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NOTES

Eastern Enterprises v. Apfel: Is the Court One Step Closer to Unraveling the Takings and Due Process Clauses?

The Fifth Amendment to the U.S. Constitution contains two provisions that protect private property interests: the Due Process Clause and the Takings Clause.¹ The Due Process Clause states that “[n]o person shall be . . . deprived of . . . property, without due process of law”² and is intended to prevent “arbitrary or irrational legislation.”³ The Takings Clause provides, “nor shall private property be taken for public use, without just compensation”⁴ and is concerned with “providing *compensation* for legitimate government action that takes ‘private property.’”⁵ Despite distinct constitutional language, the Supreme Court has created a muddled mess of the Takings and the Due Process Clauses.⁶

How the Court got into this mess is readily apparent. During the early part of the twentieth century, the Court frequently overturned economic regulations on due process grounds.⁷ By the mid-1930s, however, the Court had stopped this practice,⁸ and by 1955, the Court had virtually emasculated the Due Process Clause as it related to economic regulation.⁹ Litigators, therefore, began looking to the

1. See U.S. CONST. amend. V.

2. *Id.*

3. *Eastern Enters. v. Apfel*, 118 S. Ct. 2131, 2163 (1998) (Breyer, J., dissenting).

4. U.S. CONST. amend. V.

5. *Eastern Enters.*, 118 S. Ct. at 2161 (Breyer, J., dissenting).

6. See John D. Echeverria & Sharon Dennis, *The Takings Issue and the Due Process Clause: A Way Out of a Doctrinal Confusion*, 17 VT. L. REV. 695, 696-97 (1993) (discussing the Court’s “muddling” of the Due Process and Takings Clauses); see also Frank Michelman, *Takings*, 1987, 88 COLUM. L. REV. 1600, 1607 n.40 (1988) (“[J]udges and commentators have [not] always maintained a clear distinction between the ‘due process’ and ‘takings’ inquiries . . .”).

7. See JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 11.3, at 374-82 (5th ed. 1995).

8. The Court relented from its previous approach under tremendous pressure from President Franklin D. Roosevelt to permit his New Deal legislation to stand, as it was intended to lead the country out of the Great Depression. See WILLIAM LASSER, *THE LIMITS OF JUDICIAL POWER: THE SUPREME COURT IN AMERICAN POLITICS* 153-54 (1988).

9. See *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 488 (1955) (“The day is gone when this Court uses the Due Process Clause . . . to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident,

Takings Clause as the only source of protection against regulations that interfered with private economic interests.¹⁰ Wanting results that historically could have been achieved through the Due Process Clause, these litigators imported due process concepts into their Takings Clause analyses.¹¹ The Court, with little judicial interpretation of the Takings Clause upon which to base its opinions, followed the lead of these parties and applied due process principles in adjudicating these challenges.¹² As a result, the Court's regulatory takings analysis has developed into a substantive review of government regulation that has incorporated standards historically used in due process review.¹³ This borrowing of principles has confused the distinction between the Due Process Clause and the Takings Clause and has transformed the Court's regulatory takings analysis into a body of law that has proven to be confusing and unpredictable.¹⁴

*Eastern Enterprises v. Apfel*¹⁵ is a recent example of the Court's inconsistent treatment of the distinction between the Due Process and Takings Clauses. In this case, the Court held that the Coal Act,¹⁶ as applied to Eastern Enterprises, Inc. ("Eastern"), violated the Fifth Amendment to the U.S. Constitution.¹⁷ Due to a split of opinion regarding the judgment and its appropriate rationale, the actual

or out of harmony with a particular school of thought."); see also *Ferguson v. Skrupa*, 372 U.S. 726, 731 (1963) (stating that the Court has abandoned the "use of the 'vague contours' of the Due Process Clause to nullify laws which a majority of the Court believ[e] to be economically unwise"); *NOWAK & ROTUNDA*, *supra* note 7, § 11.4, at 388 (discussing the demise of economic substantive due process).

"Economic legislation" can be defined generally as legislation that alters the economic relations between parties, including regulation of prices, labor legislation, and restrictions on entry into business. See GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW* 829 (3d ed. 1996).

10. See Glen E. Summers, Comment, *Private Property Without Lochner: Toward a Takings Jurisprudence Uncorrupted by Substantive Due Process*, 142 U. PA. L. REV. 837, 844 (1993).

11. See *id.* at 846.

12. See *id.* at 844-46.

13. See Echeverria & Dennis, *supra* note 6, at 695; Molly S. McUsic, *The Ghost of Lochner: Modern Takings Doctrine and Its Impact on Economic Regulation*, 76 B.U. L. REV. 605, 647 (1996).

14. See Echeverria & Dennis, *supra* note 6, at 695; see also *Eastern Enters.*, 118 S. Ct. at 2155 (Kennedy, J., concurring in the judgment and dissenting in part) ("Cases attempting to decide when a regulation becomes a taking are among the most litigated and perplexing in current law.").

15. 118 S. Ct. 2131 (1998).

16. 26 U.S.C. §§ 9701-9722 (1994). See *infra* notes 43-53 and accompanying text for a discussion of the relevant portions of the Coal Act.

17. See *Eastern Enters.*, 118 S. Ct. at 2137 (plurality opinion).

holding in *Eastern Enterprises* is quite narrow.¹⁸ The concurring opinion of Justice Kennedy, read together with Justice Breyer's dissent, may indicate, however, that a majority of the Court has taken the first step in distinguishing the Due Process and the Takings Clauses. In doing so, five Justices arguably rejected two relatively recent Supreme Court decisions by concluding that, because the Coal Act was a purely economic regulation, the appropriate analysis was provided by the Due Process Clause and not the Takings Clause.¹⁹

These same five Justices also distinguished the clauses in another respect: limiting the use of the Takings Clause to otherwise legitimate regulations that affect "property."²⁰ Following this interpretation, Justices Kennedy and Breyer would not use the Takings Clause to resolve challenges that a regulation is arbitrary or irrational.²¹ Rather, they would limit its use to claims for compensation due to a "taking" of private property by an otherwise valid regulation and would leave to the jurisdiction of the Due Process Clause claims that a regulation is arbitrary or irrational.²² Based on these two apparent distinctions, an independence of the Due Process and the Takings Clauses may be taking shape.

This Note first presents the history that led Congress to enact the Coal Act and thereby caused *Eastern* to file suit.²³ After describing the facts and holding, the Note outlines the differing opinions in *Eastern Enterprises*, paying special attention to the applicability of

18. Justice O'Connor authored the plurality opinion, in which Chief Justice Rehnquist and Justices Scalia and Thomas joined, and argued that the Coal Act as applied to *Eastern* violated the Takings Clause of the Fifth Amendment. See *Eastern Enters.*, 118 S. Ct. at 2137 (plurality opinion). Justice Kennedy, writing alone, argued that the Coal Act as applied to *Eastern* violated the Due Process Clause of the Fifth Amendment. See *id.* at 2154 (Kennedy, J., concurring in the judgment and dissenting in part). Justice Breyer, joined by Justices Stevens, Souter, and Ginsburg, argued that the Coal Act as applied to *Eastern* violated neither the Due Process nor the Takings Clause. See *id.* at 2161 (Breyer, J., dissenting). This splintered opinion means that the only binding aspect of *Eastern Enterprises* is the specific result—the Coal Act is unconstitutional as applied to *Eastern*. See *Association of Bituminous Contractors, Inc. v. Apfel*, 156 F.3d 1246, 1255 (D.C. Cir. 1998).

19. See *Eastern Enters.*, 118 S. Ct. at 2157 (Kennedy, J., concurring in the judgment and dissenting in part); *id.* at 2163 (Breyer, J., dissenting).

20. See *id.* at 2159 (Kennedy, J., concurring in the judgment and dissenting in part); *id.* at 2164 (Breyer, J., dissenting).

21. See *id.* at 2158 (Kennedy, J., concurring in the judgment and dissenting in part); *id.* at 2163 (Breyer, J., dissenting).

22. See *id.* at 2158 (Kennedy, J., concurring in the judgment and dissenting in part); *id.* at 2163 (Breyer, J., dissenting).

23. See *infra* notes 32-53 and accompanying text.

the Takings Clause to Eastern's claim.²⁴ Following a brief discussion of the Due Process Clause,²⁵ the Note examines the relevant background law of the Takings Clause.²⁶ The Note then posits that Justice Kennedy and the four dissenters refused to follow portions of two previous Court decisions that permitted Takings Clause review of economic regulations.²⁷ After expanding on the dissent's arguments that the Takings Clause does not apply to economic regulations,²⁸ the Note asserts that these same five Justices further espoused limiting the Takings Clause to the review of otherwise valid regulations.²⁹ Next, the Note suggests that the plurality opinion in *Eastern Enterprises* inappropriately imports substantive due process principles into its regulatory takings analysis.³⁰ Finally, the Note proposes that the Court use the *Eastern Enterprises* decision as a step towards distinguishing the Takings and Due Process Clauses.³¹

Eastern, a Massachusetts Business Trust,³² was formed in 1929 and until 1965 conducted significant coal-mining operations.³³ As did many companies in the coal industry in 1950, Eastern signed the National Bituminous Coal Wage Agreement of 1950 ("1950 Agreement"), which created the United Mine Workers of America Welfare and Retirement Fund ("1950 W&R Fund").³⁴ Under the

24. See *infra* notes 54-95 and accompanying text.

25. See *infra* notes 96-101 and accompanying text.

26. See *infra* notes 102-40 and accompanying text.

27. See *infra* notes 141-61 and accompanying text.

28. See *infra* notes 162-81 and accompanying text.

29. See *infra* notes 182-86 and accompanying text.

30. See *infra* notes 187-206 and accompanying text.

31. See *infra* notes 207-10 and accompanying text.

32. A Massachusetts Business Trust is a business organization created by deed or declaration of trust under which business assets are managed for the benefit of those holding beneficial interest in the trust. See JAMES D. COX ET AL., CORPORATIONS § 1.13, at 20-22 (1997).

33. See *Eastern Enters.*, 118 S. Ct. at 2142 (plurality opinion). In 1965, Eastern transferred all of its coal operations to a newly created and wholly-owned subsidiary, Eastern Associated Coal Corporation ("EACC"). See *id.* at 2143 (plurality opinion). After the transfer of its coal assets to EACC, Eastern's coal division ceased to exist. See Brief for Petitioner at 4, *Eastern Enters.* (No. 97-42). From 1965 until 1987, Eastern owned EACC, first directly and then through an intermediary subsidiary. See *Eastern Enters.*, 118 S. Ct. at 2143 (plurality opinion). In 1987, Eastern sold all the stock of EACC and the intermediary subsidiary. See *id.* (plurality opinion).

34. See *Eastern Enters.*, 118 S. Ct. at 2137-38 (plurality opinion). For the better part of this century, tumultuous relations between coal miners and their employers have troubled the coal industry, with health care benefits playing a prominent role in the relations. See Brief for Federal Respondent at 2, *Eastern Enters.* (No. 97-42). In 1946, negotiations between the United Mine Workers of America ("UMWA") and the coal operators broke down, and a nationwide strike resulted. See *Eastern Enters.*, 118 S. Ct. at 2137 (plurality opinion). President Truman issued an executive order instructing the

terms of the 1950 Agreement, signatory coal operators agreed to make fixed royalty payments to the 1950 W&R Fund based on the amount of coal produced.³⁵ The coal operators, however, did not explicitly promise the miners lifetime health care benefits; instead, the health care benefits provided by the fund were subject to the complete discretion of the fund's trustees.³⁶ Even though health care benefits were established and could be altered at the discretion of the trustees, the fund provided lifetime health care benefits to miners during most of the term of the 1950 Agreement.³⁷

The 1950 W&R Fund continued to provide health care benefits to coal miners until 1974.³⁸ In 1974, due in part to changes in the law,³⁹ the coal miners' union and the coal operators entered into a new agreement that replaced the 1950 W&R Fund with two benefit plans: the 1950 Benefit Plan and the 1974 Benefit Plan.⁴⁰ Unlike the

Secretary of the Interior to take possession of all coal mines and to negotiate a settlement between the miners and the employers. *See id.* (plurality opinion). The resulting agreement, known as the Krug-Lewis Agreement, led to the National Bituminous Coal Wage Agreement of 1947. *See id.* (plurality opinion). Due to conflicts between the miners and employers over the operation of that fund, the 1947 agreement was renegotiated and the 1950 W&R Fund was established. *See id.* at 2138 (plurality opinion). *See generally* John R. Woodrum & Larry P. Rothman, *Proposals for Funding United Mine Workers of America Retiree Health Benefits: The Constitutional Dimensions*, 93 W. VA. L. REV. 633, 639-40 (1991) (stating that a strike ensued when operators refused to agree "in principle" to the union demand for a health and retirement fund).

35. *See Eastern Enters.*, 118 S. Ct. at 2137-38 (plurality opinion).

36. *See id.* (plurality opinion). The 1950 W&R Fund's Annual Report for the fiscal year ending June 30, 1955, explained the discretion of the trustees:

"Under the legal and financial obligations . . . imposed [by the Trust Agreement], the Fund is operated on a pay-as-you-go basis, maintaining a sound relationship between revenues and expenditures. Resolutions adopted by the Trustees governing [health care benefits] specifically provide that all . . . [b]enefits are subject to termination, revision, or amendment, by the Trustees in their discretion at any time. No vested interest in the Fund extends to any beneficiary."

Id. at 2138 (plurality opinion) (quoting the 1950 W&R Fund's 1955 Annual Report).

37. *See id.* at 2139 (plurality opinion). The trustees did reduce the benefits provided to the miners several times under the terms of the 1950 Agreement due to budget constraints. *See id.* (plurality opinion). These reductions caused wildcat strikes during the 1960s. *See id.* (plurality opinion).

38. *See id.* (plurality opinion). The 1950 W&R Fund was modified several times between 1950 and 1974; the basic agreement remained unchanged, however. *See id.* (plurality opinion). Specifically, the trustees retained discretion over employee benefits and lifetime health care benefits were not guaranteed. *See id.* (plurality opinion).

39. In 1974, the Employee Retirement Income Security Act of 1974 ("ERISA") altered the pension funding requirements, which created the need for a new agreement. *See* Brief for Petitioner at 5, *Eastern Enters.* (No. 97-42).

40. *See Eastern Enters.*, 118 S. Ct. at 2139 (plurality opinion); Brief for the Federal Respondent at 4, *Eastern Enters.* (No. 97-42).

previous funds, these plans specifically guaranteed lifetime health care benefits for miners as well as health care benefits to miners' widows until their death or remarriage.⁴¹ Due in part to the broadened coverage, the 1950 Benefit Plan and the 1974 Benefit Plan quickly developed financial problems.⁴²

Because of these problems, the federal government enacted the Coal Act in 1992.⁴³ Intended to ensure that certain retired coal miners receive the lifetime health care benefits to which they are entitled,⁴⁴ the Coal Act merged the 1950 and 1974 Benefit Plans into a new plan called the United Mine Workers of America Combined Benefit Fund (the "Combined Fund").⁴⁵ The Coal Act financed the Combined Fund with annual premiums assessed against certain "signatory operators."⁴⁶ Signatory operators were coal operators that

41. See *Eastern Enters.*, 118 S. Ct. at 2139-40 (plurality opinion).

42. See *id.* at 2140 (plurality opinion). The 1974 Benefit Plan was modified in 1978 in an attempt to bolster its financial position. See *id.* (plurality opinion). The 1978 National Bituminous Coal Wage Act made three primary modifications to the 1974 Benefit Plan. See Brief for Petitioner at 5, *Eastern Enters.* (No. 97-42). First, signatory employees of the 1978 agreement were assigned responsibility for the health care benefits of their own active employees and their former employees who had retired after 1975. See *id.* The 1974 Benefit Plan, however, was left intact to cover "orphaned" retiree miners—those retirees whose employers were no longer in the coal business. See *id.* Second, coal operators no longer made a fixed contribution to the trust based on coal production; rather, the 1978 agreement obligated operators to make contributions sufficient to maintain the promised benefits. See *id.* Finally, the operators signed "evergreen" clauses under which they agreed to contribute to the 1974 Benefit Plan as long as they stayed in the coal business. See *id.* Despite these modifications, the financial woes of both benefit plans continued. See *id.*

When the signatory coal operators withdrew from the agreements—either to mine coal with non-union workers or to exit the coal business altogether—the financial problems of the benefit plans multiplied. See *Eastern Enters.*, 118 S. Ct. at 2140 (plurality opinion). These withdrawals resulted in higher contribution commitments on the part of the remaining coal operators, which, in turn, led to more employers exiting the coal business and worsening financial problems for the trusts. See *id.* (plurality opinion).

43. See Coal Industry Retiree Health Benefit Act, Publ. L. No. 102-486, § 19143(a), 106 Stat. 3037 (1992) (codified at 26 U.S.C. §§ 9701-9722 (1994)). In 1988, the Secretary of Labor created the Advisory Commission on the United Mine Workers of America Retiree Health Benefits ("Coal Commission") and charged it with recommending a solution that would ensure that the orphan retirees covered by the 1950 and 1974 Benefit Plans would continue to receive promised health care. See *Eastern Enters.*, 118 S. Ct. at 2140 (plurality opinion). The legislation resulting from the recommendations of the Coal Commission is known as the Coal Act. See 26 U.S.C. §§ 9701-9706; *Eastern Enters.*, 118 S. Ct. at 2141 (plurality opinion).

44. See Energy Policy Act of 1992, Pub. L. No. 102-486, § 19142, 106 Stat. 2776, 3037 (1992) (codified as amended at 26 U.S.C. § 9701 (1994)) (stating that the Coal Act was intended to "remedy problems with the provision and funding of health care benefits with respect to the beneficiaries of [coal industry] multiemployer benefit plans").

45. See 26 U.S.C. § 9702(a)(2); *Eastern Enters.*, 118 S. Ct. at 2142 (plurality opinion).

46. 26 U.S.C. § 9701(c)(1), (3).

signed any National Bituminous Coal Wage Agreement ("NBCWA") or any other agreement requiring contributions to the 1950 or 1974 Benefit Plans.⁴⁷ Even though Eastern did not sign the 1974 or subsequent agreements, it was subject to the Coal Act because it had signed the 1950 Agreement.⁴⁸

Under the Coal Act, premiums are assessed only against those signatory operators that have been assigned coal industry retirees.⁴⁹ Retirees are assigned to a signatory coal operator based on a three-pronged statutory analysis.⁵⁰ The signatory coal operator is then responsible for paying the premiums necessary to provide health care to the assigned retirees.⁵¹ The Social Security Administration assigned Eastern over a thousand retired miners under the third prong of the Coal Act analysis;⁵² these retired miners had worked more years for Eastern prior to the effective date of the 1978 Agreement than for any other signatory coal operator.⁵³

After the Social Security Commission assessed Eastern for premiums under § 9706(a)(3) of the Coal Act, Eastern filed suit

47. *See id.* § 9701(b)(1).

48. *See id.* § 9701(b)(1), (c)(1); *Eastern Enters.*, 118 S. Ct. at 2143 (plurality opinion).

49. *See* 26 U.S.C. § 9704(b)(1).

50. *See id.* § 9706(a). Under § 9706:

the Commissioner of the Social Security shall . . . assign each coal industry retiree who is an eligible beneficiary to a signatory operator 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 period of time than any other signatory operator prior to the effective date of the 1978 coal wage agreement.

Id.

51. *See id.* § 9704(a)-(b); *Eastern Enters.*, 118 S. Ct. at 2141-43 (plurality opinion).

52. *See Eastern Enters.*, 118 S. Ct. at 2143 (plurality opinion).

53. *See id.* (plurality opinion). Generally, the miners assigned to Eastern were not assigned under the first or second prong of the statute because either they retired before the effective date of the 1978 Agreement or, if they had worked after the 1978 Agreement, the coal operators they had worked for had since gone out of business. *See id.* (plurality opinion).

against the Social Security Administration, claiming that the application of the Coal Act violated the Due Process and Takings Clauses of the Fifth Amendment.⁵⁴ Because it had never signed an agreement that promised lifetime health care benefits to the miners and it had been out of the coal industry since 1965, Eastern argued that the application of the Coal Act violated the Due Process Clause because it imposed severe retroactive liability unrelated to Eastern's participation in the multiemployer plans.⁵⁵ Moreover, Eastern argued that the Coal Act took its property without just compensation in violation of the Takings Clause.⁵⁶ Eastern requested both a declaratory judgment that the Coal Act as applied to Eastern violated the Constitution and an injunction preventing its enforcement against Eastern.⁵⁷ The U.S. District Court for the District of Massachusetts denied Eastern's motion for summary judgment and entered judgment for the Social Security Administration.⁵⁸ On appeal, the First Circuit affirmed the district court's decision,⁵⁹ and subsequently the Supreme Court granted

54. *See id.* at 2143 (plurality opinion).

55. *See* Brief for Petitioner at 21-35, *Eastern Enters.* (No. 97-42).

56. *See id.* at 35-50.

57. *See Eastern Enters.*, 118 S. Ct. at 2144-45 (plurality opinion). Originally, there was a challenge to the Court's jurisdiction. Under the Tucker Act, 28 U.S.C. § 1491 (1994), the U.S. Court of Claims has exclusive jurisdiction over claims against the United States for money damages exceeding \$10,000, *see id.*; 28 U.S.C. § 1346(a)(2). Therefore, claims that the government has taken property generally must first be litigated in the Court of Claims. *See Eastern Enters.*, 118 S. Ct. at 2144 (plurality opinion). Only upon denial of compensation by the Court of Claims is a Takings Clause claim ripe for a suit in a U.S. District Court. *See id.* (plurality opinion); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016-19 (1984). Eastern Enterprises, however, was requesting an injunction against the enforcement of the Coal Act rather than requesting money damages. *See Eastern Enters.*, 118 S. Ct. at 2144-45 (plurality opinion). Even though the Government dropped its objection to the jurisdictional issue, the plurality addressed the issue and determined that the district court properly had jurisdiction over Eastern's equitable claim. *See id.* at 2144-46 (plurality opinion).

While the Court was deciding this case, a bill was progressing through Congress that would have amended the Tucker Act. *See* S. REP. NO. 84-2, at 5 (1998). One of the provisions of the bill would have eliminated this jurisdictional issue for future claims against the government. *See id.* The bill passed the House, *see id.*, but stalled in the Senate, *see* 144 CONG. REC. S8022-02 (daily ed. July 13, 1998).

58. *See Eastern Enters. v. Shalala*, 942 F. Supp. 684, 689 (D. Mass. 1996), *aff'd sub nom. Eastern Enters. v. Chater*, 110 F.3d 150 (1st Cir. 1997), *rev'd sub nom. Eastern Enters. v. Apfel*, 118 S. Ct. 2131 (1998).

59. *See Eastern Enters.*, 110 F.3d at 162. The First Circuit rejected Eastern's substantive due process claim by relying on the deferential standard of review associated with the substantive due process review of economic regulations. *See id.* at 155-56. The court held that the Coal Act as applied to Eastern was rational because "Eastern . . . contributed directly to the mine workers' legitimate expectations of lifetime health benefits." *Id.* at 157. In response to Eastern's takings claim, the court applied the three

certiorari.⁶⁰

In a five-to-four decision reversing the lower court, the Supreme Court ruled in favor of Eastern, no rationale capturing a majority of the Court.⁶¹ Justice O'Connor, joined by three Justices, wrote the plurality opinion concluding that the Coal Act as applied to Eastern violated the Takings Clause of the Fifth Amendment.⁶² Classifying the Coal Act as an economic regulation that may "nonetheless effect a taking,"⁶³ the plurality stated that Eastern was "'permanently deprived of those assets necessary to satisfy its statutory obligation.'"⁶⁴

After deciding that the Takings Clause provided the appropriate analysis, the plurality employed the same regulatory takings analysis that the Court had used in *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust*⁶⁵ and *Connolly v. Pension Benefit Guaranty Corp.*⁶⁶ Under this analysis, the Court

factor regulatory takings analysis. See *id.* at 160; see also *infra* note 114 and accompanying text (discussing the regulatory takings analysis). Relying on precedent and its belief that Eastern contributed to the miners' expectations of health care benefits, the court had no trouble concluding that the Coal Act as applied to Eastern did not violate the Takings Clause. See *Eastern Enters.*, 110 F.3d at 160-62.

60. See *Eastern Enters. v. Apfel*, 118 S. Ct. 334 (1997). Prior to the Court granting certiorari, the Courts of Appeal for the Second, Third, Fourth, Sixth, and Seventh Circuits had upheld the application of the Coal Act against constitutional challenges. See *Holland v. Keenan Trucking Co.*, 102 F.3d 736, 739-42 (4th Cir. 1996); *Lindsey Coal Mining Co. v. Chater*, 90 F.3d 688, 693-95 (3d Cir. 1996); *In re Blue Diamond Coal Co.*, 79 F.3d 516, 521-26 (6th Cir. 1996); *Davon, Inc. v. Shalala*, 75 F.3d 1114, 1121-30 (7th Cir. 1996); *In re Chateaugay Corp.*, 53 F.3d 478, 486-96 (2d Cir. 1995). At least 40 federal judges have concluded that the Coal Act is constitutional. See Brief for Respondents the UMW Combined Benefit Fund and its Trustees at 20, *Eastern Enters.* (No. 97-42) (listing judges).

61. See *Eastern Enters.*, 118 S. Ct. at 2153-54, 2161 (plurality opinion). Even though no specific constitutional doctrine captured the whole Court, it could be argued that all nine Justices framed the issue as whether or not the Coal Act held Eastern retroactively liable for a problem that it did not cause. See *The Supreme Court—Leading Cases*, 112 HARV. L. REV. 122, 219-20 (1998) [hereinafter *Leading Cases*] (stating that all nine Justices in *Eastern Enterprises* focused on whether or not the Coal Act was retroactive).

62. See *Eastern Enters.*, 118 S. Ct. at 2137 (plurality opinion). Chief Justice Rehnquist and Justices Scalia and Thomas joined in the plurality opinion. See *id.* at 2134 (plurality opinion). Justice Thomas also wrote a concurring opinion stating his view that the Ex Post Facto Clause of the Constitution could prohibit retroactive civil laws. See *id.* at 2154 (Thomas, J., concurring). Historically, the Court has only applied the Ex Post Facto Clause to criminal statutes. See *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798).

63. *Eastern Enters.*, 118 S. Ct. at 2146 (plurality opinion).

64. *Id.* (plurality opinion) (quoting *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 222 (1986)). The plurality was able to use Takings Clause analysis because it viewed the Coal Act as a deprivation of property.

65. 508 U.S. 602 (1993).

66. 475 U.S. 211 (1986). The plaintiffs in *Concrete Pipe* and *Connolly*, like those in *Eastern Enterprises*, complained of statutes that imposed retroactive liability and affected

engaged in an "ad hoc, factual inquir[y]" in an attempt to determine what constitutes a taking under the Fifth Amendment.⁶⁷ In performing this factual inquiry, the Court relied on three factors: "(1) 'the economic impact of the regulation on the claimant'; (2) 'the extent to which the regulation has interfered with distinct investment-backed expectations'; and (3) 'the character of the governmental action.'"⁶⁸ The plurality determined that all three factors indicated that the Coal Act as applied to Eastern constituted a regulatory taking.⁶⁹

First, the plurality stated that the statute subjected Eastern to substantial economic burden because Eastern was deprived of its assets and the deprivation was substantial.⁷⁰ The plurality then assessed the proportionality of the economic impact of the statute to Eastern's experience with the retirement plan.⁷¹ In deciding that the statute was not proportional, the plurality relied on the fact that Eastern had ceased coal mining operations in 1965 and had not participated in the negotiations of nor signed the 1974 or 1978 Agreements.⁷² Additionally, it noted that, compared to the 1974 Agreement, the 1950 Agreement provided coal miners with less generous benefits, which were unvested and subject to alteration or

contractual commitments between private parties. See *Concrete Pipe*, 508 U.S. at 615 n.10; *Connolly*, 475 U.S. at 228-29 (O'Connor, J., concurring). In each of these cases, however, the Court upheld a statute against challenges under the Takings Clause. See *Concrete Pipe*, 508 U.S. at 641; *Connolly*, 475 U.S. at 221. In *Eastern Enterprises*, the plurality distinguished these previous decisions because the Coal Act as applied to Eastern imposed "severe retroactive liability on a limited class of parties that could not have anticipated the liability, and the extent of that liability [was] substantially disproportionate to the parties' experience." *Eastern Enters.*, 118 S. Ct. at 2149 (plurality opinion).

67. *Concrete Pipe*, 508 U.S. at 643 (quoting *Connolly*, 475 U.S. at 224). The plurality also distinguished *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976), and *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717 (1984). In those cases, statutes similar to the Coal Act were upheld under challenges based on substantive due process grounds. See *Eastern Enters.*, 118 S. Ct. at 2146-47 (plurality opinion).

68. *Connolly*, 475 U.S. at 224-25 (quoting *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978)).

69. See *Eastern Enters.*, 118 S. Ct. at 2149-53 (plurality opinion).

70. See *id.* at 2149-50 (plurality opinion). Under the statute, Eastern's cumulative payments were estimated to be from \$50 to \$100 million. See *id.* (plurality opinion).

71. See *id.* at 2149 (plurality opinion).

72. See *id.* at 2150 (plurality opinion). The plurality noted that Eastern retained 100% ownership of EACC—its coal mining subsidiary—until 1987, that EACC had signed the 1974 and 1978 Agreements, and that EACC would be assigned retirees under the Coal Act, if applicable. See *id.* (plurality opinion). The plurality also indicated, however, that Eastern's liability under the Coal Act was not related to Eastern's ownership of EACC. See *id.* (plurality opinion).

termination.⁷³ After considering these facts, the plurality determined that the economic burden on Eastern was significant.⁷⁴

Applying the second factor, the plurality noted that “the Coal Act substantially interfere[d] with Eastern’s reasonable investment-backed expectations.”⁷⁵ It based this determination on the view that the Coal Act imposed retroactive liability on Eastern and that it “‘attache[d] new legal consequences to [an employment relationship] completed before its enactment.’”⁷⁶ This conclusion reflects the plurality’s judgment that the coal industry, including Eastern, had not promised the coal miners lifetime health care benefits prior to 1974.⁷⁷ This judgment, coupled with the fact that the workers had not been employed by Eastern for many years, led the plurality to conclude that Eastern had developed a protected expectation that any liability under the 1950 Agreement had been settled.⁷⁸

Finally, the plurality addressed the character of the governmental action and described the Coal Act’s application to Eastern as “unusual” because it invoked concerns of fairness.⁷⁹ Ultimately, the plurality stated that Eastern could not be required to provide lifetime health care benefits to miners based on activities that occurred decades before benefits were promised.⁸⁰ After

73. *See id.* (plurality opinion).

74. *See id.* at 2150-51 (plurality opinion). The plurality explained that Eastern could seek indemnification from EACC but that its ability to do so did not alter the fact that Eastern had been assessed a substantial liability. *See id.* at 2150 (plurality opinion). The plurality also addressed the respondent’s argument that the Coal Act moderated and mitigated the economic impact to Eastern in that Eastern was only assessed liability for those former employees who were not assigned to other employers under 26 U.S.C. § 9706(a)(1) and (2). *See Eastern Enters.*, 118 S. Ct. at 2150 (plurality opinion). The Government took this argument from the Court’s language in *Connolly*; in *Eastern Enterprises*, however, the plurality distinguished *Connolly*. *See id.* (plurality opinion) (citing *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 225-26 (1986)). It stated that in *Connolly* the party subject to liability had control over the factors that moderated and mitigated the liability, whereas Eastern had no control over the mitigating factors. *See id.* (plurality opinion) (citing *Connolly*, 475 U.S. at 226 n.8).

75. *Eastern Enters.*, 118 S. Ct. at 2151 (plurality opinion).

76. *Id.* (plurality opinion) (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 270 (1994)). The opinion also included a discussion regarding the Supreme Court’s general disfavor of retroactive laws. *See id.* (plurality opinion).

77. *See id.* at 2152 (plurality opinion). Justice Stevens argued that the plurality’s opinion conflicts with the judgment of Congress and many federal judges. *See id.* at 2160-61 (Stevens, J., dissenting); *see also supra* note 60 (discussing opinions in which judges have ruled that the Coal Act is constitutional); *infra* note 197 (discussing the Justices’s differing views of the Coal Act).

78. *See Eastern Enters.*, 118 S. Ct. at 2152 (plurality opinion).

79. *See id.* at 2153 (plurality opinion).

80. *See id.* (plurality opinion).

deciding that the Coal Act as applied to Eastern violated the Takings Clause, the plurality concluded that a Due Process analysis was unnecessary, noting that the Court has expressed concerns about using the Due Process Clause to invalidate economic legislation.⁸¹

Justice Kennedy, writing alone, concurred with the judgment of the Court, but concluded that the Coal Act as applied to Eastern violated the Due Process Clause rather than the Takings Clause.⁸² After discussing the Court's general distrust for retroactive legislation, Justice Kennedy gave the Coal Act "careful consideration."⁸³ Upon such consideration, he asserted that the "remedy created by the Coal Act bears no legitimate relation to the interest which the Government asserts in support of the statute."⁸⁴ Justice Kennedy's conclusion that the Coal Act as applied to Eastern violated substantive due process hinged on his belief that Eastern did not contribute to the expectation of the miners.⁸⁵

Justice Kennedy then argued that the plurality's Takings Clause analysis was incorrect and unnecessary.⁸⁶ In deciding that the Takings Clause was inapplicable, Justice Kennedy reasoned that the Coal Act did not regulate Eastern with regard to property but rather imposed on Eastern the duty to perform an act: the payment of benefits.⁸⁷ In his view, the Takings Clause historically has been limited to cases in which "a specific property right or interest has been at stake."⁸⁸ Unlike the plurality, Justice Kennedy interpreted *Connolly* and *Concrete Pipe* not as mandating a regulatory takings analysis in *Eastern Enterprises* but rather as requiring the Court to complete a due process analysis first and use the takings analysis only in cases in which the governmental action is permissible.⁸⁹

81. See *id.* at 2153 (plurality opinion). The plurality cited *Ferguson v. Skrupa*, 372 U.S. 726, 731 (1963), and *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 488 (1955), as cases where the Court had expressed concerns about using the Due Process Clause to invalidate economic regulation. See *Eastern Enters.*, 118 S. Ct. at 2153 (plurality opinion).

82. See *Eastern Enters.*, 118 S. Ct. at 2154-60 (Kennedy, J., concurring in the judgment and dissenting in part).

83. *Id.* at 2158 (Kennedy, J., concurring in the judgment and dissenting in part).

84. *Id.* at 2159 (Kennedy, J., concurring in the judgment and dissenting in part).

85. See *id.* (Kennedy, J., concurring in the judgment and dissenting in part).

86. See *id.* at 2154-60 (Kennedy, J., concurring in the judgment and dissenting in part).

87. See *id.* at 2154-58 (Kennedy, J., concurring in the judgment and dissenting in part).

88. *Id.* at 2155 (Kennedy, J., concurring in the judgment and dissenting in part). Justice Kennedy argued that Eastern was not responsible for the miners' expectations of lifetime health care benefits. See *id.* at 2159 (Kennedy, J., concurring in the judgment and dissenting in part).

89. See *id.* at 2157-58 (Kennedy, J., concurring in the judgment and dissenting in part).

Justice Breyer, joined in dissent by three Justices, agreed with Justice Kennedy that the Due Process Clause provided the appropriate analytical framework, but argued that the Coal Act as applied to Eastern did not violate the Due Process Clause.⁹⁰ The dissent so concluded because they believed the coal industry, including Eastern, had contributed to the miners' expectations of lifetime health care benefits even before the 1974 Agreement that explicitly promised such benefits.⁹¹ Based on this belief, the dissent concluded that liability under the Coal Act was rationally related to Eastern's actions and, therefore, met the rational review standard applied under substantive due process.⁹² The dissent also agreed with Justice Kennedy's conclusion that the takings analysis was inapposite, but relied on a different interpretation of *Connolly* and *Concrete Pipe* to distinguish those cases.⁹³ Further, Justice Breyer quoted language from *Connolly* stating that the Takings Clause is not violated when "the Government does not physically invade or permanently appropriate any . . . assets for its own use."⁹⁴ He also noted that both *Connolly* and *Concrete Pipe* rejected the claim of a takings violation.⁹⁵

As evidenced by the split of opinion, the Court struggled to determine whether the Due Process Clause or the Taking Clause provided the correct analysis in *Eastern Enterprises*. The purpose of substantive due process is to protect "citizens from arbitrary or irrational legislation."⁹⁶ To make this determination, the Court

90. See *id.* at 2161-68 (Breyer, J., dissenting). Justice Stevens, joined by Justices Souter, Ginsburg, and Breyer, authored a short dissenting opinion stating that the Takings Clause did not provide the appropriate analysis. See *id.* at 2160-61 (Stevens, J., dissenting). Moreover, Justice Stevens stated his belief that the coal miners and operators had an implicit agreement that the operators would provide the miners with lifetime health benefits and characterized that belief as "critical" to the decision in *Eastern Enterprises*. See *id.* at 2160 (Stevens, J., dissenting). Because both Justice Stevens's and Justice Breyer's opinions reflect the views of the same four justices, when this Note refers to the views of the dissent, it is referring to the views of the four Justices regardless of the opinion in which the view is expressed.

91. See *id.* at 2160-61 (Breyer, J., dissenting).

92. See *id.* at 2164 (Breyer, J., dissenting).

93. Compare *id.* at 2157-58 (Kennedy, J., concurring in the judgment and dissenting in part) (arguing that *Connolly* and *Concrete Pipe* indicated that the Court first should consider general due process principles, leaving "takings analysis for cases where the governmental action is otherwise permissible"), with *id.* at 2162 (Breyer, J., dissenting) (arguing that both *Connolly* and *Concrete Pipe* "rejected the claim of Takings Clause violation").

94. *Id.* at 2162 (Breyer, J., dissenting) (quoting *Connolly*, 475 U.S. at 225).

95. See *id.* (Breyer, J., dissenting).

96. *Id.* at 2163 (Breyer, J., dissenting). Historically, the Due Process Clause only afforded persons procedural protection against deprivations of life, liberty or property.

generally attempts to ascertain whether some set of facts supports the legislative judgment or end and whether the means chosen by the legislature are rationally related to that end.⁹⁷ Additionally, it is well established that under this analysis the Due Process Clause provides great judicial deference to the legislative branch, especially in the review of economic regulations.⁹⁸

Even though the Court has not overturned a purely economic regulation under the substantive due process analysis in more than sixty years,⁹⁹ the Due Process Clause still provides the Court with a doctrinal tool to restrict certain government action.¹⁰⁰ When a statute violates due process, the remedy is generally an injunction against the statute's enforcement.¹⁰¹ Therefore, even though rarely used since the New Deal, the Due Process Clause gives the Court the power to prevent the enforcement of purely economic regulation.

Unlike the Due Process Clause, the Takings Clause is not intended to prevent government action; rather, it merely conditions government action on adequate compensation.¹⁰² Historically, the

See NOWAK & ROTUNDA, *supra* note 7, § 11.2, at 369-74. The Court's interpretation of the Due Process Clause now includes a substantive protection against government regulation known as substantive due process. *See id.*

97. *See Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 491 (1955); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 (1938); *see also* STONE ET AL., *supra* note 9, at 838 (stating that the standard includes an analysis that the means of the legislation support the justification for the legislation).

98. *See Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976) (stating that economic regulations come to the Court with a presumption of constitutionality). In part, this presumption is the reason that the Court has not overturned a purely economic regulation under the substantive due process analysis in more than 60 years. *See Eastern Enters. v. Chater*, 110 F.3d 150, 155 (1st Cir. 1997), *rev'd sub nom. Eastern Enters. v. Apfel*, 118 S. Ct. 2131 (1998). *See generally* Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1718 (1984) (discussing the Court's deferential substantive due process standard in reviewing economic regulations). This has not always been the rule. *See, e.g., Lochner v. New York*, 198 U.S. 45 (1905) (demonstrating little deference toward the judgment of a state legislature).

99. *See Eastern Enters.*, 110 F.3d at 155.

100. *See STONE ET AL.*, *supra* note 9, at 813. It has been argued, however, that the Court would not sustain any claim of violation of substantive economic rights. *See* Robert G. McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34, 38.

101. *See, e.g., Eide v. Sarasota County*, 908 F.2d 716, 722 (11th Cir. 1990).

102. *See Eastern Enters.*, 118 S. Ct. at 2161 (Breyer, J., dissenting); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 314-15 (1987) (stating that the Takings Clause is "designed not to limit the governmental interference with property rights *per se*, but rather to secure compensation in the event of otherwise proper interference amounting to a taking"); *Armstrong v. United States*, 364 U.S. 40, 49 (1960) (stating that the Takings Clause was designed to prevent the government from forcing people to bear the costs that in all fairness should be borne by the public); *see also* STONE ET AL., *supra* note 9, at 1645-46 (stating that the Takings "[C]ause reflects a

Court has classified a governmental act as a "taking" only when the government appropriated title and possession.¹⁰³ In 1922, however, the Court held in *Pennsylvania Coal Co. v. Mahon*¹⁰⁴ that the regulation of property could also effect a taking under the Fifth Amendment.¹⁰⁵ Writing for the majority, Justice Oliver Wendell Holmes stated that, "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."¹⁰⁶ The *Pennsylvania Coal* precedent places the Court in the difficult position of distinguishing regulations that reflect the valid exercise of power from regulations that effect an uncompensated taking—in other words, deciding how far is "too far."¹⁰⁷

Since *Pennsylvania Coal*, the Court's decisions generally have divided regulatory takings claims into three categories: (1) regulations in which the government physically invades or appropriates property;¹⁰⁸ (2) regulations that deprive land of all

judgment that, if government is seeking to produce some public benefit ... it is appropriate that the payment come from the public at large"). *Eastern Enterprises*, however, requested an injunction prohibiting the enforcement of the Coal Act. *See Eastern Enters.*, 118 S. Ct. at 2144-45 (plurality opinion); *see also supra* note 57 (discussing jurisdictional issues in *Eastern Enterprises* and the Tucker Act).

103. *See* McUsic, *supra* note 13, at 612 (citing *Callendar v. Marsh*, 18 Mass. (1 Pick.) 418 (1823), in which the court ruled there was no taking when the grading of a Boston street caused extensive damage to an adjacent house); *see also* MORTON HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860*, 71-74, 132 (1977) (discussing the judicial trend in the first half of the nineteenth century in which injurious acts were often noncompensable unless they were trespasses to land or actual appropriations for public use); Stephen A. Siegel, *Lochner Era Jurisprudence and the American Constitutional Tradition*, 70 N.C. L. REV. 1, 7 (1991) (stating that, prior to the rise of the regulatory state, constitutional law only protected private property from seizure).

104. 260 U.S. 393 (1922).

105. *See id.* at 415-16. Justice Kennedy characterized Justice Holmes's statement as "the genesis of the so-called regulatory takings doctrine." *Eastern Enters.*, 118 S. Ct. at 2154 (Kennedy, J., concurring in the judgment and dissenting in part). The first time the Court applied this expanded concept of takings was in *Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166 (1872). In *Pumpelly*, the Court construed the Wisconsin Constitution, which had an almost identical takings clause as the U.S. Constitution. *See id.* at 180. The Court stated that it would be an incorrect result to allow the government to destroy property but escape payment of compensation simply because it refrained from absolute conversion of the property. *See id.* at 176-78.

106. *Pennsylvania Coal*, 260 U.S. at 415.

107. The Court not only has been in this position before but also has been in this position often. *See Eastern Enters.*, 118 S. Ct. at 2155 (Kennedy, J., concurring in the judgment and dissenting in part) (listing by property interest involved the many regulatory takings cases the Court has heard since *Pennsylvania Coal*); *see also* G. Richard Hill, *Introduction: The Takings Decade*, in *REGULATORY TAKING: THE LIMITS OF LAND USE CONTROLS* at v, xv-xvii (1993) (discussing the guidance provided by cases in the 1980s).

108. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 421 (1982). This first category includes "regulations that compel the property owner to suffer a

economically beneficial use;¹⁰⁹ and (3) other regulations related to property that impart economic harm short of depriving the owner of all beneficial use of the property.¹¹⁰ The third category is the one at issue in *Eastern Enterprises*.¹¹¹ In category-three cases, the Court has attempted to determine if a regulation has "gone too far" by looking at when "justice and fairness" require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons."¹¹² To so determine, the Court has used an "ad hoc, factual inquir[y]"¹¹³ that relies substantially on three factors: (1) "the economic impact of the regulation;" (2) its interference with reasonable investment-backed expectations; and (3) "the character of the governmental action."¹¹⁴

In addition to expanding the governmental actions that can constitute a "taking," the Court also has expanded the definition of "property" for Takings Clause purposes. Originally, the Takings Clause protected only real or personal property from governmental appropriation of title or possession.¹¹⁵ The Court, however, has expanded the definition of property beyond mere title and

physical 'invasion' of his property." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992). In analyzing regulations of this type, the Court does not balance the public purpose of the regulation, nor does it consider the significance of the invasion. Instead, the Court applies a per se rule: If property is invaded, a taking has occurred. *See id.* at 1015. For an example of this type of regulation and the Court's analysis, *see Loretto*, 458 U.S. at 419. In *Loretto*, the state passed a statute that required apartment building owners to allow television cable to be put into their buildings. *See id.* at 423. The Court held that the regulation was a taking even though the physical invasion was insignificant. *See id.* at 438 n.16.

109. *See Lucas*, 505 U.S. at 1015. This second category of government regulation includes those regulations that deny all economically beneficial use of land. *See id.* In *Lucas*, the South Carolina Coastal Commission passed a regulation prohibiting construction in certain beach areas. *See id.* at 1008-09. Lucas owned two lots within the newly restricted area on which he planned to build a home. *See id.* Assuming as fact the trial court's determination that Lucas's property was worthless, *see id.* at 1020, the Court held that the South Carolina regulation effected a taking of Lucas's property, *see id.* at 1032. The Court again applied a per se rule: If the regulation eliminates all economically beneficial use of the land and the prohibited use is not a common law nuisance, the regulation is a taking. *See id.* at 1027.

110. *See Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 107, 129 (1978).

111. *See Eastern Enters.*, 118 S. Ct. at 2146 (plurality opinion).

112. *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1970).

113. *Penn Cent.*, 438 U.S. at 124.

114. *Id.* In *Penn Central*, the state passed a regulation restricting the development of certain historic landmarks. *See id.* at 115. The owners of Grand Central Terminal sued, alleging an uncompensated taking. *See id.* at 119. Although the Court ultimately held that no taking had resulted, the Court applied these factors to make its determination. *See id.* at 124.

115. *See McUsic*, *supra* note 13, at 612.

possession.¹¹⁶ “Property” now encompasses specific attributes of ownership as well.¹¹⁷ In recent cases, the Court has included within protected property the legal rights associated with property ownership, such as the right to exclude,¹¹⁸ the right to control disposition at death,¹¹⁹ and the right to all economic use.¹²⁰ By equating “property” with legal and economic rights, the Court’s expanded definition potentially includes all legal expectations.¹²¹

The Court’s expanded view of the Takings Clause is readily apparent in *Connolly* and *Concrete Pipe*. At issue in *Connolly* was a statute imposing withdrawal liability on employers withdrawing from a multiemployer pension plan.¹²² The pension plan was created in 1960 by an agreement between several thousand employers and their employees.¹²³ Under the plan, the employers agreed to pay certain amounts into trust for the employees’ pension benefits, but the employers could withdraw from the plan without liability.¹²⁴ In 1980, however, Congress passed the Multiemployer Pension Plan Amendments Act of 1980 (the “MPPAA”),¹²⁵ which requires employers withdrawing from a multiemployer pension plan to contribute their proportionate share of the plan’s unfunded vested benefits.¹²⁶ *Connolly*, a trustee administering the plan, sued, alleging that this withdrawal liability imposed by the MPPAA effected a

116. See *id.* at 624-31.

117. See *Agins v. City of Tiburon*, 447 U.S. 255, 262 (1980); see also *McUsic*, *supra* note 13, at 626-31 (discussing how the Court designated “particular economic interests as ‘essential’ aspects of property ownership”).

118. See *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1970) (stating that the “‘right to exclude’ . . . [is] a fundamental element of the property right [that] falls within this category of interests that the Government cannot take without compensation”).

119. See *Hodel v. Irving*, 481 U.S. 704, 716-17 (1992) (classifying the right to pass property after death as among “‘the most essential sticks in the bundle of rights that are commonly characterized as property’” (quoting *Kaiser Aetna*, 444 U.S. at 176)).

120. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027-28 (1992) (equating all viable economic use of real property as a property right).

121. See *McUsic*, *supra* note 13, at 626-31.

122. See *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 218 (1986).

123. See *id.*

124. See *id.* at 217.

125. The Multiemployer Pension Plan Amendments Act of 1980, Publ. L. No. 96-364, § 104(2), 94 Stat. 1217, 1217-1267 (1980) (codified as amended at 29 U.S.C. §§ 1381-1461 (1994)).

126. See *Connolly*, 475 U.S. at 213, 216. Because the terms of the plan at issue in *Connolly* did not impose liability on withdrawing employers, the MPPAA imposed liability on employers where contractually there was none. Thus, the statute “‘impose[d] a new duty or liability based on past acts.’” *Id.* at 223 (quoting *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16 (1975)).

taking of its property without just compensation.¹²⁷

In a unanimous decision, the Court ruled that the MPPAA as it applied to Connolly did not violate the Takings Clause.¹²⁸ The Court used the three-part regulatory takings analysis that distinguishes a taking from a valid regulation to determine that the regulation did not result in a taking.¹²⁹ Even though the Court ultimately found that the regulation did not result in a taking,¹³⁰ the Court opened the door for Eastern's later claim. In making its claim, Connolly equated its "assets" or economic value with "property" protected under the Takings Clause.¹³¹ By applying the takings analysis to the contested statute, the Court implicitly agreed with Connolly's characterization of economic value as property.¹³²

In *Concrete Pipe*, Concrete Pipe & Products of California, Inc. ("Concrete Pipe"), an employer and a former contributor to a pension plan, withdrew from a pension plan and was assessed withdrawal liability under the MPPAA.¹³³ Concrete Pipe filed suit alleging that the MPPAA as applied to it violated both the Due Process and the Takings Clauses of the Fifth Amendment.¹³⁴ After holding that the MPPAA did not violate substantive due process,¹³⁵ the Court analyzed Concrete Pipe's takings claim. Because the Court had previously held that physical appropriations of property were takings per se,¹³⁶ Concrete Pipe argued that the regulation should be characterized as a physical invasion of property or as destruction of

127. See *id.* at 219. In *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717 (1984), the Court had already held that the retroactive provisions of the MPPAA did not violate the Due Process Clause of the Fifth Amendment. See *id.* at 213.

128. See *Connolly*, 475 U.S. at 212. In addition, Justice O'Connor, joined by Justice Powell, authored a concurring opinion. See *id.* at 228 (O'Connor, J., concurring).

129. See *id.* at 224-25; see also *supra* notes 66-68 and accompanying text (discussing the factors the Court used in analyzing Connolly's takings claim).

130. See *Connolly*, 475 U.S. at 227-28.

131. See *id.* at 221.

132. See *id.* at 222-28.

133. See *Concrete Pipe & Prods. of California, Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 605 (1993).

134. See *id.*

135. See *id.* at 636-41. After noting that it had already concluded that the MPPAA did not violate substantive due process in *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 720 (1984), the Court applied the deferential standard of review used in substantive due process challenges to economic regulations and held that the MPPAA did not violate substantive due process as applied to Concrete Pipe. See *Concrete Pipe*, 508 U.S. at 641. Concrete Pipe also brought a procedural due process claim that the Court rejected. See *id.* at 605.

136. See *supra* note 108 and accompanying text (discussing the Court's per se rule regarding physical appropriations).

all economically beneficial use of property.¹³⁷ The Court, however, rejected this argument. Applying the three-part test from *Connolly*,¹³⁸ the Court unanimously ruled that the statute did not effect a taking.¹³⁹ Although it held against Concrete Pipe, by analyzing Concrete Pipe's claim under takings jurisprudence, the Court recognized economic value as property protected by the Takings Clause.¹⁴⁰

The statute challenged in *Eastern Enterprises*, the Coal Act, is similar to the statute at issue in *Connolly* and *Concrete Pipe*,¹⁴¹ and in both of those cases, a unanimous Court applied the regulatory takings analysis to the challenged statutes.¹⁴² Because the statute at issue in *Connolly* and *Concrete Pipe* was a purely economic regulation, it appeared after *Connolly* and *Concrete Pipe* that the Court conclusively had decided that the Takings Clause can apply to such regulations.¹⁴³ The Court's opinion in *Eastern Enterprises*, however, throws that apparent certainty into question, because five Justices concluded that the Takings Clause was inapplicable to the Coal Act, a purely economic regulation.¹⁴⁴ Even though Justice

137. See *Concrete Pipe*, 508 U.S. at 643. Concrete Pipe argued that the property taken from it was taken in its entirety. See *id.* The Court, however, rejected that argument, because it would convert all partial takings into total takings. See *id.* at 644; see also *supra* note 108 (discussing per se takings).

138. See *Concrete Pipe*, 508 U.S. at 641-43.

139. See *id.* at 643-44. Justice Thomas, in a concurring opinion, disagreed with the majority regarding an issue unrelated to the takings claim, see *id.* at 649 (Thomas, J., concurring in part and concurring in the judgment), and Justice O'Connor joined all but one sentence of the majority opinion, see *id.* at 647 (O'Connor, J., concurring).

140. See *id.* at 643-44.

141. See *Eastern Enters.*, 118 S. Ct. at 2146-47 (plurality opinion). The Coal Act is similar to the statute at issue in *Connolly* and *Concrete Pipe* in that both statutes imposed unexpected monetary obligations based on contractual relationships where previously no liability existed.

142. See *Concrete Pipe*, 508 U.S. at 643; *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 221, 225 (1986). In *Connolly*, the Court stated that "[e]xamining the MPPAA [using the three-part regulatory takings analysis] reinforces our belief that the [MPPAA] does not constitute a compensable taking under the Fifth Amendment." *Connolly*, 475 U.S. at 225. In *Concrete Pipe*, the Court stated that "the next step in our analysis is to subject the operative facts . . . to the standards derived from our prior Takings Clause cases." *Concrete Pipe*, 508 U.S. at 643. The Court then proceeded to apply the three-part regulatory takings analysis. See *id.* at 644-47.

143. See McUsic, *supra* note 13, at 655-56 & n.213.

144. See *Eastern Enters.*, 118 S. Ct. at 2154 (Kennedy, J., concurring in the judgment and dissenting in part); *id.* at 2161 (Breyer, J., dissenting); see also Thomas W. Merrill, *Compensation and the Interconnectedness of Property*, 25 *ECOLOGY L.Q.* 327, 349 n.87 (1998) (stating that five Justices in *Eastern Enterprises* determined that the Takings Clause only applies to regulations that deal with specific assets). But see *Vermont Assembly of Home Health Agencies, Inc. v. Shalala*, 18 F. Supp. 2d 355, 369 (D. Vt. 1998) (citing

Kennedy and the four dissenters proclaimed otherwise, their opinions in *Eastern Enterprises* appear to contradict the portions of *Connolly* and *Concrete Pipe* that applied the regulatory takings analysis to purely economic regulations.¹⁴⁵

Justice Kennedy purportedly relied on *Connolly* and *Concrete Pipe* but interpreted those cases as requiring the Court to undertake a substantive due process analysis first, proceeding to a Takings Clause analysis only if the challenged statute is otherwise permissible.¹⁴⁶ Justice Kennedy's interpretation of *Connolly* and *Concrete Pipe* appears reasonable, because in those cases, the Court followed that two-step process.¹⁴⁷ His purported reliance on *Connolly* and *Concrete Pipe*, however, is not compelling after considering the remainder of his opinion.

Later in his opinion, Justice Kennedy stated unequivocally that because the Coal Act does not regulate property, the regulatory takings analysis is not the appropriate analysis.¹⁴⁸ To invalidate the Coal Act as applied to *Eastern*, however, Justice Kennedy did not need to use the Takings Clause analysis because he asserted that the specific application of the Coal Act violated the Due Process Clause.¹⁴⁹ Based on his interpretation of *Connolly* and *Concrete*

Eastern Enterprises as leaving in doubt the necessity of an identified property interest to maintain a takings claim).

145. Justice O'Connor interpreted *Connolly* and *Concrete Pipe* as requiring a Takings Clause analysis. See *Eastern Enters.*, 118 S. Ct. at 2149 (plurality opinion) (stating that *Connolly* and *Concrete Pipe* "indicate that the regulatory takings framework is germane to legislation of this sort").

146. See *id.* at 2157-58 (Kennedy, J., concurring in the judgment and dissenting in part) ("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.").

147. See *Concrete Pipe*, 508 U.S. at 636; *Connolly*, 475 U.S. at 223. The *Connolly* opinion only addressed the takings issue. See *Connolly*, 475 U.S. at 223. The Court, however, previously had addressed a due process challenge to the statute. See *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717 (1984).

148. See *Eastern Enters.*, 118 S. Ct. at 2155-56 (Kennedy, J., concurring in the judgment and dissenting in part) Justice Kennedy stated:

Until today . . . one constant limitation has been that in all of the cases where the regulatory taking analysis has been employed, a specific property right or interest has been at stake. . . .

....

...The Coal Act neither targets a specific property interest nor depends upon any particular property for the operation of its statutory mechanisms [making the Takings Clause inapplicable].

Id.

149. See *id.* at 2154 (Kennedy, J., concurring in the judgment and dissenting in part).

Pipe,¹⁵⁰ his purported reliance on those cases would have required that Justice Kennedy apply the regulatory takings analysis to the Coal Act had he concluded that it did not violate the Due Process Clause. But applying the takings analysis to that statute would conflict with his statement that the Takings Clause does not apply to the Coal Act. Based on this inconsistency, Justice Kennedy's stated adherence to *Connolly* and *Concrete Pipe* in his *Eastern Enterprises* opinion¹⁵¹ is not compelling. Rather, a more reasonable interpretation of Justice Kennedy's opinion in *Eastern Enterprises* is that he would limit *Connolly* and *Concrete Pipe* to the extent those cases espouse the view that the Takings Clause applies to purely economic regulations such as the Coal Act.

Justice Breyer's dissenting opinion also appears to contradict those portions of *Connolly* and *Concrete Pipe* that apply the takings analysis to economic regulations such as the Coal Act. Besides agreeing with Justice Kennedy's statement that the Takings Clause is inapplicable because the Coal Act does not regulate property, Justice Breyer relied on the fact that the Coal Act requires payment to a third party and not the government.¹⁵² Justice Breyer stated that "the Takings Clause had *not* been violated [in *Connolly*], in part because 'the Government does not physically invade or permanently appropriate any . . . assets for its own use.'"¹⁵³ Neither of these reasons, however, effectively distinguishes *Connolly* and *Concrete Pipe* from *Eastern Enterprises*. In both *Connolly* and *Concrete Pipe*, as in *Eastern Enterprises*, the statute at issue was a purely economic regulation that required the plaintiff to make a payment to a third party, not the government.¹⁵⁴ Justice Breyer's opinion directly conflicts with the parts of *Connolly* and *Concrete Pipe* in which the Court analyzed the challenged statute under the three-part regulatory takings analysis. It is, therefore, reasonable to interpret Justice Breyer's dissent as contradicting the parts of those cases that

150. See *id.* at 2157-58 (Kennedy, J., concurring in the judgment and dissenting in part).

151. See *id.* (Kennedy, J., concurring in the judgment and dissenting in part).

152. See *id.* at 2162 (Breyer, J., dissenting).

153. *Id.* (Breyer, J., dissenting) (quoting *Connolly*, 475 U.S. at 225).

154. See *Eastern Enters.*, 118 S. Ct. at 2146 (plurality opinion) (describing the statutes from *Connolly* and *Concrete Pipe* as "somewhat similar legislative schemes"). Compare *Connolly*, 475 U.S. at 221 (discussing *Connolly*'s claim that the statute took its "assets" in the form of a general liability), and *Concrete Pipe & Prods. of California, Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 643 (1993) (quoting *Connolly* in characterizing the statute as simply imposing a liability to fund a pension plan), with *Eastern Enterprises*, 118 S. Ct. at 2146 (plurality opinion) (quoting *Connolly* to characterize the Coal Act).

provide for the Takings Clause analysis in analyzing purely economic regulations such as the Coal Act.¹⁵⁵

Additional evidence that the concurring and dissenting opinions in *Eastern Enterprises* contradict portions of *Connolly* and *Concrete Pipe* is their changed view of "property" in *Eastern Enterprises* as compared to *Connolly*. In *Connolly*, the Court implicitly acknowledged that money or economic value is property. In its review of *Connolly*'s claim, the district court¹⁵⁶ did not address the issue of whether or not a taking had occurred because it ruled that no "property" was affected by the challenged statute.¹⁵⁷ On appeal, however, after mentioning the lower court's reasoning, the Supreme Court proceeded to analyze whether the statute had effected a taking.¹⁵⁸ The Court had no reason to make this determination if it believed "property" was not at issue. By dismissing the analysis of the district court and analyzing whether a taking had occurred, the Court indicated its agreement with the plaintiff's position that money or economic value is property.¹⁵⁹ In *Eastern Enterprises*, however, five Justices stated that the Takings Clause was not applicable because no property was at issue.¹⁶⁰ Therefore, *Eastern Enterprises* may indicate that a majority of the Court is no longer comfortable with defining "property" for Takings Clause purposes as including

155. Justice Breyer also relied on the outcomes of *Connolly* and *Concrete Pipe* as a way of distinguishing those cases from *Eastern Enterprises*. See *Eastern Enters.*, 118 S. Ct. at 2162 (Breyer, J., dissenting). However, the Court's rejection of the claim of a Takings Clause violation in *Connolly* and *Concrete Pipe* seems to say little about whether or not the Takings Clause provides the appropriate analytical framework in *Eastern Enterprises*.

156. After a three-judge panel of the district court ruled in favor of Pension Benefit Guaranty Corporation, *Connolly* appealed directly to the U.S. Supreme Court under 28 U.S.C. § 1253. See *Connolly*, 475 U.S. at 221. Section 1253 gives the Supreme Court appellate jurisdiction over cases heard by a three-judge panel of the district court. See 28 U.S.C. § 1253 (1994).

157. See *Connolly v. Pension Benefit Guar. Corp.*, 631 F. Supp. 640, 644-45 (C.D. Cal. 1984), *aff'd*, 475 U.S. 211 (1986).

158. See *Connolly*, 475 U.S. at 220.

159. In the district court, *Connolly* argued that its contractual right limiting its liability was a property right that was taken by the statute. See *Connolly*, 631 F. Supp. at 645. The district court ruled that a "contractual right which insulates employers from further liability to the pension plans . . . is not property within the meaning of the takings clause." *Id.* In its case before the Supreme Court, however, *Connolly* asserted that the statute took its "assets." See *Connolly*, 475 U.S. at 221. The Court did not directly address the issue of whether or not "property" was at issue; however, the Court stated, "[w]e agree that [*Connolly* was] permanently deprived of [its] assets." *Id.* at 222. This sentence seems to indicate that the Court agreed with *Connolly*'s definition of property and equates assets or economic value with property.

160. See *Eastern Enters.*, 118 S. Ct. at 2154 (Kennedy, J., concurring in the judgment and dissenting in part); *id.* at 2161 (Breyer, J., dissenting).

economic value and applying the regulatory takings analysis to purely economic regulations.¹⁶¹

Expanding on some of Justice Breyer's concerns expressed in *Eastern Enterprises*,¹⁶² several arguments exist for limiting the use of the Takings Clause and instead relying on due process to analyze purely economic regulations.¹⁶³ First, the text of the Fifth Amendment indicates that the Due Process Clause, rather than the Takings Clause, provides the more appropriate analysis for the application of purely economic regulations—such as the Coal Act—that simply adjust “the benefits and burdens of economic life.”¹⁶⁴ The Due Process Clause is concerned with those regulations that “deprive.”¹⁶⁵ The term “deprive” focuses on the regulation's impact on the property owner.¹⁶⁶ On the other hand, the Takings Clause states that property shall not be “taken” without compensation.¹⁶⁷ The word “taken” indicates a deprivation on the part of the property owner as well as a benefit or receipt by the government.¹⁶⁸ The difference in meaning between “deprive” and “take” indicates a

161. Justice Kennedy stated that “[t]he difficulties in determining whether there is a taking or a regulation even where a property right or interest is identified ought to counsel against extending the regulatory takings doctrine to cases [dealing with purely economic regulations].” *Eastern Enters.*, 118 S. Ct. at 2155 (Kennedy, J., concurring in the judgment and dissenting in part). Justice Breyer, writing for the four dissenters, stated that the “application of the Takings Clause here [to a purely economic regulation] bristles with conceptual difficulties.” *Id.* at 2162 (Breyer, J., dissenting).

162. Justice Breyer asked three questions in his opinion in an attempt to raise the conceptual difficulties inherent in applying the Takings Clause to purely economic regulations: (1) “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.* (Breyer, J., dissenting); (2) “Would [the Takings Clause] apply to some or to all statutes and rules that ‘routinely creat[e] burdens for some that directly benefit others’?,” *id.* (Breyer, J., dissenting) (quoting *Connolly*, 475 U.S. at 223); (3) “[C]ould a court apply the same kind of Takings Clause analysis when violation means the law's invalidation, rather than simply the payment of ‘compensation?’,” *id.* (Breyer, J., dissenting).

163. To demonstrate these arguments, the discussion in this Note focuses on the Coal Act. This assumes that the Coal Act accurately represents a purely economic regulation. Justice O'Connor appears to agree with this assumption. *See id.* at 2146 (“[E]conomic regulation such as the Coal Act may . . . effect a taking.”) (plurality opinion) (emphasis added).

164. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

165. U.S. CONST. amend. V.

166. *See Echeverria & Dennis*, *supra* note 6, at 710. Webster's defines “deprive” as “to take away” or to “remove” or “destroy.” WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 606 (1993).

167. U.S. CONST. amend. V.

168. Black's Law Dictionary defines the term “take” as “to gain or receive into possession.” BLACK'S LAW DICTIONARY 1453 (6th ed. 1990).

broader scope for the Due Process Clause than the Takings Clause; a "taking" is not necessarily effected upon every deprivation of property.¹⁶⁹ It could be argued that this broader scope means that the Takings Clause was not intended to apply to purely economic regulations—those regulations that simply adjust economic benefits and burdens.¹⁷⁰ For example, the Coal Act required Eastern to pay premiums to the Combined Fund, not the government;¹⁷¹ the Coal Act "deprived" Eastern of money, but the government did not "take" money from Eastern. The text and scope of the Due Process Clause may therefore more appropriately addresses challenges to purely economic regulations than does the Takings Clause.

The above argument suggests a reason why the Takings Clause should not apply to regulations requiring private party *A* to pay private party *B*, but it does not address those economic regulations in which the government actually receives money. The remedy available under the Takings Clause, however, indicates that it is inappropriate when applied to all purely economic regulations.¹⁷² The Takings Clause is not a legal limit on governmental power to act; instead, it simply conditions that power on compensation.¹⁷³ Therefore, if Congress decides that the government should take private property for a public purpose, the government can do so as

169. See Echeverria & Dennis, *supra* note 6, at 710 (stating that the Takings Clause is more narrow in scope than the Due Process Clause because the Takings Clause requires a deprivation and an appropriation by the government).

170. See *Eastern Enters.*, 118 S. Ct. at 2161-62 (Breyer, J., dissenting) (citing *Connolly* as support for the argument that the regulation at issue did not violate the Takings Clause, in part because the government did not receive assets for its own use). If economic regulations are those regulations that require private party *A* to pay private party *B*, like the Coal Act, Echeverria and Dennis seem to agree with this conclusion. See Echeverria & Dennis, *supra* note 6, at 710; see also John V. Orth, *Taking from A and Giving to B: Substantive Due Process and the Case of the Shifting Paradigm*, 14 CONSTITUTIONAL COMMENTARY 337, 344 (1997) (stating that "the paradigm of what due process prohibited enlarged to include . . . 'taking from A and giving to B'").

171. See *Eastern Enters.*, 118 S. Ct. at 2156 (Kennedy, J., concurring in the judgment and dissenting in part) ("[T]he statute does not take money for the Government but instead makes it payable to third persons . . .").

172. Cf. Woodrum & Rothman, *supra* note 34, at 653 (citing *Connolly* as a case in which the Court applied the Takings Clause even though a compensation remedy would be meaningless because a purely economic regulation was at issue).

173. See *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 315 (1987) ("[The Takings Clause] is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking."). Even though the Takings Clause imposes no legal limit on governmental action, requiring compensation may create practical or political limits. See McUsic, *supra* note 13, at 644 (stating that in many situations, requiring compensation is equivalent to striking down a statute).

long as it compensates the property owner. If, however, the Court classifies the government's appropriation of money as a "taking," the Court effectively overturns Congress's judgment,¹⁷⁴ as can be seen from the plurality's analysis of the Coal Act in *Eastern Enterprises*.¹⁷⁵

The Coal Act expresses Congress's judgment that coal operators such as Eastern, rather than the taxpayers, should be responsible for the health care benefits of certain miners.¹⁷⁶ Consistent with the plurality's conclusion that the Coal Act effects a "taking," the only way Congress can constitutionally impose liability on Eastern under the Coal Act, as currently written, is to compensate Eastern for the liability.¹⁷⁷ If Congress compensates Eastern, then the taxpayers would be paying the miners' benefits, which is in direct conflict with Congress's implicit judgment that Eastern should pay for the benefits.¹⁷⁸ In so holding, the plurality used the Takings Clause to

174. The following hypothetical demonstrates this point. Assume that Congress passes a law requiring all utility companies to pay money to the government each year to be set aside to combat pollution by such utilities. If the companies sued and the Court invalidated this regulation under the Takings Clause, the regulation could only survive if the government paid the utility companies; obviously, government payments to the utilities would render the regulation pointless. In this hypothetical, the Takings Clause essentially would prevent government regulation—a role the Clause was not intended to serve. See *supra* note 173 and accompanying text (discussing the role of the Takings Clause).

175. Granted, the Coal Act is an *A* to *B* economic regulation; however, who *A* is required to pay is not relevant for this analysis.

176. See Brief for Federal Respondent at 5-8, *Eastern Enters.* (No. 97-42). Obviously, Congress could have imposed this liability on the taxpayers by paying the benefits out of general government funds, but in Congress's judgment the obligation belonged to coal companies. If the Court does not agree with and wants to overturn the judgment of Congress, the Court should alter due process review rather than distorting the Takings Clause. See *infra* note 206 and accompanying text.

177. Upon finding that a statute has violated the Takings Clause, the government generally has three choices: (1) amend the regulation; (2) rescind the regulation; or (3) pay for the property under eminent domain. See *First English Evangelical Lutheran Church*, 482 U.S. at 321. Obviously, choices one and two do not permit Congress to impose liability on Eastern under the current Coal Act; therefore, Congress must pay to enforce the statute.

178. This result does not occur when a regulation of "property" is ruled to be a "taking." For example, if the government rationally decides to limit a landowner's use of her property for a public purpose, the Court cannot stop the government from doing so; the Court can only require that the government pay the landowner for her loss of use. See *Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1, 11 (1990) ("If the government has provided an adequate process for obtaining compensation, and if resort to that process 'yield[s] just compensation,' then the property owner 'has no claim against the Government' for a taking.") (quoting *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194-95 (1985) (quoting *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1013, 1018 n.21 (1984))); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 297 n.40 (1981) (holding that a taking by virtue of a statute's enactment is not unconstitutional unless just compensation is not available). Therefore, the

effectively prevent the enforcement of Congress's judgment.¹⁷⁹ Obviously, the Court has a duty to enjoin the enforcement of a statute conflicting with the Constitution;¹⁸⁰ the Takings Clause, however, was not intended to give the Court such power.¹⁸¹

In addition to deciding that the Takings Clause should not apply to purely economic regulations, the opinions of Justices Kennedy and Breyer in *Eastern Enterprises* also establish a foundation for limiting the regulatory takings analysis to regulations that are otherwise permissible. Justice Breyer stated that "at the heart of the [Takings] Clause lies a concern, not with preventing arbitrary or unfair government action, but with providing *compensation* for legitimate government action that takes 'private property' to serve the 'public' good."¹⁸² Similarly, Justice Kennedy interpreted *Connolly* and *Concrete Pipe* as requiring application of the Takings Clause analysis only when the regulation at issue was otherwise permissible;¹⁸³ that is, if the regulation at issue is invalidated as arbitrary or irrational, the Takings Clause would be inapplicable.¹⁸⁴ Therefore, not only did five

government's judgment that the use of the land should be limited is not overturned.

179. This statement assumes that if Congress decided to fund the health care benefits of the miners, it would do so out of government tax revenues.

180. See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 180 (1803).

181. See *supra* note 173 and accompanying text (noting that the Takings Clause is intended to condition governmental action, not prevent it).

The remedial complication of using the Takings Clause to challenge purely economic regulations was identified by John Woodrum and Larry Rothman in their article discussing the constitutionality of legislative proposals leading to the enactment of the Coal Act. See Woodrum & Rothman, *supra* note 34, at 653. Citing *Connolly*, they noted that the Court, however, had ignored this complication and had applied the Takings Clause where the typical remedy under the Takings Clause, compensation, would have been meaningless. See *id.*

Justice O'Connor, in *Eastern Enterprises*, also realized the remedial complications of discussing a purely economic regulation under the Takings Clause. See *Eastern Enters.*, 118 S. Ct. at 2145 (plurality opinion). Prior to the Court's hearing of *Eastern Enters.*, the government had challenged the Court's jurisdiction to hear the case because Eastern had not requested compensation in the Court of Claims under the Tucker Act. See *supra* note 57 (discussing the Tucker Act and the Court's ruling). Even though the government dropped its challenge to the jurisdictional issue, Justice O'Connor stated that when a statute requires a direct transfer of funds, a claim for compensation "would entail an utterly pointless set of activities." *Eastern Enters.*, 118 S. Ct. at 2145 (plurality opinion) (quoting *Student Loan Mktg. Ass'n. v. Riley*, 104 F.3d 397, 401 (D.C. Cir. 1997)). A determination that the remedy available for a violation of the Takings Clause is "pointless" further demonstrates that the Takings Clause is not appropriate for review of purely economic regulation. See *infra* notes 187-206 and accompanying text (suggesting that Justice O'Connor in *Eastern Enterprises* inappropriately imported due process concerns into her Takings Clause analysis).

182. *Eastern Enters.*, 118 S. Ct. at 2161 (Breyer, J., dissenting).

183. See *id.* at 2157-58 (Kennedy, J., concurring in the judgment and dissenting in part).

184. See *id.* (Kennedy, J., concurring in the judgment and dissenting in part).

Justices assert that the Takings Clause should be limited to regulations that affect "property," but these same five Justices also asserted that the purpose of the Takings Clause is to provide compensation for *legitimate* government action that takes property.¹⁸⁵ Thus, if government regulations are to be invalidated as arbitrary, such invalidation should be done under the Due Process Clause.¹⁸⁶

The plurality opinion stands in contrast to the opinions of Justices Kennedy and Breyer. Rather than distinguishing the Takings Clause from the Due Process Clause, the plurality imported substantive due process principles into its Takings Clause analysis. The plurality admitted that the Coal Act raised due process concerns but applied the regulatory takings analysis because it did not want to invalidate an economic regulation using the Due Process Clause.¹⁸⁷ A close analysis of the plurality's takings analysis in *Eastern Enterprises*, however, indicates that it overturned the Coal Act due to its belief that Eastern was not responsible for the coal miners' expectations and that it would be unfair to hold Eastern responsible for a liability it did not cause.¹⁸⁸

The plurality began its analysis of economic impact by discussing the substantial liability imposed by the Coal Act; in deciding on the constitutionality of that liability, however, its analysis focused on the proportionality of Eastern's liability under the Coal Act to Eastern's experience with the benefit plans.¹⁸⁹ Ultimately, it determined that the liability was not proportional to Eastern's experience with the benefit plans because Eastern had ceased coal mining operations before lifetime health care was promised to the miners, and Eastern

185. See *id.* at 2161 (Breyer, J., dissenting) (stating that the purpose of the Takings Clause is to provide compensation for legitimate government action that takes private property); *id.* at 2157 (Kennedy, J., concurring in the judgment and dissenting in part) (stating that "the [Takings] Clause presupposes what the Government intends to do is otherwise constitutional" and is simply a "conditional limitation" as long as the government "pays the charge").

186. See *id.* at 2161, 2163 (Breyer, J., dissenting) (comparing the Due Process Clause, which safeguards citizens from arbitrary or irrational legislation, to the Takings Clause, which provides compensation for legitimate government action that takes private property for a public purpose); *id.* at 2157 (Kennedy, J., concurring in the judgment and dissenting in part) (interpreting *Connolly* and *Concrete Pipe* as requiring the Takings Clause analysis only when the regulation at issue is otherwise permissible).

187. See *id.* at 2153 (plurality opinion) (conceding that while the Takings Clause and the Due Process Clause analyses are correlated to some extent, the Takings Clause analysis is preferred because "this Court has expressed concerns about using the Due Process Clause to invalidate economic legislation").

188. Cf. *Leading Cases*, *supra* note 61, at 220-21 (stating that all nine Justices in *Eastern Enterprises* focused on whether or not the Coal Act was retroactive).

189. See *Eastern Enters.*, 118 S. Ct. at 2149 (plurality opinion).

did not negotiate or sign any agreements that promised lifetime health care benefits.¹⁹⁰ In focusing on the relationship between Eastern's previous actions and liability imposed by the Coal Act, the plurality appears to have been concerned with the rationality of imposing liability on Eastern Enterprises.

The second factor of the plurality's regulatory Takings Clause analysis is the Coal Act's interference with reasonable investment-backed expectations.¹⁹¹ In determining that the Coal Act interfered with Eastern's reasonable investment-backed expectations, the plurality relied heavily on the statute's retroactive nature,¹⁹² concluding that the statute's retroactivity implicates concerns of rationality and fairness.¹⁹³

Finally, in analyzing the third regulatory takings factor—the nature of the governmental action—the plurality relied heavily on the plurality's decision that Eastern did not promise the miners health care benefits.¹⁹⁴ It noted that Eastern's liability was "unrelated to any commitment that [Eastern] made" and that "Eastern cannot be forced to bear the expense of lifetime health benefits for miners based on its activities decades before those benefits were promised."¹⁹⁵ Its analysis of the character of the government action suggested that the Coal Act is unfair and irrational because Eastern did not create the employees' expectations and Eastern had exited the coal business years before any benefits were promised.¹⁹⁶

190. *See id.* at 2150 (plurality opinion).

191. *See id.* at 2151 (plurality opinion).

192. *See id.* at 2151-54 (plurality opinion). Justice O'Connor stated 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." *Id.* at 2152 (plurality opinion).

193. *See id.* at 2151 (plurality opinion); *Landgraf v. USI Film Prods.*, 511 U.S. 244, 270 (1994). As Justice O'Connor herself stated in the *Eastern Enterprises* opinion, "[t]he distance into the past that the Act reaches back to impose liability on Eastern . . . raise[s] substantial questions of fairness." *Eastern Enters.*, 118 S. Ct. at 2152 (plurality opinion).

194. *See id.* at 2153 (plurality opinion).

195. *Id.* (plurality opinion).

196. The plurality's analysis of the "nature" or "character" of the Coal Act, as is required by the third prong of the regulatory takings analysis, is not faithful to its precedent. In *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), the Court looked to the character or nature of the governmental action to highlight the difference between a physical invasion by the government, which is more readily recognized as a taking, and economic regulation. *See id.* at 124. In *Eastern Enterprises*, the plurality altered the analysis, stating that the Coal Act as applied to Eastern is "unusual." *Eastern Enters.*, 118 S. Ct. at 2153 (plurality opinion). Whether "unusual" means that it is more like a physical invasion or more like a economic regulation is unclear.

Given that the plurality's invalidation of the Coal Act was dictated by a concern regarding rationality and fairness,¹⁹⁷ the Due Process Clause would appear to have been a more appropriate constitutional tool. First, invalidating legislation as retroactive and arbitrary, while a legitimate reason to prevent the application of a statute, is not a part of the Court's Takings Clause jurisprudence. Rather, the text of the Takings Clause speaks to legislation that is otherwise permissible and rational: the taking of private property for public purpose.¹⁹⁸

Second, the plurality's regulatory takings analysis in *Eastern Enterprises* rings the *Lochner*¹⁹⁹ warning bell because it essentially

197. Justice Kennedy and the four dissenters were also concerned about the fairness of the retroactive nature of the Coal Act as it applied to Eastern. See *Eastern Enters.*, 118 S. Ct. at 2159 (Kennedy, J., concurring in the judgment and dissenting in part); *id.* at 2161, 2164-68 (Breyer, J., dissenting). The Justices's differing resolutions of the fairness issue can be attributed to a difference of opinion regarding the facts. The five Justices who ruled that the Coal Act as applied to Eastern violated the Fifth Amendment agreed that Eastern did not contribute to the current liability of the Combined Fund, nor did it contribute to the miners' expectation of lifetime health care benefits. See *id.* at 2152 (plurality opinion) (stating that neither the pre-1974 agreements nor congressional statements support the contention that Eastern contributed to the miners' expectations); *id.* at 2159 (Kennedy, J., concurring in the judgment and dissenting in part) (stating that Eastern "was not responsible for [the miners'] expectation of lifetime health benefits"); see also *Leading Cases*, *supra* note 61, at 219-21 (arguing that the plurality's opinion in *Eastern Enterprises* hinged on the concern that the Coal Act held Eastern retroactively responsible for a problem it did not cause). Such a view of the facts leads to the conclusion that the Coal Act was unfair as applied to Eastern. On the other hand, the dissent believed that Eastern had contributed to the miners' expectations of lifetime healthcare benefits and that the entire coal industry, including Eastern Enterprises, had implicitly promised the miners lifetime health care benefits. See *Eastern Enters.*, 118 S. Ct. at 2161 (Breyer, J., dissenting) ("Eastern helped to create conditions that led the miners to expect continued health care benefits for themselves and their families after they retired."); *id.* at 2160 (Stevens, J., dissenting) ("[T]here was an implicit understanding on both sides of the bargaining table that the operators would provide the miners with lifetime health benefits."). The Coal Act, as applied to Eastern Enterprises, seems much more rational and fair if Eastern is presumed to be responsible for creating the miners' expectations for lifetime health care.

198. See Ronald J. Krotoszynski, Jr., *Fundamental Property Rights*, 85 GEO. L.J. 555, 572 (1997) ("The Takings Clause does not address itself to irrational governmental action; to the contrary, its text speaks directly to occasions of presumptively rational governmental behavior: the taking of private property for a public purpose."); Katherine E. Stone & Philip A. Seymour, *Regulating the Timing of Development: Takings Clause and Substantive Due Process Challenges to Growth Control Regulations*, 24 LOY. L.A. L. REV. 1205, 1230 (1991) ("Arguably, takings analysis should not address the propriety of governmental regulations at all, but merely whether the damage is sufficient to amount to a taking.").

199. *Lochner v. New York*, 198 U.S. 45 (1905). In *Lochner*, the Supreme Court relied on the Due Process Clause of the Fourteenth Amendment to invalidate a statute limiting the hours that bakers could work. See *id.* at 53. While the Court's abandonment of the

made the same judgments about the Coal Act that it would have made had it used the rational basis review under the Due Process Clause.²⁰⁰ Under rational basis review, a regulation is upheld if a court can find a rational relationship between the regulation and a legitimate state objective.²⁰¹ In its takings analysis, the plurality focused on the correlation between Eastern's actions and the miners' expectations.²⁰² Such an analysis is more similar to rational basis review under substantive due process than to an investigation as to whether or not the Coal Act has gone "too far."²⁰³ What implicates *Lochner* even more emphatically, however, is the lack of legislative deference associated with the Takings Clause.²⁰⁴ Unlike the

rationale of *Lochner* has been complete, the case is still cited as representing the height of "judicial activism": an illegitimate intrusion by the courts into the realm properly reserved to the political branches of government." Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 874 (1987); see also STONE ET AL., *supra* note 9, at 828 (stating that one of the objections to *Lochner* is that the Court interfered in the realm of policymaking). Not all disagree with the concept *Lochner*, however. See, e.g., RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWERS OF EMINENT DOMAIN 5 (1985) (arguing in support of the Court's *Lochner* era jurisprudence. For a recent look at *Lochner*, see PAUL KENS, *LOCHNER V. NEW YORK: ECONOMIC REGULATION ON TRIAL* (1998).

200. Paul Kens recently commented on the similarity between the current Court's takings jurisprudence and *Lochner*. See KENS, *supra* note 199, at 184-85.

201. See *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 489 (1955); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938); NOWAK & ROTUNDA, *supra* note 7, § 11.4, at 391.

202. See *Eastern Enters.*, 118 S. Ct. at 2150 (plurality opinion).

203. "Too far" refers to Justice Oliver Wendell Holmes's famous quote from *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) ("The general rule . . . is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.").

204. Not only is legislative deference not a part of the Takings Clause, but the government may actually have the burden of proving that it should not be required to compensate the property owner. See *Echeverria & Dennis*, *supra* note 6, at 704 (stating that "the burden of proof [in takings inquiries] subtly shifts to the government"). The Ninth Circuit has recently ruled that a city had the burden to prove that its denial of a development permit was reasonable, see *City of Monterey v. Del Monte Dunes of Monterey, Ltd.*, 127 F.3d 1149 (9th Cir. 1997), but the Supreme Court has granted certiorari on this issue, see *City of Monterey*, 118 S. Ct. 1359 (1998). See also David G. Savage, *Land of Opportunity: Can Property Owners Sue over a City's Regulatory Decision?*, A.B.A. J., Oct. 1998, at 34, 34 (discussing the case). A decision is expected by the end of the 1998 Term.

The plurality appears to have invalidated the Coal Act under the Takings Clause instead of the Due Process Clause for fear of a return to *Lochner*. See *Eastern Enters.*, 118 S. Ct. at 2153 (plurality opinion) (stating that the Court has expressed concerns about using the Due Process Clause to invalidate economic regulations). Interestingly, the plurality did not discuss how its takings analysis avoids the same *Lochner* pitfalls. See Summers, *supra* note 10, at 885 (arguing that the importation of due process principles into Takings Clause jurisprudence subjects the Takings Clause to the same problems and criticisms that led to the demise of *Lochner*-style substantive due process).

regulatory takings analysis, Due Process Clause analysis of economic regulations includes a history of legislative deference that ensures that rational judgments of Congress are upheld.²⁰⁵ The plurality, however, believed the Coal Act as applied to Eastern was unfair and should be invalidated. But if the plurality is unhappy with the level of scrutiny provided by the Due Process Clause, it should alter substantive due process review of economic regulations rather than distorting the Takings Clause.²⁰⁶

In the future, plaintiffs likely will rely on *Eastern Enterprises* when challenging economic regulations.²⁰⁷ The courts could use these future cases as opportunities to define more clearly the roles of the Due Process and Takings Clauses. To start, the Court could follow the lead of the concurring and dissenting opinions in *Eastern Enterprises* and use the Due Process Clause, rather than the Takings Clause, for review of purely economic regulations.²⁰⁸ Limiting the Takings Clause in this way would be a first step in clarifying the appropriate uses of the two clauses and would allow federal and state legislatures to enact economic regulations without concerns of being second-guessed by courts applying a non-deferential standard of review. Additionally, the Court could limit the use of the regulatory takings analysis to otherwise legitimate regulations—those regulations that have met all other constitutional mandates. Such a limitation may assist the Court in beginning to remove the

205. See *Carolene Prods.*, 304 U.S. at 152 (stating that the purpose of the Due Process Clause is to see whether “in the light of the facts made known or generally assumed [the regulation] is of such a character as to preclude the assumption that it rests upon some rational basis”); see also ROBERT G. MCCLOSKEY, *THE AMERICAN SUPREME COURT* 125 (2d ed. 1994) (“It is hard to conceive a law so patently unreasonable that it would fail under [the due process rationality] test . . .”).

206. See Summers, *supra* note 10, at 872. Summers makes two good points in his Comment. First, the Court should stop using the Takings Clause to accomplish what no longer can be done under substantive due process; if the Court is unhappy with the substantive due process standard, then it should change the standard. See *id.* at 872, 885. Second, Summers argues that importing substantive due process principles into the takings analysis will lead the Takings Clause to the same fate as *Lochner* substantive due process. See *id.* at 885.

207. The reliance on *Eastern Enterprises* has already begun. See *Association of Bituminous Contractors, Inc. v. Apfel*, 156 F.3d 1246, 1253-58 (D.C. Cir. 1998) (rejecting a plaintiff's assertion that *Eastern Enterprises* compels the court to conclude that the statute at issue was unconstitutional because it was retroactive); *United States v. Vertac Chem. Corp.*, No. LR-C-80-109, 1998 WL 842868, at *15-16 (E.D. Ark. Oct. 23, 1998) (finding that *Eastern Enterprises*'s holding that the retroactive provisions of the Coal Act are unconstitutional under the Takings Clause is not applicable).

208. See Summers, *supra* note 10, at 872 (stating that if the Court is unsatisfied with its level of review under the Due Process Clause, it should fix the Due Process Clause rather than expanding the Takings Clause).

substantive due process principles from the regulatory takings analysis.²⁰⁹ Distinguishing the Takings and Due Process Clauses in these two ways could begin the process of establishing some functional independence between the Clauses, and would be an important step toward demystifying an area of law that is already "one of the most difficult and litigated."²¹⁰

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209. See KENS, *supra* note 199, at 184-85 (commenting on the similarity between the current Court's takings jurisprudence and the analysis in *Lochner*); Stone & Seymour, *supra* note 198, at 1230 ("Arguably, takings analysis should not address the propriety of governmental regulations at all, but merely whether the damage is sufficient to amount to a taking."); Summers, *supra* note 10, at 885 (commenting that regulatory takings analysis may be doomed for the same fate as substantive due process review of economic regulations if the Court does not remove substantive due process principles from the regulatory takings analysis).

The current Court, however, may not want to revitalize substantive due process principles. Expanding the Takings Clause instead of the Due Process Clause allows the Court to protect private property and economic rights without affecting the Court's position on civil liberties, such as abortion, which historically have been grounded in the Due Process Clause. See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973).

210. *Eastern Enters.*, 118 S. Ct. at 2155 (Kennedy, J., concurring in the judgment and dissenting in part) (discussing the regulatory takings doctrine).