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Expropriatory Intent: Defining the Proper Boundaries of Substantive Due Process and the Takings Clause

Ronald J. Krotoszynski Jr.
University of Alabama - School of Law, rkrotoszynski@law.ua.edu

EXPROPRIATORY INTENT: DEFINING THE PROPER BOUNDARIES OF SUBSTANTIVE DUE PROCESS AND THE TAKINGS CLAUSE

RONALD J. KROTOSZYNSKI, JR.*

This Article examines and critiques the contemporary Supreme Court's expansive construction of the Takings Clause. Although the Supreme Court generally has decried the use of substantive due process to invalidate economic and social legislation, many of the recent regulatory takings cases deploy the Takings Clause to second-guess the legitimacy or fundamental fairness of such enactments. The Article argues that when a plaintiff alleges that a federal or state law is fundamentally unjust or arbitrary, the federal courts should analyze the merits of the claim under the rubric of substantive due process, rather than the Takings Clause.

As Justice Holmes observed in Pennsylvania Coal Company v. Mahon, *some regulations, although styled as police power enactments, constitute de facto expropriations of private property. Recent regulatory takings cases, however, utilize a hodgepodge of factors to determine the essential nature of the government's action. In lieu of continued reliance on these disparate tests, federal courts should ask and answer a single inquiry: in the totality of the circumstances, has the government acted with expropriatory, rather than regulatory, intent (for example, is the regulation effectively a proxy for the exercise of the eminent domain power)? This approach would bring needed doctrinal clarity to a muddled area of constitutional law. Moreover, it would preclude takings claims associated with most basic health, safety, and environmental laws and regulations (all of which would be, and should be, subject to substantive due process review).*

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In recent years, the Supreme Court has attempted—without much success—to disentangle the Takings Clause of the Fifth Amendment from the substantive aspect of the Due Process Clauses of the Fifth and Fourteenth Amendments.[1] The need for such an

1. *See, e.g.*, E. Enters. v. Apfel, 524 U.S. 498, 522–24 (1998) (plurality opinion) (applying the Takings Clause to challenge a federal statute imposing retroactive funding liability for retired coal miners' medical benefits and finding a violation); *id.* at 539 (Kennedy, J., concurring in the judgment and dissenting in part) (applying substantive due

undertaking results from the Supreme Court's increasing willingness to permit disgruntled property owners to invoke the Takings Clause as a catchall guarantor of property interests.[2] Despite this doctrinal confusion, the Supreme Court has continued to deploy the Takings Clause (a provision that, on its face, does not limit the scope of government power, but rather conditions government action on the payment of "just compensation")[3] to limit the ability of government to adopt certain economic and social regulations.[4]

Over the past two decades, the Justices have defined the scope of the Takings Clause in ever-broader terms, effectively transforming a protection against uncompensated eminent domain actions into a general-purpose guarantor of any and all private property rights.[5] This Article argues that the Due Process Clauses, rather than the Takings Clause, should serve as the source of a generalized constitutional protection of property rights against arbitrary or fundamentally unfair government actions.

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process analysis to the same issue to support an identical conclusion); *id.* at 553 (Breyer, J., dissenting) (applying substantive due process analysis but concluding that the statute is not fundamentally unfair or irrational); Dolan v. City of Tigard, 512 U.S. 374, 384 n.5 (1994) (noting a dispute between majority and dissenting Justices on whether the Takings Clause or the doctrine of substantive due process should govern the case); *id.* at 405–07 (Stevens, J., dissenting) (arguing that the majority has interpreted the Takings Clause in a fashion that largely replicates the effects of *Lochner v. New York*).

2. *But cf.* First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 339 (1987) (Stevens, J., dissenting) ("In my opinion, however, it is the Due Process Clause rather than that doctrine [the regulatory takings doctrine] that protects the property owner from improperly motivated, unfairly conducted, or unnecessarily protracted governmental decisionmaking.").

3. U.S. CONST. amend. V.

4. Several prominent legal scholars, including Professor Richard Epstein and Judge Richard Posner, have advocated such an interpretation of the Takings Clause for many years. *See, e.g.*, Coniston Corp. v. Vill. of Hoffman Estates, 844 F.2d 461, 463–66 (7th Cir. 1988) (Posner, J.); Chicago & N.W. Transp. Co. v. United States, 678 F.2d 665, 668–70 (7th Cir. 1982) (Posner, J.); JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT 3–9, 133–34 (1992); RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 5, 16, 25–30 (1985) [hereinafter, EPSTEIN, TAKINGS]; RICHARD A. POSNER, ECONOMIC ANALYSIS OF THE LAW 56–61 (4th ed. 1992); Richard A. Epstein, *History Lean: The Reconciliation of Private Property and Representative Government*, 95 COLUM. L. REV. 591, 595–98 (1995); Douglas W. Kmiec, *The Original Understanding of the Takings Clause Is Neither Weak Nor Obtuse*, 88 COLUM. L. REV. 1630, 1639–40 (1988). *But cf.* Gerald Torres, *Taking and Giving: Police Power, Public Value, and Private Right*, 26 ENVTL. L. 1, 5–10 (1996) (criticizing the use of the Takings Clause as a limitation on the exercise of traditional police powers). These efforts have not been in vain in light of recent events. *See infra* notes 73–98 and accompanying text.

5. *See, e.g.*, City of Monterey v. Del Monte Dunes, 526 U.S. 687, 702–03 (1999); *E. Enters.*, 524 U.S. at 522–24 (plurality opinion); *Dolan*, 512 U.S. at 383–86; Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1014–16 (1992); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 831–36 (1987); Agins v. City of Tiburon, 447 U.S. 255, 260–63 (1980).

At least five descriptions of compensable takings now exist. Almost any physical occupation of real property by the government constitutes a taking,[6] even if it occurs for only a limited period.[7] Regulations that deny the owner of land *all* economically beneficial use of the land also constitute a taking.[8] Conditional approval of improvements to land, where the conditions are unrelated to the problems associated with the development, can constitute a taking.[9] A taking also can occur when the conditions for approval relate to the development problems, but are disproportionate to the scope or degree of the problems that the proposed development will cause.[10] Expropriation of cash constitutes a taking, even if the owner might not have a legal right to the specific monies taken.[11] Finally, a regulation of land might constitute a taking depending on the economic impact of the regulation on the landowner, the regulation's consistency with reasonable, investment-backed expectations, and the general "character" of the government's action.[12]

Notwithstanding this plethora of approaches, the Supreme Court consistently has decried reliance on any one test or combination of tests when deciding regulatory takings cases. "In 70-odd years of succeeding 'regulatory takings' jurisprudence, we have generally eschewed any "set formula" for determining how far is too far, preferring to 'engag[e] in . . . essentially ad hoc, factual inquiries.' "[13] Unsurprisingly, this lack of doctrinal clarity has greatly facilitated ever-broader judicial applications of the Takings Clause.

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6. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426–35 (1982).

7. *See First English Evangelical Lutheran Church*, 482 U.S. at 312–20.

8. *See Lucas*, 505 U.S. at 1015–16.

9. *See Nollan*, 483 U.S. at 836–39.

10. *See Dolan*, 512 U.S. at 391.

11. *See* Phillips v. Wash. Legal Found., 524 U.S. 156, 163–70 (1998); Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 160–64 (1980); *see also* Wash. Legal Found. v. Tex. Equal Access to Justice Found., 270 F.3d 180, 185–95 (5th Cir. 2001) (holding that expropriation of interest on lawyer trust accounts constitutes a per se taking and declining to apply *Penn Central* analysis).

12. *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 123–25 (1978); *see also* PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 82–83 (1980) (holding that the reviewing court in a takings case must inquire "into such factors as the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations").

13. *Lucas*, 505 U.S. at 1015 (quoting *Penn Cent. Transp. Co.*, 438 U.S. at 124 (quoting Goldblatt v. Hempstead, 369 U.S. 590, 594 (1962)) (alteration in original)); *see also id.* at 1071 (Stevens, J., dissenting) ("We have frequently and consistently recognized that the definition of a taking cannot be reduced to a 'set formula' and that determining whether a regulation is a taking is 'essentially [an] ad hoc factual inquir[y].' ") (quoting *Penn Cent. Transp. Co.*, 438 U.S. at 124 (quoting *Goldblatt*, 369 U.S. at 594)) (alterations in original)).

Recent cases have pushed the scope of the Takings Clause further and further from the paradigmatic case of government expropriating land for public use.[14] This shift has not gone unnoticed; dissenting justices have vigorously objected to the conservative majority's effort to transform the Takings Clause into a new source of *Lochner*-esque restrictions on federal and state health, safety, and welfare regulations.[15]

In theory, the federal courts could attempt to metamorphose the Takings Clause into an all-purpose protector of property interests. Even so, a reasonable observer might question the usefulness of torturing the text of the Takings Clause to fit virtually all scenarios imposing a burden on a property interest. Reviving meaningful substantive due process review of legislation affecting economic or property interests might represent a superior jurisprudence. Indeed, the Supreme Court's willingness to police the limits of punitive damages awarded under state tort law strongly suggests that, at least in some circumstances, the ghost of economic due process continues to haunt the pages of the United States Reports.[16]

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14. *See, e.g.*, E. Enters. v. Apfel, 524 U.S. 498, 538 (1998) (plurality opinion) (invalidating retroactive funding obligation for retired miners' benefits as a regulatory taking). For a discussion of the "original understanding" of the Takings Clause, see generally William M. Treanor, Note, *The Origins and Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694 (1985).

15. *See Dolan*, 512 U.S. at 405–07 (Stevens, J., dissenting) (arguing that the majority reinstated *Lochner* review under the rubric of regulatory takings analysis); *Lucas*, 505 U.S. at 1068–70 (Stevens, J., dissenting) (suggesting that the majority's approach to regulatory takings harkens back to the *Lochner* doctrine); First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 339–41 (1987) (Stevens, J., dissenting) (arguing that the majority's approach to regulatory takings doctrine will impede, if not prevent, promulgation of important health and safety regulations for fear of engendering financial liabilities under the regulatory takings doctrine); *see also Dolan*, 512 U.S. at 384 n.5 (noting the existence of a dispute among Justices regarding the proper source of constitutional protection of property rights). Under the *Lochner* doctrine, the federal courts routinely scrutinized state and federal laws regulating the economy under a standard of unreasonableness "but in practice found many laws designed to protect the physical and economic well-being of workers to be 'unreasonable.' " *See* Ronald J. Krotoszynski, Jr., *Fundamental Property Rights*, 85 GEO. L.J. 555, 561–67 (1997) (describing and critiquing the *Lochner* doctrine). The Supreme Court formally abandoned *Lochner* in 1937. *See id.* at 566–67; *see also* W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 388–96 (1937) (sustaining, against a *Lochner* challenge, minimum wage legislation); *cf.* Morehead v. New York *ex rel* Tipaldo, 298 U.S. 587, 610–18 (1936) (invalidating minimum wage legislation virtually identical to the statute at issue in *West Coast Hotel* on *Lochner* grounds).

16. *See* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 574–75, 585–86 (1996); Honda Motor Co. v. Oberg, 512 U.S. 415, 420–21 (1994); TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 453–58 (1993); Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 15–18 (1991); *cf.* LON FULLER, THE MORALITY OF LAW 170–76 (rev. ed. 1969) (arguing that adjudication is an inept means for allocating economic resources).

Under the federal Constitution, all persons (including fictive persons) should enjoy stable property rights. This interest, however, sounds not in the language of eminent domain, but rather in the more measured cadence of substantive due process. The enjoyment of stable property rights falls under substantive due process because when the government acts as a regulator, it does not "take" property, even though health, safety, and welfare regulations often incidentally burden the use or enjoyment of property, or obligate citizens to pay money to the government. For reasons that will be developed more fully below, a valid Takings Clause claim should not lie every time a government action adversely affects a property right, but rather the federal courts should recognize takings claims only when government acts with expropriatory intent.[17]

This Article proposes that the Supreme Court cabin the scope of its regulatory takings doctrine by requiring a would-be plaintiff to establish that the regulation does not really advance a legitimate health, safety, or welfare objective. The consequences of failing to limit meaningfully the scope of the Takings Clause would be quite undesirable—nothing less than the ability of the federal and state governments to enact laws and regulations that promote the entire community's welfare is at stake. The federal courts could best achieve the necessary doctrinal limitations by imposing an additional element to regulatory takings claims: a showing of expropriatory intent on the part of the government entity that established the ostensibly confiscatory regulation.

Government certainly could use the cadence of "public safety" to enact land use restrictions (or restrictions on other forms of property) that merely mask an expropriation of private property for government use. The mere invocation of public safety must not serve as a shibboleth that precludes any meaningful judicial inquiry into the real intent and effect of the regulation at issue. Wrapping a de facto expropriation in the cellophane wrapper of a police power enactment should not preclude a property owner from obtaining "just compensation" from the government.[18] At the same time, however, the federal courts must not deploy the Takings Clause in a fashion

17. *See infra* text and accompanying notes 125–36.

18. *See generally* Pa. Coal Co. v. Mahon, 260 U.S. 393, 413–15 (1922) (holding that "regulatory takings" are cognizable under the Takings Clause and that regulations that "go too far" trigger the just compensation requirement).

that risks resurrecting the long-discredited doctrine of *Lochner v. New York*.[19]

Under a theory of "expropriatory intent," a would-be Takings Clause plaintiff should be required to show, by a preponderance of the evidence, that the government action that adversely affected her property interest was tantamount to an eminent domain action. If government uses the pretext of a regulatory enactment to achieve a de facto expropriation, a takings claim should lie.[20] Conversely, when government acts in a regulatory capacity (that is, with "regulatory intent"), the fact that the regulations adversely affect property values should not suffice to support a valid takings claim.[21]

As will be developed more fully below,[22] many benefits would result from incorporating the question of expropriatory intent into the Supreme Court's contemporary regulatory takings doctrine. Perhaps most importantly, it would ensure that Takings Clause doctrine does not morph into a revived *Lochner* doctrine. Given that several members of the conservative majority routinely proclaim their trust in the good sense and basic fairness of democratically elected legislatures,[23] it is, at best, anomalous for these very same Justices to ride across the jurisprudential countryside on extended hunt and destroy missions under the rubric of "regulatory takings."

Other benefits might also accrue: An approach to regulatory takings premised on expropriatory intent would be more intellectually honest and give a more choate meaning to Justice

19. 198 U.S. 45, 53–58 (1905); *see* Barton H. Thompson, Jr., *The Allure of Consequential Fit*, 51 ALA. L. REV. 1261, 1262–69 (2000) (arguing that contemporary Takings Clause jurisprudence arguably constitutes a return to the *Lochner* doctrine).

20. *See, e.g.*, *Pa. Coal Co.*, 260 U.S. at 415.

21. *But cf.* E. Enters. v. Apfel, 524 U.S. 498, 528–37 (1998) (plurality opinion) (recognizing a viable regulatory takings claim on facts that did not establish expropriatory intent on the part of the government).

22. *See infra* text and accompanying notes 73–136.

23. Consider, for example, this celebration of democratic self-rule from Justice Scalia:

> Consequently, while I would think it entirely compatible with the commitment to representative democracy set forth in the founding documents to argue, in the legislative chambers or in electoral campaigns, that the state has *no power* to interfere with parents' authority over the rearing of their children, I do not believe that the power which the Constitution confers upon me *as a judge* entitles me to deny legal effect to laws that (in my view) infringe what is (in my view) that unenumerated right.

Troxel v. Granville, 530 U.S. 57, 91–92 (2000) (Scalia, J., dissenting); *see also* Planned Parenthood v. Casey, 505 U.S. 833, 979–80 (1992) (Scalia, J., dissenting, joined by Rehnquist, C.J., and White & Thomas, JJ.) ("The permissibility of abortion, and the limitations upon it, are to be resolved like most important questions in our democracy: by citizens trying to persuade one another and then voting.").

Holmes' aphorism that regulations that "go[] too far"[24] are takings; additionally, it would more fully credit the text and historical understanding of the Takings Clause and have the decided advantage of relating directly to these textual and historical moorings; and finally it would relocate generalized inquiries into the basic fairness of government action where they belong—under the rubric of substantive due process.

Of course, the federal courts should never permit government to act in a fundamentally unfair or arbitrary fashion.[25] If a government action adversely affects a cognizable liberty or property interest,[26] citizens should be able to demand fundamental fairness with respect to the means used to achieve the governmental objective. Statutes or common law rules imposing retroactive liability, or imposing unlimited punitive damages, arguably transgress this expectation of basic fairness.[27] Such claims deserve careful judicial scrutiny—but under the substantive aspect of the Due Process Clauses, rather than the Takings Clause.[28]

Part I of this Article describes and analyzes the Justices' opinions in *Eastern Enterprises* v. *Apfel*,[29] a case that squarely presents the question of whether the Takings Clause or substantive due process encompasses a generalized right against governmental imposition of unreasonable burdens on private property interests. Part II considers the potentially unlimited reach of the *Eastern Enterprises* plurality's gloss on the scope of the Takings Clause. Part III evaluates Justice Kennedy's alternative reading of the Takings Clause, an approach that would ask whether the government specifies a particular

24. *Pa. Coal Co.*, 260 U.S. at 415.

25. *See generally* William Van Alstyne, *Cracks in the New Property: Adjudicative Due Process in the Administrative State*, 62 CORNELL L. REV. 445, 487–90 (1977) (arguing that federal courts should broadly construe the concept of due process of law to protect citizens from any "procedural grossness" regardless of the precise nature of the liberty or property interest at issue).

26. *See* Perry v. Sindermann, 408 U.S. 593, 599 (1972); Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 569–75 (1972); *see also* Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 895–954 (2000) (describing and criticizing the Supreme Court's efforts to define and delimit the "property" interests protected by the Due Process Clauses).

27. *See* Am. Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 58–61 (1999); BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 574–75 (1996); Honda Motor Co. v. Oberg, 512 U.S. 415, 420–21 (1994).

28. *See, e.g.*, Welch v. Henry, 305 U.S. 134, 146–48 (1938) (holding that retroactive forms of taxation are subject to challenge under the doctrine of substantive due process and promising to invalidate such laws if, in operation, they prove to be "so harsh and oppressive as to transgress the constitutional limitation").

29. 524 U.S. 498 (1998) (plurality opinion).

property interest when creating a regulatory burden, but rejects it in favor of an approach based on the fundamental nature of the government's action (as reflected by the government's probable intent when acting). Part IV argues that, in the absence of expropriatory intent, a takings claim should not lie against the government. Part V examines some potential objections to an intent-based approach to the Takings Clause. Finally, this Article concludes that requiring expropriatory intent as an essential element of a regulatory takings claim would bring needed doctrinal clarity to an otherwise muddled area of constitutional law.

I. *EASTERN ENTERPRISES* AND THE SCOPE OF THE TAKINGS CLAUSE: A RESULT IN SEARCH OF A RATIONALE

Eastern Enterprises v. *Apfel*[30] highlights the utility of the expropriatory intent approach to regulatory takings jurisprudence. In *Eastern Enterprises*, the Supreme Court of the United States faced the question of whether and how the Constitution limits the ability of Congress to impose retroactive financial obligations on a limited class of entities. Eastern Enterprises, facing a multi-million dollar annual liability under a novel health benefits funding scheme for retired coal miners, challenged certain provisions of the Coal Industry Retiree Health Benefit Act of 1992 (the Coal Act). The company argued that the funding provisions violated both principles of substantive due process and the Takings Clause.

The Justices divided sharply when deciding the case, with no single opinion garnering five votes. A four-justice plurality, led by Justice O'Connor, held that the Coal Act's funding scheme violated the Takings Clause.[31] Justice Kennedy, writing only for himself, agreed that the statute was unconstitutional, but held that this result flowed from substantive due process analysis.[32] Four Justices dissented from the result—that the statute violated either the Takings Clause or substantive due process—but, like Justice Kennedy, relied on substantive due process analysis to decide the case.[33]

A. *The Factual Background*

The facts of *Eastern Enterprises* are reasonably straightforward. In 1992, Congress resolved a longstanding controversy over the

30. *Id.* (plurality opinion).
31. *Id.* at 522–24 (plurality opinion).
32. *Id.* at 539 (Kennedy, J., concurring).
33. *Id.* at 553 (Breyer, J., dissenting).

funding of certain health benefits for retired coal miners by imposing funding obligations on all entities that employed such workers (whether at present or at some point in the distant past).[34] Sources of funding for miners' and retired miners' health care benefits varied considerably from 1947 to 1992; a series of voluntary industry-union agreements created a funding scheme that provided defined benefits for covered employees and retirees.[35] By the 1970s, however, the funding mechanisms proved inadequate to the task of providing comprehensive benefits—benefits to which the miners and retired miners believed they were entitled.

In 1988, Congress, the unions, and the industry began to work on a comprehensive reform plan to secure adequate funding for the health care benefits. Elizabeth Dole, then-Secretary of Labor, convened the Advisory Commission on United Mine Workers of America Retiree Health Benefits to facilitate these negotiations.[36] The Commission recommended a new funding mechanism that would require both current employers of coal miners and employers of presently retired coal miners to make substantial annual financial contributions to a trust fund that would pay for the benefits.[37]

Congress ultimately enacted legislation requiring any signatory (or its successor) to the prior health benefit agreements to fund comprehensive benefits for retirees.[38] Under this plan, any company that had employed presently-retired coal miners would be required to pay for current health care benefits, even if the company no longer participated in the coal mining industry.[39] Arguably, this congressionally mandated solution represented an unreasonable extension of benefits for certain retired miners who had left service under plans that expressly conditioned future benefits on adequate funding under the pre-existing funding mechanisms.[40]

Pursuant to the funding mechanism selected by Congress, the Commissioner of Social Security assessed Eastern Enterprises with an annual premium of five million dollars.[41] Rather than simply pay this assessment, Eastern Enterprises initiated a lawsuit in federal district

34. *See* The Coal Industry Retiree Health Benefit Act of 1992, Pub. L. No. 102-486, 106 Stat. 3037 (1992) (codified as amended at 26 U.S.C. §§ 9701–9722 (1994 & Supp. V 1999)).

35. *See E. Enters.*, 524 U.S. at 504–11 (plurality opinion).

36. *Id.* at 511–13 (plurality opinion).

37. *Id.* at 512–13 (plurality opinion).

38. *Id.* at 514–15 (plurality opinion); *see* §§ 9701, 9701(c)(2)(A), 9706(a).

39. *E. Enters.*, 524 U.S. at 514–15 (plurality opinion).

40. *Id.* at 507–09, 514–15 (plurality opinion).

41. *Id.* at 517 (plurality opinion).

court seeking a declaration that the new funding scheme obligations violated either the Takings Clause or the Fifth Amendment's Due Process Clause. Alternatively, the company argued that the Commissioner misinterpreted the Coal Act.[42] The district court granted summary judgment for the Commissioner on all three claims, and the U.S. Court of Appeals for the First Circuit affirmed this decision.[43]

B. The Divided Supreme Court's Decision

The Supreme Court divided 4–1–4 on the constitutionality of the Coal Act's funding scheme. Writing for the plurality, Justice O'Connor immediately focused upon Eastern Enterprises's takings claim. Although the "case does not present the 'classi[c] taking' in which the government directly appropriates private property for its own use," the plurality held that "economic regulation such as the Coal Act may nonetheless effect a taking."[44]

Justice O'Connor recited the three-part test for regulatory takings enunciated in *Penn Central Transportation Co.*[45] and subsequently applied by the Supreme Court in regulatory takings cases.[46] Under this test, a reviewing court must consider "[t]he economic impact of the regulation on the claimant," "the extent to which the regulation has interfered with distinct investment-backed expectations," and "the character of the governmental action."[47] One should note, however, that prior to *Eastern Enterprises*, the Supreme Court generally has applied *Penn Central Transportation Co.* only in the context of cases involving restrictions on the use or enjoyment of real property, rather than in cases involving straightforward monetary obligations to the federal government.[48]

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42. *Id.* (plurality opinion).

43. E. Enters. v. Chater, 110 F.3d 150, 159–62 (1st Cir. 1997), *rev'd sub. nom.*, E. Enters. v. Apfel, 524 U.S. 498 (1998) (plurality opinion).

44. *E. Enters.*, 524 U.S. at 522–23 (plurality opinion).

45. 438 U.S. 104, 124 (1978).

46. *See E. Enters.*, 524 U.S. at 523–24 (plurality opinion) (framing regulatory takings inquiry in terms of the "economic impact of the regulation, its interference with reasonable investment-backed expectations, and the character of the government action").

47. *Penn Cent. Transp. Co.*, 438 U.S. at 124; *see also* PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 83 (1980) (applying three-part test to hold that permitting members of the public to engage in free speech activities on private commercial property does not constitute a taking); Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979) (applying three-part test to hold that the government may not require public access to a privately owned dredged pond without invoking its eminent domain powers and paying just compensation).

48. *See supra* text and accompanying notes 6–12.

In Justice O'Connor's view, the Supreme Court's task was to determine whether the Coal Act's funding provisions comported with basic notions of "justice and fairness."[49] If a law imposes "severe retroactive liability on a limited class of parties that could not have anticipated the liability, and the extent of that liability is substantially disproportionate to the parties' experience," the plurality concluded that it would transgress the Takings Clause.[50]

Applying this test to the facts of the case, Justice O'Connor found that the Coal Act's economic impact on Eastern Enterprises (and other affected past and present coal mining companies) was "considerable" and "substantial."[51] Moreover, "the company is clearly deprived of the amounts it must pay the Combined Fund."[52] Additional considerations, such as the "disproportionate impact" of the funding scheme on corporations no longer in the mining business and the retroactive nature of the funding scheme, merely confirmed the plurality's finding that the Coal Act's funding obligations constituted a "taking."[53] As Justice O'Connor opined: "[T]he Constitution does not permit a solution to the problem of funding miners' benefits that imposes such a disproportionate and severely retroactive burden upon Eastern."[54]

Although Justice O'Connor attempted to cabin the Court's inquiry with references to notions such as "basic fairness," "reasonable investment-backed expectations," "proportionality," and "retroactivity,"[55] at bottom these catch phrases were all really parts of a larger whole: a generalized inquiry into the fundamental fairness of the Coal Act's funding provisions. Under *Eastern Enterprises*, the gravamen of a regulatory taking is the degree to which the law or regulation seems to impose costs unfairly and arbitrarily on a particular class of persons or entities. Generalized inquiries into the fairness or justice of government actions, at least as a matter of

49. *E. Enters.*, 524 U.S. at 523 (plurality opinion).
50. *Id.* at 528–29 (plurality opinion).
51. *Id.* at 529 (plurality opinion).
52. *Id.* (plurality opinion).
53. *See id.* at 530–35 (plurality opinion).
54. *Id.* at 536 (plurality opinion). *But cf.* Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 14–16 (1976) (rejecting a substantive due process challenge to a federal law that imposed a retroactive financial liability on coal mine operators for a portion of the health care costs associated with treating retired coal miners suffering from black lung disease).
55. *E. Enters.*, 524 U.S. at 523–24 (plurality opinion).

history and precedent, implicate concerns rooted in the concept of due process of law, rather than in the Takings Clause.[56]

When recast in this fashion, the Supreme Court's Takings Clause jurisprudence begins to bear an uncanny resemblance to the *Lochner*-era instantiation of substantive due process.[57] As an operational matter, the *Eastern Enterprises* plurality opinion tracks *Lochner*: instead of ordering "just compensation," the plurality simply strikes down the offending statute as unfair or irrational. The Takings Clause is thus transformed from a specific requirement to compensate persons when government expropriates property for a public purpose into a generalized guarantee against the enactment of fundamentally unfair or unjust laws.

It is true, of course, that prior Supreme Court opinions had articulated and applied this three-factor test (most notably the *Penn Central* case).[58] It is also true that the Supreme Court, in both prior and subsequent cases, has held that money, in the form of interest, constitutes "property" for purposes of applying the Takings Clause.[59] Justice O'Connor's plurality opinion in *Eastern Enterprises* is exceptional, however, because it stitches together these two concepts in a new and problematic fashion.

The cases in the *Penn Central* line invariably involved restrictions on the use or enjoyment of real property. The cases involving interest on bank accounts prohibited direct government expropriations of the interest earned on the accounts, so that reliance on the three-part

56. *See, e.g.*, Welch v. Henry, 305 U.S. 134, 146–48 (1938) (rejecting substantive due process challenge to tax law that imposed a retroactive tax liability and analyzing taxpayer's claim in terms of the law's fundamental fairness); *see also* United States v. Carlton, 512 U.S. 26, 30–34 (1994) (citing and applying the rule of *Welch* and finding a retroactive tax law insufficiently "harsh and oppressive" to violate the limitations imposed by the doctrine of substantive due process).

57. *See, e.g.*, Liggett Co. v. Baldridge, 278 U.S. 105, 111–13 (1928); Truax v. Corrigan, 257 U.S. 312, 327–28 (1921); Coppage v. Kansas, 236 U.S. 1, 13–17 (1915); Lochner v. New York, 198 U.S. 45, 53–56 (1908); *see also* Thompson, *supra* note 19, at 1262–69 (stating that after *Eastern Enterprises* "it is hard to see why taxes are not fodder for a takings analysis"); *cf.* W. Coast Hotel v. Parrish, 300 U.S. 379, 391–400 (1937) (repudiating the *Lochner* doctrine as applied to laws establishing minimum wage requirements).

58. *See* Penn. Cent. Transp. Co. v. New York City, 438 U.S. 104, 124–25 (1978); *see also* PruneYard Shopping Center v. Robins, 447 U.S. 74, 82–84 (1980) (repeating and applying the three-factor test).

59. *See* Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 160–64 (1980); *see also* Phillips v. Wash. Legal Found., 524 U.S. 156, 163–70 (1998) (holding that interest earned on lawyer-controlled trust accounts constitutes "property" for purposes of applying the Takings Clause); Wash. Legal Found. v. Tex. Equal Access to Justice Found., 270 F.3d 180, 185–95 (5th Cir. 2001) (holding that expropriation of interest on lawyer trust accounts constitutes a per se taking and declining to apply the *Penn Central* analysis).

Penn Central test was unnecessary to the disposition of the case.[60] By transposing the *Penn Central* test into a new and different context, Justice O'Connor, at least potentially, has radically expanded the scope of the Takings Clause into a new *Lochner*-esque weapon deployable against disfavored social and economic legislation.

That said, the plurality expressly eschewed any reliance on the doctrine of substantive due process to support its conclusion. "Because we have determined that the third tier of the Coal Act's allocation scheme violates the Takings Clause as applied to Eastern, we need not address Eastern's due process claim."[61] In light of the "severe, disproportionate, and extremely retroactive burden on Eastern," the Takings Clause provided a sufficient basis for providing the requested injunctive relief.[62]

Justice Kennedy concurred in part and dissented in part from the plurality's holding, providing the critical fifth vote to disallow the Coal Act's funding scheme.[63] Although he agreed with the plurality that the retroactive nature of the law and the significant financial burden it imposed on Eastern Enterprises were germane to a proper analysis of Eastern's claim, he preferred to rely upon the substantive aspect of the Due Process Clause to analyze the constitutionality of the Coal Act's funding provisions. In Kennedy's view, the imposition of severe retroactive funding obligations was sufficiently arbitrary to violate the Constitution.[64] "[D]ue process protection for property must be understood to incorporate our settled tradition against retroactive laws of great severity."[65] The Coal Act's funding provisions, at least as applied to Eastern Enterprises, "represent[ed] one of the rare instances where the Legislature has exceeded the limits imposed by due process."[66]

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60. No serious person would disagree with the proposition that a direct government expropriation of interest earned on a savings account represents a "taking." The only real question would be whether the facts and circumstances are such that the government's seizure of the money, in violation of the general common law rule that interest follows principal, should be ignored or excused. *See Webb's Fabulous Pharmacies*, 449 U.S. at 160–64 (holding that interest on monies held by the court for the benefit of bankrupt's creditors constitutes "property" for purposes of Takings Clause and cannot be seized by the clerk of court to cover operating expenses in light of rule that "interest . . . follows . . . principal").

61. E. Enters. v. Apfel, 524 U.S. 498, 538 (1998) (plurality opinion).

62. *Id.* (plurality opinion).

63. *See id.* at 539, 540–550 (Kennedy, J., concurring in the judgment and dissenting in part).

64. *Id.* at 547–50 (Kennedy, J., concurring in the judgment and dissenting in part).

65. *Id.* at 549 (Kennedy, J., concurring in the judgment and dissenting in part).

66. *Id.* (Kennedy, J., concurring in the judgment and dissenting in part).

Four Justices dissented from the invalidation of the Coal Act's funding provisions.[67] Writing for the dissenting Justices, Justice Breyer agreed with Justice Kennedy that substantive due process, rather than the Takings Clause, provided the relevant decisional principle: "The Constitution's Takings Clause does not apply."[68] He went on to explain that the Takings Clause does not limit the scope of government action, but merely conditions such action on compensation to adversely affected citizens. Because the federal government did not seek to deprive Eastern Enterprises of any specific, identified property interest, the funding scheme did not effect a "taking" of Eastern Enterprises's property.[69]

In Justice Breyer's view, "there is no need to torture the Takings Clause to fit this case" because "[t]he question involved—the potential unfairness of retroactive liability—finds a natural home in the Due Process Clause, a Fifth Amendment neighbor."[70] Applying the Due Process Clause, Justice Breyer did not find the Coal Act's funding provisions to be sufficiently arbitrary or unfair to warrant invalidation.[71] He reached this conclusion because "the relationship between Eastern and the payments demanded by the Coal Act is special enough to pass the Constitution's fundamental fairness test."[72]

II. PANDORA'S BOX AND THE POTENTIALLY INFINITE REACH OF THE TAKINGS CLAUSE UNDER JUSTICE O'CONNOR'S REASONING IN *EASTERN ENTERPRISES*

Perhaps unwittingly, Justice O'Connor's *Eastern Enterprises* plurality opinion threatens to open a veritable Pandora's box. By divorcing the *Penn Central* test from its real property moorings and recharacterizing it as a generalized inquiry into the fundamental fairness of the government action in question, the opinion easily could serve as the basis for a rejuvenation of *Lochner*-like review of economic and social legislation. This section will explore in some detail the wisdom of turning the Takings Clause into a general mandate to strike down health, safety, and environmental laws and will consider some possible alternative readings of the Takings Clause that might be less likely to produce such an untoward result.

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67. *See id.* at 553 (Breyer, J., dissenting) (joined by Justices Stevens, Souter, and Ginsburg).

68. *Id.* at 554 (Breyer, J., dissenting).

69. *See id.* at 554–56 (Breyer, J., dissenting).

70. *Id.* at 556 (Breyer, J., dissenting).

71. *See id.* at 558–68 (Breyer, J., dissenting).

72. *Id.* at 559 (Breyer, J., dissenting).

A. *Searching for Principled Limits to the Takings Clause*

The problem of defining a "taking" has vexed the federal courts since *Pennsylvania Coal Company* v. *Mahon*.[73] Taken to its logical extreme, any requirement to pay money to the government could constitute a taking. Moreover, Justice O'Connor's plurality opinion in *Eastern Enterprises* does little to preclude such a broad claim.

Justice O'Connor's test features three factors that lower courts must consider. The *Eastern Enterprises* three-factor test requires a reviewing court to consider the "economic impact of the regulation, its interference with reasonable investment-backed expectations, and the character of the government action."[74]

The reviewing court should be particularly sensitive to schemes that "impose[ ] severe retroactive liability on a limited class of parties that could not have anticipated the liability," especially when "the extent of that liability is substantially disproportionate to the parties' experience."[75] Any revenue measure or regulation that imposes a scheme of nontrivial civil fines or forfeitures potentially creates a severe economic impact. Whether this impact comports with "reasonable, investment-backed expectations" would largely be in the eye of the beholder.[76]

The final consideration, the "character of the government action," is an amorphous concept. Judges are clever wordsmiths, and

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73. 260 U.S. 393, 413–16 (1922).

74. *E. Enters.*, 524 U.S. at 523–24 (plurality opinion) (citations omitted).

75. *Id.* at 528–29 (plurality opinion).

76. As a home owner with a substantial outstanding mortgage, I would certainly consider it to be a transgression of my "reasonable, investment-backed expectations" were Congress to repeal the deduction for home mortgage loan interest payments. If Congress were to make such a change, I could potentially take some solace in the plurality's willingness to sit as a council of review over such legislation insofar as it might arm me with a serious takings claim. Of course, this argument runs counter to the acceptable ways of looking at governmental regulation. If Congress decided to abolish the income tax in favor of a flat sales or consumption tax, the implementing legislation should not be subject to a serious Takings Clause challenge. The Supreme Court should not interpret the Takings Clause to repeal the inherent authority Congress possesses to make basic economic and social policies. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152–54 (1938); Norman v. Baltimore & Ohio R.R. Co., 294 U.S. 240, 306–08 (1935). It would be particularly egregious for the federal courts to deploy the Takings Clause to thwart congressional revisions of the tax code. *See* U.S. CONST. art. I, § 7, cl. 1 ("All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills."); *id.* art. I, § 8, cl. 1 ("The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises . . . ."); *id.* amend. XVI ("The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.").

one harbors the nagging suspicion that virtually any law creating a monetary or regulatory obligation could be characterized as either eminently reasonable or outrageously unfair without much judicial heavy lifting.[77]

It is difficult to see how this explication of the test meaningfully limits the scope or bite of the Takings Clause. For example, a change in marginal tax rates could support a plausible argument under each factor. Consider, for purpose of illustration, a federal law raising the highest marginal tax rate on personal income from thirty-nine to fifty percent. Holding all other tax policies constant, this would require some higher income taxpayers to surrender more money in order to satisfy their annual federal income tax obligations. Since the inception of the federal income tax in 1913,[78] no credible person has suggested that federal income tax obligations transgress the Takings Clause.[79]

Yet, as a matter of logic, why should we expect the federal courts to treat an obligation to pay taxes any differently from an obligation to make an involuntary financial contribution to fund retired workers' health care benefits?[80] If the Takings Clause applies to any enactment that "takes" a single dollar, as Justice O'Connor suggests,

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77. *See* Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 793–97, 804–15, 819–22 (1983). Again, one must keep in mind that although this three-part test predates *Eastern Enterprises*, its application in the context of a simple money obligation breaks significant new ground. *See supra* text and accompanying notes 45–48.

78. *See* U.S. CONST. amend. XVI.

79. On the other hand, one might plausibly argue that a particular tax is so fundamentally arbitrary or unjust as to violate substantive due process. *See* Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 14–20 (1976).

80. As a matter of economic logic, the transactions are largely, if not completely, identical. Suppose Congress simply passed a special tax applicable to any entity that operates, or formerly operated, a coal mine. Pursuant to this special tax, such enterprises would pay higher marginal corporate tax rates than other kinds of corporations; the monies generated from this special tax would be paid into the U.S. Treasury, without any special earmarks. Concurrently, Congress might appropriate, from general treasury funds, monies sufficient to fund health care benefits for retired coal miners. This arrangement would duplicate the result generated by the funding provisions of the Coal Act—the only difference is the indirect, as opposed to direct, earmarking of the funds generated from the special tax. Plainly, one would have to exalt form over substance to suggest that a general revenue obligation applied to one sector of the national economy does not transgress the Takings Clause because Congress does not dedicate the resulting revenues, but an identical financial burden would transgress the Takings Clause were Congress to mandate that the revenues be directly used to pay for the health care benefits. *Cf.* New Energy Co. v. Limbach, 486 U.S. 269, 278 (1988) (invalidating on Dormant Commerce Clause grounds a discriminatory tax credit program for Ohio-produced ethanol, but permitting states to maintain direct subsidy programs for ethanol producers that would have an identical economic effect).

then virtually any federal or state enactment creating a monetary obligation must potentially survive scrutiny under the Takings Clause.[81] After all, the hypothetical tax statute "takes" money just as effectively as the Coal Act's provisions; it does so to promote a public purpose (the funding of the federal government's operations); and it does so without providing compensation for the taking.[82]

One could distinguish the facts in *Eastern Enterprises* because a change in the marginal tax rates is not necessarily retroactive in all cases. Of course, a change in tax rates could be retroactive in its first year of operation. Unless Congress makes the changes effective only in the following tax year, a law passed midyear and effective for the current tax year would have retroactive effects (indeed, absent changes in withholding amounts, some taxpayers might face penalties for underwithholding federal income tax payments).[83] In a larger sense, though, it is far from clear that a lack of retroactivity, by itself, would automatically save a law from Takings Clause scrutiny under the plurality's approach.

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81. One might argue that the Sixteenth Amendment implicitly repeals the Takings Clause of the Fifth Amendment and the right against uncompensated takings implicit in the Fourteenth Amendment's guarantee of "due process of law." *See* U.S. CONST. amend XVI ("The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration."); *cf. id.* art. I, § 9, cl. 4 ("No capitation, or other direct, Tax shall be laid, unless in proportion to the Census or Enumeration herein before directed to be taken."). The Supreme Court has rejected an implied repeal of the Twenty-First Amendment, *see* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 514–16 (1996), and there is no compelling reason to suppose that the Takings Clause would fare differently. The best counterexample involves the Fourteenth Amendment's repeal of state sovereign immunity from federal court jurisdiction. *See* Seminole Tribe of Florida v. Florida, 517 U.S. 44, 54–73 (1996). The Fourteenth Amendment, in contrast to the Sixteenth Amendment, establishes obligations on the states that might be unenforceable in the absence of federal court jurisdiction over claims arising under it and legislation enacted to enforce it. No such fundamental incompatibility exists with respect to the Sixteenth Amendment and the Takings Clause.

82. One might claim that government actions often convey benefits to the citizenry. So-called "givings" are governmental actions that disproportionately enhance or increase the value of some, but not all, citizens' property. *See* Abraham Bell & Gideon Parchomovsky, *Givings*, 111 YALE L.J. 547, 618 (2001). Although the topic of "givings" deserves more scholarly attention, *see id.* at 549–55, 618, there is no necessary correspondence between the beneficiaries of givings and those particularly harmed by government regulations. Nor, under the regulatory takings doctrine, should a generalized benefit enjoyed by the citizenry as a whole satisfy the government's obligation to compensate a small group of exceptionally affected property owners.

83. *See* Abraham Bell & Gideon Parchomovsky, *Takings Reassessed*, 87 VA. L. REV. 277, 314–15 (2001) (noting that "the taxing power remains the neglected corner of the takings triangle" and suggesting that some tax schemes should be deemed "takings," depending on their precise manner of operation and the property interests that they affect).

The *Eastern Enterprises* plurality emphasized the lack of "proportionality" between the amount assessed against former employers in the coal mining industry and the employers' expectations regarding such funding obligations.[84] At its essence, Justice O'Connor's opinion stands for little more than the proposition that the Takings Clause prohibits the government from imposing unfair financial obligations. Whether a particular obligation is sufficiently unfair to require "just compensation" is, of course, a matter committed to the sound discretion of the federal judiciary.

Ironically enough, the Supreme Court had already faced such questions in the context of substantive due process challenges to retroactive forms of taxation. In this largely analogous context, the Supreme Court has explained that "[i]n each case it is necessary to consider the nature of the tax and the circumstances in which it is laid before it can be said that its retroactive application is so harsh and oppressive as to transgress the constitutional limitation."[85] The *Welch* court cautioned that "a tax is not necessarily unconstitutional because retroactive."[86] On the facts at bar, the *Welch* court found no substantive due process violation: "Since no citizen enjoys immunity from [the] burden [of taxation], its retroactive imposition does not necessarily infringe due process, and to challenge the present tax it is not enough to point out that the taxable event, the receipt of income, antedated the statute."[87] Thus, in the context of substantive due process, retroactivity alone does not automatically trigger a finding of a violation.

More recently still, the Supreme Court has rejected a substantive due process challenge to statutorily imposed, retroactive funding requirements on the former employers of retired coal miners who suffer from black lung (also known as pneumoconiosis). The Supreme Court considered the mine operators' objection to the retroactive funding obligation, but declined to grant relief.[88] The Court explained:

> [i]t is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden

84. *See* E. Enters. v. Apfel, 524 U.S. 498, 529–37 (1998) (plurality opinion).

85. Welch v. Henry, 305 U.S. 134, 147 (1938).

86. *Id.* at 146.

87. *Id.* at 147.

88. Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 14–20 (1976). In light of *Eastern Enterprises*, it would appear that the plaintiffs' lawyers in *Turner Elkhorn Mining* simply litigated their claim under the wrong constitutional clause.

> is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way.[89]

Moreover, "legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations. This is true even though the effect of the legislation is to impose a new duty or liability based on past acts."[90]

The Supreme Court did not find the retroactivity claim meritorious in this context: "the imposition of liability for the effects of disabilities bred in the past is justified as a rational measure to spread the costs of the employees' disabilities to those who have profited from the fruits of their labor—the operators and coal consumers."[91] In principle, the same result should have applied in the context of the Coal Act's funding requirements for retired miners' health benefits.[92]

B. The Potential Consequences of Opening Pandora's Box: The Takings Clause Run Amok

Under the logic of the plurality opinion in *Eastern Enterprises*, the Takings Clause potentially provides relief where substantive due process would not; litigants may attack any legislation or regulation that requires the payment of money as a Takings Clause violation. If successful, the offending government (federal or state) must pay "just compensation" for the unlawful taking. At the risk of redundancy, it bears noting that this turns the text of the Takings Clause on its head: "[N]or shall private property be taken for public use without just compensation."[93] Under the logic of Justice O'Connor's approach, the private property at issue, money or federal reserve notes, having been taken for a "public use," triggers an obligation on the part of the government to provide "just compensation," presumably federal reserve notes of a sort fungible with those taken.

The linguistic syntax of the Takings Clause screams out against this result. The language, on its face, plainly anticipates a sort of exchange: the government deprives someone of a property interest (whether tangible or intangible property), it does so for a legitimate

89. *Id.* at 15.
90. *Id.* at 16 (citations omitted).
91. *Id.* at 18.
92. *See* E. Enters. v. Apfel, 524 U.S. 498, 557, 566–68 (1998) (Breyer, J., dissenting) (citing and applying *Usery* when analyzing the fundamental fairness of the retroactive funding obligation imposed on Eastern Enterprises).
93. U.S. CONST. amend. V.

reason, and it thereby incurs an obligation to pay fair market value for the property at issue.[94] Although it is true that money, whether in the form of federal reserve notes, bank credits, gold ingots, or Euros, constitutes "property," it is quite silly to consider a general financial obligation to government, such as the income tax, as a government "taking" of the funds or credits used to satisfy the obligation.

The reason for this distinction relates to the intent, or purpose, behind the government's actions. When a state government employs the power of eminent domain to take title to a parcel of land, thereby displacing a private citizen whose home sits upon the land, the government possesses expropriatory intent; it intends to take and possess a particular thing in order to accomplish a specific goal or objective. When government enacts general revenue measures, and most regulations, it lacks this expropriatory intent—government is indifferent as to how a taxpayer obtains the funds to satisfy the obligation. The taxpayer could use cash reserves, take out a loan, or even sell the Matisse. The source of the funds is a matter of almost complete indifference.[95] In these circumstances, the requisite expropriatory intent is utterly absent.

Indeed, taken to its logical conclusion, the Federal Reserve Board's Open Market Committee arguably "takes" property every time it raises or lowers interest rates. The value of any interest-bearing financial instrument will ebb and flow with changes in the Federal Reserve Bank's interest rates.[96] These changes, although not retroactive, are undoubtedly inconsistent with at least some reasonable, investment-backed expectations and can produce severe, unanticipated effects on the value of existing securities.[97] Yet, one

94. *See* Agins v. City of Tiburon, 447 U.S. 255, 260–63 (1980); *cf.* Krotoszynski, *supra* note 15, at 606–07 (arguing that substantive due process, rather than the Takings Clause, should serve as the basis for constitutional challenges to social or economic legislation that adversely affects property interests when the gravamen of the challenge is that the law is fundamentally unfair or unjust).

95. If one sold powder cocaine in order to obtain the funds, the federal government might lodge an objection. *See generally* RANDALL KENNEDY, RACE, CRIME, AND THE LAW 364–86 (1997) (describing and critiquing the federal government's enforcement and punishment of crimes associated with cocaine and positing racial bias as the real reason for differential treatment of defendants convicted of offenses involving crack, rather than powder, forms of cocaine).

96. *See* MARTIN MAYER, THE FED: THE INSIDE STORY OF HOW THE WORLD'S MOST POWERFUL FINANCIAL INSTITUTION DRIVES THE MARKET 3–27 (2001).

97. *See* Richard W. Rahn, Editorial, *Defeating Deflation*, WALL ST. J., Nov. 19, 2001, at A20 (noting that commodities producers acquired debt in order to finance expansion under "the reasonable expectation that the Federal Reserve would maintain stable money" and "have been less able to service their debt" due to the Federal Reserve's failure to supply adequate money).

would like to think that the federal government can conduct monetary policy without potentially incurring infinite liabilities under the Takings Clause.[98]

C. *Closing Pandora's Box: Toward a Principled Limitation on the Scope of the Takings Clause*

In order to avoid such untoward results, the Supreme Court should modify its regulatory takings jurisprudence to fit this proposed model by requiring a showing of expropriatory intent as an essential element of a regulatory takings claim. For example, consider a general revenue law that affects millions of citizens in an identical fashion: suppose that Congress repeals the personal income tax deduction for interest paid on a home mortgage loan.[99] Abolition of the home mortgage interest deduction would provoke a hue and cry from many federal taxpayers, but government would be largely indifferent as to how any given taxpayer obtained the funds to satisfy the increased federal income tax obligation. No regulatory taking occurs because the law affects a huge number of people in an indiscriminate fashion and government is indifferent to the means used to satisfy the obligation (for example, the government lacks expropriatory intent). Moreover, the governmental regulation does not relate so much to the property itself as to conduct or behavior associated with the property (in the example, the abolition of a de facto subsidy for home ownership that would exert negative pressure on the value of residential real estate).

Current regulatory takings jurisprudence focuses only on the first proposition—the broad-based effects of the law—and ignores completely the second.[100] To allow this gloss to capture the scope of regulatory takings is too imprecise. A reviewing court should not find a regulatory taking when a law or regulation affects a small number of

98. In the context of legislation voiding gold clauses in pre-existing contracts, the Supreme Court simply chalked the financial losses associated with the change in monetary policy up to the risk of doing business. *See* Norman v. Baltimore & Ohio R.R. Co., 294 U.S. 240, 306–11 (1935). Whether this same analysis would hold true today is uncertain in light of the plurality's approach in *Eastern Enterprises*.

99. *See* 26 U.S.C.A. § 163(a), (h) (West 1988 & Supp. 2001) (providing for the deductibility of interest paid on a qualified home mortgage).

100. *See, e.g.*, Palazzolo v. Rhode Island, 121 S. Ct. 2448, 2457–58 (2001); Lucas v. S. C. Coastal Council, 505 U.S. 1003, 1014–15 (1992); Kaiser Aetna v. United States, 444 U.S. 164, 175–80 (1979); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 123–25 (1978).

entities exceptionally, but government lacks the requisite expropriatory intent.[101]

For example, regulations implementing the Clean Air Act might affect only a few dozen industrial facilities. Failure to comply with the regulations might result in the Environmental Protection Agency ("EPA") imposing significant monetary penalties on the noncompliant facilities.[102] In some cases, the cost of retrofitting the affected plants might exceed the value of the refurbished, compliant facility.[103] In economic terms, the regulation would destroy

101. It bears noting that the Supreme Court, at least in the distant past, once considered the government's subjective intent an important factor in Takings Clause cases. *See* Mitchell v. United States, 267 U.S. 341, 345 (1925) ("There is no finding as a fact that the government took the business, or that what it did was intended as a taking. If the business was destroyed, the destruction was an unintended incident of the taking of the land."); Tempel v. United States, 248 U.S. 121, 130 (1918) ("Under such circumstances it must be assumed that the government intended to take and to make compensation for any property taken, so as to afford the basis for an implied promise."); Peabody v. United States, 231 U.S. 530, 538–39 (1913) ("But, in this view, the question remains whether it satisfactorily appears that the servitude has been imposed; that is, whether enough is shown to establish an intention on the part of the government to impose it."); *see also* Angelle v. State, 34 So. 2d 321, 323 (La. 1948) ("We think that the statement refers exclusively to the power of eminent domain, i.e., the intentional or purposeful expropriation or appropriation of private property for a public use or convenience."). These cases clearly demonstrate that a showing of intentional expropriation can be successfully incorporated into takings analyses.

102. *See* David M. Driesen, *The Societal Cost of Environmental Regulation: Beyond Administrative Cost-Benefit Analysis*, 24 ECOLOGY L.Q. 545, 554–55 (1997); Clifford Rechtschaffen, *Deterrence vs. Cooperation and the Evolving Theory of Environmental Enforcement*, 71 S. CAL. L. REV. 1181, 1186–90 (1998); Michael Levinson, Note, *Deterring Air Polluters Through Economically Efficient Sanctions: A Proposal for Amending the Clean Air Act*, 32 STAN. L. REV. 807, 812–14 (1980); Samantha Levine, *Getting that Clean Thing: "Yes" to Air Quality Rules*, U.S. NEWS & WORLD REP., Mar. 12, 2001, at 39, 39; *see also* Barton H. Thompson, Jr., *The Endangered Species Act: A Case Study In Takings and Incentives*, 49 STAN. L. REV. 305, 306–07, 343–47 (1997) (analyzing and critiquing potential Takings Clause challenges to the enforcement of the Endangered Species Act). *See generally* Robert Cooter, *Prices and Sanctions*, 84 COLUM. L. REV. 1523, 1524–38, 1550–52 (1984) (modeling the economic effects of monetary sanctions as an enforcement tool for environmental protection laws).

103. Environmental laws mandating health-based, as opposed to cost/benefit, regulations, such as the Clean Air Act, 42 U.S.C.A. §§ 7401–7671q (West 1995 & Supp. 2001), are particularly likely to produce such results. *See* Clean Air Act, 42 U.S.C. § 7409 (1994); Whitman v. Am. Trucking Ass'n, 121 S. Ct. 903, 908–11 (2001) (holding that the EPA may not consider the costs of implementation when writing air quality standards under section 109 of the Clean Air Act); Am. Lung Ass'n v. EPA, 134 F.3d 388, 388–89 (D.C. Cir. 1998) (requiring the EPA to establish health- and technology-based air quality standards under the Clean Air Act sufficient to protect particularly vulnerable persons from air pollution); Lead Indust. Ass'n v. EPA, 647 F.2d 1130, 1148–53 (D.C. Cir. 1980) (noting that "[n]othing in [the Clean Air Act's] language suggests that the Administrator is to consider economic or technological feasibility in setting ambient air quality

completely the value of the enterprise as a widget factory. Under contemporary takings jurisprudence, the owners could challenge the validity of the EPA's regulations as a taking: the EPA may regulate, but it must pay the fair market value of the plant prior to the adoption of the new emissions standards. Yet, on the hypothetical facts, the government is regulating solely to advance legitimate health and safety concerns; in no meaningful sense is the government attempting to use regulations to expropriate private property (for example, seize and control private property for its own benefit). Embracing a doctrinal approach to the Takings Clause that would create potentially limitless liability for government entities seeking to curb pollution through regulation makes little sense if the community is supposedly empowered to enact laws that regulate both behavior and property for the common good.

Professor John Hart has persuasively argued that the Framers did not anticipate that regulatory takings would be compensable under the Takings Clause.[104] Little good would be accomplished by simply rehashing his excellent historical arguments. Obviously, however, the contemporary Supreme Court does not view the original understanding of the Takings Clause as placing an absolute limit on its scope.[105]

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standards"); *see also* Mark Seidenfeld & Jim Rossi, *The False Promise of the "New" Nondeledgation Doctrine*, 76 NOTRE DAME L. REV. 1, 2–4 (2000).

104. *See* John F. Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252, 1252–57, 1281–93 (1996) (arguing that historical record, at least during the colonial period, supports the view that legislation may limit or burden land use in order to promote public good, and observing absence of any legal doctrine even roughly approximating the regulatory takings doctrine during this period) [hereinafter Hart, *Colonial Land Use Law*]; John F. Hart, *Land Use Law in the Early Republic and the Original Meaning of the Takings Clause*, 94 NW. U. L. REV. 1099, 1099–1102, 1107–54 (2000) (describing early land use policies during the era of the Federal Convention and noting the utter absence of the regulatory takings doctrine in state or federal courts) [hereinafter Hart, *Land Use Law in the Early Republic*]; *see also* John F. Hart, *Forfeiture of Unimproved Land in the Early Republic*, 1997 U. ILL. L. REV. 435, 448–51 (arguing that historical evidence does not support contemporary Supreme Court's regulatory takings doctrine and positing that such claims should be analyzed under the doctrine of substantive due process).

105. Ironically, Justice Scalia and Justice Thomas, among the Supreme Court's most ardent supporters of textualism and originalism in interpreting the Constitution, abandon their loyalty to these interpretive schools when Takings Clause questions appear at bar. Emerson may have been right to suppose that a foolish consistency is the hobgoblin of small minds, but the failure of either Justice Scalia or Justice Thomas to explain this lapse in their textualist/originalist faith is disturbing. Given this state of affairs, one would be hard pressed to refute an inference that these Justices simply refuse to follow their ostensibly preferred interpretive rules in this context because, in Takings Clause cases, such an approach simply will not support the substantive outcomes that they prefer. *Cf.* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW

Notwithstanding the fact that both text and logic support a more limited reading of the Takings Clause, in light of *Eastern Enterprises*, it appears doubtful that a majority of the contemporary Supreme Court will limit the scope of the regulatory takings doctrine in favor of a renewed commitment to meaningful substantive due process review of government actions that adversely affect private property interests. Nevertheless, the Supreme Court could, were it so inclined, reorient its regulatory takings jurisprudence in a fashion that would make it at least somewhat more intellectually honest.

At a minimum, the expropriatory intent requirement would shift most litigation alleging that a particular government action is fundamentally unfair or irrational to either the Due Process Clauses or the Equal Protection Clause.[106] Analysis of the basic fairness of government action, as a matter of text and logic, would be better accommodated as an incident of the due process of law. After all, the Takings Clause, on its face, does not purport to place any substantive limits on government action, but instead *conditions* such action on the payment of "just compensation." Due process of law, on the other hand, limits not only the procedures by which government acts, but the very ability of government to pursue certain ends.[107] Although the Due Process Clauses of the Fifth and Fourteenth Amendments do not textually proscribe arbitrary or unjust governmental action, since at least *Palko v. Connecticut*,[108] the Supreme Court has deployed these clauses to protect fundamental rights "implicit in the concept of ordered liberty."[109] One such unenumerated constitutional right flowing from the substantive aspect of the Due Process Clauses is the right to be free from utterly arbitrary or unjust government actions.[110] Accordingly, utterly arbitrary or unjust government actions affecting

3–47 (Amy Gutmann ed., 1997) (arguing that textualism, coupled with originalism, represents the most legitimate approach to interpreting ambiguous legal texts, including both statutes and the Constitution); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 854–57, 861–64 (1989) (same).

106. *See infra* text and accompanying notes 209–18; *cf.* Vill. of Willowbrook v. Olech, 528 U.S. 562, 564–65 (2000) (holding that an arbitrary and irrational denial of access to municipal water service on equal terms as other would-be customers violates the Equal Protection Clause, even if the plaintiff constitutes a "class of one").

107. *See* Planned Parenthood v. Casey, 505 U.S. 833, 848–51 (1992) (joint opinion) (explaining and applying the concept of due process of law as an affirmative limitation on government power to regulate certain important autonomy interests); Duncan v. Louisiana, 391 U.S. 145, 148–49 (1968) (noting that due process of law protects rights implicit in the concept of ordered liberty, whether or not enumerated in the Bill of Rights).

108. 302 U.S. 319 (1937).

109. *Id.* at 325.

110. *See* County of Sacramento v. Lewis, 523 U.S. 833, 845–47 (1998).

property interests would give rise to a substantive due process claim.[111]

Moreover, the ad hoc nature of the Supreme Court's current regulatory takings doctrine is profoundly embarrassing. The Justices have repeatedly disclaimed the existence of any specific test or verbal formula that absolutely limits the scope of this doctrine.[112] By way of contrast, the Justices have settled on a fairly predictable analytical approach to substantive due process claims. Laws burdening "fundamental" rights, as identified through an examination of history and tradition, require special justification from the government to be deemed constitutional, whereas laws burdening "non-fundamental" liberty or property interests are only subject to rational basis review.[113] Lower court judges and government officials have a very good idea of what substantive due process requires and can identify and apply the appropriate tests with relative ease. This promotes determinacy in the law, a value generally associated with legitimacy and fairness. The Supreme Court's highly contextualized, ad hoc approach to deciding regulatory takings cases arguably disserves these values.

The expropriatory intent approach would banish the prospect of a revitalized *Lochner* doctrine in the guise of regulatory takings doctrine (an objective that most observers would deem a worthy one)[114] and would reorient Takings Clause jurisprudence along lines

111. As Justice Souter has explained, "Since the time of our early explanations of due process, we have understood the core of the concept to be protection against arbitrary [government] action." *Id.* at 845.

112. *See* Palazzolo v. Rhode Island, 121 S. Ct. 2448, 2457 (2001) (explaining that "[s]ince *Mahon*, we have given some, but not too specific, guidance to courts confronted with deciding whether a particular government action goes too far and effects a regulatory taking"); Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992) (noting that "[i]n 70-odd years of succeeding 'regulatory takings' jurisprudence, we have generally eschewed any "set formula" for determining how far is too far" (quoting Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978) (noting that "this Court, quite simply has been unable to develop any 'set formula' for determining 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" and describing regulatory takings analyses as "essentially ad hoc, factual inquiries"))); Goldblatt v. Hempstead, 369 U.S. 590, 594 (1962) ("There is no set formula to determine where a regulation ends and a taking begins.").

113. *See* Washington v. Glucksberg, 521 U.S. 702, 719–22 (1997); Bowers v. Hardwick, 478 U.S. 186, 191–95 (1986); Moore v. City of East Cleveland, 431 U.S. 494, 500–505 (1977) (plurality opinion); *see also* Krotoszynski, *supra* note 15, at 567–68, 583–90 (describing and critiquing the Supreme Court's bifurcated approach to due process analysis).

114. *But cf.* EPSTEIN, TAKINGS, *supra* note 4, at 99–100, 295–303, 314–29 (arguing for a very broad interpretation of the Takings Clause to prohibit such things as a progressive

more consistent with its historical and textual roots. At the end of the day, one reasonably may ask why, as a matter of constitutional jurisprudence, the Supreme Court should read the Takings Clause to both replicate and recreate the guarantee of fundamentally fair governance encompassed in the very notion of "due process of law." The answer to such an inquiry is easy: The federal courts should not torture the Takings Clause in a facile effort to avoid any appearance of conjuring *Lochner*'s ghost.

These considerations notwithstanding, in a very limited number of cases, government regulation can serve as an effective proxy for a de facto exercise of eminent domain.[115] If government regulates the use of an extremely limited class of property in ways that virtually preclude any economically viable uses, a reasonable person could infer from the circumstances that the government's intent is not really regulatory, but rather is to expropriate the property for a governmental use. A conscientious federal judge could infer expropriatory intent from circumstances that belie any plausible regulatory intent.

Suppose a county government prohibits any building permits for beachfront homes unless and until a property owner seeking a building permit cedes, in perpetuity, an easement for a park along the high tide line, plus five feet.[116] The regulation essentially conditions any home improvements on the creation of a public park on the property owner's land. The ordinance effectively requires the landowner to donate the strip of land to the government. The county government does not directly condemn the land to create a coastal park; instead, it attempts to use regulatory powers (in this case zoning and building permit laws) to effect a land grab.

Contemporary takings law would prohibit such action absent compensation at fair market value for the land.[117] Government undoubtedly has the power to take the land and put it to public use; it just cannot take the land indirectly and refuse to pay fair market value for it. *Nollan*,[118] *Lucas v. South Carolina Coastal Council*,[119] and *Dolan v. City of Tigard*[120] all demonstrate that government cannot

income tax, federal labor regulations, and other health, safety, and environmental protection laws and regulations).

115. *See* Pa. Coal Co. v. Mahon, 260 U.S. 393, 413–15 (1922).

116. These facts reasonably approximate the facts at issue in *Nollan v. California Coastal Commission*, 483 U.S. 825, 827–28 (1987).

117. *See id.* at 831, 834–37, 841–42.

118. *Id.*

119. 505 U.S. 1003 (1992).

120. 512 U.S. 374 (1994).

attempt to coerce property rights incident to zoning or permitting decisions.[121] That said, none of these cases makes plain that the government's expropriatory intent drives the result.[122] The majority opinions in these cases address concerns such as "proportionality" between the burden imposed in exchange for the benefit and require a "reasonable fit" between conditions on land use and the effects of land use.[123]

The presence of expropriatory intent, however, would provide a stronger foundation for the results in at least some of these cases.[124] When government exercises regulatory power, but circumstances indicate an expropriatory intent, the Takings Clause should mandate the payment of "just compensation." This result does not obtain because a regulation that affects property values constitutes a "taking" as a matter of course. Rather, the rule reflects a practical judgment that government is not really regulating at all. When regulation serves as a mere pretext for expropriation, the Takings Clause should protect the economic interests of a property owner. On the other hand, when government lacks expropriatory intent, the fact that regulation imposes financial burdens should not be a sufficient condition to support a valid takings claim.

D. *The Theory Applied: A Preliminary Reassessment of* Eastern Enterprises

Returning to *Eastern Enterprises*, the problem with Justice O'Connor's logic seems clear: Congress did not possess expropriatory intent with respect to the funds used to provide health benefits to retired coal miners and their dependents. Congress was utterly indifferent to the means Eastern Enterprises used to satisfy its five million dollar obligation. The Coal Act might have been arbitrary, unfair, grossly retroactive—a thoroughly awful piece of

121. *See id.* at 383–96 (holding that a city's conditional approval of a building permit on the dedication of a portion of the property for flood control and traffic improvements constitutes a taking); *Lucas*, 505 U.S. at 1020–32 (remanding because a regulation that prohibits a beachfront landowner from building residential homes affects property value); *Nollan*, 483 U.S. at 841–42 (holding that California may not condition a building permit upon granting an easement; rather it must use its eminent domain power and pay for the easement).

122. *But cf.* Peabody v. United States, 231 U.S. 530, 538–39 (1913) (requiring proof of intent to deprive a property owner of full enjoyment of her property as an essential element of a takings claim); *see also* Tempel v. United States, 248 U.S. 121, 130 (1918) (stating intent requirement and finding that government possessed intent to expropriate based on circumstantial evidence).

123. *See infra* text and accompanying notes 163–208.

124. *See infra* text and accompanying notes 209–18.

legislative craftsmanship all-around. The Coal Act was not, however, a taking.[125]

Whether the Coal Act was sufficiently arbitrary to transgress the substantive aspect of the Due Process Clause is a matter over which reasonable minds could—and did—differ. Justice Kennedy believed that the imposition of severe retroactive financial obligations constituted a fundamentally unfair course of government conduct.[126] As such, it violated the Fifth Amendment's Due Process Clause guarantee of non-arbitrary governance.[127]

The four dissenting Justices, led by Justice Breyer, agreed that substantive due process framed the relevant constitutional question, but disagreed with Justice Kennedy about whether the Coal Act's funding scheme was fundamentally unjust.[128] Because the employers anticipated some sort of ongoing funding obligation for the retirees' health benefits, the Coal Act's financial obligations were hardly utterly unforeseeable. Moreover, the employers benefited directly from the labors of the retirees in question, and the funding scheme required payments only for the workers Eastern Enterprises employed at its own mines.

Whether Justice Kennedy or Justice Breyer has the better of the argument over the merits of the substantive due process claim, they

125. In contrast to the funding provisions of the Coal Act, one could imagine a hypothetical law that actually would reflect expropriatory intent with respect to a particular sum of money. Suppose, incident to a war effort, that Congress wishes to raise funds to pay for troops, equipment, and munitions. Rather than simply raising taxes to fund these expenses, and distrusting the wisdom of relying on the innate patriotism of the nation's citizens, Congress passes a law requiring corporations with cash reserves in excess of $100 million to purchase at least $50 million of government bonds bearing an annual interest rate of only one percent. Let us further assume that, at the time Congress enacts the law, the prevailing interest rates for federal securities of the sort in question hovers around the four percent mark. On these facts, a taking has occurred: the federal government possesses expropriatory intent with respect to the corporate cash reserve accounts. Moreover, the government has failed to provide just compensation for the taking (for example, market interest rates on the involuntary bond purchases). Congress could, of course, simply raise corporate tax rates to achieve the same net financial results. This alternative approach should not, however, trigger a Takings Clause claim. Thus, the means the government selects to achieve its objectives should play an important role in determining the viability of a takings claim.

126. E. Enters. v. Apfel, 524 U.S. 498, 547–50 (1998) (Kennedy, J., concurring in the judgment and dissenting in part).

127. *See id.* at 549 (Kennedy, J., concurring in the judgment and dissenting in part) ("The case before us presents one of the rare instances where the Legislature has exceeded the limits imposed by due process."). *See generally* Symposium, *When Does Retroactivity Cross the Line?:* Winstar, Eastern Enterprises, *and Beyond*, 51 ALA. L. REV. 933 (2000) (analyzing and critiquing the Supreme Court's use of substantive due process in recent cases to restrict the use of retroactive state and federal laws).

128. *See E. Enters.*, 524 U.S. at 553–58 (Breyer, J., dissenting).

were both correct to reject the Takings Clause as the root of Eastern Enterprises's constitutional objection to the Coal Act's funding scheme. Perhaps if Justice Kennedy or Justice Breyer had identified the absence of expropriatory intent in their respective analyses of the problem, the plurality would have been somewhat less free to recreate the Takings Clause as a font of general judicial review of economic, environmental, and social legislation affecting property interests (meaning virtually all such legislation).

There is, of course, another aspect of this problem that bears noting. The Takings Clause mandates an automatic remedy; if a plaintiff shows that private property has been taken, she is entitled to receive "just compensation,"[129] or fair market value, for the property at issue. Even if government only displaces the property owner temporarily, it must pay fair market value for the use of the property on a temporally limited basis.[130] Thus, the Takings Clause is a very plaintiff-friendly constitutional provision.[131] There is good reason for this: when government exercises its powers of eminent domain to dispossess a private citizen of a property interest, the law should afford the affected citizen a strong, virtually automatic remedy. On such facts, an award of "just compensation" would be eminently reasonable. The analysis should be somewhat different, however, when a citizen is upset about the financial effects of economic or social legislation on her property. If government had to compensate citizens whenever new legislation had such an impact, the business of democratic self-government would grind to a halt.

Essentially, the mere existence of pre-existing property rights would estop the government from making changes in the existing laws. Not even the Justices comprising the *Eastern Enterprises* plurality would be likely to embrace this position. Yet, full

129. U.S. CONST. amend V.

130. First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 317–20 (1987).

131. Of course, a careful observer will recognize the absurdity of a true Takings Clause remedy in *Eastern Enterprises*: rather than invalidating the funding provisions of the Coal Act, the Supreme Court should have ordered the Social Security Administration to pay "just compensation" to Eastern Enterprises for the uncompensated taking. Strictly speaking, the appropriate remedy for the ersatz taking Eastern Enterprises suffered would have been a refund of the monies paid to the government, plus interest at prevailing market rates. This result, although fully and facially consistent with the text of the Takings Clause, was too ridiculous even for Justice O'Connor, who instead simply voided the funding mechanism in question. It bears noting that the Takings Clause does not usually prohibit government action (as Justice O'Connor's approach implicitly presumes), but merely conditions such action on the payment of just compensation.

compensation at fair market value is the textual remedy for a proven violation of the Takings Clause.

By way of contrast, the substantive aspect of the Due Process Clauses requires a plaintiff to show, in the absence of a fundamental right, that government action is fundamentally unfair—so much so that it is either "arbitrary and irrational" or "shocks the conscience."[132] Merely negligent government conduct will almost never violate the substantive aspect of the Due Process Clauses (again, in the absence of a fundamental right). Many government regulations that would easily survive substantive due process review might not survive Takings Clause review without generating an obligation to compensate affected property owners. Moreover, the remedy for a violation of substantive due process is not compensation, but judicial invalidation of the offending statute.

If the gravamen of a complaint is that government action is unfair or unjust, rather than that the government has expropriated property for its own use, the federal courts should require the plaintiff to plead and prove the case under the less forgiving standards of substantive due process. This means that in most cases, the government action will not generate an award of money damages. Only in truly egregious cases will the government incur financial obligations to adversely affected property owners.[133]

Requiring proof of expropriatory intent would properly cabin the scope of the Takings Clause to cases in which government is

132. Krotoszynski, *supra* note 15, at 583–90; *see also* Davidson v. New Orleans, 96 U.S. 97, 102 (1877) ("It seems to us that a statute which declared in terms, and without more, that the full and exclusive title of a described piece of land, which is now in A., shall be and is vested in B., would, if effectual, deprive A. of his property interest without due process of law, within the meaning of the constitutional provision."). *See generally* County of Sacramento v. Lewis, 523 U.S. 833, 845–46 (1998) (noting that "[s]ince the time of our early explanations of due process, we have understood the core of the concept to be protection against arbitrary action" and explaining that "[o]ur cases dealing with abusive executive action have repeatedly emphasized that only the most egregious official conduct [meets the standard]" and that "for half a century now we have spoken of the cognizable level of executive abuse of power as that which shocks the conscience"); United States v. Carlton, 512 U.S. 26, 30–31 (1994) (analyzing retroactive tax legislation under "harsh and oppressive" standard and noting that this standard prohibits "arbitrary and irrational" laws).

133. This analysis assumes, of course, that the Supreme Court would not simply revive a more aggressive form of substantive due process for claims involving property rights to replace its current, highly expansive understanding of the Takings Clause. *Cf.* Williamson v. Lee Optical of Okla., 348 U.S. 483, 487–89 (1955) (applying substantive due process review in a highly deferential form, essentially permitting the state government to regulate opticians without proffering any real reasons for the rules). Revival of *Lochner* under the Due Process Clauses, rather than the Takings Clause, would not represent a significant doctrinal improvement.

effectively attempting to control property for its own purposes without first paying for it.[134] This approach would be consistent with the original understanding of the Takings Clause[135] and would provide a doctrinally persuasive rationale for the results in *Pennsylvania Coal Company v. Mahon*[136] and its jurisprudential progeny.

III. JUSTICE KENNEDY'S CLOSE-BUT-NOT-QUITE TAKINGS ANALYSIS

As will be developed more fully below, Justice Kennedy appropriately analyzed Eastern Enterprises's claim under the constitutional rubric of substantive due process. In doing so, he offered several reasons for rejecting Eastern Enterprises's takings claim. Although Justice Kennedy recognized the potential pitfalls associated with the plurality's gloss on the Takings Clause, his alternative approach would, like the plurality's approach, extend the scope of the Takings Clause too far. On the other hand, Justice Kennedy's test would be somewhat less susceptible to outright judicial manipulation than the plurality's test and, on its face, would not invite open-ended inquiries into the abstract justice or fairness of economic or social legislation under the rubric of regulatory takings doctrine.

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134. As Chief Justice Rehnquist has explained, the Takings Clause does not prohibit any particular subset of government actions, but rather conditions certain government actions on the payment of just compensation:

> This basic understanding of the Amendment makes clear that it is designed not to limit governmental interference with property rights *per se*, but rather to secure *compensation* in the event of an otherwise proper interference amounting to a taking. Thus, government action that works a taking of property rights necessarily implicates the "constitutional obligation to pay just compensation."

First English Evangelical Lutheran Church, 482 U.S. at 315 (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)).

135. *See* Hart, *Land Use Law In the Early Republic*, *supra* note 104, at 1107–47.

136. 260 U.S. 393 (1922). The argument would be that the Pennsylvania law at issue in *Mahon* effectively seized ownership of mineral rights and then transferred those rights to those using the surface of the land. The state government did not wish to purchase mineral rights in order to protect subsistence, but simply legislated the property right in underground minerals out of existence where exercising those rights would endanger above-ground dwellings. The case is not really about a regulation that adversely affected a property interest, but rather is about an attempt by Pennsylvania to seize all mineral rights where the exercise of those rights might endanger existing surface developments. Because Pennsylvania's law adversely affected property rights and because the state government possessed expropriatory intent, the Supreme Court correctly decided the case. *See infra* text and accompanying notes 153–62.

A. *"Specificity" As the Essential Element of a Takings Claim*

Justice Kennedy intuitively realized that the Coal Act did not constitute a taking: "Our cases do not support the plurality's conclusion that the Coal Act takes property."[137] For Justice Kennedy, the fact that the Coal Act "imposes a staggering financial burden on the petitioner, Eastern Enterprises," was not a sufficient condition to trigger the Takings Clause, because the law did not "operate upon or alter an identified property interest, and it [was] not applicable to or measured by a property interest."[138] He went on to note that the Coal Act did not "encumber an estate in land . . . , a valuable interest in an intangible . . . , or even a bank account or accrued interest."[139] Because the Coal Act was "indifferent as to how the regulated entity elects to comply or the property it uses to do so," it did not transgress the Takings Clause.[140] Accordingly, to characterize the effect of such a law as a "taking" was both "imprecise" and "unwise."[141]

For Justice Kennedy, the essence of a takings claim is the identification of a specific res that the government seeks to seize or control: "Until today, however, one constant limitation has been that in all of the cases where the regulatory takings analysis has been employed, a specific property right or interest has been at stake."[142] In the case at bar, "[t]he Coal Act neither targets a specific property interest nor depends upon any particular property for the operation of its statutory mechanisms."[143]

In Justice Kennedy's view, the Supreme Court should avoid an open-ended approach to the Takings Clause because it would require federal courts routinely to engage in "normative considerations about the wisdom of government decisions."[144] As Justice Kennedy properly notes, the Takings Clause does not limit the scope of permissible government action; rather, it merely requires the government to pay for the property interests that it takes.[145] If the

137. E. Enters. v. Apfel, 524 U.S. 498, 540 (1998) (Kennedy, J., concurring in the judgment and dissenting in part).

138. *Id.* (Kennedy, J., concurring in the judgment and dissenting in part).

139. *Id.* (Kennedy, J., concurring in the judgment and dissenting in part).

140. *Id.* (Kennedy, J., concurring in the judgment and dissenting in part).

141. *Id.* (Kennedy, J., concurring in the judgment and dissenting in part).

142. *Id.* at 541 (Kennedy, J., concurring in the judgment and dissenting in part).

143. *Id.* at 543 (Kennedy, J., concurring in the judgment and dissenting in part).

144. *Id.* at 545 (Kennedy, J., concurring in the judgment and dissenting in part).

145. *Id.* (Kennedy, J., concurring in the judgment and dissenting in part) ("The Clause operates as a conditional limitation, permitting the government to do what it wants so long as it pays the charge."). Of course, if the Supreme Court attempted to enforce the "public use" requirement of the Takings Clause in a meaningful way, a different result might

question presented goes to the basic fairness or legitimacy of the government's policy, rather than the question of compensation, a reviewing court should employ the Due Process Clause rather than the Takings Clause.

Justice Kennedy's policy arguments are quite sound and his demarcation of the line between takings claims and substantive due process claims makes a great deal of sense. When government acts in a way that affects a particular property interest, and does so intentionally, expropriatory intent may well be present. But the specificity of the government's action vis-à-vis a property interest will not invariably indicate a government action that is tantamount to an expropriation. Moreover, as will be discussed in greater detail below, a regulatory takings doctrine focused on the specificity of the government's demand could be easily evaded. Thus, Justice Kennedy's definition of a taking does not entirely foreclose the plurality's analysis of the Coal Act.

B. The Shortcomings of Justice Kennedy's Approach

For Justice Kennedy, the question of whether the government has committed a taking depends on the specificity of the property interest affected; a generalized obligation that does not identify a particular means of satisfaction does not constitute a taking because it does not directly affect a specific property interest. Justice O'Connor could counter this reasoning rather easily: Money constitutes property.[146] The Takings Clause protects property, whether tangible or intangible. In order to satisfy a financial obligation to the federal government, one must have money (which, again, constitutes property). Any law requiring the payment of a financial obligation has the effect of requiring the surrender of money. Accordingly, any law requiring the payment of money effects a taking as to the money used to satisfy the obligation.

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obtain. To date, however, the Court has not undertaken any such effort and, on the contrary, has made clear that the public use requirement does not really limit the scope of government action affecting property interests. *See* Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 239–43 (1984); Berman v. Parker, 348 U.S. 26, 31–34 (1954).

146. *See* Phillips v. Wash. Legal Found., 524 U.S. 156, 163–72 (1998) (holding that interest on lawyer trust accounts constitutes "property" for purposes of the Takings Clause); Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 160–64 (1980) (holding that interest on court-held funds constitutes property and cannot be used to defray local court's operational expenses without compensation); Wash. Legal Found. v. Tex. Equal Access to Justice Found., 270 F.3d 180, 185–95 (5th Cir. 2001) (holding that expropriation of interest on lawyer trust accounts constitutes a per se taking and declining to apply *Penn Central* analysis).

Arguably, Justice Kennedy's objection that the government does not require any particular sum of money to satisfy an obligation would be inconsequential from Justice O'Connor's perspective. Whatever money one used to satisfy the obligation would be "taken" by the government. The fact that the government did not specify the precise federal reserve notes or bank accounts to be used would not make the government's demand for money operate with any less "specificity" vis-à-vis the money used to satisfy the obligation. In other words, one could manipulate Justice Kennedy's concept of "specificity" by simply deeming the property taken "specified" by the government. This analysis would, of course, also hold true for government demands associated with property other than money.

An example might help to clarify matters. Suppose that the government required a farmer to deliver a dozen hens to the Internal Revenue Service. In all probability, the government would be indifferent as to which chickens the farmer selected to satisfy the debt. Under Justice Kennedy's analysis, however, the specification of chickens would trigger the Takings Clause. Suppose the IRS demands cash rather than chickens. From an economic perspective, the effect on the farmer is exactly the same. Thus, the "specificity" requirement does not necessarily relate to or correlate with the government's subjective intent vis-à-vis a particular property interest.

Whether the government seizes property and sells it to satisfy a debt or, alternatively, requires the taxpayer to satisfy the debt with cash (perhaps forcing the taxpayer to liquidate property interests), the economic effect of the transaction would be the same. It would be silly to make the existence of a takings claim turn on whether the IRS or the taxpayer actually sells the chickens.[147] In this sense, then, Justice O'Connor has the better of the argument: an obligation to pay money affects a property interest by completely defeasing the person or corporation of its property interest in a particular sum of money.

Notwithstanding its shortcomings, the specificity requirement might well provide support for a finding of expropriatory intent. If the government demands the surrender of Blackacre to satisfy an outstanding tax obligation, rather than simply presenting the taxpayer with a bill that the taxpayer must satisfy with assets of her own

147. *But cf.* Bell & Parchomovsky, *supra* note 83, at 315 ("At least a colorable argument exists that when payment [of taxes] can only be made with particular property rather than a common means of exchange, the government action is a taking and not a tax.").

choosing, it would not be unreasonable to infer an expropriatory motive on the part of the government. If collection of revenue were the government's real objective, the specification of Blackacre as the means of satisfying a generalized need for revenue seems rather odd. Coupled with additional facts—for example, Blackacre sits adjacent to a national park and two years earlier the government sought to purchase Blackacre but the owner refused to sell the property—a demand for specific property might well reflect expropriatory intent.

The problem is that specificity is, at best, an imperfect proxy for expropriatory intent. Justice Kennedy plainly believes that a taking requires something more than a generalized interest in enforcing a statutory obligation to pay money, refrain from polluting, or protect the safety of workers laboring at an industrial facility. Thus, Justice Kennedy recognized the shortcomings of the plurality's approach and the importance of the government's intent in analyzing regulatory takings claims. His proposed test falls short, however, because it fails to capture the essence of a regulatory taking—expropriatory intent. One can avoid the problem by focusing on the *purpose* of the government regulation rather than whether the government action affects a specific property interest. Justice Kennedy's concurring opinion, however, never quite frames the matter in these precise terms.

The Takings Clause should supply a remedy only when government holds a particular subjective intent vis-à-vis a property interest. A taking occurs only when government wishes to expropriate property for its use without providing just compensation. A generalized obligation to satisfy a tax debt lacks any expropriatory intent. Government has no specific interest in any particular property, but rather a generalized interest in ensuring that the taxpayer satisfies the financial obligation.

Returning to the Farmer Brown hypothetical, whether the IRS seizes the chickens or effectively forces Farmer Brown to sell them, no taking has occurred. Because the source of the government's actions is regulatory in nature, the government lacks expropriatory intent regardless of how it seeks to satisfy a tax debt.

The same would hold true of most Occupational Health and Safety Administration ("OSHA") and EPA regulations. Government, acting as a regulator, creates an obligation to refrain from creating certain workplace or environmental hazards, on pain of a fine or forfeiture. Alternatively, government requires employers to

remedy conditions that constitute unsafe working conditions[148] or to reduce the amount of toxic emissions associated with an industrial facility's operation.[149] In these circumstances, statutes or regulations could operate directly on specific property interests. Under Justice Kennedy's approach, all such regulations would be subject to attack as regulatory takings because they potentially satisfy the "specificity" requirement.[150] An approach requiring a showing of expropriatory intent, however, would require would-be litigants to rely upon the less welcoming doctrine of substantive due process.

In sum, the specificity of the government's demand should not serve to ground a takings claim. Rather, the Supreme Court should require takings plaintiffs to establish expropriatory, as opposed to regulatory, intent on the part of the government. The model of a takings claim should be the uncompensated exercise of eminent domain powers.[151] If the sovereign seizes property, and occupies it for its own use, expropriatory intent exists. As one moves from direct seizure of land into the murky world of regulatory takings, the same inquiry should be made and answered: can a reviewing court fairly characterize the government's action as reflecting an analogous desire to own, control, and exercise dominion over a particular interest in property?[152] If on the facts at bar the court can answer this question affirmatively, a taking has occurred, even if the government used regulatory powers to achieve its objective.

IV. REORIENTING TAKINGS CLAUSE JURISPRUDENCE TO INCORPORATE THE "EXPROPRIATORY INTENT" APPROACH

Virtually all of the United States Supreme Court's cases finding a regulatory taking would fit within the expropriatory intent analytic framework. This section considers how, and in some cases whether,

148. *See, e.g.*, Am. Textile Mfrs. Inst., Inc. v. Donovan, 452 U.S. 490, 493–95 (1981); Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607, 611–15 (1980). *See generally* SIDNEY SHAPIRO & THOMAS MCGARITY, WORKERS AT RISK: THE FAILED PROMISE OF THE OCCUPATIONAL HEALTH AND SAFETY ADMINISTRATION (1994) (describing comprehensively OSHA's process of regulating the health and safety of workplaces).

149. *See, e.g.*, Chevron U.S.A., Inc. v. Nat'l Res. Def. Council, Inc., 467 U.S. 837, 839–42, 845–51 (1984); *see also* Levine, *supra* note 102, at 39 (noting business leaders' concern regarding the economic effects of EPA pollution standard).

150. Of course, Justice O'Connor's approach would treat virtually any law or regulation as a taking, if it is sufficiently burdensome to the regulated entities and sufficiently unexpected.

151. *See* Hart, *Land Use Law in the Early Republic*, *supra* note 104, at 1154–56.

152. *See* Susan Rose-Ackerman & Jim Rossi, *Disentangling Deregulatory Takings*, 86 VA. L. REV. 1435, 1481–86 (2000).

the expropriatory intent analysis would affect the outcomes in some of the Supreme Court's major regulatory takings cases.

A. Pennsylvania Coal Company v. Mahon

Pennsylvania Coal Company v. *Mahon*,[153] the original source of the Supreme Court's regulatory takings jurisprudence, would probably be decided the same way under the expropriatory intent approach. In *Mahon*, the Pennsylvania state legislature enacted a law prohibiting the exploitation of mineral rights when such action would threaten the subsistence necessary to support an existing structure on the surface.[154] On its face, the Kohler Act constituted a regulatory enactment designed to protect the health, safety, and welfare of Pennsylvania citizens residing in structures located atop anthracite coal deposits; indeed, the Commonwealth of Pennsylvania defended the statute as a run-of-the-mill application of the state's traditional police powers (a view that the Pennsylvania state courts embraced).

Writing for the majority, Justice Holmes opined that the Supreme Court, pursuant to the Takings Clause, had a duty to make an independent determination of the real-world effects of the Kohler Act. Although "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law,"[155] limits exist to the state's power to enact regulations affecting property values. "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[156] Because this inquiry involves "a question of degree," a reviewing court cannot dispose of it "by general propositions."[157] In the case at bar, Pennsylvania's legislature had gone too far in transferring value from the holders of mineral rights to the holders of surface rights.

Mahon's test is a case study in vagueness. An inquiry into whether a particular statute "goes too far" in affecting property rights invites judges to pull out their individual moral compass.[158] Justice

153. 260 U.S. 393 (1922).

154. *See id.* at 412–13 (describing the effects of the Kohler Act, PA STAT. §§ 15330a-1 to 15330a-11 (West Cum. Supp. 1928)).

155. *Id.* at 413.

156. *Id.* at 415.

157. *Id.* at 416.

158. *Cf.* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 12–20 (1959) (arguing that judges must engage in principled decision making in order to maintain the institutional legitimacy of the federal courts).

Holmes, however, could have rested the result in *Mahon* on a far less ephemeral foundation.

Pennsylvania styled the Kohler Act as a police power regulation and, at least superficially, that description was apt. On the other hand, the Kohler Act had the effect of vesting those holding surface rights with an absolute veto over the exercise of mineral rights—mineral rights for which the owner had paid fair market value. In this fashion, the law effectively transferred property rights from the owners of mineral rights to the owners of surface rights; the state expropriated the mineral rights and gave control over them to the holders of surface rights (at least under certain circumstances). Although in the guise of regulation, the state's behavior really constituted a kind of expropriation. Moreover, the expropriatory nature of the Kohler Act was hardly accidental. The state legislature intended to transfer control over the exercise of property rights from one set of owners to another, without any consideration for those surrendering their property rights.

On these facts, a reviewing court could reasonably find that the state legislature possessed the requisite expropriatory intent to support a takings claim. In economic terms, the Kohler Act was little different in its effects than if the state had simply invoked its eminent domain powers, seized certain mineral rights, and then redistributed the mineral rights to those who inhabited buildings on the surface of the land. Because the use of eminent domain would have triggered an obligation to pay fair market value for the mineral rights taken, the state decided to use the cellophane wrapper of a regulatory statute to achieve its desired end.[159]

Justice Brandeis's dissent takes the state's intended goal, public safety, at face value: "But restriction imposed to protect the public health, safety, or morals from dangers threatened is not a taking."[160] In his view, the Kohler Act was "merely the prohibition of a noxious use."[161] This approach ignores the fact that those building houses while holding only surface rights assumed a rather considerable risk: they bet that the owner of the mineral rights would elect not to exercise them.

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159. *See* United States v. Kahriger, 345 U.S. 22, 38 (1953) (Frankfurter, J., dissenting) (arguing that "the Court cannot shut its eyes to what is obviously, because designedly, an attempt to control conduct which the Constitution left to the responsibility of the States, merely because Congress wrapped the legislation in the verbal cellophane of a revenue measure").

160. *Mahon*, 260 U.S. at 417 (Brandeis, J., dissenting).

161. *Id.* (Brandeis, J., dissenting).

If a person constructing a home wished to ensure against such an eventuality, she would have been entirely free to acquire both the surface and mineral rights before building. Similarly, a person wishing to buy an existing home would undoubtedly undertake a title search prior to closing. A properly executed search would inevitably reveal that the current owner lacked ownership of the mineral rights. A prudent buyer would demand a discount in the price of the home reflecting the risk of damage or inconvenience if the owner of the mineral rights elected to exercise them.

Pennsylvania could have prohibited, *ab initio*, the division of mineral rights from surface rights, within municipal boundaries. The fact is that the state did not initially enact such a limitation on the transfer of property rights and, later realizing the problems associated with divorced ownership, attempted to fix the problem through a naked wealth transfer. Having created a market for mineral rights, the state could not effectively extinguish those rights by conditioning their use on the permission of the owner of the surface rights.[162]

B. Nollan v. California Coastal Commission

Applying a theory of expropriatory intent would not affect the outcome in *Nollan* v. *California Coastal Commission*,[163] another major regulatory takings case, either. In *Nollan*, the owners of a beachfront lot sought a permit to demolish a dilapidated beachfront bungalow and erect a new house.[164] The California Coastal Commission, which possessed jurisdiction over the Nollans's permit application, agreed to grant the permit on the condition that the Nollans cede, in perpetuity, an easement across the property that would connect two public beaches.[165] Ostensibly, the easement was a condition to compensate for the potential blockage of a roadside view that existed prior to construction of the new house.

Writing for the majority, Justice Scalia characterized the California Coastal Commission's quid pro quo demand as a regulatory taking. "To say that the appropriation of a public easement across a landowner's premises does not constitute the

162. Of course, in the absence of a pre-existing market, the state could have limited the alienability of mineral rights as a matter of state property law. Such a regulation would limit the use of real property, but would not reflect expropriatory intent on the part of the state. In this way, then, the timing of the governmental action, as much as the nature of the action, could play an important role in analyzing a regulatory takings claim.

163. 483 U.S. 825 (1987).

164. *Id.* at 827–28.

165. *Id.* at 828.

taking of a property interest but rather (as Justice Brennan contends) 'a mere restriction on its use,' is to use words in a manner that deprives them of all their ordinary meaning."[166]

He went on to invoke the *Mahon* test of a fundamentally fair relationship between the state's interests and the economic effect on the property owner. On the facts at bar, "the lack of nexus between the condition and the original purpose of the building restriction converts the purpose to something other than what it was."[167] Justice Scalia explained that "unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but 'an out-and-out plan of extortion.' "[168] California possessed the power of eminent domain, pursuant to which it could extract the desired easement from the Nollans' property; however, if it wished to do this, it would be required to furnish the Nollans with "just compensation" for the lost property rights.[169]

The expropriatory intent theory is tailor-made for these facts. Rather than conducting an inquiry into the reasonableness of the fit between the conditional permit and the effect on the roadside view, the reviewing court would inquire into the fundamental nature of the Coastal Commission's actions: Did the Commission possess regulatory or expropriatory intent? Because the stated effect on the roadside view had no discernable relationship to connecting two public beaches via an extorted easement, a reasonable fact finder would likely conclude that the Commission's claims of health, safety, and welfare concerns were merely pretextual. Although in the guise of the application of a comprehensive zoning scheme, the facts suggest a desire to take property without paying fair market value. As Justice Scalia suggests, an identical transaction would have been to condemn the desired easement via eminent domain (thereby incurring an obligation to compensate the Nollans).

Had the Commission imposed limitations on height, color, or other aesthetic conditions related to both the adequacy and aesthetics of the view from the road, a reasonable trier of fact would have been

166. *Id.* at 831 (citation omitted).

167. *Id.* at 837.

168. *Id.* (quoting J.E.D. Assocs., Inc. v. Atkinson, 432 A.2d 12, 14–15 (N.H. 1981)).

169. *See id.* at 841–42 ("California is free to advance its 'comprehensive program,' if it wishes, by using the power of eminent domain for this 'public purpose'; but if it wants an easement across the Nollans' property, it must pay for it." (citation omitted)).

harder pressed to infer expropriatory intent.[170] That said, the lack of fit between policy goals and conditions on development, per se, should not be the focus of the reviewing court's inquiry. Rather, the inquiry should focus on the probable motivation of the governmental entity. Where government attempts to effect an uncompensated transfer of property rights for a public purpose, federal courts should find a violation of the Takings Clause.

C. Lucas v. South Carolina Coastal Council

Lucas v. *South Carolina Coastal Council*[171] presents a somewhat harder case than *Nollan*. Under an expropriatory intent approach, the result in *Lucas* would probably be different than under the Supreme Court's approach.

Lucas involved the South Carolina Coastal Council's creation and enforcement of a beachfront erosion control plan that severely limited development on lots located seaward of the line of predicted erosion. Concerned about the potential for erosion on the Isle of Palms, a delicate barrier island, the council adopted a plan that prohibited Mr. Lucas from developing two beachfront lots because they were located within the plan's buffer zone.

The council's enforcement of its rules effectively precluded the issuance of building permits for houses to be located on two very expensive beachfront lots on the Isle of Palms.[172] That said, the council did not require Lucas to condition the development of his lot on some neighboring landowner's consent[173] or to convey an interest in the land to the government.[174] Instead, because of safety and environmental concerns, the agency simply refused to allow any

170. *See generally* Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 505–12, 521 n.25 (1981) (plurality opinion) (invalidating local ordinance because overbroad but noting that First Amendment would permit a city policy banning outdoor commercial advertising displays, including billboards, in order to promote aesthetic values); City Council of L.A. v. Taxpayers for Vincent, 466 U.S. 789, 805–07 (1984) (noting that *Metromedia* upheld "city's interest in avoiding visual clutter" against a First Amendment challenge and stating that "[w]e reaffirm the conclusion of the majority in *Metromedia*").

171. 505 U.S. 1003 (1992).

172. *Id.* at 1006–07.

173. *Cf.* Pa. Coal Co. v. Mahon, 260 U.S. 393, 413–16 (1922) (rejecting on Takings Clause grounds a Pennsylvania law that conditioned the exercise of mineral rights to mine coal on the consent of the surface owner who might be adversely affected by extraction of the underground coal deposits).

174. *Cf. Nollan*, 483 U.S. at 827–31 (rejecting on Takings Clause grounds conditional approval of building permit where the government required a property owner to grant an easement across land to connect two public beaches, thereby turning portion of the property into a de facto public beach).

development on the lots in question (or any other similarly situated lots that had not yet been developed).

On these facts, the council lacked any expropriatory intent: it did not seek to convert Mr. Lucas's land to public use, or otherwise require him to cede control of it to some third party. Rather, because of the threat of erosion and the need to protect a sensitive ecosystem, the agency required Lucas to refrain from developing his land. To be sure, the effect of the agency's decision had a profound impact on the value of Lucas's property. Obviously, a beachfront parcel with a house has a much higher market value than a beachfront parcel that the owner cannot develop with a permanent structure. This logic, however, proves too much. Virtually any scheme of zoning diminishes the ability of property owners to put their land to its most economically valuable potential use. A cement plant might be quite profitable if located in the middle of a suburban residential housing development, but the owners of such real property are not usually free to put the land to industrial use.

Mr. Lucas certainly suffered a serious change in his expectations regarding the possible use of the parcel. The Takings Clause cannot, however, be used to protect his reliance interests without defeasing government of the ability to establish basic public policies. Consider, for example, a jurisdiction that permits land-based casino gambling operations. Many developers, placing reliance on the local law permitting casino gambling, might allocate capital resources to the construction and operation of luxury hotel/casino resorts. The amortization schedules for these developments might run for a decade or more (for example, the investments can be profitable only if operated for a period of years).

Now suppose, incident to an election, an anti-gambling legislature and governor take control of the state house. Upon taking office, the legislators and governor repeal the laws permitting land-based casinos and impose stiff criminal penalties for any and all violations of the new anti-gambling laws. The developers of the new casino hotels have just suffered a tremendous financial setback; they probably cannot recover their stranded capital in the new anti-gambling climate. If Justice Scalia's logic in *Lucas* is correct, because the value of the casinos as casinos is now zero, the state would incur

an obligation to buy out the developers before repealing its permissive gambling laws.[175]

This approach to the Takings Clause effectively denies government the ability to set basic health, safety, and welfare policies when doing so severely affects capital investments. As a matter of constitutional governance, neither the states nor the federal government should be precluded from changing course without compensating those adversely affected for upset economic expectations.[176] As the *Lochner*-era Supreme Court once observed, "[p]arties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them."[177]

The South Carolina Beachfront Management Act was, in principle, no different from the hypothetical repeal of the gambling laws. The state permitted virtually unchecked growth on the barrier islands until it realized that the ecological and financial costs of such growth could not (or should not) be borne by the citizens of the Palmetto State.[178] Mr. Lucas might not have foreseen this basic change in public policy, but this should not entitle him to a government buy out of his stranded capital investment. The South Carolina law reflected regulatory, and not expropriatory, intent.[179] Its effects, although perhaps unexpected, unfair, and costly to Mr. Lucas, do not constitute a "taking" of the affected properties.[180]

Of course, Mr. Lucas could claim that, as a matter of substantive due process, the Beachfront Management Act has a secondary retroactivity that is fundamentally unfair. Similarly, the owners of the casino resorts in the hypothetical might challenge the gambling repeal legislation on substantive due process grounds. Of course, neither Mr. Lucas nor the hypothetical casino owners would be likely to

175. *But see* Westside Quik Shop, Inc. v. Stewart, 534 S.E.2d 270, 274–75 (S.C. 2000) (rejecting regulatory takings claim premised on change of legal status of video poker machines from lawful to unlawful).

176. *See* Rose-Ackerman & Rossi, *supra* note 152, at 1481–86, 1493–95.

177. Norman v. Baltimore & Ohio R.R. Co., 294 U.S. 240, 308 (1935).

178. Development in areas prone to erosion would certainly adversely affect the insurance rates in the jurisdiction. Conversely, prohibiting development in such areas should decrease the risk of claims, and thereby facilitate more reasonable premiums.

179. The government limited land use in certain coastal zones to reduce the risk of erosion and, where erosion would be inevitable, to minimize the financial and environmental losses and risks to human safety.

180. To be clear, I am not suggesting or arguing that only public use of a property interest would indicate or support an inference of expropriatory intent. For example, *Mahon* involved a transfer of property rights between private parties, rather than a public occupation or dedication of private property to the general public.

prevail on such a claim.[181] The point still remains: courts should use substantive due process, rather than the Takings Clause, to review claims that new public policies are fundamentally unfair or arbitrary.[182]

D. Dolan v. City of Tigard

Dolan v. *City of Tigard*[183] presents a middle case; the facts are more suggestive of expropriatory intent than *Lucas*, but less suggestive of such intent than either *Mahon* or *Nollan*. In *Dolan*, Florence Dolan, the owner of a plumbing and electric supply store, wished to expand the size of her store and increase the number of parking spaces available for her customers.[184] She also planned to develop a second building and create still more parking spaces.[185] In order to make these improvements, Dolan needed the city's approval.

The City Planning Commission approved Ms. Dolan's proposed improvements to her lot, but conditioned its approval on Dolan granting the city a permanent easement across her land for a greenway.[186] The greenway would feature a pedestrian/bicycle pathway open to the public.[187] In addition, the Commission required Dolan to refrain from developing a portion of her land to permit

181. *See* Westside Quik Shop, Inc. v. Stewart, 534 S.E.2d 270, 274–75 (S.C. 2000).

182. The Supreme Court's most recent regulatory takings case, *Palazzolo* v. *Rhode Island*, 121 S. Ct. 2448 (2001), addresses the question of precisely *who* may litigate a takings claim. The would-be plaintiff, Anthony Palazzolo, took title to real property incident to the dissolution of a corporation, Shore Gardens, Inc. During the period Shore Gardens held title to the land, Rhode Island adopted legislation that protected wetlands from development. *Id.* at 2455–56. The Rhode Island Supreme Court held that because Palazzolo took title after the effective date of the land use restrictions, he could not raise a takings claim. *Id.* at 2456–57. For purposes of applying the expropriatory intent approach to regulatory takings claims propounded in this Article, the case presents facts virtually identical to those in *Lucas*; Rhode Island adopted an environmental protection statute that, as implemented, effectively banned development on salt marshes. *See id.* at 2454–56. In order to avoid environmental damage, the Rhode Island Coastal Resources Management Council refused to grant either Shore Gardens or Mr. Palazzolo permission to develop the wetlands portion of the parcel. As in *Lucas*, and on its face, the state does not appear to possess expropriatory intent. That said, the Supreme Court's disposition of the case focused primarily on the question of whether the transfer of title precluded Palazzolo from prosecuting a takings claim. *See id.* at 2462–64. The majority concluded that the transfer of title, standing alone, did not preclude Mr. Palazzolo from bringing a takings claim premised on the continuing effects of the environmental legislation. *Id.*

183. 512 U.S. 374 (1994).

184. *See id.* at 379.

185. *Id.*

186. *Id.* at 379–80.

187. *See id.* at 397–80.

improvements to a storm drainage system associated with Fanno Creek, a stream running across her parcel.[188]

Ms. Dolan objected to the conditions.[189] The Commission responded by saying the conditions were directly linked to the increased traffic and drainage problems that the proposed improvements to Dolan's parcel would cause.[190] Additional paving would increase the runoff into the Fanno Creek, thereby increasing the risk of localized flooding; the increased vehicular traffic going to and from the businesses on Ms. Dolan's parcel would contribute to noise, traffic, and pollution problems in the City of Tigard.[191]

Ms. Dolan sued in state court, alleging that the Commission's conditions did not reasonably relate to legitimate state interests, and therefore transgressed the Takings Clause.[192] The Oregon state courts uniformly rejected Dolan's claim, finding that an "essential nexus" existed between the conditions and the potential effects of Dolan's proposed improvements to her land.[193] The United States Supreme Court granted a writ of certiorari to review the Oregon Supreme Court's decision sustaining the Commission's conditional approval of Ms. Dolan's permit applications.[194]

Writing for the majority, Chief Justice Rehnquist noted that "[w]ithout question, had the city simply required the petitioner to dedicate a strip of land along Fanno Creek for public use, rather than conditioning the grant of her permit to redevelop her property on such a dedication, a taking would have occurred."[195] The City of Tigard did not, however, directly seize Dolan's property. In these circumstances, a taking occurs if the government's actions fail to "substantially advance legitimate state interests" or if the government "denies an owner economically viable use of his land."[196] Chief Justice Rehnquist further observed that an additional requirement applies in cases involving conditional approvals of land use: an "essential nexus" must exist between the government's conditions and the legitimate state interest.[197]

188. *Id.*
189. *See id.* at 380–81.
190. *Id.* at 381–82.
191. *Id.*
192. *See id.* at 382–83.
193. *See id.*
194. *Id.* at 374.
195. *Id.* at 384.
196. *Id.* at 385 (quoting Agins v. City of Tiburon, 447 U.S. 255, 260 (1980)).
197. *See id.* at 386–87.

In the case at bar, Chief Justice Rehnquist readily agreed with the City of Tigard that increased traffic and flooding problems could result from Dolan's improvements.[198] Accordingly, a nexus existed between the Commission's conditions and the city's objectives set forth in the master zoning plan.[199] For the majority, however, this determination did not end the inquiry. Rather, having established a nexus, the majority required that the "essential nexus" also meet a proportionality test—the Commission's conditions could not be overbroad relative to the incremental increase in traffic or flooding associated with the improvements.[200]

Chief Justice Rehnquist explained that "[w]e think a term such as 'rough proportionality' best encapsulates what we hold to be the requirement of the Fifth Amendment."[201] Although "[n]o precise mathematical calculation is required," the government must "make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development."[202] Applying this test, he found that the City of Tigard had failed to relate the scope of the dedications to the increased traffic and flooding problems directly associated with Ms. Dolan's redevelopment plan.[203]

Justice Stevens authored the principal dissent, arguing that the City of Tigard's zoning plan was a routine health, safety, and welfare regulation that deserved a high degree of judicial deference.[204] In his view, "[i]f the government can demonstrate that the conditions it has imposed in a land use permit are rational, impartial and conducive to fulfilling the aims of a valid land use plan, a strong presumption of validity should attach to those conditions."[205] Moreover, the burden of demonstrating the irrationality of the local government's conditions "belongs squarely on the shoulders of the party challenging the state action's constitutionality."[206]

198. *Id.* at 387.

199. *See id.* at 387–88.

200. *See id.* at 388–96; *see also* Monterey v. Del Monte Dunes, 526 U.S. 687, 702–03 (1999) (stating that the "rough-proportionality" test elaborated in *Dolan* applies only to "the special context of exactions" and has not been extended to outright denials of proposed development plans requiring zoning waivers or permits).

201. *Dolan*, 512 U.S. at 391.

202. *Id.*

203. *See id.* at 394–95.

204. *See id.* at 396–97, 405, 409–11 (Stevens, J., dissenting).

205. *Id.* at 411 (Stevens, J., dissenting).

206. *Id.* (Stevens, J., dissenting). Justice Stevens also took issue with whether a conditional approval of a discretionary waiver constituted a taking in any event. Because the City of Tigard had enacted an otherwise valid comprehensive land use plan and

Applying an expropriatory intent analysis, *Dolan* falls somewhere between *Nollan* and *Lucas*. The City of Tigard did not directly act on Ms. Dolan's property interests; rather, it responded to a request for discretionary action by conditioning approval upon the surrender of valuable property rights. If one focuses on the city's interest in maintaining the integrity of its comprehensive zoning plan, it seems to have possessed purely regulatory intent. Tigard's City Planning Commission merely enforced an otherwise valid set of restrictions when analyzing Ms. Dolan's proposed redevelopment plan for her land. Conversely, if one focuses upon the nature of the conditions Tigard imposed, it looks like a direct exaction of Dolan's property rights as a quid pro quo for obtaining permission to expand her business operations.

Chief Justice Rehnquist's focus on the degree of relationship between the conditions and the underlying objectives of the master zoning plan would be highly relevant in analyzing the city's probable intent. If flooding were the sole concern, permitting public access to Ms. Dolan's land would not have any relationship to meeting this goal. Moreover, a simple promise not to develop the floodplain portion of the parcel, rather than a transfer of title to the city, would have been more than sufficient to meet this concern. The forced creation of a public park on the floodplain easement, however, would tend to support an inference of expropriatory intent—the City of Tigard wanted to establish a municipal park on Dolan's land, but did not wish to pay for the land prior to putting it to such a use.

If the city's real concern was increased traffic due to the expanded business, a flat denial would have made more sense than requiring a footpath/bike trail across Ms. Dolan's land. How many people buying plumbing supplies or electrical supplies will walk or use a bicycle for transport? It seems doubtful that a person purchasing a bathtub or toilet will simply strap the purchase onto her handy Schwinn ten-speed. If Ms. Dolan operated a restaurant or cyber cafe, it might be plausible to believe that the city's requirement of foot and pedal power access to the business reflected a genuine concern for traffic rather than a desire to open a new park. Although

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Dolan's proposal violated it, the City of Tigard was completely within its rights to deny flatly Dolan's application for a waiver. *See id.* at 407–10 (Stevens, J., dissenting). Nor would Stevens treat conditional approvals of zoning variances as "unconstitutional conditions." In his view, the increased value of the improved parcel would have to be measured against the value lost due to the city's conditions. If the benefits were more valuable than the costs, no taking, direct or indirect, would have occurred. *See id.* at 407–09 (Stevens, J., dissenting).

the matter is not entirely free from doubt, Ms. Dolan's lawyers could make a strong case for finding that the City of Tigard possessed expropriatory, rather than regulatory, intent when establishing the conditions on the required variances and permits.

The focus of the analysis, however, should be on discerning the city's actual motive for establishing the conditions on the waivers and permits, rather than the fairness of the conditions in the abstract. Some communities, like Hilton Head Island, South Carolina, and Seaside, Florida, maintain highly restrictive zoning laws designed to promote a particular aesthetic vision. Waivers of these plans, if granted at all, might be highly conditioned on things like extensive landscaping, greenbelts to hide unsightly buildings, or other potentially costly mitigation techniques. Even if these conditions severely burden the ability of a landowner to develop her property, the federal courts should not deem them to be "takings" based on an independent examination of the "rough proportionality" between the effects of the conditions and the goals of the master zoning plan. A community dedicated to preserving an aesthetic ideal should be permitted to raise the transaction costs of commercial development without incurring liabilities under the Takings Clause.

The City of Tigard's behavior departed from this model in a number of important ways. Although one could justify the easement as a flood control measure, transferring title to the city and requiring public access did not advance the city's stated goal in avoiding flooding problems. Although on different facts, access to Dolan's business via foot or bicycle might have been plausible as a traffic mitigation measure, the nature of Dolan's store severely undercuts the logic of this argument. In the totality of the circumstances, the City of Tigard basically extorted parklands as a condition of approving Dolan's redevelopment plan. If one were to model an identical transaction, the exercise of eminent domain over the land adjoining the Fanno Creek and the creation of a public park/greenway would have achieved an identical result.

Had the City of Tigard simply limited the square footage of the new buildings (so as to limit the potential traffic associated with them) and mandated a floodplain easement to mitigate runoff problems associated with more paved surfaces along the Fanno Creek drainage area, the city could have made a much more persuasive case that it lacked expropriatory intent. To be sure, the conclusion that the city possessed expropriatory intent rests on an inference drawn from the facts. Such an inference is, however, entirely plausible in the totality of the circumstances.

The principal focus of a reviewing court's inquiry provides the key difference between Chief Justice Rehnquist's approach and the approach proposed in this Article. Chief Justice Rehnquist engaged in an open-ended analysis of the fundamental fairness of the City of Tigard's conditions—provoking Justice Stevens to accuse the majority of resurrecting *Lochner* via the Takings Clause.[207] The wisdom, or fundamental fairness, of a local government's decision would not serve as the focus of an inquiry into expropriatory intent. Local governments would be free to pass truly stupid laws, in the sense of maximizing wealth or utility—laws that significantly and irrationally reduce the value of real property within the jurisdiction.[208]

E. Expropriatory Intent, the Takings Clause, and the Proper Role of Substantive Due Process

An open-ended inquiry into the "legitimacy" of local land use decisions, coupled with an "essential nexus" and "rough proportionality" requirement for conditional waivers of court-approved policies, simply invites federal judges to serve as the ultimate local zoning board.[209] Moreover, such judicial efforts surely will chill local governments from properly exercising their responsibility to regulate land use for the good of the entire community. Focusing the judicial review process on whether a governmental entity acted with expropriatory intent would significantly cabin the ability of federal judges to second-guess local land use policies. Moreover, such an approach would make it virtually impossible to deploy the Takings Clause to attack environmental and workplace regulations designed to promote health, safety, and welfare.

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207. Justice Stevens objected that:

> The so-called 'regulatory takings' doctrine that the Holmes dictum kindled has an obvious kinship with the line of substantive due process cases that *Lochner* exemplified. Besides having similar ancestry, both doctrines are potentially open-ended sources of judicial power to invalidate state economic regulations that Members of this Court view as unwise or unfair.

See id. at 406–07 (Stevens, J., dissenting).

208. For example, imagine a law requiring that all residential construction undertaken after a certain date feature thatched roofs. Similarly, an eco-friendly community in California might ban central air conditioning systems in new homes to conserve electricity or to avoid noise pollution. In either case, the restrictions would undoubtedly depress property values, for reasons that most observers would find dubious.

209. *Cf.* Rose-Ackerman & Rossi, *supra* note 152, at 1493 ("When the government is best characterized as a policymaker, compensation should not be the general rule.").

The OSH Act,[210] the Endangered Species Act,[211] the Clean Air Act,[212] and many other similar enactments could all trigger staggering financial liabilities if the federal courts permit takings claims based on a showing of "severe retroactive liability" that upsets "reasonable, investment-backed expectations." Rather than permitting duly elected legislative bodies to establish basic economic, social, and environmental policies, those with sufficient capital could, via careful investment, estop government from making more than superficial changes in the community's social order. For example, by investing in certain property, and perhaps making improvements, a property owner could effectively foreclose the government from changing any legal rule if the change would significantly and adversely affect the property's value.

In the context of the Contracts Clause,[213] the Supreme Court wisely has rejected the idea that capital investment precludes the subsequent exercise of the police powers to change basic social policies.[214] The Justices should abandon the *Lochner*-esque approach to the Takings Clause reflected in cases like *Eastern Enterprises* and *Lucas*. Instead, they should require plaintiffs in takings cases to establish that the government's action is tantamount to a direct expropriation of the property interest at issue. Should the plaintiffs fail to meet the burden of establishing expropriatory intent, they should obtain neither financial compensation nor injunctive relief (unless they can show a substantive due process violation).[215]

In this sense, then, requiring a showing of expropriatory intent as a necessary element of a takings claim would bring needed doctrinal

210. *See* The Occupational Health and Safety Act of 1970, 29 U.S.C. §§ 651–678 (1994 & Supp. V 1999).

211. *See* The Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1554 (2000).

212. *See* The Clean Air Act, 42 U.S.C.A. §§ 7401–7671q (West 1995 & Supp. 2001).

213. U.S. CONST. art. I, § 10, cl. 1 ("No state shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts.").

214. *See* Home Building & Loan Ass'n v. Blaisdell, 290 U.S. 398, 434–43 (1934); *see also* Exxon Corp. v. Eagerton, 462 U.S. 176, 189–94 (1983) (rejecting Contracts Clause objection to provision in Alabama excise tax statute prohibiting suppliers from passing the cost of the tax increase on to consumers); Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400, 410–19 (1983) (rejecting Contracts Clause claim based on effects of state law selecting price methodology for natural gas even though law had the effect of reducing price term in pre-existing contracts). *But cf.* Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 240–51 (1978) (holding invalid, on Contract Clause basis, a Minnesota law that imposed a retroactive pension funding obligation on certain employers).

215. *See* Rose-Ackerman & Rossi, *supra* note 152, at 1481–86 (arguing that government should not be liable to pay compensation when it acts as policymaker, even if changes in policy have adverse financial consequences for regulated entities).

order to an otherwise muddled field of constitutional law. Of course, the Supreme Court's case law on physical occupation of property[216] and temporally limited takings[217] could easily co-exist with a substantially revised doctrine of regulatory takings premised on a showing of expropriatory intent. Regulatory takings cases based on ad hoc determinations of fundamental fairness or evaluations of whether a particular regulation "goes too far" would not.[218] Perhaps most importantly, an approach to regulatory takings premised on expropriatory intent would avoid the undesirable resurrection of *Lochner*-esque judicial review of basic economic and social legislation—a result left quite open by Justice O'Connor's plurality opinion in *Eastern Enterprises*.

V. POTENTIAL OBJECTIONS AND RESPONSES TO REQUIRING EXPROPRIATORY INTENT AS AN ESSENTIAL ELEMENT OF A TAKINGS CLAUSE CLAIM

Requiring a showing of expropriatory intent would not necessarily make the adjudication of takings claims substantially easier. After all, precisely what does it mean to say that the government acted with "expropriatory intent"? At least arguably, modifying Takings Clause jurisprudence to require a showing of expropriatory intent would simply shift the battle from one shibboleth to another. Exchanging one set of casuistic exercises for another would not improve the clarity or effectiveness of Takings Clause jurisprudence, nor would it more effectively cabin the limits of judicial discretion.[219]

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216. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 427–32, 435 (1982).

217. *See* First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 317–20 (1987).

218. *See, e.g.*, E. Enters. v. Apfel, 524 U.S. 498, 522–24 (1998) (plurality opinion); Pa. Coal Co. v. Mahon, 260 U.S. 393, 413–15 (1922).

219. *See generally* Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 866–67, 874–79 (1960) (describing his unqualified commitment to enforcing the text of the Constitution as written and suggesting that "balancing" approaches to the task of interpreting constitutional text undermine its provisions and invite federal judges to arrogate legislative powers to themselves); Harry Kalven, Jr., *Upon Rereading Mr. Justice Black on the First Amendment*, 14 UCLA L. REV. 428, 447–53 (1967) (describing and critiquing Justice Black's "literalist" approach to constitutional adjudication in the specific context of the Free Speech Clause); Charles A. Reich, *Mr. Justice Black and the Living Constitution*, 76 HARV. L. REV. 673, 690–94, 717–23, 733–50 (1963) (expressing fears that rules embracing judicial discretion, such as substantive due process, will inevitably devolve over time into forms of naked judicial activism). *But cf.* Universal Camera Corp. v. NLRB, 340 U.S. 474, 489 (1951) ("There are no talismanic words that can avoid the process of judgment.").

A critic might argue that, under the proposed theory, judges intent on finding a taking would declare "expropriatory intent" to exist, whereas judges equally bent on denying the existence of a takings claim would simply report that the government lacked the requisite intent. It is certainly true that a judge could deploy the test in support of a results-oriented jurisprudence. This objection, however, proves too much.

Many tests in constitutional law presuppose good faith application by judges.[220] The Supreme Court's free speech and equal protection precedents are rife with three-part tests that require subjective application of factors capable of manipulation (for example, the constitutionality of a federal or state law depending on a showing of a "substantial relationship to a significant government interest").[221] Among these factors, of course, is intent. For example, in *Washington* v. *Davis*,[222] the Supreme Court held that proof of discriminatory intent constitutes an essential element of an equal protection claim.[223]

In order to establish an Equal Protection Clause violation, a plaintiff must prove that the government harbored discriminatory intent.[224] When a law facially discriminates on an invidious basis, showing discriminatory intent presents little difficulty.[225] Conversely, when a facially neutral law has a disparate impact on a vector triggering strict scrutiny (for example, race), the plaintiff cannot prevail unless she establishes that this impact is something more than

220. *But cf.* Bush v. Gore, 531 U.S. 98, 108–11 (2000) (applying the Equal Protection Clause in a strong fashion, requiring a state to count ballots under a rational standard, even absent any showing of discriminatory intent or purposeful discrimination, and featuring a majority composed of Justices not well-known for broadly interpreting the Equal Protection Clause in cases presenting similar facts); Ronald J. Krotoszynski, Jr., *An Epitaphios for Neutral Principles in Constitutional Law:* Bush v. Gore *and the Emerging Jurisprudence of* Oprah!, 90 GEO. L.J. ____ (forthcoming 2002) (arguing that majority opinion was unprincipled and reflects devolution of stare decisis in favor of judging process predicated on drafting opinions that reach preferred outcomes).

221. *See* Miss. Univ. for Women v. Hogan, 458 U.S. 718, 723–26 (1982).

222. 426 U.S. 229 (1976).

223. *See id.* at 239–45.

224. *See* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 264–65 (1977); *see also* Michelle Adams, *Causation and Responsibility in Tort*, 79 TEX. L. REV. 643, 644–52, 684–701 (2001) (discussing the related, but distinct, requirement that a governmental entity prove intentional past discrimination that causes continuing contemporary effects as a predicate for any current affirmative action efforts using race or gender classifications).

225. *See, e.g.*, United States v. Virginia, 518 U.S. 515, 531–34 (1996); Loving v. Virginia, 388 U.S. 1, 11–12 (1967).

merely coincidental.[226] A plaintiff may establish discriminatory intent through an inference arising from statistical disparities, but a statistical disparity, standing alone, does not establish the requisite discriminatory intent.[227]

Plainly, the requirement of showing discriminatory intent requires judges to engage in a bit of guesswork regarding the actual motives of a governmental body.[228] To some extent, of course, a reviewing court might well find it quite impossible to discern with certainty the actual motive of a majority of those legislators supporting or opposing a particular piece of legislation.[229] Nevertheless, federal courts undertake the effort, and the Supreme Court has never suggested that the federal courts are institutionally incapable of enforcing fairly the requirement of establishing discriminatory intent.

Returning to the context of the Takings Clause, a requirement of showing expropriatory intent should not prove any more difficult in application than the analogous requirement of establishing discriminatory intent in certain types of equal protection cases. That the test might be susceptible to manipulation in the hands of results-oriented jurists does not demonstrate the inefficacy of the test across

226. *See, e.g.*, McCleskey v. Kemp, 481 U.S. 279, 292–99 (1987); Yick Wo v. Hopkins, 118 U.S. 356, 368–74 (1886).

227. *Compare* Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 271–80 (1979) (rejecting gender-based equal protection claim because plaintiff failed to establish discriminatory intent notwithstanding disparate impact of hiring preference for veterans), *and Vill. of Arlington Heights*, 429 U.S. at 264–71 (rejecting race-based equal protection claim because plaintiffs failed to establish discriminatory intent notwithstanding discriminatory effect of zoning decision), *with* Hunter v. Underwood, 471 U.S. 222, 227–31 (1985) (finding a facially neutral provision of the Alabama constitution to violate the Equal Protection Clause because framers of provision harbored discriminatory intent when including it), *and* Castaneda v. Partida, 430 U.S. 482, 492–500 (1977) (permitting use of statistical disparities in racial composition of petit and grand juries to support inference of discriminatory intent on part of local court officials).

228. *See, e.g.*, Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 540–42 (1993) (analyzing political events surrounding adoption of city ban on "ritual slaughter" and finding that city ordinance reflected intentional animus toward practitioners of Santerian religion). *But cf.* Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 65–66 (1988) (questioning whether legislative intent even exists and suggesting that legislative decision making should be viewed merely as a related series of bargains); Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61, 68–70 (1994) (same).

229. *Cf. Hunter*, 471 U.S. at 228–33 (examining the history of Alabama constitutional conventions and concluding that, based on statements by some participants and overall attitude of delegates, state constitutional provision denying convicted felons the right to vote reflected both discriminatory purpose and effect and, therefore, was invalid on equal protection grounds).

the broad generality of cases.[230] Furthermore, as with discriminatory intent in equal protection cases, judges could infer expropriatory intent from circumstantial evidence.[231] In consequence, the requirement of establishing expropriatory intent would not be solely an exercise in judicial caprice.

Over time, precedents would develop that delimit how and when government acts with expropriatory intent. As these cases begin to accrue, judges wishing to depart from earlier precedents arbitrarily will find undertaking such a task increasingly difficult.[232] Because the essence of the art of judging is giving reasons in support of results,[233] the de facto discretion of judges to apply the expropriatory intent requirement in an arbitrary fashion would recede over time as the precedents defining and applying the standard became more numerous. In the end, as Justice Frankfurter once explained, "The ultimate reliance for the fair operation of any standard is a judiciary of high competence and character and the constant play of an informed professional critique upon its work."[234]

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230. *See* Universal Camera Corp. v. NLRB, 340 U.S. 474, 489 (1951) ("Some scope for judicial discretion in applying the formula can be avoided only by falsifying the actual process of judging or by using the formula as an instrument of futile casuistry. It cannot be too often repeated that judges are not automata.").

231. Factors that might support drawing such an inference include the effect of the regulation on particular property owners, the number of property owners affected by the regulation, and the degree to which the property owners may still put their property to its regular or intended use. Thus, a law or regulation that effectively precludes any economically beneficial use of property, and that affects only a handful of property owners, might reflect expropriatory intent on the part of the government, depending on the other facts and circumstances. In cases like *Nollan* or *Dolan*, the case for finding expropriatory intent would be quite strong (if not compelling). Conversely, in cases like *Eastern Enterprises*, the plaintiffs would have a more difficult time establishing this element from the circumstances.

232. E. Gary Spitko, *A Biologic Argument for Gay Essentialism-Determinism: Implications for Equal Protection and Substantive Due Process*, 18 U. HAW. L. REV. 571, 595–96 (1996) ("Having set forth in the last sixty years an ample body of case law giving meaning to 'liberty' within the privacy sphere of the Due Process Clause, the Supreme Court is better able to distill directly from those cases the principles that speak to the definition of liberty.").

233. *See* Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 648–59 (1995); *see also* Ronald J. Krotoszynski, Jr., *Back to the Briarpatch: An Argument in Favor of Constitutional Meta-Analysis in State Action Determinations*, 94 MICH. L. REV. 302, 333–34 (1995) (describing the overly formalistic nature of court's state action determinations as an avoidance of reasoned judicial discretion).

234. *Universal Camera Corp.*, 340 U.S. at 489; *see* Deborah Jones Merritt & James J. Brudney, *Stalking Secret Law: What Predicts Publication in the United States Courts of Appeals*, 54 VAND. L. REV. 71, 121 (2001) ("Applying law, like shaping it, requires judgment; judgment implies discretion.").

A second potential objection inheres in the potentially limitless scope of the concept of "expropriation." At its most general level, "expropriation" occurs any time a government makes a demand of its citizens. Whether government demands time or money, every legal command expropriates, or "takes," either labor or the monetized value of labor. In this way, every government action carries with it a kind of "expropriatory intent."[235] Obviously, this Article does not intend to connote such a meaning for purposes of developing a theory of the Takings Clause premised on expropriatory intent. This Article argues that "expropriatory intent" exists only when a government acts to possess property via conduct that, at the time the Framers drafted and ratified the Bill of Rights, would constitute a taking. Thus, an uncompensated exercise of the state's eminent domain powers would present a classic case of a government acting with expropriatory intent, whereas the enactment of general health, safety, or welfare laws incidentally affecting property uses or values would not.[236] In addition, government actions that, although cloaked in regulatory form, are tantamount to an uncompensated eminent domain action would also reflect expropriatory intent. General health, safety, and welfare laws that could not be modeled as uncompensated eminent domain actions would not satisfy either definition.

In this sense, expropriatory intent does not exist in every case where the government demands labor or wealth. If one were to construe the term to encompass any government action commanding the surrender of labor or wealth, *every* government action would constitute a taking. Although effectively squelching the possibility of government exercising its duly delegated powers might appeal to radical libertarians and anti-government World Trade Organization ("WTO") protestors, it does not represent a plausible theory of the Takings Clause. Indeed, even the broadest of the Supreme Court's takings pronouncements implicitly rejects the idea that *every* obligation to surrender labor or money to the government constitutes an uncompensated taking.

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235. *See generally* FRIEDRICH A. HAYEK, THE ROAD TO SERFDOM (1944) (arguing that government's principal legitimate role is to secure and protect stable property rights and that government should strictly limit activities that involve the involuntary acquisition of citizens' property or wealth); JOHN LOCKE, TWO TREATISES OF GOVERNMENT §§ 25–51, at 303–320 (P. Laslett ed., Cambridge Univ. Press 1967) (1690) (explaining the labor theory of property and the government's ability to both secure stable property rights and exact property rights from citizens incident to the social contract).

236. *See* Hart, *Colonial Land Use Law*, *supra* note 104, at 1287–97; Hart, *Land Use Law in the Early Republic*, *supra* note 104, at 1147–56.

All scholarly and judicial commentators agree that some government actions should constitute takings, whereas others should not.[237] Accordingly, the question in each instance is whether the government's demands should be cognizable as a "taking" because they are somehow too onerous or arbitrary, or force a disproportionate economic burden upon a single property owner. Given the clear historical mandate for a limited vision of the Takings Clause, and the ready availability of the doctrine of substantive due process to thwart truly outrageous government conduct,[238] the Supreme Court should give the Takings Clause a limited reading—a reading supported by both its text and historical roots.[239]

The Supreme Court remains free, of course, to disregard history in favor of a textualist, but not originalist, parsing of the text. Indeed, Justice O'Connor's opinion in *Eastern Enterprises* incorporates and reflects just such an approach.[240] Once one abandons the historical

237. *See, e.g.*, EPSTEIN, TAKINGS, *supra* note 4, at 19–31; WILLIAM A. FISCHEL, REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS (1995); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 9-6, at 605–07 (2d ed. 1988); Robert H. Bork, *The Constitution, Original Intent, and Economic Rights*, 23 SAN DIEGO L. REV. 823, 829–32 (1986); Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1218–24 (1967); Carol M. Rose, *A Dozen Propositions on Private Property, Public Rights, and the New Takings Legislation*, 53 WASH. & LEE L. REV. 265, 267–70, 284–87 (1996); Rose-Ackerman & Rossi, *supra* note 152, at 1439–40, 1477–79; Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 61–67 (1964); Torres, *supra* note 4, at 16–17.

238. *See, e.g.*, Milnot Co. v. Richardson, 350 F. Supp. 221, 224 (S.D. Ill. 1972) (invalidating statutory ban on interstate shipment of Milnot, a filled milk product, because the Filled Milk Act, which prohibited such interstate shipment, did not bar otherwise identical products from moving freely in interstate commerce); Heimgaertner v. Benjamin Elec. Mfg. Co., 128 N.E.2d 691, 695–97 (Ill. 1955) (striking down a state statute as irrational under state constitution substantive due process review); Monrad G. Paulson, *The Persistence of Economic Due Process in the States*, 34 MINN. L. REV. 91, 94–117 (1950) (describing the survival of meaningful substantive due process review of economic legislation in some state supreme courts); *cf.* Morey v. Doud, 354 U.S. 457, 463–70 (1957) (invalidating on equal protection grounds, as irrational, a law that singled out American Express for special positive treatment in sale of money orders); *see also* United States v. Carolene Prods Co., 304 U.S. 144, 152–54 (1938) (providing the rational basis test as the proper standard for evaluating economic and social legislation that does not rely upon a suspect classification or adversely affect a fundamental right); TRIBE, *supra* note 237, § 8-7, at 582–86 (describing the decline, but not abolition, of substantive due process review of economic legislation in the federal courts).

239. *See generally* Jim Chen, Commentary, *The Second Coming of* Smith v. Ames, 77 TEX. L. REV. 1535, 1562–65 (1999) (providing cogent arguments for restricting the Takings Clause to its textual and historical limits in the context of so-called "deregulatory takings" and warning that if the federal courts fail to reject efforts to expand the Takings Clause to reach deregulatory takings "[t]hese Takings Clause arguments will become ever more aggressive, even downright outrageous").

240. *See* William L. Church, *The* Eastern Enterprises *Case: New Vigor for Judicial Review?*, 2000 WIS. L. REV. 547, 552–56.

underpinnings of the Takings Clause, however, it becomes rather difficult to ground an alternative theory of the Takings Clause other than by ad hoc reference to one's personal attitude toward the general wisdom and desirability of government regulation of private property interests.[241] Attention to history and tradition seems preferable to an unfettered judicial mandate to strike down economic and social legislation at will under the rubric of the Takings Clause.[242]

Reliance on a theory of expropriatory intent would, therefore, rest upon a particularized understanding of government actions that constitute "expropriation" rather than "regulation." As a matter of economic fact, all government regulation expropriates, insofar as it either prohibits economically desirable conduct or mandates economically undesirable conduct. The federal courts should find expropriatory intent only in the limited circumstances where government regulation is but a step removed from the direct uncompensated exercise of eminent domain powers.[243] The Takings Clause, properly understood, does not prohibit government regulation, but rather government expropriation.[244] Only when the facts demonstrate that government has for all intents and purposes engaged in an eminent domain action should a takings claim lie. Of course, this approach would not deny citizens the proper protection

241. *See* ROBERT H. BORK, THE TEMPTING OF AMERICA 229–30 (1990) ("My difficulty is not that Epstein's Constitution would repeal much of the New Deal and the modern regulatory-welfare state but rather that these conclusions are not plausibly related to the original understanding of the Takings Clause."); Bork, *supra* note 237, at 829–32 (arguing that "only by limiting themselves to the historic intentions underlying each clause of the Constitution can judges avoid becoming legislators" and noting specifically that "[f]or the subject of economic rights, that means we must turn away from the glamor of abstract philosophic discourse and back to the mundane and difficult task of discovering what the Framers were trying to accomplish with the Contracts Clause and the Takings Clause"); *see also* MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 157 (1999) ("The Framers simply did not think that there could be what we now call a regulatory taking.").

242. *See generally* Griswold v. Connecticut, 381 U.S. 479, 500–02 (1965) (Harlan, J., concurring in judgment) (finding a right to marital privacy implicit in the concept of ordered liberty given a history/tradition of special recognition of the marital relationship at common law and urging federal judges when interpreting vague constitutional language to abjure reliance on clever tests in favor of "continual insistence upon respect for the . . . the teachings of history" and "solid recognition of the basic values that underlie our society"); Poe v. Ullman, 367 U.S. 497, 541–44 (1961) (Harlan, J., dissenting) (arguing that history and tradition provide the best and most reliable means of cabining the scope of judicial discretion when interpreting otherwise vague constitutional text).

243. *See supra* text and accompanying notes 99–124.

244. *See* TUSHNET, *supra* note 241, at 157 (noting that for the Framers "takings were physical invasions of property, and they happily imposed regulations that destroyed the value of a piece of property without offering the owner any compensation").

of the Takings Clause, but rather would require citizens aggrieved by economic or social legislation to plead and prove their case under the doctrine of substantive due process.[245]

A final, structural argument supports limiting the scope of the Takings Clause to a particular subset of government actions that adversely affect private property interests. Congress could exercise virtually none of the powers set forth in Article I, Section 8 without access to revenue or in the absence of an ability to compel behavior.[246] If the framers of the Fifth Amendment's Takings Clause intended it to *pro tanto* repeal the enumerated powers of the federal government, it does seem rather odd that the Supreme Court failed to notice this fact until 1922.[247]

Ultimately, any theory of the Takings Clause will require its proponents to draw and defend lines. Some expropriations constitute takings, whereas other government actions that adversely affect property interests do not constitute expropriations at all. Just as the First Amendment does not privilege wire or mail fraud, even if one engages in speech to accomplish the fraud,[248] not every government action can give rise to an obligation to pay compensation if the business of government is to continue. This Article proposes a line of demarcation derived from the core concern of the Takings Clause: uncompensated exercises of the power of eminent domain.

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245. As Professor Mark Tunick has observed:

> Restricting its interpretation of the Takings Clause by using the plain meaning of 'take' would not necessarily diminish property protections, because there are other provisions in the Constitution providing protection to property owners. In fact, the Due Process Clauses can be construed more naturally than can the Takings Clause to restrict unjustified government limitations on use.

See Mark Tunick, *Constitutional Protections of Private Property: Decoupling the Takings and Due Process Clauses*, 3 U. PA. J. CONST. L. 885, 898 (2001).

246. It would be difficult, if not impossible, to maintain a military, or build post roads, or regulate commerce, without an ability to spend money and constrain behavior in ways that adversely affect wealth maximization. Moreover, promoting the useful arts and sciences through a system of copyrights and patents undoubtedly limits the ability of entrepreneurs to trade in copyrighted or patented materials. All of these enumerated federal powers would be rendered nugatory if the government's exercise of them triggered an obligation to compensate citizens for any adverse effect on existing property interests.

247. *See generally* Pa. Coal Co. v. Mahon, 260 U.S. 393, 414–16 (1922); *see also* United States v. Sec. Indust. Bank, 459 U.S. 70, 78 (1982) (citing and applying *Pennsylvania Coal*); Kaiser Aetna v. United States, 444 U.S. 164, 178 (1979) (citing *Pennsylvania Coal* as the source of the regulatory takings doctrine and applying the doctrine to a federal regulatory scheme).

248. *See* S. Elizabeth Wilborn Malloy & Ronald J. Krotoszynski, Jr., *Recalibrating the Cost of Harm Advocacy: Getting Beyond* Brandenburg, 41 WM. & MARY L. REV. 1159, 1160–68, 1171–73, 1180–85 (2000).

One could, of course, propound and defend a different, perhaps broader, vision of the Takings Clause. Doing so would require an alternative understanding of the core purpose of the clause, and a plausible limiting principle that cabins the scope of the clause so as to permit government to continue its operations. To date, the Supreme Court's regulatory takings cases do not reflect a consistent theme, or an intelligible limiting principle. If a majority of the Justices elect to reject expropriatory intent as a limiting principle for the Supreme Court's regulatory takings doctrine, the Justices should at least take the time and trouble to articulate an alternative theory that brings a modicum of doctrinal clarity to this troubled field of constitutional law.

CONCLUSION

The Supreme Court's contemporary regulatory takings jurisprudence consists of a series of discrete, unrelated tests and lacks a single unifying theory. Adoption of an expropriatory intent requirement as an essential element of a valid takings claim would bring needed doctrinal clarity and focus to the Supreme Court's regulatory takings jurisprudence. Moreover, as noted above, it would not necessarily upset the results that the Justices have reached in the recent regulatory takings cases (*Lucas* and *Eastern Enterprises* excepted, of course).[249]

The Supreme Court's decisions involving direct regulations on land use deploy constitutional tests and verbal formulas wholly removed from those that it has invoked in cases involving conditional approvals of zoning variances. Expropriatory intent would refocus regulatory takings jurisprudence along the lines initially sketched by Justice Holmes in *Mahon*: only when a regulatory action is tantamount to a direct expropriation should a takings claim lie. The Supreme Court could best incorporate this rule by requiring a showing of expropriatory intent as a necessary element of a regulatory takings claim.

249. *See supra* text and accompanying notes 153–208.