice* ¶38.32[1], p. 239 (2d ed. 1969) (internal quotation marks omitted)).

The Court in *Reynolds* was on solid footing. In England, while the general practice of Parliament was to provide for the payment of compensation, parliamentary supremacy enabled it to take private property for public use without compensation. See, e.g., Randolph, *The Eminent Domain*, 3 L. Q. Rev. 314, 323 (1887) (“That there is no eminent domain *sub nomine* in England is because the power is included, and the right to compensation lost, in the absolutism of Parliament. The only technical term approximating eminent domain is ‘compulsory powers’ as used in statutes granting to companies and associations the right to take private property for their use”). See also McNulty, *The Power of “Compulsory Purchase” Under the Law of England*, 21 Yale L. J. 639, 644–646 (1912). Thus, when Parliament made provision for compensation, it was free to prescribe whatever procedure it saw fit, and while the agency of a common-law jury was sometimes chosen, very frequently other methods were adopted. See Blair, *Federal*

Condemnation Proceedings and the Seventh Amendment, 41 Harv. L. Rev. 29, 32–36 (1927); *id.*, at 36 (“[A]n ample basis exists in the parliamentary precedents for the conclusion that the common law sanctioned such diverse methods of assessment that no one method can be said to have been made imperative by the Seventh Amendment”). See also 1A J. Sackman, Nichols on Eminent Domain §4.105[1], p. 4–115, and, §4.107, pp. 4–136 to 4–137 (rev. 3d ed. 1998) (“It had become the practice in almost all of the original thirteen states at the time when their constitutions were adopted, to refer the question of damages from the construction of [high]ways . . . to a commission of viewers or appraisers, generally three or five in number”); *id.*, at 4–137 (“[I]t has been repeatedly held that when land is taken by authority of the United States, the damages may be ascertained by any impartial tribunal”).

In sum, at the time of the framing the notion of regulatory taking or inverse condemnation was yet to be derived, the closest analogue to the then-unborn claim was that of direct condemnation, and the right to compensation for such direct takings carried with it no right to a jury trial, just as the jury right is foreign to it in the modern era. On accepted Seventh Amendment analysis, then, there is no reason to find a jury right either by direct analogy or for the sake of preserving the substance of any jury practice known to the law at the crucial time. Indeed, the analogy with direct condemnation actions is so strong that there is every reason to conclude that inverse condemnation should implicate no jury right.

III

The plurality avoids this obvious conclusion in two alternative ways. One way is to disparage the comparison of inverse to direct taking, on the grounds that litigation of the former involves proof of liability that the latter does not and is generally more onerous to the landowner. The

Opinion of SOUTER, J.

disparagement is joined with adoption of a different analogy, between inverse condemnation proceedings and actions for tortious interference with property interests, the latter of which do implicate a right to jury trial. The plurality's stated grounds for avoiding the direct condemnation analogy, however, simply break down, and so does the purported comparison to the tort actions. The other way the plurality avoids our conclusion is by endorsing the course followed by JUSTICE SCALIA in his separate opinion, by selecting an analogy not to tort actions as such, but to tort-like §1983 actions. This alternative, however, is ultimately found wanting, for it prefers a statutory analogy to a constitutional one.

A

1

The plurality's argument that no jury is required in a direct condemnation proceeding because the government's liability is conceded, leaving only the issue of damages to be assessed, rests on a premise that is only partially true. The part that is true, of course, is that the overwhelming number of direct condemnation cases join issue solely on the amount of damages, that is, on the just compensation due the landowner. But that is not true always. Now and then a landowner will fight back by denying the government's right to condemn, claiming that the object of the taking was not a public purpose or was otherwise unauthorized by statute. See, *e.g.*, *Hawaii Housing Authority v. Midkiff*, 467 U. S. 229, 240 (1984) ("There is . . . a role for courts to play in reviewing a legislature's judgment of what constitutes a public use, even . . . [if] it is an 'extremely narrow' one" (citation omitted)); *Shoemaker*, 147 U. S., at 298. See also 2A Sackman, *supra*, at 7–81 to 7–82, and nn. 89–90 (listing state cases where condemnation clauses and the Due Process Clause of the Fourteenth Amendment have been relied upon by property owners to contest attempts to

acquire their property for private purposes); 2 J. Lewis, *Law of Eminent Domain* §417, p. 923, and n. 51 (2d ed. 1900). What is more, when such a direct condemnation does have more than compensation at stake, the defense of no public purpose or authority closely resembles, if indeed it does not duplicate, one of the grounds of liability for inverse condemnation noted in *Agins*, 447 U. S., at 260–261, and raised in this case: the failure of the regulation to contribute substantially to the realization of a legitimate governmental purpose.⁴ Indeed, the distinction between direct and inverse condemnation becomes murkier still when one considers that, even though most inverse condemnation plaintiffs accept the lawfulness of the taking and just want money, see *infra*, at 18, some such plaintiffs ask for an injunction against the government’s action, in which event they seek the same ultimate relief as the direct condemnee who defends against the taking as unauthorized. If the direct condemnee has no right to a jury, see 2A Sackman, *supra*, §7.03[11][a], at 7–90 (“The question of whether a legislative determination of a public use is really public has been declared by the courts ultimately to be a judicial one”), the inverse condemnee should fare no differently.

This recognition may underlie the fact that the plurality’s absence-of-liability-issue reasoning for distinguishing direct and inverse condemnation fails to resonate through the cases holding that direct actions carry no jury right or commenting on the absence of juries in such cases. While the plurality cites an opinion of Justice Baldwin, sitting on Circuit, for its position, *ante*, at 21–22 (citing *Bonaparte v. Camden & Amboy R. Co.*, 3 F. Cas. 821, 829 (No. 1,617)

⁴See, e.g., J. Laitos, *Law of Property Rights Protection* §12.04[A], pp. 12–12 to 12–13 (1999) (“The police power takings standard also means that the taking prohibition becomes more like a due process check on the police power”; describing two claims as “an identical test”).

Opinion of SOUTER, J.

(CC NJ 1830)), this citation leaves the reader with a rather skewed perspective on the diversity of rationales underlying early state cases in which the right of a direct condemnee to a jury trial was considered and denied. Several courts rested on the fact that proceedings to secure compensation were in the nature of suits against the sovereign, and thus the legislature could qualify and condition the right to bring such suits, at least to the extent of providing that they be conducted without a jury. See, e.g., *Ligat v. Commonwealth*, 19 Pa. 456, 460 (1852) (“A sovereign state is not liable to an action at law, against her consent; and the right of trial by jury has, therefore, no existence in such a case”); *Pennsylvania R. Co. v. First German Lutheran Congregation of Pittsburgh*, 53 Pa. 445, 449 (1866) (“In taking private property for its road [the railroad corporation] exercises a part of the sovereign power of the state . . . [and] the right of trial by jury has never been held to belong to the citizen himself in proceedings by the state under her powers of eminent domain”). See also *McElrath v. United States*, 102 U. S. 426, 440 (1880). Just as significantly, the plurality’s new rationale is absent from any of our precedents, including those underlying the *Reynolds* decision.⁵

Finally, the absence of the plurality’s rationale from our prior discussions of the matter most probably reflects the fact that the want of a liability issue in most condemnation cases says nothing to explain why no jury ought to be

⁵See n. 1, *supra*. Moreover, if presence of a liability issue were crucial, then the jury right presumably would be lost in every tort case with liability conceded, which goes to trial on damages alone. Such, of course, is not the practice. See, e.g., *Blazar v. Perkins*, 463 A. 2d 203, 207 (R. I. 1983) (“The fact that prior to trial, defendants admitted liability, thereby removing one issue from the consideration of the jury, does not alter the application of th[e] principle [that plaintiffs cannot waive a jury trial on the issue of damage when defendants have demanded a jury trial]”).

provided on the question of damages that always is before the courts. The dollars-and-cents issue is about as “factual” as one can be (to invoke a criterion of jury suitability emphasized by the Court in another connection, *ante*, at 29–30), and no dispute about liability provokes more contention than the price for allowing the government to put a landowner out of house and home. If an emphasis on factual issues vigorously contested were a sufficient criterion for identifying something essential to the preservation of the Seventh Amendment jury right, there ought to be a jury right in direct condemnation cases as well as the inverse ones favored by the plurality.

The plurality’s second reason for doubting the comparability of direct and inverse condemnation is that the landowner has a heavier burden to shoulder in the latter case, beginning with a need to initiate legal action, see *United States v. Clarke*, 445 U. S., at 257. Once again, however, it is apparent that the two varieties of condemnation are not always so distinguishable. The landowner who defends in a direct condemnation action by denying the government’s right to take is in no significantly different position from the inverse condemnee who claims the government must pay or be enjoined because its regulation fails to contribute substantially to its allegedly public object. See, *e.g.*, 2A Sackman, Nichols on Eminent Domain §7.03[12], at 7–105 to 7–106 (citing cases where “the challenger has the burden of proof to show that the taking is not for a public purpose”). And once again one may ask why, even if the inverse condemnee’s burden always were the heavier, that should make any difference. Some plaintiffs’ cases are easy and some are difficult, but the difficult ones are no different in front of a jury (except on the assumption that juries are more apt to give David the advantage against Goliath, which I do not believe is the plurality’s point). Neither the Fifth nor the Seventh Amendment has ever been thought to shift and spring with ease of proof. Cf.

Opinion of SOUTER, J.

United States v. 101.88 Acres of Land, More or Less, Situated in St. Mary's Parish, La., 616 F.2d 762, 772 (CA5 1980) ("The 5th Amendment, while it guarantees that compensation be just, does not guarantee that it be meted out in a way more convenient to the landowner than to the sovereign").

2

Just as the plurality's efforts to separate direct from inverse condemnation actions thus break down, so does its proposal to analogize inverse condemnation to property damage torts. Whereas the plurality posits an early practice of litigating inverse condemnation as a common-law tort, there was in fact a variety of treatments, some of them consistent with the plurality's argument, some of them not. None of those treatments turned on the plurality's analysis that a State's withholding of some recovery process is essential to the cause of action. In the end, the plurality's citations simply do not point to any early practice both consistently followed and consistent with the concepts underlying today's inverse condemnation law.

a

The plurality introduces its claimed analogue of tort actions for property damage by emphasizing what it sees as a real difference between the action of the government in direct condemnations, and those inverse condemnations, at least, that qualify for litigation under §1983. Whereas in eminent domain proceedings the government admits its liability for the value of the taking, in the inverse condemnation cases litigated under §1983, it refuses to do so inasmuch as it denies the landowner any state process (or effective process) for litigating his claim. See *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U. S. 172, 194–195 (1985). Thus the plurality explains that

“[a]lthough the government acts lawfully when, pursuant to proper authorization, it takes property and provides just compensation, the government’s action is lawful solely because it assumes a duty, imposed by the Constitution, to provide just compensation. See *First English*, 482 U. S., at 315 (citing *Jacobs*, 290 U. S., at 16). When the government repudiates this duty, either by denying just compensation in fact or by refusing to provide procedures through which compensation may be sought, it violates the Constitution. In those circumstances the government’s actions are not only unconstitutional but unlawful and tortious as well.” *Ante*, at 26.

According to the plurality, it is the taking of property without providing compensation or a mechanism to obtain it that is tortious and subject to litigation under §1983. See *ante*, at 23, 26. By this reasoning, the plurality seeks to distinguish such a §1983 action from a direct condemnation action and possibly from “an ordinary inverse condemnation suit,” as well, *ante*, at 30, by which the plurality presumably means a suit under a state law providing a mechanism for redress of regulatory taking claims.

The plurality claims to have authority for this view in some early state and federal cases seeing regulatory interference with land use as akin to nuisance, trespass, or trespass on the case, *ante*, at 24–25, and I agree that two of the plurality’s cited cases,⁶ decided under state law, are

⁶Two of the cases cited by the plurality offer at most tangential support. Plaintiff’s claim in *Barron ex rel. Tiernan v. Mayor of Baltimore*, 7 Pet. 243, 249 (1833), was dismissed for lack of jurisdiction, on the ground that the Fifth Amendment was not applicable to the States. In *Lindsay v. Commissioners*, 2 Bay 38 (S. C. 1796), the plaintiff sought a writ of prohibition restraining city commissioners from laying out a street, not damages. While the plurality relies on the opinion of one

Opinion of SOUTER, J.

authority for the tort treatment the plurality claims to be the appropriate analogy. See *Gardner v. Village of Newburgh*, 2 Johns. 162 (N. Y. 1816) (Kent, Ch.); *Pumpelly v. Green Bay Co.*, 13 Wall. 166 (1872). One other is arguably such authority; *Richards v. Washington Terminal Co.*, 233 U. S. 546 (1914), is somewhat ambiguous, holding that the law of nuisance would provide compensation for interference with enjoyment of land when the State chose not to take the interest by direct condemnation; the measure of damages (not explained) may well have been what the Fifth Amendment would provide for a temporary partial taking.

Beyond these cases, however, any prospect of a uniform tort treatment disappears. One of the plurality's cited cases, *Bradshaw v. Rodgers*, 20 Johns. 103 (N. Y. 1822), was reversed by *Rogers v. Bradshaw*, 20 Johns. 735 (N. Y. 1823). As the concept of public liability was explained in the latter opinion, it turned not on an issue of garden variety tort law, but on whether there was a total absence or not of legal authority for a defending public officer's action with respect to the land. See *id.*, at 743 ("I should doubt exceedingly, whether the general principle, that private property is not to be taken for public uses without just compensation, is to be carried so far as to make a public officer, who enters upon private property by virtue of legislative authority, specially given for a public purpose, a trespasser, if he enters before the property has been paid for. I do not know, nor do I find, that the precedents will justify any court of justice in carrying the general principle to such an extent"). See also Brauneis, *The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century*

 justice favoring the granting of the writ, the court actually divided equally, the result being denial of the writ. Moreover, even within that opinion, the quoted statement is the equivalent of dictum since it is not necessary to the reasoning in favor of granting the writ.

State Just Compensation Law, 52 Vand. L. Rev. 57, 64–65 (1999) (demonstrating that pre-Civil War owner-initiated just compensation plaintiffs could recover retrospective damages under common law action of trespass or trespass on the case only after defendant was “stripped of his [legislative] justification”). Cf. *Leader v. Moxon*, 2 Black. W. 924, 927, 96 Eng. Rep. 546, 547 (C. P. 1773) (commissioners acted outside their statutory authority and were thus liable in tort); *Boulton v. Crowther*, 2 Barn. & Cress. 701, 707, 107 Eng. Rep. 544, 547 (K. B. 1824). Under these cases, there would be no recovery unless the public officer interfering with the property right was acting wholly without authority. But as absence of legal authorization becomes crucial to recovery, the analogy to tort liability fades. What is even more damaging to the attempted tort analogy, whether it rests on simple tort cases like *Gardner* or legal authorization cases like *Bradshaw*, is that this 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.⁷ See *First English Evangelical Lutheran*, 482 U. S., at 314–315 (citing *Williamson County Regional Planning Comm’n v. Hamilton Bank of Johnson City*, 473 U. S. 172, 194 (1985)); *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U. S. 264, 297, n. 40 (1981); *Hurley v. Kincaid*, 285 U. S., at 104; *Monongahela Nav. Co. v. United States*, 148 U. S. 312, 336 (1893); *United States v. Jones*, 109 U. S., at 518). Unlike damages to redress a wrong as understood in *Gardner* or *Bradshaw* (or even in a modern tort action), a damages award in an inverse condemnation

— — — — —

⁷When an inverse condemnee seeks an injunction (as when a direct condemnee challenges the taking, or a plaintiff claims a substantive due process violation), there is a claim of wrong in the sense of lack of authority. But this is not so in the usual case where damages are sought.

Opinion of SOUTER, J.

action orders payment of the “just compensation” required by the Constitution for payment of an obligation lawfully incurred.

To the plurality’s collection of tort and authorization cases, one must add those that are so far from reflecting any early understanding of inverse condemnation as conventionally tortious that they treat inverse condemnation as grounding an action in quasi contract, see, *e.g.*, *Jacobs v. United States*, 290 U. S., at 16. Although the quasi-contractual action seems to be the closest cousin to the plurality’s conception of §1983 as applied here, the resemblance is limited by that strain of quasi contract⁸ theory holding that the defendant must pay for what he has received to avoid unjust enrichment, see E. Farnsworth, *Farnsworth on Contracts* §2.20, p. 101 (3d ed. 1994), whereas the theory of just compensation for a taking is that the owner must be paid for what he has lost, *United States v. Miller*, 317 U. S. 369, 373–374 (1943).

After a canvass of these materials, the only conclusion that seems reasonable to me is that prior to the emergence of the modern inverse condemnation action a spectrum of legal theories was employed to respond to the problem of inverse taking. No one of these experiments can be accepted as a definitive analogue of the contemporary action, and each of them is inconsistent in some way with the contemporary view that inverse condemnation enforces payment for the owner’s value in property lawfully taken.

b

If the chosen tort analogy were not already too weak to sustain the plurality’s position, it would be rendered so by the plurality’s inability to identify any tort recovery under the old cases for the government’s sin of omission in fail-

— — — — —
⁸See Williston on Contracts §1.6, pp. 27–28 (4th ed. 1990) (restitution not limited by theory of unjust enrichment).

ing to provide a process of compensation (which the plurality finds at the heart of the §1983 claim), as distinct from the acts of interfering with use or enjoyment of land. The plurality simply fails to find any analogue on this element, and its failure is in fact matched by the failure of its §1983 theory to fit the reality of §1983 litigation for inverse takings. When an inverse condemnation claim is brought under §1983, the “provision” of law that is thereby enforced, *Golden State Transit Corp. v. Los Angeles*, 493 U. S. 103, 106 (1989), is the Fifth Amendment Just Compensation Clause and no other.⁹ There is no separate cause of action for withholding process, and respondents in the instant case do not claim otherwise; they simply seek just compensation for their land, subject to the usual rules governing §1983 liability and damages awards.¹⁰

— — — — —

⁹Of course, §1983 “is not itself a source of substantive rights, but a method for vindicating federal rights elsewhere conferred by those parts of the United States Constitution and federal statutes that it describes.” *Baker v. McCollan*, 443 U. S. 137, 144, n. 3 (1979). Accord, *Johnson v. University of Wisconsin-Eau Claire*, 70 F.3d 469, 481 (CA7 1995) (“Because §1983 does not create substantive rights, but rather provides a remedy for violations of pre-existing rights, §1983 claims must specifically allege a violation of the Constitution or ‘laws’ of the United States”).

¹⁰Respondents in this case sought damages for the fair market value of the property, interim damages for a temporary taking, holding costs, interest, attorney’s fees, costs, and other consequential damages. Complaint pp. 14–15; First Amended Complaint pp. 16–17. The jury was instructed that in calculating damages: “[I]t’s up to you to decide the difference in value, the fair market value as a result of the City’s decision. Multiply it by an interest rate you think is appropriate, for a length of time you think is appropriate. So those are the three elements of computing the damages claimed if you determine the plaintiff is entitled to recover.” 11 Record 1426. Respondents thus sought no incremental “damages” (beyond just compensation) for denial of state compensation procedures. Indeed, the only “damages” available in inverse condemnation cases is the just compensation measured by the value of the land. See *supra*, at 3. See, e.g., *Eide v. Sarasota County*,

Opinion of SOUTER, J.

c

Finally, it must be said that even if the tort analogue were not a failure, it would prove too much. For if the comparison to inverse condemnation were sound, it would be equally sound as to direct condemnation and so require recognition of the very jury right that we have previously denied. This perception was apparent to the Court of Appeals in this case, when it wrote (erroneously) that “both eminent domain and inverse condemnation actions resemble common-law actions for trover to recover damages for conversion of personal property, and detinue and replevin.” 95 F. 3d 1422, 1427 (CA9 1996). The Court of Appeals, indeed, cited *Beatty v. United States*, 203 F. 620 (CA4 1913), as does the plurality, *ante*, at 26, in which the Fourth Circuit held that the landowner in a direct condemnation proceeding had a Seventh Amendment right to a jury determination of just compensation:

“The taking of property by condemnation under the power of eminent domain is compulsory. The party is deprived of his property against his will. . . . The analogy to a suit at common law for trespass is close and complete, and it is for that reason presumably the Supreme Court of the United States, acting on the definition of a suit at common law previously indicated by it, has decided that a proceeding by the United States to condemn lands for public purposes is a suit at common law. If so it be, then it would follow that the defendant, if he claims it, is entitled at some stage in

— — — — —
 908 F. 2d 716 (CA11 1990). The fact that no further element of damages is recognized confirms rejection of the tort analogy, for it would be a peculiar tort indeed that did not recognize its concomitant injury in damages. Cf. *Miller v. Campbell County*, 854 P. 2d 71, 77 (Wyo. 1993) (rejecting reliance on tort law in holding that emotional distress is not a proper element of damages in inverse condemnation actions).

the proceeding to have his damages assessed by a jury.” 203 F., at 626.

The plurality’s analogy, if accepted, simply cannot be confined to inverse condemnation actions alone, and if it is not so confined it runs squarely against the settled law in the field of direct condemnation.

B

In addition to the plurality’s direct tort analogy, it pursues a different analytical approach in adopting JUSTICE SCALIA’s analogy to §1983 actions seeking legal relief, see *ante*, at 17. JUSTICE SCALIA begins with a more sweeping claim: “The central question remains whether a §1983 *suit* is entitled to a jury.” *Ante*, at 2 (opinion concurring in part and concurring in judgment). The analogy to the broad class of §1983 actions is put forward as serving the undoubted virtues of simplicity and uniformity in treating various actions that may be brought under a single remedial statute. It is only when “apply[ing] this methodology to the present case,” *ante*, at 5, that JUSTICE SCALIA is careful not to claim too much: he no longer argues for drawing an analogy between §1983 inverse condemnation actions and all §1983 actions, but only those §1983 actions brought to recover money damages, see *ante*, at 7. This subclass of §1983 actions, he quite correctly notes, has been treated as tortlike in character and thus as much entitled to jury trial as tort actions have been at common law. For two independent reasons, however, I think the analogy with §1983 actions, either as a class or as a subclass of damages actions, is inadequate.

1

First, the analogy to all §1983 actions does not serve any unified field theory of jury rights under §1983. While the statute is indeed a prism through which rights originating elsewhere may pass on their way to a federal jury

Opinion of SOUTER, J.

trial, trial by jury is not a uniform feature of §1983 actions. The statute provides not only for actions at law with damages remedies where appropriate, but for “suit[s] in equity, or other proper proceeding[s] for redress.” 42 U. S. C. §1983. Accordingly, rights passing through the §1983 prism may in proper cases be vindicated by injunction, see, *e.g.*, *Mitchum v. Foster*, 407 U. S. 225, 242–243 (1972) (§1983 falls within “expressly authorized” exception of Anti-Injunction Act and thus authorizes injunctions staying state-court proceedings), orders of restitution, see, *e.g.*, *Samuel v. University of Pittsburgh*, 538 F.2d 991, 994–995 (CA3 1976) (restitution of university fees collected pursuant to rule held to violate Equal Protection Clause), and by declaratory judgments, see, *e.g.*, *Steffel v. Thompson*, 415 U. S. 452, 454, 475 (1974) (declaratory relief under §1983 available in suit claiming state criminal statute constitutionally invalid), none of which implicate, or always implicate, a right to jury trial. Comparing inverse condemnation actions to the class of §1983 actions that are treated like torts does not, therefore, preserve a uniformity in jury practice under §1983 that would otherwise be lost. JUSTICE SCALIA’s metaphor is, indeed, an apt one: §1983 is a prism, not a procrustean bed.

Nor, as I have already mentioned, see *supra*, at 17–19, is there a sound basis for treating inverse condemnation as providing damages for a tort. A State’s untoward refusal to provide an adequate remedy to obtain compensation, the *sine qua non* of an inverse condemnation remedy under §1983, is not itself the independent subject of an award of damages (and respondents do not claim otherwise); the remedy is not damages for tortious behavior, but just compensation for the value of the property taken.

2

Even if an argument for §1983 simplicity and uniformity were sustainable, however, it would necessarily be

weaker than the analogy with direct condemnation actions. That analogy rests on two elements that are present in each of the two varieties of condemnation actions: a Fifth Amendment constitutional right and a remedy specifically mandated by that same amendment. Because constitutional values are superior to statutory values, uniformity as between different applications of a given constitutional guarantee is more important than uniformity as between different applications of a given statute. If one accepts that proposition as I do, a close analogy between direct and inverse condemnation proceedings is necessarily stronger than even a comparably close resemblance between two statutory actions.

IV

Were the results of the analysis to this point uncertain, one final anomaly of the Court's position would point up its error. The inconsistency of recognizing a jury trial right in inverse condemnation, notwithstanding its absence in condemnation actions, appears the more pronounced on recalling that under *Agins* one theory of recovery in inverse condemnation cases is that the taking makes no substantial contribution to a legitimate governmental purpose.¹¹ This issue includes not only a legal component that may be difficult to resolve, but one so closely related to similar issues in substantive due process property claims, that this Court cited a substantive due process case when recognizing the theory under the rubric of inverse condemnation. See *Agins*, 447 U. S., at 260

¹¹The jury's inverse condemnation verdict did not indicate which of the theories formed the basis of its liability finding: (1) whether the city's action did not substantially advance a legitimate purpose; or (2) whether the city's denial of the permit deprived the subject property of all economically viable use.

Opinion of SOUTER, J.

(citing *Nectow v. Cambridge*, 277 U. S. 183, 188 (1928)).¹² Substantive due process claims are, of course, routinely reserved without question for the court. See, e.g., *County of Sacramento v. Lewis*, 523 U. S. 833, 853–855 (1998); *Washington v. Glucksberg*, 521 U. S. 702, 722–723 (1997); *FM Properties Operating Co. v. Austin*, 93 F. 3d 167, 172, n. 6 (CA5 1996) (rational relationship to legitimate government interest for purposes of substantive due process a question of law for the court); *Samerica Corp. v. Philadelphia*, 142 F. 3d 582, 590–591 (CA3 1998) (same as to city historical commission action).¹³ Thus, it would be far removed from usual practice to charge a jury with the duty to assess the constitutional legitimacy of the government’s objective or the constitutional adequacy of its relationship to the government’s chosen means.

The usual practice makes perfect sense. While juries are not customarily called upon to assume the subtleties of deferential review, courts apply this sort of limited scrutiny in all sorts of contexts and are routinely accorded institutional competence to do it. See, e.g., *Pearson v. Grand Blanc*, 961 F. 2d 1211, 1222 (CA6 1992) (deferential substantive due process review a matter of law for the court). Scrutinizing the legal basis for governmental action is “one of those things that judges often do and are likely to do better than juries unburdened by training in exegesis.” *Markman*, 517 U. S., at 388. It therefore should bring no surprise to find that in the taking cases a

¹²I 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.

¹³The substantive due process taking claim concentrates on whether the government’s aims are “clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.” *Village of Euclid v. Ambler Realty Co.*, 272 U. S. 365, 395 (1926).

question whether regulatory action substantially advances a legitimate public aim has more often than not been treated by the federal courts as a legal issue. See, e.g., *New Port Largo, Inc. v. Monroe County*, 95 F.3d 1084, 1092 (CA11 1996) (whether regulatory taking occurred is an issue for the court); *Mid Gulf, Inc. v. Bishop*, 792 F.Supp. 1205, 1213–1214, 1215 (Kan. 1992) (whether city’s regulations unreasonable and a taking a question of law for the court); *Gissell v. Kenmare Township*, 512 N.W. 2d 470, 474 (N.D. 1994) (necessity for proposed taking a question for the court); *Yegen v. Bismarck*, 291 N.W. 2d 422, 424 (N.D. 1980) (taking *vel non* of private property for public use a question of law). But see *Gray v. South Carolina Dept. of Highways*, 427 S.E. 2d 899 (S.C. App. 1992) (whether no taking because closing of intersection was needed to prevent serious public harm is jury issue). These practices point up the great gulf between the practical realities of taking litigation, and the Court’s reliance on the assertion that “in suits sounding in tort for money damages, questions of liability were decided by the jury, rather than the judge, in most cases,” *ante*, at 27.

Perhaps this is the reason that the Court apparently seeks to distance itself from the ramifications of today’s determination. The Court disclaims any attempt to set a “precise demarcation of the respective provinces of judge and jury in determining whether a zoning decision substantially advances legitimate governmental interests.” *Ante*, at 31. It denies that today’s holding would extend to “a broad challenge to the constitutionality of the city’s general land-use ordinances or policies,” in which case, “the determination whether the statutory purposes were legitimate, or whether the purposes, though legitimate, were furthered by the law or general policy, might well fall within the province of the judge.” *Ibid.* (And the plurality presumably does not mean to address any Seventh Amendment issue that someone might raise when the

Opinion of SOUTER, J.

government has provided an adequate remedy, for example, by recognizing a compensatory action for inverse condemnation, see *ante*, at 23, 26.) But the Court's reticence is cold comfort simply because it rests upon distinctions that withstand analysis no better than the tort-law analogies on which the Court's conclusion purports to rest. The narrowness of the Court's intentions cannot, therefore, be accepted as an effective limit on the consequences on its reasoning, from which, I respectfully dissent.¹⁴

¹⁴I would therefore remand the case. There would be no need for a new trial; the judge could treat the jury's verdict as advisory, so long as he recorded his own findings consistent with the jury's verdict. See Fed. Rule of Civ. Proc. 52(a).