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THE TAKINGS CLAUSE AS A VEHICLE FOR JUDICIAL ACTIVISM: EASTERN ENTERPRISES V. APFEL PRESENTS A NEW TWIST TO TAKINGS ANALYSES

INTRODUCTION

Scholars have described the takings jurisprudence of the United States Supreme Court as a "pernicious mess,"1 "incoherent, piecemeal, or categorical,"2 and "notoriously muddled."3 Stemming from the Fifth Amendment of the Constitution, the takings doctrine limits the government's power of eminent domain by prohibiting seizure of property without just compensation.4 In Pennsylvania Coal Co. v. Mahon,5 the Supreme Court recognized that a regulation affecting private property can be considered a taking that violates the Fifth Amendment.6 The Supreme Court has intimated that the Takings Clause may be invoked when a regulation requires the payment of benefits, but it has rejected the notion that general financial liability, absent a connection to a specific property interest, violates the Fifth Amendment.7

In Eastern Enterprises v. Apfel,8 the Supreme Court held that the Coal Industry Retiree Health Benefit Act of 19929 (the Coal Act) was unconstitutional as applied to Eastern Enterprises.10 A plurality held that the Coal Act effected a taking by requiring a company no longer in the coal industry to retroactively pay

4. See U.S. Const. amend. V.
5. 260 U.S. 393 (1922).
6. See id. at 416; see also Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1027 (1992) (holding that destruction of all value in property by a regulation is a taking).
retired coal miners’ benefits.11 Before the decision was handed down, some commentators dismissed the case’s importance.12 They called the takings argument “tenuous” because the Supreme Court had rejected takings claims involving similar legislation in the past.13 One commentator concluded that “the greatest interest in this case [was] the mystery of why the Court granted certiorari.”14 However, in subsequent months, this decision has been regarded as “path-breaking” in the arenas of property law, retroactive legislation, and judicial activism.15

This Comment reviews and discusses the opinion in Eastern Enterprises v. Apfel as well as its implications. Part I contains a brief history of the regulatory takings doctrine. Part II explains the background of The Coal Act and the case. Part III presents an analysis of the holding of Eastern Enterprises, including the concurring and dissenting opinions. Part IV discusses the possible legacy of Eastern Enterprises, focusing on the new twists added to the takings analysis. Part V explores the relationship between the Takings Clause and judicial activism. Finally, Part VI discusses suggestions regarding the issues in this case that will most likely resurface.

I. A BRIEF HISTORY OF TAKINGS JURISPRUDENCE

The core of takings jurisprudence centers around the Fifth Amendment provision that “private property [shall not] be taken for public use without just compensation.”16 Twentieth century case law concerning the Takings Clause has expanded its meaning from prohibiting the physical invasion of property17 to the notion that a regulation that merely affects a stick in the bundle of property rights can constitute a taking.18

11. See id. at 539 (Kennedy, J., concurring in judgment only).
13. See id.
14. Id.
16. U.S. CONST. amend. V.
A. The Fifth Amendment

The three elements that form the backbone of the Fifth Amendment are "private property," "taken for public use," and "without just compensation." James Madison defined property as "that dominion which one man claims and exercises over the external things of the world, in exclusion of every other individual . . . embrac[ing] everything to which a man may attach a value and have a right; and which leaves to everyone else the like advantage." Takings jurisprudence conceives property as a bundle of rights, including the right to possess, use, and alienate property, as well as the right to exclude others. Several forms of property have evolved in case law including: real property, trade secrets and intellectual property, contracts, money in the form of accrued interest, pension plans, business interests, and water rights.

The meaning of "taken for public use" as used in the Fifth Amendment is somewhat vague. The Framers chose the stronger verb "taken," rather than "deprived," which is used earlier in the Fifth Amendment. Some scholars believe, based on historical studies, that Madison and the Drafters intended the Takings Clause "to apply only to direct physical taking of property by the federal government." The "public use" portion of the phrase, a controlling factor in the government’s eminent domain power, limits the power to

21. See id. at 12.
23. See Clegg et al., supra note 19, at 11.
24. See id. "Deprivation of property" would have been a broader phrase than "taken"; this arguably shows that the Framers intended the Takings Clause only to cover actual appropriations, not deprivation of or interference with property interests. See id.
25. Byrne, supra note 1, at 93. (quoting William M. Treanor, The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment, 94 Yale L. J. 694, 711 (1985)). However, other scholars believe that the Framers intended an expansive definition of "property protection commanded by natural law." Byrne, supra note 1, at 93. The latter definition of property has prevailed in the Supreme Court since 1922 and provided the backbone for the regulatory takings doctrine. See id. at 93-94.
take property only for public purposes.\textsuperscript{26} In \textit{Hawaii Housing Authority v. Midkiff},\textsuperscript{27} the Supreme Court stated that "[t]he 'public use' requirement is . . . coterminous with the scope of a sovereign's police powers."\textsuperscript{28} The legitimate public purpose of a regulation can be tested through a means-end evaluation.\textsuperscript{29} However, the Court has been unclear as to what test, if any, should be used to analyze the public use requirement.\textsuperscript{30}

"Without just compensation" is the remedial portion of the clause.\textsuperscript{31} Courts have construed this provision to mean that if the government exercises its power of eminent domain, it must pay.\textsuperscript{32} While this text is broad, typically the term "just" turns on the notion of fair market value.\textsuperscript{33}

\textbf{B. The Regulatory Takings Doctrine}

More traditional takings cases involve a physical invasion or appropriation of property by the government.\textsuperscript{34} In \textit{Loretto v. Telepromter Manhattan CATV Corp},\textsuperscript{35} the Court held that a rooftop cable installation was a permanent physical occupation that destroyed the most exalted property right, the right to exclude.\textsuperscript{36} This destruction mandated compensation.\textsuperscript{37}

The regulatory takings cases prove to be conceptually more difficult because the case law presents a stream of ad-hoc factual inquiries instead of a framework to analyze future problems.\textsuperscript{38} "Cases attempting to decide when a regulation becomes a taking are among the most litigated and perplexing in current law."\textsuperscript{39}

\begin{itemize}
\item \textsuperscript{26} \textit{See Jesse Dukeminier & James E. Krier, Property 1146 (3d ed. 1993).}
\item \textsuperscript{27} 467 U.S. 228 (1984).
\item \textsuperscript{28} Id. at 240.
\item \textsuperscript{29} \textit{See Dukeminier & Krier, supra note 26, at 1153-56.}
\item \textsuperscript{30} \textit{See id.; see also Patrick Wiseman, When the End Justifies the Means: Understanding Takings Jurisprudence in a Legal System with Integrity, 63 St. John's L. Rev. 433, 440 (1988).}
\item \textsuperscript{31} \textit{See Clegg et al., supra note 19, at 10.}
\item \textsuperscript{32} \textit{See id.}
\item \textsuperscript{33} \textit{See id.}
\item \textsuperscript{34} \textit{See Eastern Enters. v. Apfel, 524 U.S. 498, 522 (1998).}
\item \textsuperscript{35} 458 U.S. 419 (1982).
\item \textsuperscript{36} \textit{See id. at 421, 433.}
\item \textsuperscript{37} \textit{See id. at 441.}
\item \textsuperscript{38} \textit{See Wiseman, supra note 30, at 435-36.}
\item \textsuperscript{39} \textit{Eastern Enters., 524 U.S. at 541 (Kennedy, J., concurring in the judgment and dissenting in part).}
\end{itemize}
The genesis of the regulatory takings doctrine can be traced to Justice Holmes's statement in *Pennsylvania Coal*, that “[t]he general rule at least is, that while property may be regulated to a certain extent, if a regulation goes too far it will be recognized as a taking.” The aim of the regulatory takings doctrine, as quoted by the plurality in *Eastern Enterprises*, is “to prevent the government from forcing some people alone to bear public burdens that, in all fairness and justice, should be borne by the public as a whole.” No constitutional provision expressly addresses regulatory takings. The Fifth Amendment neither makes any mention of government regulation nor does it create a framework to measure when a regulation becomes sufficiently overreaching to constitute a taking.

In *Penn Central v. City of New York*, the Court introduced a fact-based balancing test for regulatory takings that weighs private interests against the public's interests. The factors of the balancing test include: the economic impact of the regulation, its interference with reasonable investment-backed expectations, and the character of the government action.

The “economic impact” on the claimant is a measure of the degree of harm that the regulation causes the claimant. While a court may consider economic repercussions, it should evaluate the entire situation. If the claimant benefits overall from the regulation, an “average reciprocity of advantage” could defeat a takings claim. For example, if challenged zoning regulations raise property values in the area, a court could find that the claimant enjoys an “average reciprocity of advantage,” which outweighs the harm incurred.

Analysis of the degree of “interference with investment-backed expectations” turns on the balancing of several factors,
including whether the claimant had sufficient notice of the possible effects of regulation when he or she acquired the property. In *Penn Central*, the Court balanced the extent that the government regulation interfered with the owner's use of the property against the owner's expectations of use before the regulation. The Court found that the owner could continue to use the property in the manner it expected when it purchased the property despite the regulation. "So the law does not interfere with what must be regarded as Penn Central's primary expectation concerning the use of the parcel." 

Analysis of the "character of the government action" requires evaluation of the nature of the regulation, whether it involves a physical invasion of property or regulatory interference. This factor includes an inquiry into the "public use" question, which is whether the purpose of the regulation was legitimate and weighty. For example, when the government's purpose involves regulation of a nuisance, the public interests served often outweigh the private harm. When private harm outweighs the interests served, the court generally finds a taking.

Weighing these factors is an "essentially ad hoc, factual inquir[y]." Scholars argue that to create a more viable rule, courts should conduct the takings inquiry sequentially and in a more principled manner. The Court does not use the balancing test analysis in every takings case, and its inconsistency in analyzing takings questions only adds to the confusion of the incoherent doctrine. "If a lawyer wished to state current takings doctrine for a legally trained client, she would need to identify four separate clusters of rule-like

51. *See id.* at 23-32.
53. *See id.*
54. *Id.*
56. *See CLEGG ET AL., supra note 19, at 35.*
57. *See Wiseman, supra note 30, at 459-61; see also Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1030 (1992) (holding that deprivation of all viable use of property by the application of the South Carolina Beachfront Management Act was a taking).  
58. *See Wiseman, supra note 30, at 459-61.*
60. *See CLEGG ET AL., supra note 18, at 52; Wiseman supra note 30, at 461.*
61. *See Byrne, supra note 1, at 103-04.*
utterances, any one of which might be taken from the shelf to decide a particular case."\textsuperscript{62}

The first "rule-like utterance" is the \textit{Penn Central} balancing test explained above.\textsuperscript{63} A second rule or test comes from the holding in \textit{Agins v. City of Tiburon},\textsuperscript{64} in which the Court held that an unconstitutional taking rested on two factors: (1) a means-ends analysis of the regulation to determine if it "substantially advanc[ed] legitimate state interest," and (2) a focus on pure economic loss to the claimant "without regard to the need for the regulation or the expectations of the owner . . . ."\textsuperscript{65} A third test, articulated in \textit{Loretto}, attempted to create a per se rule.\textsuperscript{66} The rule that emerged from \textit{Loretto} states that permanent physical occupation is a per se taking.\textsuperscript{67} And yet another possible takings analysis, similar to the third, involves the finding of a taking when a "fundamental" property right is affected.\textsuperscript{68} However, the Court has not determined what rights and uses are "fundamental."\textsuperscript{69}

The second test mentioned above stemmed from \textit{Agins} and presents a means-ends analysis, similar to that used in due process cases.\textsuperscript{70} The Court also used the means-ends reasoning in both \textit{Nollan v. California Coastal Commission}\textsuperscript{71} and \textit{Dolan v. City of Tigard}.\textsuperscript{72} In \textit{Nollan}, the plaintiff challenged the

\textsuperscript{62} Id.
\textsuperscript{63} See id. at 104; see also \textit{Penn Cent.}, 438 U.S. at 124.
\textsuperscript{64} 447 U.S. 255 (1980).
\textsuperscript{65} Byrne, supra note 1, at 104; see also \textit{Agins}, 447 U.S. at 260. The Court picked up on parts of this test and affirmed it in \textit{Lucas} twelve years later. See Byrne, supra note 1, at 104; see also \textit{Lucas v. South Carolina Coastal Council}, 505 U.S. 1003, 1016 (1992).
\textsuperscript{67} See Byrne, supra note 1, at 105.
\textsuperscript{68} See \textit{Loretto v. Telepromter Manhattan CATV Corp.}, 458 U.S. 419, 441 (1982); see also Byrne, supra note 1, at 105.
\textsuperscript{69} See Byrne, supra note 1, at 105.
\textsuperscript{70} See id. Byrne compares \textit{Andrus v. Allard}, 444 U.S. 51 (1979) (holding compensation is not mandated when a claimant was denied the right to sell eagle feathers) with \textit{Hodel v. Irving}, 481 U.S. 704 (1987) (mandating compensation when individuals were denied the right to devise land). See Byrne, supra note 1, at 105 n.108.
\textsuperscript{71} See Summers, supra note 65, at 872.
\textsuperscript{72} 483 U.S. 825 (1987).
\textsuperscript{73} 512 U.S. 374 (1994).
California Coastal Commission's right to condition a building permit on the grant of an easement for public beach access. The Court held that the conditional permit would not violate the Fifth Amendment if the condition imposed substantially furthered government purposes which would justify denial of the permit. An "essential nexus" must exist between the condition imposed and the harm that would be caused by granting the permit subject to the condition. The Nollan test seems to further define the means-end standard as "rationally related," making it a harder test to satisfy.

The Court further expanded on the "essential nexus" test in Dolan, which involved a challenge to a building permit conditioned on the granting of an easement for a municipal greenway. The Court found that there was an "essential nexus . . . between the 'legitimate state interest[s]' and the permit condition exacted by the city." Having found a nexus, the Court held that the degree of connection between the conditions imposed on granting a permit and the harm caused by the owner's proposition should be "roughly proportional." In both Nollan and Dolan, the Court left unanswered whether the "essential nexus" and the "rough proportionality" tests were limited to takings cases involving conditional permits and exactions or were generally applicable to all takings cases as part of the means-ends analysis.

The Court made an effort to clarify the takings doctrine in Lucas v. South Carolina Coastal Commission. Lucas involved a challenge to a state regulation enacted to prevent beach erosion, which prohibited the plaintiffs from building on beachfront property, thus rendering their property valueless. The Court held that when a regulation denies an owner all viable use of his land it violates the Fifth Amendment.

73. See Nollan, 483 U.S. at 828.
74. See id. at 841.
75. See id. at 830-37.
76. See Dolan, 512 U.S. at 379-80.
77. Id. at 388 (quoting Nollan, 483 U.S. at 837).
78. See id. at 391.
79. See Brief for the Petitioner at 38, Eastern Enters. v. Apfel, 524 U.S. 498 (1998) (No. 97-42) (stating "recent decisions confirm that the nexus requirement is an essential element of takings analysis); see also supra notes 164, 236 and accompanying text.
81. See id. at 1007.
regardless of the government interests it furthers. 82 Even though the Court attempted to create a per se test for a takings violation, Lucas is only helpful in extreme cases—when 100% of the viable use of the property is destroyed. 83 For other takings situations, the Court only suggested "a case-specific inquiry into the public interest advanced in support of the restraint." 84 Justice Kennedy, concurring in the judgment of Lucas, stated that "[t]he finding of no value must be considered under the Takings Clause by reference to the owner's reasonable, investment-backed expectations." 85 This assertion directly refers to the Penn Central balancing test and suggests that Justice Kennedy would like to maintain some uniformity in takings jurisprudence. 86

The numerous tests and ensuing confusion stem from the immense breadth of the regulatory takings doctrine and its purpose, namely "to mark as a matter of principle when limitation of property use becomes unfair." 87 Although, regulatory takings have included a broad spectrum of government actions, until Eastern Enterprises the Court had limited unconstitutional takings to situations where a specific property interest was affected. 88 The Court had suggested that a regulation that adversely affected a monetary interest could violate the takings clause. 89 However, until Eastern Enterprises, the Court had not found unconstitutional any taking dealing with purely economic legislation or interests in wealth. 90

82. See id. at 1019.
83. See Summers, supra note 65, at 883.
84. Lucas, 505 U.S. at 1015. It is questionable whether this phrase refers to the "ad hoc factual inquiry" sometimes used or a balancing test. If it is a balancing test, then which one? See Summers, supra note 65, at 883.
85. Lucas, 505 U.S. at 1034.
87. Byrne, supra note 1, at 105.
90. See Eastern Enters., 524 U.S. at 554 (Breyer, J., dissenting).
II. *Eastern Enterprises v. Apfel*: Background

Congress enacted the Coal Act in 1992 to cover the health care benefits of retired coal miners.\(^91\) The statute responded to a crisis in the management of retired coal miners’ benefits caused by the shrinking number of coal companies, rising costs of healthcare, and the growing number of retired miners.\(^92\) This litigation arose when Social Security Commissioner Kenneth Apfel tried to collect payments Eastern Enterprises owed under the Coal Act for its portion of retired miners.\(^93\)

A. Eastern Enterprises

Prior to 1965, Eastern Enterprises, formerly Eastern Gas and Fuel Associates, owned Boston Gas Company and Midland Enterprises Inc., which operated barges and maintained extensive coal operations.\(^94\) Eastern Enterprises employed miners who were members of the United Mine Workers of America (UMWA) and was signatory to all collective bargaining agreements between 1947 and 1964.\(^95\) Eastern Enterprises’s direct affiliation with the coal industry ceased in 1965 when it transferred its coal-related assets and operations to a wholly-owned subsidiary, Eastern Associated Coal Corporation (EACC).\(^96\) In 1987, it sold this stock in EACC to Peabody Holding Company.\(^97\)

B. The Coal Act

The Coal Act consolidated a series of collective bargaining agreements between the industry and the UMWA relating to health care benefits for coal miners.\(^98\) Congress enacted the statute based on findings of the Coal Commission, which was

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92. *See* id.
93. *See* Eastern Enters., 524 U.S. at 517.
95. *See* id. at 3
96. *See* id. at 6, 7.
97. *See* id. at 7.
established in the 1980's to study the crisis regarding these health care benefits.\footnote{99}{See id. at 8.}

1. Benefit Plans

Prior to the Coal Act, coal companies contributed to large UMWA trusts that were established in 1947 by the first National Bituminous Coal Wage Agreement (NBCWA) to ensure health care benefits and pensions for coal miners following a strike that had paralyzed the industry.\footnote{100}{See Eastern Enters. v. Chater, 110 F.3d 150, 153 (1st Cir. 1997), rev'd, 524 U.S. 498 (1998).} Three years later, the 1950 NBCWA established a multi-employer trust to finance the benefits for miners and their families as a product of collective bargaining between the miners and the coal operators.\footnote{101}{See Brief for the Federal Respondent at 5, Eastern Enters. (No. 97-42).} The structure remained in place until it was amended in 1974, in response to changing demographics and the implementation of the Employee Retirement Income Security Act of 1974\footnote{102}{29 U.S.C. § 1001 (1974).} ("ERISA").\footnote{103}{See Brief for the Federal Respondent at 6, Eastern Enters. (No. 97-42). Eastern Enterprises did not involve the two remaining trusts providing pension benefits. See id. at 2-3.}

At this point, the 1950 NBCWA was divided into four multi-employer trusts.\footnote{104}{See id.} The 1950 UMWA Benefit Trust (1950 Trust) and the 1974 UMWA Benefit Trust (1974 Trust) financed medical benefits for workers and their families.\footnote{105}{See id. at 6-7.} The 1950 Trust covered miners who had retired before January 1, 1976, and the 1974 Trust funded benefits to active miners for life.\footnote{106}{See id. at 7.}

Another NBCWA in 1978 included a guarantee clause, obligating signatories to make contributions to maintain benefits, and an evergreen clause, securing contributions from signatories as long as they remained in business regardless of whether they signed any agreements after the 1978 NBCWA.\footnote{107}{See id. at 7-8.}

In the 1980s, a combination of factors caused a crisis in the health care benefits system, including the rising costs of
medical services, shifts in the mining industry, and especially the increasing dilemma of "orphaned" retirees whose employers had stopped contributing to the trust.\textsuperscript{108} The future looked dire as health costs rose and the pool of contributors shrank; heavy burdens fell on those companies that remained.\textsuperscript{109}

2. The Coal Commission

In response to another strike in 1988 and the impending crisis in benefits, Secretary of Labor Elizabeth Dole established the Advisory Commission on United Mine Workers of America Retiree Health Benefits (Coal Commission) to study the financial condition of the 1950 and 1974 trusts and to ensure that orphaned workers received the lifetime benefits to which they were entitled.\textsuperscript{110} The Coal Commission recognized the concessions that coal miners had made to secure healthcare benefits, including accepting lower pension benefits in exchange for better healthcare coverage.\textsuperscript{111} The Coal Commission recommended that the miners be protected through a statutory scheme of obligated contributions.\textsuperscript{112} It suggested that Congress create a fund financed by industry-wide fees or, in the alternative, spread the costs of orphaned miners between current and past NBCWA signatories.\textsuperscript{113}

3. The Coal Act

Responding to the Coal Commission's findings, Congress passed the Coal Act in 1992 to ensure uninterrupted benefits to miners and their families.\textsuperscript{114} The statute combined the 1950 and

\textsuperscript{108} See id. at 8.
\textsuperscript{110} See Brief for the Federal Respondent at 9, Eastern Enters. (No. 97-42).
\textsuperscript{111} See Eastern Enters., 524 U.S. at 511-12.
\textsuperscript{112} See id. at 512.
\textsuperscript{113} See id.
\textsuperscript{114} See Agency Management of the Implementation of the Coal Act: Hearings Before the Senate Subcomm. of Gov't Management, Restructuring, and the District of Columbia, 105th Cong. 2 (1998) [hereinafter Hearings] (written statement of Deborah Walker, Treasury Acting Deputy to the Benefits Tax Counsel). President Bush vetoed the first version of the bill, which imposed an industry-wide tax on coal operators to fund the benefits of orphaned retired miners; the bill held signatories to the 1978 or future NBCWAs responsible for funding their own beneficiaries. See Eastern Enters., 524 U.S. at 513. Using the Coal Commission's alternative plan, which held coal operators who contributed to the 1950 and 1974 Trusts responsible for orphaned retirees, Congress
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1974 trusts to form the United Mine Workers of America Combined Benefit Fund (Combined Fund). 115 Revenues would be derived through annual assessments paid by “signatory coal operators,” including all companies that partook in any NBCWA or agreement that mandated contributions to the 1950 or 1974 funds. 116

Regardless of whether the company continued to be involved in the coal industry, any signatory or “related persons” could be held liable for premiums. 117 The Commissioner of Social Security would assess premiums due from signatories based on a plan set forth in the statute. 118 Code section 9706, which assigned the beneficiaries, reads:

[T]he Commissioner of Social Security shall...assign each coal industry retiree who is an eligible beneficiary to a signatory operator which (or any related person with respect to which) remains in business in the following order:

(1) First, to the signatory operator which—
(A) was a signatory to the 1978 coal wage agreement or any subsequent coal wage agreement, and
(B) was the most recent signatory operator to employ the coal industry retiree in the coal industry for at least 2 years.

(2) Second, if the retiree is not assigned under paragraph (1), to the signatory operator which—
(A) was a signatory to the 1978 coal wage agreement or any subsequent coal wage agreement, and
(B) was the most recent signatory operator to employ the coal industry retiree in the coal industry.

(3) Third, if the retiree is not assigned under paragraph (1) or (2), to the signatory operator which employed the coal industry retiree in the coal industry for a longer

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115. See Brief for the Federal Respondent at 14, Eastern Enters. (No. 97-42). The statute created an additional fund, the 1992 UMWA Benefit Plan, which was not at issue in the Eastern Enterprises case. See Eastern Enters., 524 U.S. at 514 n.2.
117. See id. “Related persons [could include] successors in interest and businesses or corporations under common control.” Id.
118. See id. at 514-15.
period of time than any other signatory operator prior to the effective date of the 1978 coal wage agreement.119

The premium was called a “reachback tax” because it reached backward to attach liability to all companies that had ever signed an NBCWA between 1946 and 1988, regardless if they had signed the 1988 NBCWA.120 Companies like Eastern Enterprises fell into the category of “super-reachback status” because they had either left the coal industry or did not sign UMWA contracts after 1974.121 As long as companies had signed a wage agreement at one time before 1988 and were still in business, the Coal Act held them responsible for a portion of the retired miners’ benefits because they participated in past collective bargaining agreements that guaranteed lifetime benefits to miners.122 “The assigned company’s obligation is perpetual.”123

Through the Coal Act, the Commissioner assigned Eastern Enterprises 1400 annual premiums, of which only 376 were for retired miners who worked when Eastern was active in the coal business (the rest were spouses and children).124 Eastern Enterprises’s first yearly premium exceeded five million dollars.125

C. The History of the Case

Eastern Enterprises sued the Commissioner of Social Security over the assessment of super-reachback liability for the health benefits of 1400 retired miners and their families, claiming takings and due process violations.126 Eastern Enterprises argued that the Coal Act was retroactive and fundamentally unfair because it placed financial burdens on Eastern

120. See Hearings, supra note 114, (Statement of Sen. Brownback).
121. See id.
122. See id. Justice Stevens and several circuit courts believed that reachback and super-reachback status was fair. They deferred to congressional judgment because in order to stay in business these companies made deals with the miners, who fought hard for benefits; also, regardless of their withdrawal from the coal industry, the companies made profits from the miners’ work for many years. See Eastern Enters. v. Apfel, 524 U.S. 498, 550-51 (1998) (Stevens, J., dissenting).
125. See id.
Enterprises even though the company had left the coal industry almost thirty years previously and had sold its assets in the successor company. 127 The Massachusetts district court granted summary judgment in favor of the government. 128 The First Circuit Court of Appeals affirmed the district court’s ruling, rejecting both the due process and takings claims. 129 The court stated that, “[t]he constitutional arguments are retreads which have taken their lumps from courts of appeals in five other circuits.” 130 The First Circuit confidently upheld the constitutionality of the Coal Act, supported by precedent and rulings of other circuits. 131 It stated that, “[t]he Coal Act was motivated by a legitimate legislative purpose; the assignment system which it created lies within the wide universe of rational measures that were available to Congress as vehicles for furthering that purpose; and the statutory scheme, as applied, [did] not impermissibly confiscate Eastern’s property.” 132

Eastern Enterprises appealed to the Supreme Court, and surprisingly, the Court granted certiorari. 133 Cases challenging similar statutes on appeal to the Supreme Court had been unsuccessful in both due process and takings analyses. 134 However, in Eastern Enterprises, the Court held that the Coal Act of 1992 was unconstitutional as applied to Eastern Enterprises, with a plurality finding that it violated the Takings Clause. 135

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127. See generally Brief for the Petitioner at 1-20, Eastern Enters. (No. 97-42).
130. Id. at 152.
131. See id. at 161-62.
132. Id. at 162.
133. See Eastern Enters. v. Apfel, 522 U.S. 931 (1987); see also Funk, supra note 12, at 8.
D. Precedent: Four Similar Statutes Survived

The grant of certiorari surprised those who thought the same issues had already been litigated and decided.\textsuperscript{136} Prior to \textit{Eastern Enterprises}, the Court rejected challenges to four other withdrawal liability statutes.\textsuperscript{137}

In \textit{Usury v. Turner Elkhorn Mining Co.},\textsuperscript{138} the Supreme Court upheld the constitutionality of the Black Lung Benefits Act of 1972\textsuperscript{139} under a substantive due process challenge.\textsuperscript{140} The statute required coal operators to compensate miners and their families for injuries caused by black lung disease.\textsuperscript{141} The Court held that economic regulations were presumptively valid and the assignment of benefits under the Act was “justified as a rational measure to spread the costs of employees’ disabilities to those who have profited from the fruits of their labor.”\textsuperscript{142}

In another case, \textit{Pension Benefit Guaranty Corp. v. R.A. Gray & Co.},\textsuperscript{143} the Multiemployer Pension Plan Amendments Act of 1980\textsuperscript{144} (MPPAA) survived a due process challenge to its retroactive provisions.\textsuperscript{145} The MPPAA imposed obligatory payments on companies that withdrew from multi-employer pension plans that took effect on April 29, 1980.\textsuperscript{146} One provision retroactively applied the fees to the five months preceding the statute’s enactment.\textsuperscript{147} The Court held that the retroactivity was both rational and necessary to prevent companies from withdrawing as the legislative process slowly progressed.\textsuperscript{148} The due process challenge ultimately failed as well.\textsuperscript{149}

\textit{Connolly v. Pension Benefit Guaranty Corp.}\textsuperscript{150} involved a takings challenge similar to the one in \textit{Eastern Enterprises} and

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\textsuperscript{136} \textit{See} Funk, \textit{supra} note 12, at 8. \textit{See supra} text accompanying note 13.

\textsuperscript{137} \textit{See infra} notes 138-161 and accompanying text.

\textsuperscript{138} 428 U.S. 1 (1976).

\textsuperscript{139} 30 U.S.C. \$ 901 (1972).

\textsuperscript{140} \textit{See Usury v. Turner Elkhorn Mining Co}, 428 U.S. 1, 3 (1976).

\textsuperscript{141} \textit{See id.} at 1.

\textsuperscript{142} \textit{Id.} at 18.

\textsuperscript{143} 467 U.S. 717 (1984).

\textsuperscript{144} 29 U.S.C. \$ 1001 (1994).


\textsuperscript{146} \textit{See id.} at 725.

\textsuperscript{147} \textit{See id.}

\textsuperscript{148} \textit{See id.} at 729.

\textsuperscript{149} \textit{See id.}

\textsuperscript{150} 475 U.S. 211 (1986).
had appeared to settle the takings question with regard to pension liability. 151 Connolly also involved the MPPAA, but the petitioner used the Takings Clause to challenge the statute’s constitutionality because the due process challenge failed in R.A. Gray Co. 152 The Court warned that when due process has been satisfied “it would be surprising indeed to discover now that ... Congress unconstitutionally had taken the assets of the employers there involved.” 153 The Court recognized the possibility that withdrawal liability could constitute a taking because the statutory payment obligation permanently deprived a company of assets. 154 However, the Court held that the statute did not effect a taking; it applied a balancing test that evaluated: “(1) ‘the economic impact of the regulation on the claimant’; (2) ‘the extent to which the regulation [had] interfered with distinct investment-backed expectations’; and (3) ‘the character of the governmental action.’” 155 In applying the balancing test, the Court deferred to the legislative scheme and held that the public interests outweighed the burdens to the litigants. 156 Justice O’Connor, who wrote for the plurality in Eastern Enterprises, wrote a concurring opinion and stressed that Connolly left open the possibility that withdrawal liability could effect a taking or due process violation. 157

Finally, in the most recent case, Concrete Pipe & Products of California v. Construction Laborers Pension Trust for Southern California, 158 the Court again rejected a takings and due process challenge to the MPPAA. 159 Using the balancing test from Connolly, the Court upheld the constitutionality of the statute under the Takings Clause, rejecting Concrete Pipes’s contention that the law forced it “to bear a burden ‘which, in all fairness

152. See id. at 213.
153. Id. at 223.
154. See id. at 222.
156. See id. at 225-28.
157. See id. at 228. Justice O’Connor relied on her concurrence in Connolly to draw similarities between the cases and to suggest that the Court had considered whether general liability could effect a taking prior to Eastern Enterprises. See Eastern Enters. v. Apfel, 524 U.S. 498, 538 (1998).
159. See id. at 605.
and justice, should be borne by the public as a whole.” In response to Concrete Pipe’s takings argument, the Court stated that “a claimant’s parcel of property could not first be divided into what was taken and what was left for the purpose of demonstrating the taking of the former to be complete and hence compensable.”

Thus, the issue of withdrawal liability had been well litigated by 1993 in four Supreme Court cases. In two takings challenges, the balancing test came out in favor of the government because of the presumptive constitutionality of economic legislation and because the public interests outweighed the burdens on litigants. The Supreme Court had not sustained a due process challenge to purely economic legislation in more than sixty years and stated in Concrete Pipe and Connolly that, if a statute did not violate due process, it would be surprising for the Court to find a taking. Additionally, five circuit courts had upheld the constitutionality of the Coal Act. It appeared that the issues already had been decided when Eastern Enterprises presented its case to the Supreme Court.

III. EASTERN ENTERPRISES V. APFEL

A. The Plurality Finds a Taking

The parties and some legal scholars expected the Court to expand or narrow the means-ends analysis set forth in Agins, Nollan, and Dolan, as evidenced by the parties’ briefs and journal articles prior to the decision. Eastern Enterprises tried

160. Id. at 646-47 (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)).
161. Id. at 644.
162. See supra notes 137-159 and accompanying text.
165. See Concrete Pipe, 508 U.S. at 641; Connolly, 475 U.S. at 223.
166. See Eastern Enters. v. Chater, 110 F.3d 150 (1st Cir. 1997), rev’d, 524 U.S. 498 (1998); Holland v. Keenan Trucking Co., 102 F.3d 738 (4th Cir. 1996); Blue Diamond Coal Co. v. Secretary of HHS, 79 F.3d 516 (6th Cir. 1996); Davon, Inc. v. Shalala, 75 F.3d 1114 (7th Cir. 1996); LTV Steel Co. v. Shalala, 53 F.3d 478 (3d Cir. 1995).
to fit the facts of its case, which did not involve real property, into the "essential nexus" test set forth in *Nollan* and expounded on in *Dolan*:

[A]s applied to Eastern, the Coal Act imposes an involuntary tax or premium obligation upon conduct completed thirty to fifty years ago. Such a permanent appropriation of property requires compensation unless it is based upon and proportional to some connection or nexus between the property owner's conduct and the social ill which the appropriation seeks to address.\(^{168}\)

The government and UMWA tried to distinguish *Eastern Enterprises* from *Dolan*, partly by pointing out that *Eastern Enterprises* did not involve real property.\(^{169}\) As amicus curiae, the California Cities and Counties argued that the means-ends analysis should not be expanded to apply to Eastern Enterprises's situation.\(^{170}\)

The plurality opinion, written by Justice O'Connor and joined by Justices Scalia, Thomas, and Chief Justice Rehnquist, found an unconstitutional taking, yet completely evaded the "essential nexus" analysis; the plurality thus left open the question of how *Nollan* and *Dolan* are to be interpreted.\(^{171}\) The plurality instead relied on a balancing test and held that the super-reachback taxes imposed on Eastern Enterprises effected a taking.\(^{172}\) The factors it considered, first articulated in *Penn Central* and *Connolly*, included the economic impact of the Coal Act on

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171. See *Eastern Enters.*, 524 U.S. at 503-38.

172. See *id.* at 528-37.
Eastern Enterprises, the Act's interference with its investment-backed expectations, and the nature of the regulation.\footnote{See id.}

1. Economic Impact

The first factor in the balancing test measured the regulation's economic impact on the claimant.\footnote{See id. at 529. But see Eastern Enters. v. Chater, 110 F.3d 150, 160 (1st Cir. 1997), rev'd, 524 U.S. 498 (1998). In regard to the "economic impact," the court stated that "Eastern mines this shaft for all it is worth (and then some), arguing that the assignment provisions of the Coal Act, if not invalidated, will subject it to an ultimate liability of roughly $100 million." Id. at 160. See id. at 160-61. The court stated that Eastern Enterprises's liability was reasonable and proportional to its involvement with earlier plans based on the number of assignments. See id. at 160-61. See id. at 530. But see Brief for Federal Respondent at 17, Eastern Enter. (No. 97-42) (stating that EACC, the successor company Eastern Enterprises owned until 1987, signed the 1974, 1978, and 1988 NBCWAs that guaranteed retired miners and their dependents lifetime benefits).}

The plurality admitted that the economic loss did not rise to the level of a physical occupation or regulation of property, but it sidestepped that problem and instead stated that the issue involved proportionality: "an employer's statutory liability for multi-employer plan benefits should reflect some 'proportionality' to its experience with the plan."\footnote{Id.} The plurality held that the liability assigned to Eastern Enterprises was disproportional because the company had ceased its own coal operations in 1965, and it was only a signatory to the 1947 and 1950 NBCWAs—not the subsequent NBCWAs in 1974 and 1978.\footnote{See Eastern Enters., 524 U.S. at 529.}

The plurality found that the possible liability of EACC, Eastern Enterprises's wholly-owned subsidiary that took over the coal operations, had no bearing on Eastern Enterprises's potential liability.\footnote{Id.} The plurality also disregarded the argument that indemnification would alter the economic impact.
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on Eastern Enterprises and held that indemnification would not mitigate the million-dollar premiums that Eastern Enterprises would initially have to pay.\textsuperscript{179}

Additionally, the plurality was not persuaded that the Coal Act allayed part of Eastern Enterprises's burden by not requiring it to pay the lifetime benefits of all of its former employees.\textsuperscript{180} The plurality stated that no reduction could mitigate the Act's substantial economic burden on Eastern Enterprises.\textsuperscript{181}

2. Interference with Reasonable Investment-Backed Expectations

A second factor in the Court's balancing test concerned the regulation's interference with the claimant's investment-backed expectations.\textsuperscript{182} The plurality used this prong to express its disapproval of the Coal Act's retroactivity.\textsuperscript{183}

The plurality pointed to a 1935 bankruptcy case, Louisville Joint Stock Land Bank v. Radford,\textsuperscript{184} in which the Court held that a bankruptcy provision violated the Takings Clause because it reached backwards and applied to rights gained before Congress adopted the provision.\textsuperscript{185} The Court then compared Eastern Enterprises to Louisville, stating that "the Coal Act operates retroactively, divesting Eastern of property long after the company believed its liabilities under the 1950 W&R Fund to have been settled."\textsuperscript{186} The plurality stated that because Eastern Enterprises did not sign the 1974 and 1978 NBCWAs, it had no reason to expect that it could be held liable for the lifetime benefits of workers from thirty to fifty years back.\textsuperscript{187} The plurality did not deny that the miners were entitled

\textsuperscript{179} See id.
\textsuperscript{180} See id. at 532.
\textsuperscript{181} See id.
\textsuperscript{182} See id.
\textsuperscript{183} See id.
\textsuperscript{184} 295 U.S. 555, 601-02 (1935).
\textsuperscript{185} See Eastern Enters., 524 U.S. at 534.
\textsuperscript{186} Id. But cf. id. at 551 (Stevens, J., dissenting) (stating that there was "an implicit understanding on both sides of the bargaining table that the operators would provide the miners with lifetime health benefits" and that the companies understood and Congress was aware of this fact while writing the Coal Act).
\textsuperscript{187} See id. at 539-31. But see Eastern Enters. v. Chater, 110 F.3d 150, 161 (1st Cir. 1997), rev'd, 524 U.S. 498 (1998). The First Circuit held that Eastern Enterprises was
to their lifetime benefits but noted that "the Constitution does not permit a solution to the problem of funding miners' benefits that imposes such a disproportionate and severely retroactive burden upon Eastern." 188

3. Nature of the Governmental Action

The final factor in the plurality's balancing test involved the nature of the government action. 189 Without questioning that the benefit crisis was a complex situation properly in the hands of Congress, the plurality criticized the means Congress employed, indicating that the Coal Act's retroactivity "implicates fundamental principles of fairness underlying the Takings Clause." 190 The plurality held that Eastern Enterprises was not liable for the healthcare benefits of retired miners based on actions the company took thirty years ago. 191

4. The Obstacle Course of Precedent

The plurality carefully steered itself through precedent that had found similarly structured statutes constitutional. Relying on Turner Elkhorn, Connolly, and Concrete Pipe, the plurality reasoned that a framework for questioning the constitutionality of economic regulations had been established and that the question of retroactive liability had been left open. 192

The plurality distinguished Eastern Enterprises from Connolly mainly by noting the degree of retroactivity imposed on Eastern—the years that had passed since Eastern

aware of heavy governmental regulation in the area of benefits. See id. "Having contributed to the expectation of lifetime health benefits for miners, Eastern had every reason to anticipate that it might be called upon to bear some of the financial burden that this expectation engendered." Id.; cf. Eastern Enters., 524 U.S. at 568-57 (Breyer, J., dissenting). Language implicating the fundamental fairness of retroactive legislation should be analyzed under due process arbitrariness standards. See id. at 556 (Breyer, J., dissenting).

188. Eastern Enters., 524 U.S. at 538.
189. See id. at 537.
190. Id. But see Eastern Enters. v. Chater, 110 F.3d 150, 161 (1st Cir. 1997), rev'd, 524 U.S. 498 (1998) (holding that the nature of the governmental action was "merely a public program that readjusts economic burdens" and distinguished the case from a taking by comparing it to cases with physical invasions or when monies collected went directly to the government, not a private fund).
191. See Eastern Enters., 524 U.S. at 537.
192. See id. at 529.
Enterprises was directly involved with the coal industry—and the degree to which Eastern could not have anticipated the liability. Writing for the plurality, Justice O'Connor relied on the concurrence she had written in Connolly, where she warned that "imposition of liability 'without regard to the extent of a particular employer's actual responsibility for [a benefit] plan's promise of fixed benefits to employees' could raise serious concerns under the Takings Clause." The crux of the plurality's holding lies in the severity of the retroactivity for Eastern Enterprises.

Justice Thomas wrote a brief concurring opinion, emphasizing that the Coal Act violated the Takings Clause, but provided no additional takings analysis. He further opined that extension of ex post facto jurisprudence into the civil context would render laws such as the Coal Act unconstitutional without having to delve into the Takings Clause analysis.

B. The Swing Vote: Unconstitutional But No Taking

Justice Kennedy concurred in the decision to hold the Coal Act unconstitutional, but he disagreed with the plurality's reasoning because he thought the act violated due process principles and not the Takings Clause. Justice Kennedy was particularly troubled by the plurality's use of the takings analysis on the Coal Act because the Act purported to impose the burden of paying benefits, without infringing on any specific property interest.

To the extent it affects property interests, it does so in a manner similar to many laws; but until today, none were thought to constitute takings. To call this sort of governmental action a taking as a matter of constitutional

193. See id. at 530-31.
196. See id. at 538 (Thomas, J., concurring).
197. See id. at 538-39. (Thomas, J., concurring).
198. See id. at 539 (Kennedy, J., concurring in the judgment and dissenting in part).
199. See id. at 540 (Kennedy, J., concurring in the judgment and dissenting in part).
interpretation is both imprecise and, with all due respect, unwise.\textsuperscript{200}

A constant limitation in regulatory takings law has been the destruction of a specific property interest at stake—the right to use, alienate, or exclude.\textsuperscript{201} Justice Kennedy opined that the plurality disregarded the implicit requirement that some specific property interest might be infringed, warning that without these boundaries regulatory takings law would be immersed in confusion.\textsuperscript{202} He predicted headaches for state and local governments and suggested new claims and causes of action would flood the lower courts with litigation.\textsuperscript{203} Justice Kennedy further noted that the plurality made a “normative judgment about the Coal Act” that runs counter to the purpose of the Takings Clause by placing limits on the power of government instead of compensating citizens for governmental intrusion on their property rights.\textsuperscript{204}

In regard to the precedent that the plurality cited, Justice Kennedy called the language in \textit{Connolly} and \textit{Concrete Pipe} “equivocal on the question of whether we should apply the regulatory takings analysis to instances like the one now before us.”\textsuperscript{205} He interpreted the two cases to stand for the reasoning that takings analysis should be used only after due process analysis and “where the government action is otherwise permissible.”\textsuperscript{206} He concluded his concurrence by stating that an analysis of the Coal Act under due process principles would be a more proper way to test the legitimacy of Congressional action; he then found the Act violated Eastern Enterprises’s due process rights.\textsuperscript{207}

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\textsuperscript{200} \textit{Id.} (Kennedy, J., concurring in the judgment and dissenting in part).
\textsuperscript{201} \textit{See id.} at 541 (Kennedy, J., concurring in the judgment and dissenting in part).
\textsuperscript{202} \textit{See id.} at 542 (Kennedy, J., concurring in the judgment and dissenting in part).
\textsuperscript{203} \textit{See id.} (Kennedy, J., concurring in the judgment and dissenting in part).
\textsuperscript{204} \textit{Id.} at 544-45 (Kennedy, J., concurring in the judgment and dissenting in part).
\textsuperscript{205} \textit{Id.} at 546 (Kennedy, J., concurring in the judgment and dissenting in part).
\textsuperscript{206} \textit{Id.} (Kennedy, J., concurring in the judgment and dissenting in part).
\textsuperscript{207} \textit{See id.} at 547-50 (Kennedy, J., concurring in the judgment and dissenting in part).
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According to Justice Kennedy, the Act violated due process principles because the statute’s retroactivity did not even pass the deferential means-end standard. \textit{See id.} (Kennedy, J., concurring in the judgment and dissenting in part).
C. The Dissent

A four-justice dissent stated that the Coal Act was constitutional, rejecting both takings and due process arguments. Justice Stevens and Justice Breyer wrote separately, and Justices Ginsberg and Souter joined both.

1. Justice Stevens

Justice Stevens expressed concern that the plurality substituted its own judgment for the judgment of Congress and a majority of circuit courts. He reasoned that when Congress passed the Coal Act, legislators and the Coal Commission were more familiar with the situation of reachback companies like Eastern Enterprises and the intent of coal operators that signed the NBCWAs. Justice Stevens pointed to the critical fact that during collective bargaining agreements in the 1950s and 1960s, coal operators implicitly understood that their promise of lifetime benefits to the miners was a concession to prevent strikes and keep the mines operating. Additionally, Justice Stevens cited several circuit court decisions that held the Coal Act constitutional and its means rational. He concluded that Eastern Enterprises had not overcome the burden of presumptive constitutionality accorded to economic legislation under either due process or takings analysis.

2. Justice Breyer

Justice Breyer criticized the plurality’s use of a takings analysis when other remedies such as due process would better conform to Eastern Enterprises’s claim. He stated that there was “no need to torture the takings clause to fit this case.” Like Justice Kennedy, Justice Breyer stated that a taking must involve a “specific interest in physical or intellectual

208. See id. at 553-68 (Breyer, J., dissenting).
209. See id. (Breyer, J., dissenting); id. at 550-53 (Stevens, J., dissenting).
210. See id. at 550-53 (Stevens, J., dissenting).
211. See id. at 553 (Stevens, J., dissenting).
212. See id. at 551 (Stevens, J., dissenting).
213. See id. at 551-52 (Stevens, J., dissenting). See also cases cited supra note 163.
214. See id. at 553 (Stevens, J., dissenting).
215. See id. at 554 (Breyer, J., dissenting).
216. Id. at 550 (Breyer, J., dissenting).
property.”217 He argued that this case involved “an ordinary liability to pay money, and not to the Government, but to third parties.”218

Justice Breyer contended that the case should have been decided under the Court's reasoning in Connolly, where it found no takings violation partially because “the Government does not physically invade or permanently appropriate any... assets for its own use.”219 In Eastern Enterprises, the Government acted as an administrator, but the assessments were channeled to a private, third-party fund.220 Justice Breyer questioned the wisdom of extending the regulatory takings doctrine to include claims like Eastern Enterprises's where the government directs payment to a third person, asking whether the next logical step would be to find a taking when one simply pays the government taxes.221

Further, he questioned the viability of using the takings clause to invalidate legislation rather than to compensate for government infringement of property rights.222 Finally, he pointed out that issues involving the fairness of retroactive statutes should be evaluated using due process principles, which “safeguard[ ] citizens from arbitrary or irrational legislation.”223 Justice Breyer concluded that the Coal Act was constitutional under due process scrutiny.224

217. Id. at 554 (Breyer, J., dissenting).
218. Id. (Breyer, J., dissenting).
219. Id. at 555 (Breyer J., dissenting) (quoting Connolly v. Pension Benefit Guar., 475 U.S. 211, 225 (1988) (emphasis omitted)).
220. See id. (Breyer J., dissenting).
221. See id. at 556 (Breyer J., dissenting).
222. See id. (Breyer J., dissenting). See also First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 314 (1987) (holding that the Takings Clause is a remedial measure to obtain compensation when the government improperly interferes with a property interest).
223. Eastern Enter., 524 U.S. at 558 (Breyer, J., dissenting).
224. See id. at 558-63 (Breyer, J., dissenting). Justice Breyer's reasoning for finding no due process violation is beyond the scope of this Comment.
IV. NEW TWISTS IN THE TAKINGS ANALYSIS AND
THE LEGACY OF EASTERN ENTERPRISES

Eastern Enterprises will have an effect on the law of takings
no matter how it is interpreted in the future.\textsuperscript{225} For precedential
purposes, the judgment will stand that the Coal Act was
unconstitutional as applied to Eastern Enterprises,\textsuperscript{226} while only
a plurality held that the statute violated the Takings Clause.\textsuperscript{227}
Yet, the Supreme Court and lower courts could expand upon the
plurality’s reasoning in a subsequent case.\textsuperscript{228} However, Eastern
Enterprises’s legacy may lie in the reasoning of the concurrence
and dissent, supported by five justices, who found that
regulations that affect general wealth and liability must be
challenged under due process, rather than takings, principles.\textsuperscript{229}

A. Following the Plurality

Justice O’Connor, writing for the plurality, held that the Coal
Act violated the Takings Clause and was unconstitutional as
applied to Eastern Enterprises.\textsuperscript{230} While the decision to hold the
Act unconstitutional has the precedential force of five justices,
the takings reasoning represents a minority view. However, the
plurality’s reasoning has support among conservatives, and
lower courts may use it to expand the takings doctrine.\textsuperscript{231}

1. Property

Justice O’Connor’s opinion in Eastern Enterprises represents
a divergence in regulatory takings jurisprudence because the

\textsuperscript{225} See Gerald Gunther & Kathleen M. Sullivan, Constitutional Law 41-44 (13th
ed. Supp. 1998). This text cites Eastern Enterprises first for substantive due process
analysis and scrutiny of economic regulation. See id. at 41. However, on the next page,
the authors cite Eastern Enterprises under the heading “Other Constitutional
Safeguards of Economic Rights” and follow it with a discussion of regulatory takings
discipline. Id. at 42.

\textsuperscript{226} See Eastern Enters., 524 U.S. at 537.

\textsuperscript{227} See id.

\textsuperscript{228} See generally Kendall & Lord, supra note 167 (noting the increasing use of the
Takings Clause for invalidating legislation and the growing influence of the libertarian
views of Richard Epstein in the federal judiciary).

\textsuperscript{229} See Thomas W. Merrill, Compensation and the Interconnectedness of Property,

\textsuperscript{230} See Eastern Enters., 524 U.S. at 537.

\textsuperscript{231} See generally Kendall & Lord, supra note 167.
analysis removes the necessity that a specific property interest be at stake.\textsuperscript{232}

The plurality created new property rights to which the Fifth Amendment can be applied by extending the Takings Clause to cover general liability.\textsuperscript{233} Before this decision, takings analysis had been confined to problems involving interests in property, not general liability.\textsuperscript{234}

Justice Kennedy, concurring in the judgment only, criticized the plurality’s expansion of the notion of property for takings purposes:

Our cases do not support the plurality’s conclusion that the Coal Act takes property. The Coal Act imposes a staggering financial burden on the petitioner, Eastern Enterprises, but it regulates the former mine owner without regard to property. It does not operate upon or alter an identified property interest, and it is not applicable to or measured by a property interest. The Coal Act does not appropriate, transfer, or encumber an estate in land (\textit{e.g.}, a lien on a particular piece of property), a valuable interest in an intangible (\textit{e.g.}, intellectual property), or even a bank account or accrued interest. The law simply imposes an obligation to perform an act, the payment of benefits. . . . To the extent it affects property interests, it does so in a manner similar to many laws; but until today, none were thought to constitute takings.\textsuperscript{235}

Justice O’Connor failed to respond to the contention that the plurality’s decision expanded the notion of property for takings purposes.\textsuperscript{236} She recognized that \textit{Eastern Enterprises} did not represent the “classi[c] taking” but replied that “economic regulation such as the Coal Act may nonetheless effect a taking.”\textsuperscript{237}

Justices Kennedy and Breyer both emphasized the notion that a regulation at issue under a takings analysis must involve a specific interest in property, which is the only thread holding

\begin{itemize}
\item \textsuperscript{232} \textit{See Eastern Enters.}, 524 U.S. at 542 (Kennedy, J., concurring in the judgment and dissenting in part).
\item \textsuperscript{233} \textit{See Eastern Enters.}, 524 U.S. at 554 (Breyer, J., dissenting).
\item \textsuperscript{234} \textit{See id.} at 542 (Kennedy, J., concurring in the judgment and dissenting in part).
\item \textsuperscript{235} \textit{Id.} at 540 (Kennedy, J., concurring in the judgment and dissenting in part).
\item \textsuperscript{236} \textit{See id.} at 522 (Kennedy, J., concurring in the judgment and dissenting in part).
\item \textsuperscript{237} \textit{Id.} at 522-23 (Kennedy, J., concurring in the judgment and dissenting in part).
\end{itemize}
together the regulatory takings doctrine. The plurality's analysis has added a new dimension to property interests—general liability—which could open the floodgates to more litigation under the Takings Clause.

2. Regulatory Takings Analysis

The plurality's opinion has also added to the imprecision of the regulatory takings analysis and leaves unsettled which of the "clusters of rule-like utterances" will emerge as the basis for testing regulatory takings. However, the plurality in *Eastern Enterprises* did articulate a three-factor balancing test, which considered "[t]he economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental action." The Fourth Circuit cited *Eastern Enterprises* in *Carolina Water Service v. City of Winston-Salem* for the regulatory takings analysis test, stating the above three factors.

The *Eastern Enterprises* plurality opinion failed to mention the means-ends analysis from *Agins* or the "rough proportionality" analysis in *Dolan*, but instead it picked up the three-factor balancing test cited in *Penn Central* and *Connolly*. The absence of any mention of *Dolan* may suggest

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238. *See id.* at 542, 554 (Kennedy, J., concurring in the judgment and dissenting in part).
239. *See Brief Amicus Curiae of California Cities and Counties at 1, Eastern Enters.* (No. 97-42).

The amici communities have a substantial interest in this case because petitioner and its amici urge the Court to adopt a broad, unprecedented reading of the taking clause. This interpretation, if adopted, would result in the filing of significantly greater numbers of claims under the taking clause for financial compensation based on local land use regulation. . . . [T]he sweeping proposal advanced by petitioner and its amici to change established takings doctrine could have ramifications far beyond the context of this case.

*Id.*

240. *Byrne, supra note 1,* at 103-104.
243. *See id.* at *5.
that Nollan and Dolan are limited to cases involving conditional permits.245

Additionally, the plurality’s decision lacked any formal means-end analysis.246 The Amicus Curiae Brief of California Cities and Counties argued that the means-end analysis has no place in takings jurisprudence at all.247 “At the distinctive core of takings analysis is the presumption that the means and ends government has selected are valid; the relevant question is whether the takings clause compels the payment of just compensation as a condition of government carrying out presumptively valid action.”248 Perhaps the Court has begun a journey away from the means-ends analysis for takings purposes, and the Eastern Enterprises opinion could stand for the adoption of the three-factor balancing test for regulatory takings.

3. Conceptual Severance

Professor Radin introduced the term “conceptual severance” in 1988, which she defined as
delineating a property interest consisting of just what the government action has removed from the owner, and then asserting that [the] particular whole thing has been permanently taken. Thus, this strategy hypothetically or conceptually ‘severs’ from the whole bundle of rights just those strands that are interfered with by the regulation, and then hypothetically or conceptually construes those strands in the aggregate as a separate whole thing.249

245. See id. at 503-538; see also Dolan v. City of Tigard, 512 U.S. 374 (1994); Nollan v. California Coastal Comm., 483 U.S. 825 (1987); Brief for Petitioner at 38-43, Eastern Enters. (No. 97-42). Eastern Enterprises tried to fit the “essential nexus requirement” of Nollan and Dolan with the facts in its own case. See Brief for Petitioner at 39-43, Eastern Enters. (No. 97-42). The Court did not mention either case in the decision, implying that the “essential nexus” and “rough proportionality” test are limited to cases involving unconstitutional conditions on land. See Brief for the Federal Respondent at 40, Eastern Enters. (No. 97-42).
246. See Eastern Enters., 524 U.S. at 500-38.
247. See Brief Amicus Curiae of California Cities and Counties at 11, Eastern Enters. (No. 97-42).
248. Id. at 12.
This concept is also known as the “denominator problem.” Conceptual severance fits into the takings analysis when a court considers whether the regulation diminishes the property’s value, affects the owner’s investment-backed expectations, and destroys an essential property right. Before answering those questions, a court should first ask “on what property should [it] focus [its] attention?”

The Court has struggled with the denominator problem, but not answered it; instead, it has added to the problems of incoherence and confusion in the takings arena. The Court announced a nonseverability rule in Penn Central Transportation Co. v. City of New York, refusing to find a taking of the air rights above the building at issue stating, “[t]aking’ jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated.” Then, in Keystone Bituminous Coal Ass’n v. DeBenedictis, the Court held that there was no regulatory taking caused by The Subsidence Act, which required that fifty percent of plaintiff’s coal could not be mined but had to remain in the support estate below the ground; the Court refused to accept the support estate “as a distinct segment of property for ‘takings’ purposes.” However, in First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, Justice Rehnquist

251. See E-mail Interview with Professor Patrick Wiseman, Georgia State University College of Law (October 11, 1999) [hereinafter Wiseman Oct. Interview].
252. Id.
253. See Fee, supra note 250, at 1537; Lisker, supra note 250, at 669.
257. Keystone, 480 U.S. at 501; accord Concrete Pipe & Prods. of Cal., Inc v. Construction Laborers Pension Trust, 508 U.S. 602, 644 (1993) (stating that “a claimant’s parcel of property could not first be divided into what was taken and what was left for the purpose of demonstrating the taking of the former”). But see Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) (holding that a law that prevented extraction of coal from the support estate effected a taking).
sanctioned a temporal conceptual severance when he wrote that “if regulatory legislation is ultimately determined to work a taking, compensation is due for the period from the imposition of the legislation until its judicial invalidation.”\textsuperscript{259} Additionally, the dissenting justices in \textit{Keystone} rejected the nonseverability rule and argued that property could be divided into discrete segments for takings purposes.\textsuperscript{260}

\textit{Lucas v. South Carolina Coastal Council}\textsuperscript{261} has been termed a “point of departure” in the Supreme Court’s analysis of conceptual severance.\textsuperscript{262} Writing for the Court, Justice Scalia held that a taking may occur when a regulation “deprives land of all economically beneficial use.”\textsuperscript{263} Justice Scalia recognized the denominator problem when he determined what property to examine for the diminution-in-value analysis, stating that “this uncertainty regarding the composition of the denominator in our ‘deprivation’ fraction has produced inconsistent pronouncements by the Court.”\textsuperscript{264} Justice Scalia rejected the \textit{Penn Central} approach (nonseverability) as “extreme” and “unsupportable.”\textsuperscript{265} He suggested that the answer to the denominator problem may lie in “how the owner’s reasonable expectations have been shaped by the State’s law of property—[that is], whether and to what degree the State’s law

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\textsuperscript{259} Radin, supra note 249, at 1874. \textit{First English} represents what scholars have called “temporal severance.” \textit{See} Lisker, supra note 250, at 700-01.

In other words, the Court divided the property into at least two segments along a timeline—one for the time that the regulation is in effect, and one for the time after it is struck down. In each segment, the parcel remains the same, and damages are due only for the duration of the first segment.

\textit{Id.} Under this analysis, \textit{Penn Central} and \textit{Keystone Bituminous} represent vertical severance—division of property into vertical segments for takings purposes; the Court has rejected this approach. \textit{See id.} at 699-700. Functional severance is represented by cases such as \textit{Nollan} and \textit{Dolan}, where certain property can be separated from the whole so that a permit can be conditioned subject to a particular use (easement). \textit{See id.} at 701-04. Finally, horizontal severance involves dividing the property into smaller lots. \textit{See id.} at 694-95, 705-06.


\textsuperscript{261} 505 U.S. 1003 (1992).


\textsuperscript{263} \textit{Lucas}, 505 U.S. at 1027.

\textsuperscript{264} \textit{Id.} at 1016-17.

\textsuperscript{265} \textit{See id.}
has accorded legal recognition and protection...with respect to which the takings claimant alleges a diminution in (or elimination of) value.” Commentators have criticized Scalia’s approach in *Lucas* because it may make government regulations more vulnerable to takings challenges, expand protections given to landowners, and “would often lead to arbitrary and surprising outcomes.”

Enter the *Eastern Enterprises* plurality, which held that a taking occurs when a regulation deprives a plaintiff of 100% of monies owed pursuant to the Coal Act: an outright adoption of the doctrine of conceptual severance. The implications of this twist in the denominator problem could be enormous.

Professor Radin warned against adoption of conceptual severance in takings analyses, fearing that “[e]very curtailment of any of the liberal indicia of property, every regulation of any portion of an owner’s ‘bundle of sticks’ is a taking of the whole of that particular portion considered separately,” including price regulations and building restrictions. In *Eastern Enterprises*, the Court journeys down the proverbial slippery slope by considering Eastern Enterprises’s entire financial obligation.
under the Coal Act a discrete segment of its assets that the
government could take.  

The Eastern Enterprises plurality opinion further compounds
the denominator problem because the case did not involve real
property. The problem with Eastern is treating money as
‘takeable’ property at all. The denominator problem becomes
either intractable (is the ‘whole’ property a company’s capital
assets [or] net worth. . .) or irrelevant (what’s ‘taken’ in the
constitutional sense is what’s literally taken . . .) The logical
extension of the latter premise is that all government fees
become unconstitutional takings; this seems to be a very broad
position, but it is one that scholars like Professor Epstein
embrace. Justice Breyer, dissenting in Eastern Enterprises,
realized the conceptual difficulties created by the application
of the Takings Clause to cases of general liability and opined
that the takings analysis should be reserved to real property.

The problem of conceptual severance bleeds into other issues,
such as the confusion between substantive due process and the
takings analysis.

It would appear that any government-imposed fee may now
be treated as ‘property’ for takings purposes; instead of
asking whether the fee is justified as a reasonable means to
achieve a legitimate government purpose (a due process
analysis) the plurality in Eastern Enterprises asks if the fee

273. See discussion supra Part IV.A.1 and accompanying notes (discussing
the arguments by Justices Kennedy and Breyer that the takings analysis should be limited
to real property).
275. See id.; Richard A. Epstein, Takings: Private Property and the Power of
Eminent Domain (1985) (hereinafter Epstein I). Epstein theorizes that “taxation is
prima facie a taking of private property . . . With a tax, the government takes property
in the narrowest sense of the term, ending up with ownership and possession of that
which was once in private hands . . .” Id. at 100. Epstein extends his takings analysis to
government regulations as well. See id. at 100-01. “All regulations, all taxes, and all
modifications of liability rules are takings of private property prima facie compensable
[hereinafter Epstein II].
Clause authority is not surprising, for application of the Takings Clause here bristles
with conceptual difficulties. If the Clause applies when the government simply orders
A to pay B, why does it not apply when the government simply orders A to pay the
government, i.e., when it assesses a tax?” Id. at 556.
is 'private property' which has been 'taken' for a 'public purpose' . . . . [A]ny fee would meet this 'test.'

After Eastern Enterprises, the Third Circuit faced the denominator problem in Unity Real Estate Co. v. Hudson, which involved the "categorical takings approach," as applied to fiscal liability, not property. The plaintiffs in Unity Real Estate argued that the Coal Act's assessments would force them to go out of business and that the court therefore should find that the Act caused a categorical taking. The court rejected the application of the categorical takings doctrine, stating:

To date the categorical approach has only been used in real property cases such as Lucas v. South Carolina . . . . In those cases, the concept of 'total destruction' of value refers not to the owner's total assets but to some identifiable property interest. Indeed, even a multi-billionaire would be eligible for an award under a categorical takings approach if some small, distinct parcel of his holdings were condemned or rendered worthless through regulation. Therefore, the 'total destruction' language of cases concerning real property should not be mechanically applied to the situation at bar . . . . The Supreme Court has repeatedly rejected the argument that a tax—even a tax on a small set of businesses—may violate due process or constitute a taking simply because it may force some of the regulated entities out of business . . . .

The Third Circuit relied on the dissenting and concurring opinions in Eastern Enterprises to reject the plaintiffs' takings argument. The court cited mechanical problems that might occur in certain cases, such as when the company is on the verge of bankruptcy or before its resources are depleted. Further, the court feared opening the floodgates of litigation, calling the plaintiffs' argument "a Pandora's box that would

278. 178 F.3d 649 (3d Cir. 1999).
279. See id. at 674.
280. See id. Eastern Enterprises did not present to the Supreme Court the argument that the Coal Act would drive it out of business, thus the Unity Real Estate plaintiffs argued that their takings claim was still viable. See id.
281. Id. at 674-75.
282. See id. at 676.
283. See id.
throw into question every economic law regulation imaginable. Companies could adjust their accounting practices to prove that any particular regulation would be enough to destroy them as profitable enterprises.\footnote{\textit{Id.}} The deferential tone of \textit{Unity Real Estate} is quite different from the plurality opinion in \textit{Eastern Enterprises}, which held that a taking occurred because the Coal Act imposed a harsh economic burden on the plaintiffs yet did not threaten the existence of the company.\footnote{See Eastern Enters. v. Apfel, 524 U.S. 498, 500-38 (1998); \textit{Unity Real Estate}, 178 F.3d at 658 (finding the distinguishing factor to be that the \textit{Unity} plaintiffs signed the 1974 NBCWA whereas Eastern Enterprises had not; thus the Coal Act survived the Third Circuit's due process analysis).} It is hard to predict how the Supreme Court would have decided \textit{Unity Real Estate}.\footnote{See \textit{supra} note 282 and accompanying text.} The plurality could view the economic impact on the plaintiffs as more severe than the impact in \textit{Eastern Enterprises}, where the plaintiffs did not argue potential destruction of their business, and thus find a taking under the balancing tests; the five justices who held that the takings clause should apply only to real property could join to write a majority opinion and analyze the claim under due process standards.\footnote{See \textit{supra} note 286 and \textit{supra} note 283.} 

\textbf{B. The Dissent and the Concurrence}

Courts in subsequent takings challenges may find that \textit{Eastern Enterprises} held that general fiscal liability cannot be a taking under the Fifth Amendment because the \textit{Eastern Enterprises} plurality represented only a minority view.\footnote{\textit{See Eastern Enters.}, 524 U.S. at 498, 539 (1998) (Kennedy, J., concurring in the judgment and dissenting in part); \textit{id.} at 554 (Breyer, J., dissenting).} In a recent article, Thomas W. Merrill cited \textit{Eastern Enterprises}, noting that "the Supreme Court, by a vote of five to four, agreed that the Taking Clause applies only to interferences with specific assets, and ruled that a regulation reducing general wealth must be challenged under the Due Process Clause."\footnote{Merrill, \textit{supra} note 229, at 349 n.87.} This analysis suggests that the concurring and dissenting opinions represent current takings law; this undermines the precedential force of the plurality opinion. Another article states...
that by distinguishing the situations in which the takings and
due process analysis apply, the five concurring and dissenting
justices have taken the first steps to clearing away the confusion
between the two doctrines. This reference pertains to the
notion in the concurring and dissenting opinions that because
the Coal Act is a purely economic regulation, it should be
analyzed solely under due process standards.

The decisions of the lower courts in the wake of *Eastern
Enterprises* vary widely as to which parts (if any) of the opinion
are binding and whether Justice Kennedy's due process
concurrence or Justice O'Connor's takings plurality opinion
governs the analysis of retroactive legislation.

The First Circuit gleaned from *Eastern Enterprises* that "a
majority of justices found that the Takings Clause issue can
arise only after a plaintiff's property right has been
independently established." In *Association of Bituminous Contractors, Inc. v. Apfel*, the
D.C. Circuit upheld the constitutionality of the Coal Act as
applied to the Association on due process grounds. Because
the Association did not assert a takings claim in earlier
proceedings or in supplemental briefs filed after the Supreme
Court handed down the *Eastern Enterprises* decision, the D.C.
Circuit deemed the takings claim waived. However, the court
failed to use the due process analysis set forth by Justice
Kennedy in *Eastern Enterprises* and stated that it could "in no
sense be thought a logical subset of the plurality's takings
analysis." The court further stated that the only binding
aspect of *Eastern Enterprises* was the specific finding that the

290. See John Decker Bristow, *Note, Eastern Enterprises v. Apfel: Is the Court One
Step Closer to Unraveling the Takings and Due Process Clauses?* 77 N.C. L. REV. 1525,
1551 (1999).

291. *See Eastern Enter.,* 524 U.S. at 498, 539 (1998) (Kennedy, J., concurring in the
judgment and dissenting in part); *see id.* at 554 (Breyer, J., dissenting).

292. *See, e.g., infra notes 293-304 and accompanying text.*

293. *Parella v. Rhode Island Employees' Retirement Sys.,* 173 F.3d 48, 58 (1st Cir. 1999).
*But see Vermont Assembly of Home Health Agencies, Inc. v. Shalala, 18 F. Supp.2d 355,
389 (D. Vt. 1998) (citing *Eastern Enterprises* for the proposition that "[r]ecent Supreme
Court jurisprudence casts doubt on whether a plaintiff must specify an identified
property interest at all in a regulatory takings claim").

294. 158 F.3d 1246 (D.C. Cir. 1998).

295. *See id.* at 1258.

296. *See id.* at 1254.

297. *Id.* at 1255.
Coal Act was unconstitutional as applied to Eastern Enterprises.\textsuperscript{298} The Third Circuit held that "Eastern, therefore, mandates judgment for the plaintiffs only if they stand in a substantially identical position to Eastern Enterprises with respect to both the plurality and Justice Kennedy's concurrence."\textsuperscript{299}

In \textit{Unity Real Estate}, the Third Circuit stated that it must follow the binding authority created by the five-to-four vote \textit{against} the Eastern takings analysis and thus only considered the due process claims in a case challenging the as-applied constitutionality of the Coal Act.\textsuperscript{300} On the other hand, in evaluating the constitutionality of a statute under the Takings Clause, a district court judge did find that "the standard articulated by Justice O'Connor in the plurality opinion [of Eastern Enterprises] is the appropriate framework under which the defendant's challenge to the constitutionality of CERCLA as applied to the facts of this case should be evaluated."\textsuperscript{301}

Some courts have conceded that the plurality opinion in \textit{Eastern Enterprises} is not binding because only four justices agreed but believe that the takings reasoning espoused in the plurality "is entitled to some persuasive precedential effect."\textsuperscript{302} Finally, some lower courts have amalgamated Justice O'Connor's plurality opinion and Justice Kennedy's concurring opinion in an attempt to derive a binding precedent.\textsuperscript{303} For example, one district court stated that "the opinions overall

\begin{itemize}
\item \textsuperscript{298} See \textit{id.}
\item \textsuperscript{299} Unity Real Estate Co. v. Hudson, 178 F.3d 649, 659 (3d Cir. 1999).
\item \textsuperscript{300} See \textit{id.} at 659.
\item \textsuperscript{303} See Maria v. McElroy, 68 F. Supp.2d 206, 217 (E.D.N.Y. 1999); see also Maine Yankee Atomic Power Co. v. United States, 44 Fed. Cl. 372, 378 (Fed. Cl. 1999); Anker Energy Corp. v. Consolidation Coal Co., 177 F.3d 161, 171-74 (3d Cir. 1999).
\end{itemize}
evidence a serious concern with retroactive lawmaking,” and that “the harshness and oppressiveness of a measure enters into the due process rationality calculus” yet cited to the plurality’s takings analysis.304 This meshing of opinions suggests *Eastern Enterprises* has further confused lower courts on due process and takings principles.

While the legacy of *Eastern Enterprises* is not clear, the fractured nature of the opinion and varying interpretations by lower courts will probably cause the Supreme Court to revisit the issue of takings challenges as applied to economic legislation. In the meantime, plaintiffs may have more opportunity “based on some ‘sense’ that the law is confused in this area—to achieve a more demanding review of regulations that affect the use of [their] property by presenting substantive due process arguments in a takings context.”305

**C. The Effect of *Eastern Enterprises* on Other Retroactive Legislation**

The Supreme Court’s attack on retroactive legislation leaves current laws with retroactive provisions open to a renewed attack on their constitutionality. “The Court’s decision in *Eastern* may create trepidation on the part of the U.S. Environmental Protection Agency.”306 The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)307 imposes strict liability for clean-up costs caused by environmental pollution on all parties responsible for the pollution, including current and former owners or facility operators and those who sent or transported waste to a contaminated site.308 “In connection with CERCLA liability, the phrase ‘retroactive liability’ refers to parties who performed the act which makes them liable—be it ownership, operation, waste disposal or waste transport—before the effective date of

CERCLA, January 1, 1980.\textsuperscript{309} Before \textit{Eastern Enterprises}, opponents of CERCLA unsuccessfully argued that the Act was unconstitutional based on its retroactivity.\textsuperscript{310}

Many companies feel that CERCLA is grossly ‘unfair in changing the rules after the game is played.’ It is seen by many as an arbitrary discriminatory tax, allocating a disproportionate share of the cost of modern environmental remediation to companies and citizens who feel like they did nothing wrong under applicable law years ago but now are left without a chair to sit on when the music stops. This frustration is magnified when the companies turn to the insurance companies who sold them liability insurance, only to hear that this loss, because it was not anticipated or for other reasons, is excluded from coverage.\textsuperscript{311}

While past challenges to CERCLA’s constitutionality have failed, \textit{Eastern Enterprises} opens the courthouse doors to plaintiffs who challenge the statute as applied because it declared the Coal Act’s retroactive provisions unconstitutional as applied to \textit{Eastern Enterprises}.\textsuperscript{312} Some scholars believe that facts egregious enough under CERCLA could trigger a decision similar to \textit{Eastern Enterprises}, where the retroactivity was severe enough to effect a taking under the Fifth Amendment or violate due process.\textsuperscript{313}

The decision in \textit{Eastern Enterprises} makes it clear that courts must be prepared to find that in any given case the particular facts of CERCLA liability, if enforced against an unfortunate party to the limits of the strict, joint, several and retroactive law, will run afoul of the takings and due process clauses of the Constitution.\textsuperscript{314}

\begin{thebibliography}{9}
\bibitem{309} \textit{Id.} at 849.
\bibitem{310} \textit{See, e.g.,} United States v. Olin Corp., 107 F.3d 1508 (11th Cir. 1997); United States v. Northeastern Pharm. & Chem. Co., 810 F.2d 726 (8th Cir. 1986); Howard, \textit{supra} note 308, at 849.
\bibitem{311} Howard, \textit{supra} note 308, at 854.
\bibitem{312} \textit{See id.} at 863.
\bibitem{313} \textit{See id.} at 863.
\bibitem{314} \textit{Id.} To illustrate this point, Howard discusses a hypothetical family-run grocery store. \textit{See id.} at 849. After purchasing the land on which the store is built, the grandfather disposed of a half-empty paint can that he found on the property; he takes the can to the landfill, as required by local ordinances. \textit{See id.} Fifty years later, the landfill leaks hazardous waste and requires clean-up and maintenance, which costs several hundred million dollars. \textit{See id.} Although the grocery store had since moved and
\end{thebibliography}
Thus far, lower courts have rejected this new analysis of CERCLA's retroactivity. In United States v. Alcan Aluminum Corp., defendants in a CERCLA action brought a motion to dismiss relying on Eastern Enterprises, arguing that CERCLA's retroactive liability violates the Takings Clause, substantive due process, and the ex post facto provisions of the Constitution. Alcan argued that "Eastern Enterprises' effectively overruled all decisions by lower courts holding that CERCLA could be constitutionally applied retroactively." The district court held that the takings analysis of the plurality was not binding precedent. However, the court proceeded to use the plurality's taking analysis as persuasive authority, but it still held that CERCLA effected no unconstitutional taking as applied to Alcan under the Eastern Enterprises analysis. Alcan argued that the liability was severe and disproportionate because Alcan did not cause environmental harms; however, the court pointed out that Alcan had no factual basis for that assertion, which was hotly contested in the proceedings. Further, the $5 million economic impact on Alcan (the first prong of the Eastern Enterprises three-factor balancing test) was substantially less than Eastern Enterprises's potential $50 million to $100 million liability. The court found a sufficient link between the environmental harms caused and the ensuing liability to hold that in calculating its investment-backed expectations, Alcan could reasonably foresee its potential exposure—unlike Eastern Enterprises, which could have reasonably expected that its liabilities were offset by the payments it made under earlier collective bargaining agreements. Further, the court cited

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the property was sold, the grandson could be jointly and severally liable for the costs of clean-up. See id. Depending on how many other contributors to the landfill were still in business, the grandson's liability could range from $500,000 to $500 million. See id. Howard suggests that this scenario "represents numerous actual cases of similarly excessive liability." Id. at 883. But see 42 U.S.C. § 9601(35)(A)(iii) (1998) (owners who acquire property through inheritance may meet an exception to liability under the statute).

316. See id. at 98.
317. Id.
318. See id. at 99.
319. See id. at 100.
320. See id. at 99.
321. See id. at 100.
322. See id.
Turner Elkhorn for the proposition that retroactive legislation was appropriate, analogizing that "[j]ust as it was reasonable in Turner Elkhorn to impose retroactive liability for unforseen diseases relating to mining, it [was] reasonable . . . to impose retroactive liability for possibly unforseen costs of responding to environmental harms resulting from a party's disposal of waste." Finally, the court briefly analyzed the third, "nature of the government action" prong, stating that the action in this case was "not unusual." The court found no merit in Alcan's due process claim, relying on case law prior to Eastern Enterprises, which presumed that economic legislation was constitutional absent evidence that the legislature acted in an irrational or arbitrary manner; it also found that the patchwork of dissenting and concurring opinions in Eastern Enterprises was not persuasive.

Relying on Alcan, a Virginia district court denied summary judgment to the defendant in a CERCLA action based on the same constitutional arguments the plaintiffs made in Eastern Enterprises. The defendant failed in its initial attempt to argue that Eastern Enterprises represented binding authority, claiming that the plurality opinion combined with Justice Kennedy's concurrence "reflect a new respect . . . for the rights of individuals and businesses facing retroactive application of CERCLA to conduct that occurred before its enactment." The court evaluated the takings claim under the plurality's balancing test in Eastern Enterprises and found that CERCLA's retroactive provisions survived constitutional scrutiny.

323. Id.
324. Id.
327. Id. at 679.
328. See id. Under the three-factor test, the potential economic impact was not too severe or disproportionate; did not interfere with the company's economic expectations because it was not unfair to hold it liable for the environmental consequences of its actions; and the nature of the action (retroactivity) was appropriate because liability could be tied to specific harms that CERCLA sought to remedy (whereas Eastern's liability could not be sufficiently tied to conduct causing liability). See id.
Other courts reviewing the constitutionality of CERCLA in light of *Eastern Enterprises* have also upheld the statute. A Department of Justice spokesperson stated that the department was confident that challenges to CERCLA would fail in spite of *Eastern Enterprises*. The fact that clean-up costs under CERCLA do relate to a present and substantial threat makes CERCLA less retroactive and thus distinguishes CERCLA cases from *Eastern Enterprises*. Yet the plurality's taking analysis in *Eastern Enterprises* suggests that if the retroactivity of the government regulation is sufficiently severe, the economic impact is extreme, and the liability imposed by the statute is only tenuously related to the conduct of the plaintiff, then the Supreme Court might be willing to find CERCLA unconstitutional as applied to a particular plaintiff.

Some litigants have used the *Eastern Enterprises* framework to challenge the Energy Policy Act of 1992. The Federal Court of Claims issued an opinion covering three identical claims by utility companies. In each, the court found that the Act's provisions requiring monetary payments for clean-up costs by end-users of uranium were both retroactive and not sufficiently related to the plaintiffs' past conduct; therefore, both effected a

329. *See* Franklin County Convention Facilities Auth. v. American Premier Underwriters Inc., 61 F. Supp. 2d 740 (S.D. Ohio 1999) (upholding the constitutionality of CERCLA under the *Eastern Enterprises* plurality's analysis: CERCLA liability is tied directly to the past actions of the parties and thus does not interfere with investment-backed expectations, and the liability is proportionate to the harms caused); United States v. Vertac Chem. Corp., 33 F. Supp. 2d 769 (E.D. Ark. 1998) (rejecting a constitutional challenge to CERCLA's retroactive provisions, holding that *Eastern Enterprises* did not apply and stating that the defendants could not use their challenge to relativate liability).


332. *See* Eastern Enter. v. Apfel, 524 U.S. 498 (1998); Howard, *supra* note 308, at 883. It should be noted that like the CERCLA litigation, the Coal Act also survived constitutional scrutiny in five circuits, yet the plurality still found a taking. *See supra* note 166.


taking and violated the plaintiffs’ due process rights. The court stated that “[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court must be viewed as that position taken by those members who concurred in the judgment on the narrowest grounds.” The court stated that while Eastern Enterprises did not stand for a clear and distinct rationale, it stands for the principle that “a liability that is severely retroactive, disruptive of settled expectations and wholly divorced from a party’s experience may not constitutionally be imposed.” Ultimately, the plaintiffs failed the due process analysis promulgated by the court, which examined the extent of retroactivity and proportionality, as well as the Eastern Enterprises plurality’s takings analysis.

V. THE TAKINGS CLAUSE AS A VEHICLE FOR JUDICIAL ACTIVISM

The use of the Takings Clause to invalidate legislation is not a new idea. Justice Stevens, dissenting in Dolan, stated that the regulatory takings doctrine was a “potentially open-ended source of judicial power to invalidate state economic regulations . . . .” Justice Kennedy acknowledged in Eastern Enterprises that “[t]he imprecision of our regulatory takings doctrine does open the door to normative considerations about the wisdom of government decisions.” While the liberals of the Court are traditionally criticized for their activism, the conservatives “promote aggressive application of the Just Compensation Clause . . . [and] enthusiastically turn to the courts to champion their vision of wise social and economic policy.”

The plurality’s decision reflects the influence of the libertarian anti-regulatory policy of scholars like Professor

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335. See, e.g., Maine Yankee, 44 Fed. Cl. at 372.
336. Id. at 378 (quoting King v. Palmer, 950 F.2d 771, 783 (D.C. Cir. 1991)).
337. Id.
338. See id. at 378-81.
340. See generally Epstein I and Epstein II, supra note 275.
342. Lazarus, supra note 3, at 1124.
Richard Epstein, who advocate more judicial activism through the takings clause and claim that many forms of economic governmental regulations, such as taxation, are takings. Eastern Enterprises supports the theory that “many of the changes in takings law that have taken place over the last [eleven] years correspond quite closely to a blueprint for takings doctrine . . .” put forth by Epstein. Epstein bases his theory on the Lockean philosophy that one has natural rights involving ownership of property, and even the slightest government interference with property is offensive. Epstein encourages activist judicial review of regulatory legislation using the takings doctrine. Epstein has stated that “[a]ll regulations, all taxes, and all modifications of liability rules are takings of private property prima facie compensable by the state.” Epstein wrote about retroactive legislation and characterized the special taxes in Turner Elkhorn as a taking, stating that “[t]o allow the form of the redistribution to govern is to ignore the mandate of the [takings] clause, which is to prevent that redistribution from taking place, even in disguised form.

Many scholars contend that the Constitution does not support Epstein’s view.

Richard Epstein and the promoters of the Takings Project are calling for federal judges to interfere substantially with a plethora of democratically-enacted and democratically-supported legislative measures, even though such a result is not commanded by the language of the Constitution, not explained by reference to the framers’ intentions, and not justified by any coherent constitutional theory.

The decision in Eastern Enterprises follows Epstein’s theory in that it uses the regulatory takings doctrine to invalidate economic legislation. Justice Breyer questioned the use of the Takings Clause in this manner and asked if the next step would

343. See generally Epstein I & Epstein II, supra note 275.
344. Kendall & Lord, supra note 107, at 510.
345. See id. at 519.
346. See id.
347. Epstein II, supra note 275, at 10.
348. Epstein I, supra note 275, at 258.
349. See Kendall & Lord, supra note 107, at 524.
350. Id. at 527.
be to invalidate taxation through the Takings Clause.\footnote{352} Professor Epstein would answer Justice Breyer's question in the affirmative, asserting that taxation is a taking.\footnote{353} Furthermore, "as soon as one adopts conceptual severance, as it seems the Court did . . . , there is an easy slippery slope into the radical Epstein position."\footnote{354} For when the denominator for takings purposes becomes the property literally taken, then all taxes and regulations seemingly create compensable takings by deprivation of 100% of the denominator.\footnote{355}

Some have criticized the Court's arguably activist expansion of takings jurisprudence.\footnote{356} Professor Lazarus stated that "there is no greater hypocrisy than the promotion of the Takings Clause . . . . This is pure judicial activism; a pure judicial override of state and local government."\footnote{357}

Some newspapers have characterized the Rehnquist Court as an activist court, stating that a "[r]adical change is underway at the Supreme Court."\footnote{358} In 1995, the \textit{New York Times} prophetically charged that the Court was "toppling doctrines and precedents that had held for decades,' while displaying 'a disrespect [for Congress] bordering on contempt.'\footnote{359} Other newspapers focused on \textit{Lucas}, which many have criticized as an expansion of the Fifth Amendment and a misinterpretation of precedent.\footnote{360} In relation to takings jurisprudence, \textit{Eastern Enterprises} represents a far more radical shift, as Justices Kennedy, Breyer, and Stevens pointed out, because it expanded the notions of property for takings purposes and used the takings clause as a vehicle for evaluating Congressional wisdom and the validity of legislation.\footnote{361} Five justices in \textit{Eastern Enterprises} believed that due process principles are a more appropriate means of evaluating the fairness and validity of the

\footnotesize{352. See id. at 558. (Breyer, J., dissenting).
353. See Epstein I, supra note 275, at 100.
354. Radin, supra note 249, at 1677-78.
356. See Kendall & Lord, supra note 167, at 527.
357. Symposium, supra note 339, at 111.
358. Zeigler, supra note 339, at 1307 (quoting A Court Running in the Wrong Direction, N.Y. TIMES, July 6, 1995, at A20 (editorial)).
359. Id.
360. See id. at 1380.
Coal Act's retroactive provisions.\textsuperscript{362} By invalidating an economic regulation on Takings Clause grounds, the \textit{Eastern Enterprises} plurality does what commentators have long criticized as judicial activism—it used the Takings Clause "to halt government regulation."\textsuperscript{363}

VI. AVOIDING THE PITFALLS OF \textit{EASTERN ENTERPRISES}

Courts deciding future Takings Clause cases involving retroactive liability should avoid several pitfalls present in \textit{Eastern Enterprises}; they should not further expand the notions of property and conceptual severance or use the Takings Clause as a vehicle for judicial activism. The \textit{Eastern Enterprises} concurring and dissenting opinions instruct courts how to avoid these pitfalls.\textsuperscript{364}

Courts should avoid introducing more confusion into an already muddled doctrine by expanding the notion of property to include general liability and wealth.\textsuperscript{365} If courts expand the notion of property to include general liability for Fifth Amendment takings analyses, everything will have to be treated as a property interest.\textsuperscript{366} This could create a new level of scrutiny for economic legislation.\textsuperscript{367} Due process scrutiny used to be sufficient; courts applied the Takings Clause only if a specific property interest was at stake.\textsuperscript{368} The plurality implied that when a regulation adjusts the benefits and burdens on the public, it now must meet the takings test.\textsuperscript{369} Under the plurality's reasoning, not only could every regulation now fall within the Takings Clause, but absent the Sixteenth Amendment authorizing Congress to collect income taxes, taxation would potentially be a taking.\textsuperscript{370}

\textsuperscript{362} See id.
\textsuperscript{363} Kendall & Lord, supra note 167, at 521.
\textsuperscript{364} See id.
\textsuperscript{365} See Eastern Enter., 524 U.S. at 542 (Kennedy, J., concurring).
\textsuperscript{366} See Interview with Professor Patrick Wiseman, Georgia State University College of Law (Nov. 3, 1998) [hereinafter Wiseman Nov. Interview].
\textsuperscript{367} See id.
\textsuperscript{368} See id.
\textsuperscript{369} See id.
\textsuperscript{370} See id. Judge Seyla of the First Circuit Court of Appeals shares Professor Wiseman's skepticism: "[G]iven the pervasiveness of the government's regulatory power, it would be foolhardy to assume 'that the takings clause is violated whenever
Regarding judicial activism achieved using Takings Clause principles, five concurring and dissenting justices warned against using the Takings Clause to make normative judgments about Congressional legislation.371

This sort of analysis is in uneasy tension with our basic understanding of the Takings Clause, which has not been understood to be a substantive or absolute limit on the government's power to act. The Clause operates as a conditional limitation, permitting the Government to do what it wants so long as it pays the charge.372

As one commentator notes, "[i]f the Court is now unhappy with the level of means-end scrutiny provided by due process, it should correct this problem at the source, rather than by making an end-run around due process via the Takings Clause."373

Justice Breyer stated at the beginning of his dissent that the language of the Fifth Amendment is concerned "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."374 Justice Breyer stated that "there is no need to torture the Takings Clause to fit this case ... the potential unfairness of retroactive liability[ ] finds a natural home in the Due Process Clause."375 Justice Stevens further argued that courts should defer to Congress's and the circuit courts' understanding of the Coal Act's aims.376

Although its primary mistake involves treating money or fiscal liability as "takeable" property, the plurality's acceptance of conceptual severance compounds the incoherence, adding a

372. Id. at 545. (Kennedy, J., concurring in the judgment and dissenting in part).
373. Id. at 556. (Breyer, J., dissenting).
375. Id. at 556. (Breyer, J., dissenting).
376. See id. at 553. (Stevens, J., dissenting).
new level of confusion to due process and takings issues. The plurality incorrectly frames the issue: instead of considering the due process questions—whether the fee is justified as a reasonable means to achieve a government purpose—the plurality asks if the fee is "private property" which has been "taken" for a "public purpose." Justice Kennedy noted an important distinction with which scholars have agreed. "My reading of Connolly and Concrete Pipe, is that we should proceed first to general due process principles, reserving takings analysis for cases where the governmental action is otherwise permissible." Like Justice Kennedy, Professor Wiseman would initially inquire into whether the government has deprived the owner of his or her property without due process before reaching the remedial takings questions. Wiseman's approach uses both formal rules and balancing to analyze takings problems in a more principled manner that reduces the need to use ad hoc factual inquiries, such as the Eastern Enterprises plurality's three-factor balancing approach.

Because of the Court's fragmentation, Eastern Enterprises should stand for the judgment, not the reasoning. As Eastern Enterprises illustrates, however, Professor Epstein's theories have slowly crept into the regulatory takings doctrine over the last ten years, encouraging judicial activism in the lower courts and in the Supreme Court. The fact that the expansion of the takings doctrine in Eastern Enterprises was only supported by a plurality will not deter Epstein's followers from using his

379. Id. at 546. (Kennedy, J., concurring in the judgment and dissenting in part).
380. See Wiseman, supra note 30, at 440-42. Professor Wiseman's hypothesis cannot be applied in Eastern Enterprises, however, because his test focuses on whether a real property right is affected by governmental regulation; in Eastern Enterprises, the answer to this question would be no because only general liability was at stake. See id. at 440 n.30. The means-ends questions that determine the legitimacy of the governmental action in Professor Wiseman's theory can be generalized and applied to the Coal Act to assess its validity under due process principles. See Wiseman Nov. Interview, supra note 386.
381. See Wiseman, supra note 30, at 465.
382. See Wiseman Nov. Interview, supra note 386.
383. See Kendall & Lord, supra note 167, at 582.
views as a license to encourage a new wave of judicial activism that could undermine economic legislation. 384

CONCLUSION

The Supreme Court’s decision in *Eastern Enterprises* has thrown takings jurisprudence into a further state of confusion and incoherence. 385

Although *Eastern Enterprises*’s legacy is uncertain, the case has already had a major effect on the administration of health care benefits for retired miners. 386 One hundred twenty-four companies shared Eastern Enterprises’s status as described by the Court. 387 Six pending cases have been settled with the companies’ obligations voided, and many companies have confronted the Social Security Administration and asked that their obligations under the Act be voided in light of *Eastern Enterprises*; this could potentially orphan more than 6000 miners. 388

Congress may have to amend or rewrite significant portions of the Coal Act in response to *Eastern Enterprises*. 389 However, the UMWA issued a statement asserting that the decision applied very narrowly to the circumstances of the case and that the decision will leave undisturbed the liability of other employers and the funding of health benefits through the year 2000. 390

The future direction of takings law is hard to predict, although the doctrine will likely be shaped by several

384. *Cf* Byrne, *supra* note 1, at 117-23 (discussing the controversial efforts by conservatives encouraging activism in the courts and use of the Takings Clause to frustrate environmental regulation).


386. *See infra* note 389 and accompanying text.

387. *See* *Hearings*, *supra* note 114, at 4 (statement of Marilyn O’Connell, Associate Commissioner for Program Benefits).

388. *See id.*


possibilities. First, Justice Kennedy is more likely to join Eastern Enterprises's dissent regarding the reasoning in takings claims because he did not treat this case as a takings violation.\(^{391}\) The dissenting justices may restrain the burgeoning concept of conceptual severance and confine the application of takings analysis to cases involving real property. Second, presidents could appoint new judges who do not support the libertarian takings policies advocated by Professor Epstein.\(^{392}\) Clinton appointees Ginsberg and Breyer reasoned in Eastern Enterprises that the Takings Clause was not the proper vehicle to evaluate economic legislation.\(^{393}\) Third, while the Court's fractured opinions may undermine Eastern Enterprises's precedential force, they may inspire new takings challenges to retroactive statutes.\(^{394}\)

The sweeping nature of the decision also could create new opportunities for litigants to argue a takings claim and could spawn a plethora of new cases in the lower courts.\(^{395}\) In this scenario, the Supreme Court will almost certainly have to revisit the issue and perhaps will finally set clearer limitations on the regulatory takings doctrine for lower courts to follow.

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391. See Eastern Enters. v. Apfel, 524 U.S. 498, 539-40 (Kennedy, J., concurring in the judgment and dissenting in part); see also Kendall & Lord, supra note 167, at 583-584.
392. See Byrne, supra note 1, at 119-20.
393. See id.
395. See Eastern Enters., 524 U.S. at 542 (Kennedy, J., concurring in judgment and dissenting in part).
396. The author wishes to thank Professor Patrick Wiseman for his contributions to this article and for creating "illusions of clarity" in the otherwise incoherent takings jurisprudence of the Supreme Court.