10-13-2001

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

This working paper will be published in
North Carolina Law Review
Vol. 80 Issue 3, March 2002

Forthcoming 80 N.C. L. Rev. (Issue 3/March 2002)

Draft 9/6/01

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

by

Ronald J. Krotoszynski, Jr.[1]

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.[2] The need for such an undertaking results from the Supreme Court's increasing willingness to permit disgruntled property owners to invoke the Takings Clause as a catch-all guarantor of property interests. Thus, the Supreme Court has deployed the Takings Clause (a

---

[1] Ethan Allen Faculty Fellow and Associate Professor of Law, Washington and Lee University School of Law. I would like to thank Professors Brad Wendel, Quince Hopkins, Gary Spitko, Michelle Adams, Michael Heise, Lyrissa Barnett Lidsky, Gerry Moohr, Bob Danforth, Dan Cole, Jim Chen, Betsy Wilborn Malloy, Dorothy Brown, and Steve Ware for providing very helpful comments on earlier drafts of this article. My research assistant, James M. Puckett, rendered invaluable assistance on this article. Finally, I gratefully acknowledge the financial support of a research grant from the Frances Lewis Law Center. As always, any errors or omissions are mine alone.

[2] See, e.g., Eastern Enterprises v. Apfel, 524 U.S. 498 (1998) (plurality opinion) (applying Takings Clause to challenge to federal statute imposing retroactive funding liability for retired coal miners' medical benefits and finding a violation); id. at 539 (Kennedy, J., concurring) (applying substantive due process analysis to same issue to support identical conclusion); id. at 553 (Breyer, J., dissenting) (applying substantive due process analysis but concluding that statute is not fundamentally unfair or irrational).

provision that, on its face, does not limit the scope of government power, but rather conditions government action on the payment of "just compensation") to limit the ability of government to adopt certain economic and social regulations.[3]

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.[4] 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

---

[3] Several prominent Law and Economics scholars, including Professor Richard Epstein and Judge Richard Posner, have advocated such an interpretation of the Takings Clause for many years. See, e.g., Richard A. Epstein, Takings: Private Property and the Power of Eminent Domain 5, 16, 25-30 (1985); Richard A. Epstein, "History Lean: The Reconciliation of Private Property and Representative Government," 95 Colum. L. Rev. 591, 595-98 (1995); James W. Ely, Jr., The Guardian of Every Other Right 3-9, 133-34 (1992); Douglas W. Kmiec, "The Original Understanding of the Takings Clause Is Neither Weak Nor Obtuse," 88 Colum. L. Rev. 1630, 1639-40 (1988); Richard A. Posner, Economic Analysis of the Law (4th ed. 1992); Chicago & Northwestern Transp. Co. v. U.S., 678 F.2d 665, 668-70 (7th Cir. 1982); Coniston Corp. v. Village of Hoffman Estates, 844 F.2d 461, 463-66 (7th Cir. 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). It increasingly appears that these efforts have not been in vain.

[4] See, e.g., Eastern Enterprises v. Apfel, 524 U.S. 498 (1998); Monterey v. Del Monte Dunes, 526 U.S. 687 (1999); Dolan v. City of Tigard, 512 U.S. 374 (1994); Lucas v. South Carolina Coastal Comm'n, 505 U.S. 1003 (1992); Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987); Agins v. City of Tiburon, 447 U.S. 255 (1980).

rights against arbitrary or fundamentally unfair government actions.

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 why torturing the text of the Takings Clause to fit virtually all scenarios involving the imposition of a burden on a property interest represents a superior jurisprudence to a limited revival of meaningful substantive due process review of legislation adversely affecting economic or property interests. 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.[5]

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. This is because when 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.

---

[5] See BMW v. Gore, 517 U.S. 559 (1996); TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443 (1993); Pacific Mutual v. Haslip, 499 U.S. 1 (1991).

For reasons that will be developed more fully below, a valid Takings Clause claim should not lie every time a government action has an adverse effect on a property right, but rather the federal courts should recognize takings claims only when government acts with expropriatory intent.[6]

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 cellophane wrapper of a regulatory enactment to achieve a de facto expropriation, a takings claim should lie.[7] Conversely, when government acts in a regulatory capacity (i.e., with "regulatory intent"), the fact that the regulations adversely affect property values should not serve as a sufficient predicate to support a valid takings claim.[8]

Of course, the federal courts should never permit government to act in a fundamentally unfair or arbitrary fashion.[9] If a government action adversely affects a cognizable liberty or

---

[6] See infra text and accompanying notes ___ to ___.

[7] See, e.g., Pennsylvania Coal Co. v. Mahon, 260 U.S. 413 (1922).

[8] But cf. Eastern Enterprises, 524 U.S. at 528-37.

[9] 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).

property interest,[10] 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.[11] Such claims deserve careful judicial scrutiny -- but under the substantive aspect of the Due Process Clauses, rather than the Takings Clause.

Part I of this Article describes and analyzes the Supreme Court's opinions in *Eastern Enterprises* v. *Apfel*,[12] a case that squarely presents the question of whether the Takings Clause or substantive due process encompasses a generalized right against the government imposing 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 takes up Justice Kennedy's alternative reading of the Takings Clause, an approach that would look to whether the government specifies a particular property interest when creating a regulatory burden, and rejects it in favor of an

---

[10] See Board of Regents v. Roth, 408 U.S. 564 (1972); Perry v. Sindermann, 408 U.S. 593 (1972); see also Thomas W. Merrill, "The Landscape of Constitutional Property," 86 Va. L. Rev. 885 (2000).

[11] See American Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40 (1999); BMW v. Gore, 517 U.S. 559 (1996).

[12] 524 U.S. 498 (1998).

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

I. *Eastern Enterprises* and the Scope of the Takings Clause: A Result in Search of a Rationale

In Eastern Enterprises v. Apfel,[13] 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 [hereinafter the "Coal Act"]. Eastern Enterprises 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,

---

[13] 524 U.S. 498 (1998).

led by Justice O'Connor, held that the Coal Act's funding scheme violated the Takings Clause. Justice Kennedy, writing only for himself, agreed that the statute was unconstitutional, but held that this result flowed from substantive due process analysis. 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.

A. The Factual Background

The facts of Eastern Enterprises are reasonably straightforward. In 1992, Congress resolved a longstanding controversy over the 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).[14] 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.[15] By the 1970s, however, the funding mechanisms had proven inadequate to the task

[14] See The Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. §§ 9701-9722 [hereinafter "The Coal Act"].

[15] See Eastern Enterprises, 524 U.S. at 504-11.

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 that would 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.[16] The Commission recommended a new funding mechanism that would require both current and past employers of retired coal miners to make substantial annual financial contributions to a trust fund that would pay for the benefits.[17]

Congress ultimately enacted legislation requiring any signatory (or its successor) to the prior health benefit agreements to fund comprehensive benefits for retirees.[18] Under this plan, any company that had employed presently-retired coal miners would be required to assume financial responsibility for paying for current health care benefits, even if the company no longer participated in the coal mining industry.[19] At least arguably, this congressionally-mandated solution represented an unreasonable extension of benefits for certain retired miners who

---

[16] Id. at 511-13.

[17] Id. at 512-13.

[18] Id. at 514-15; see 26 U.S.C. §§ 9701, 9706(a), 9701(c)(2)(A).

[19] Eastern Enterprises, 524 U.S. at 514-15.

had left service under plans that expressly conditioned future benefits on adequate funding under the pre-existing funding mechanisms.[20]

Pursuant to the funding mechanism selected by Congress, the Commissioner of Social Security assessed Eastern Enterprises with an annual premium of $5 million.[21] Rather than simply pay this assessment, Eastern Enterprises initiated a lawsuit in federal district court seeking a declaration that the new funding scheme obligations violated either the Takings Clause or the Due Process Clause. The company argued in the alternative that the Commissioner has misinterpreted the Coal Act.[22] 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.[23]

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' takings claim. Although the "case does not present the

---

[20] Id. at 507-09, 514-15.

[21] Id. at 517.

[22] Id. at 517.

[23] See Eastern Enterprises v. Chater, 110 F. 3d 150 (1st Cir. 1997), rev'd, Eastern Enterprises v. Apfel, 524 U.S. 498 (1998).

'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."[24] 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."[25] 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.[26]

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."[27] Moreover, "the company is clearly deprived of the amounts it must pay the Combined Fund."[28] Additional considerations, such as the "disproportionate impact" of the funding scheme on corporations no longer in the mining business and the retroactive nature of

---

[24] Id. at 522-23.

[25] Id. at 523.

[26] Id. at 528-29.

[27] Id. at 529.

[28] Id.

the funding scheme, merely confirmed the plurality's finding that the Coal Act's funding obligations constituted a "taking."[29] As Justice O'Connor opined, "the Constitution does not permit a solution to the problem of funding miners' benefits that imposes such a disproportionate and severely retroactive burden upon Eastern."[30]

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," 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. Try as she might, Justice O'Connor's efforts to canalize the plurality's takings inquiry ultimately proved ineffectual. The gravamen of a regulatory taking, under *Eastern Enterprises*, is the degree to which the law or regulation seems to impose costs unfairly and arbitrarily on a particular class of persons or entities. 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.[31]

---

[29] See id. at 530-35.

[30] Id. at 536.

[31] See, e.g., Lochner v. New York, 198 U.S. 45 (1908); Coppage v. Kansas, 236 U.S. 1 (1915); Truax v. Corrigan, 257 U.S.

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."[32] In light of the "severe, disproportionate, and extremely retroactive burden on Eastern," the Takings Clause provided an entirely sufficient basis for providing the requested injunctive relief.[33]

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.[34] 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

---

312 (1921); Weaver v. Palmer, 278 U.S. 105 (1928); cf. West Coast Hotel v. Parrish, 300 U.S. 379 (1937).

[32] Id. at 538.

[33] Id. at 538.

[34] See id. at 539, 540-550 (Kennedy, J., concurring in the judgment and dissenting in part).

violate the Constitution.[35] "[D]ue process protection for property must be understood to incorporate our settled tradition against retroactive laws of great severity."[36] 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."[37]

Four justices dissented from the invalidation of the Coal Act's funding provisions.[38] 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."[39] 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.[40]

---

[35] Id. at 547-50.

[36] Id. at 549.

[37] Id.

[38] See id. at 553 (Breyer, J., dissenting) (joined by Justices Stevens, Souter, and Ginsburg).

[39] Id. at 554.

[40] See id. at 554-56.

In Justice Breyer's view, "there is no need to torture the Taking 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."[41] 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.[42] 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."[43]

II. The Potentially Infinite Reach of the Takings Clause Under Justice O'Connor's Reasoning in *Eastern Enterprises*

Taken to its logical extreme, any requirement to pay money would constitute a taking under the approach set forth in Justice O'Connor's plurality opinion. Consider, for example, a federal law raising the highest marginal tax rate on personal income from 39% to 50%. Holding all other tax policies constant, this would result in an obligation for some higher income taxpayers to surrender more money in order to satisfy their annual federal income tax obligations. Since the inception of the federal

---

[41] Id. at 556.

[42] See id. at 558-68.

[43] Id. at 559.

income tax in 1913,[44] no credible person has suggested that federal income tax obligations transgress the Takings Clause.

Yet, as a matter of logic, why should an obligation to pay taxes be treated any differently than an obligation to make an involuntary financial contribution to fund retired workers' health care benefits?[45] If the Takings Clause applies to any enactment that "takes" a single dollar, as Justice O'Connor suggests, then virtually any federal or state enactment creating a monetary obligation must potentially survive scrutiny under the Takings Clause. After all, the hypothetical tax statute "takes"

---

[44] See U.S. Const. amend. XVI (1913).

[45] 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).

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.

One could object that 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 mid-year and effective for the current tax year would have retroactive effects (indeed, absent changes in withholding amounts, some taxpayers might face penalties for under withholding federal income tax payments). 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. Justice O'Connor's test features three factors that lower courts must consider, and a change in marginal tax rates would support a plausible argument under each factor.

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."[46] The reviewing court should be particularly sensitive to schemes that "impose[ ] severe retroactive liability on a limited class of

---

[46] Eastern Enterprises, 524 U.S. at 523-24.

parties that could not have anticipated the liability," especially when "the extent of that liability is substantially disproportionate to the parties' experience."[47] Any revenue measure, or regulation, that imposes a scheme of non-trivial 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.[48]

The final consideration, the "character of the government action," sounds like an awfully amorphous concept. Judges are clever wordsmiths, and one harbors the nagging doubt that

---

[47] Id. at 528-29.

[48] 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 this were to transpire, I could potentially take some solace in the plurality opinion'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 is plainly silly. 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 Products 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. at art. I, § 8, cl. 1 ("The Congress shall have the Power To lay and collect Taxes, Duties, Imposts, and Excises. . .").

virtually any law creating a monetary obligation could be characterized as either eminently reasonable or outrageously unfair without much judicial heavy lifting.[49]

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.[50] 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.

Thus, under the logic of *Eastern Enterprises*, any legislation or regulation that requires the payment of money may be attacked as a violation of the Takings Clause. 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: "Nor shall private property be taken

---

[49] 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).

[50] See Eastern Enterprises, 524 U.S. at 529-37.

for a public purpose, without just compensation."[51] 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 property or intangible property), it does so for a legitimate reason, and it thereby incurs an obligation to pay fair market value for the property at issue.[52] Although it is true that money, whether in form of federal reserve notes, bank credits, gold ingots, or Euros, constitutes "property," it is quite silly to think of a general financial obligation to government as a government "taking" of the funds or credits used to satisfy the obligation.

The reason for this 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

---

[51] U.S. Const. amend. V.

[52] See Agins v. City of Tiburon, 447 U.S. 257, 260-61 (1980); cf. Ronald J. Krotoszynski, Jr., "Fundamental Property Rights," 85 Geo. L.J. 555, 606-07 (1997).

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, sell the Matisse, etc. The source of the funds is a matter of almost complete indifference.[53] 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.[54] 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. Yet, one would like to think that the federal government can conduct monetary policy without

---

[53] 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).

[54] See Martin Mayer, The FED: The Inside Story of How the World's Most Powerful Financial Institution Drives the Market (2001).

potentially incurring infinite liabilities under the Takings Clause.[55]

In order to avoid such 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 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. Abolition of the deductibility of home mortgage interest 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 (i.e., 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

---

[55] 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.

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 broadbased effects of the law -- and ignores completely the second. The problem with this approach to regulatory takings is that a reviewing court should not find a regulatory taking when a law or regulation affects a small number of entities exceptionally, but government still lacks the requisite expropriatory intent. Regulations implementing the Clean Air Act might affect only a few dozen industrial facilities. Failure to comply with the regulations might result in the EPA imposing significant monetary penalties on the non-compliant facilities.[56] In some cases, the cost of retrofitting the affected plants might exceed the value of the refurbished,

---

[56] See David M. Driesen, "The Societal Cost of Environmental Regulation: Beyond Administrative Cost-Benefit Analysis," 24 Ecology L.Q. 545 (1997); Clifford Rechtschaffen, "Deterrence vs. Cooperation and the Evolving Theory of Environmental Enforcement," 71 S. Cal. L. Rev. 1181; Note, "Deterring Air Pollution 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," U.S. News & World Rep., Mar. 12, 2001, at 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 Cooter, "Prices and Sanctions," 84 Colum. L. Rev. 1523 (1984) (modelling the economic effects of monetary sanctions as an enforcement tool for environmental protection laws).

compliant facility.[57] In economic terms, the regulation would destroy 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: EPA may regulate, but it must pay the fair market value of the plant prior to the adoption of the new emissions standards. This approach creates potentially limitless liability for government entities seeking to curb pollution through regulation.

Professor John Hart has persuasively argued that the Framers did not anticipate that regulatory takings would be compensable under the Takings Clause.[58] Little good would be accomplished by simply rehashing his excellent historical arguments. It is obvious, however, that the contemporary Supreme Court has absolutely no intention of holding itself bound by the original

---

[57] Environmental laws mandating health-based, as opposed to cost/benefit, regulations, such as the Clean Air Act, are particularly likely to produce such results. See American Trucking Ass'n v. EPA, ___ S. Ct. ___ (2001); American Lung Ass'n v. EPA, 134 F.3d 388 (D.C. Cir. 1998); Lead Indust. Ass'n v. EPA, 647 F.2d 1150 (D.C. Cir. 1980); Clean Air Act, 42 U.S.C. § 7409; see also Mark Seidenfeld & Jim Rossi, "The False Promise of the 'New' Nondeledgation Doctrine," 76 Notre Dame L. Rev. 1, 2-4 (2000).

[58] See John F. Hart, "Colonial Land Use Law and Its Significance for Modern Takings Doctrine," 109 Harv. L. Rev. 1252 (1996); John F. Hart, "Land Use Law In the Early Republic and the Original Meaning of the Takings Clause," 94 Nw. U. L. Rev. 1099 (2000); see also John F. Hart, "Forfeiture of Unimproved Land in the Early Republic," 1997 U. Ill. L. Rev. 435.

understanding of the Takings Clause.[59] If a reliable majority of the Justices refuses to credit the lessons of history, presumably reflecting the original intent of the Framers of the Takings Clause, it is probably overly optimistic to hope that text and logic would prove any more persuasive to them. 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.

In a very limited number of cases, government regulation serves as an effective proxy for a de facto exercise of eminent domain.[60] 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 to

---

[59] 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 (Amy Gutmann ed. 1997); Antonin Scalia, "Originalism: The Lesser Evil," 57 U. Cin. L. Rev. 849, 854-57, 861-64 (1989).

[60] See Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413-15 (1922).

regulate, 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 beach front 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.[61] 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 land owner 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.[62] 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

---

[61] These facts reasonably approximate the facts at issue in Nollan v. California Coastal Commission, 483 U.S. 825 (1987).

[62] Nollan, 483 U.S. at 831, 834-37, 841-42.

fair market value for it. *Nollan*,[63] *Lucas*,[64] and *Dolan*[65] all make plain that government cannot attempt to coerce property rights incident to zoning or permitting decisions. That said, none of these cases makes plain that the government's expropriatory intent drives the result.

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.[66] The presence of expropriatory intent, however, provides a stronger foundation for the results in these cases. 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

---

[63] Id.

[64] Lucas v. South Carolina Coastal Comm'n, 505 U.S. 1003 (1992).

[65] Dolan v. City of Tigard, 512 U.S. 374 (1994).

[66] See infra text and accompanying notes ___ to ___.

imposes financial burdens should not be a sufficient condition to support a valid takings claim.

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 $5 million dollar obligation. The Coal Act might have been arbitrary, unfair, grossly retroactive -- a thoroughly awful piece of legislative craftsmanship all-around. The Coal Act was not, however, a taking.[67]

---

[67] 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 dollars to purchase at least $50 million dollars of government bonds bearing an annual interest rate of only 1 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 4% 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 (i.e., 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.

Whether the Coal Act was sufficiently arbitrary to transgress the substantive aspect of the Due Process Clause is 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.[68] As such, it violated the Fifth Amendment's Due Process Clause guarantee of non-arbitrary governance.[69]

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.[70] 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 benefitted 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.

---

[68] Eastern Enterprises, 524 U.S. at 547-50 (Kennedy, J., concurring in the judgement and dissenting in part).

[69] See id. at 549 ("The case before us presents one of the rare instances where the Legislature has exceeded the limits imposed by due process."); see also Symposium, "When Does Retroactivity Cross the Line?: *Winstar*, *Eastern Enterprises*, and Beyond," 51 Ala. L. Rev. 933 (2000).

[70] See 524 U.S. at 553, 554-58 (Breyer, J., dissenting).

Whether Justice Kennedy or Justice Breyer has the better of the argument over the merits of the substantive due process claim, they are both correct to reject the Takings Clause as the root of Eastern Enterprises's constitutional objection to the Coal Act's funding scheme. Unfortunately, neither Justice Kennedy nor Justice Breyer identified the lack of expropriatory intent as the principal reason for rejecting a Takings Clause analysis. This left Justice O'Connor, joined by Chief Justice Rehnquist and Justices Scalia and Thomas, 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," 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.[71] Thus, the Takings Clause is a very plaintiff-friendly constitutional provision.[72]

---

[71] First Lutheran Church v. Los Angeles County, 482 U.S. 304, 317-20 (1987).

[72] 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 substantive aspect of the Due Process Clauses, by way of contrast, requires a plaintiff to show, in the absence of a fundamental right, that government action is fundamentally unfair -- so much so that it "shocks the conscience."[73] 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.

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

---

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.

[73] See Krotoszynski, supra note ___, at 583-90.

government incur financial obligations to adversely affected property owners.[74]

Requiring proof of expropriatory intent would properly cabin the scope of the Takings Clause to cases in which government is effectively attempting to control property for its own purposes without first paying for it.[75] This approach would be consistent with the original understanding of the Takings Clause[76] and would provide a doctrinally persuasive rationale for the results in

---

[74] 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 Oklahoma, 348 U.S. 483 (1955). Revival of *Lochner* under the Due Process Clauses, rather than the Takings Clause, would not represent a significant doctrinal improvement.

[75] 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 government 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 Lutheran Church v. Los Angeles County, 482 U.S. 304, 315 (1987).

[76] See Hart, "Land Use In the Early Republic," supra note ___, at 1107-47.

Pennsylvania Coal Company v. *Mahon*[77] and its jurisprudential progeny.

III. Justice Kennedy's Close-But-Not-Quite Takings Analysis

As will be developed more fully below, Justice Kennedy correctly analyzed Eastern Enterprises's claim under the constitutional rubric of substantive due process. Along the way, 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.

A. "Specificity" as the Essential Element of a Takings Claim

Mr. Justice Kennedy intuitively realized that the Coal Act did not constitute a taking: "Our cases do not support the

---

[77] 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 ___ to ___.

plurality's conclusion that the Coal Act takes property."[78] For Justice Kennedy, the fact that the Coal Act "imposes a staggering 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."[79] 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."[80] 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. Accordingly, to characterize the effect of such a law as a "taking" was both "imprecise" and "unwise."[81]

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 taking analysis has been employed, a specific property right or interest

---

[78] Eastern Enterprises, 524 U.S. at 540.

[79] Id.

[80] Id.

[81] Id.

has been at stake."[82] 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."[83]

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 of the wisdom of government decisions."[84] 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.[85] If the question presented goes to the basic fairness or legitimacy of the government's policy, rather than the question of compensation, a reviewing court should deploy the Due Process Clause rather than the Takings Clause.

---

[82] Id. at 541.

[83] Id. at 543.

[84] Id. at 545.

[85] Id. at 545 ("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 obtain. To date, however, the Justices have made no effort to undertake such an effort and, on the contrary, have made clear that the public use requirement does not really limit the scope of government action affecting property interests. See Hawaii Housing Auth. v. Midkiff, 467 U.S. 229 (1984); Berman v. Parker, 348 U.S. 26 (1954).

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. His definition of a taking, however, 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. 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.

Justice Kennedy's objection that the government does not require any particular money to be used would be beside the point. If the government required a farmer to deliver a dozen hens to the Internal Revenue Service, it would probably be indifferent as to which chickens she 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.

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. 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.

Of course, Justice O'Connor's approach still suffers from the decided shortcoming that it proves too much; as noted earlier, under her formulation of the takings inquiry, <u>all</u> regulations, at least potentially, constitute compensable takings. The problem may be avoided if one switches focus from the question of whether government action affects a property interest to the purpose of the government regulation. Justice Kennedy's concurring opinion, however, never really quite frames the matter in these precise terms.

The Takings Clause should supply a remedy only when government holds a particular subjective intent vis a 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, regardless of precisely how the government seeks to satisfy a tax debt it lacks expropriatory intent.

The same would hold true of most 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[86] or to reduce the amount of toxic emissions

---

[86] See, e.g., Industrial Union Dep't, AFL-CIO v. American Petroleum Inst., 448 U.S. 607 (1980); American Textile Mfrs. Institute, Inc. v. Donovan, 452 U.S. 490 (1981); see also Sidney Shapiro and Thomas McGarity, Workers at Risk (1994).

associated with an industrial facility's operation.[87] 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.[88] 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, it is not the specificity of the government's demand that should 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.[89] 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

---

[87] See Chevron, U.S.A., Inc. v. NRDC, 467 U.S. 837 (1984); see also Levine, supra note ___.

[88] 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.

[89] See Hart, "Land Use Law in the Early Republic," supra note ___, at 1154-56.

desire to own, control, and exercise dominion over a particular interest in property?[90] 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.

C. Reorienting Takings Clause Jurisprudence to Incorporate the "Expropriatory Intent" Approach

Virtually -- but not quite -- all of the United States Supreme Court's regulatory takings cases finding a regulatory taking would fit within the expropriatory intent analytic framework. Consider, for example, *Pennsylvania Coal Company* v. *Mahon*,[91] the original source of the Supreme Court's regulatory takings jurisprudence.

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.[92] On its face, the Kohler Act constituted a regulatory enactment designed to protect the health, safety, and welfare of Pennsylvania residents residing in structures located atop anthracite coal deposits; indeed, the

---

[90] See Susan Rose-Ackerman & Jim Rossi, "Disentangling Deregulatory Takings," 86 Va. L. Rev. 1435, 1481-86 (2000).

[91] 260 U.S. 393 (1922).

[92] See id. at 412-13 (describing the effects of the Kohler Act, P.L. 1198).

state of Pennsylvania defended the statute as a run-of-the-mill application of the state's traditional police powers (a view embraced by the Pennsylvania state courts).

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,"[93] there are limits 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."[94] Because this inquiry involves "a question of degree," a reviewing court cannot dispose of it "by general propositions."[95] 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. To inquire as to whether a particular statute "goes too far" in affecting property rights is to invite judges to pull out their individual moral

---

[93] Id. at 413.

[94] Id. at 415.

[95] Id. at 416.

compasses.[96] Yet, Justice Holmes could have rested the result in *Mahon* on a far less ephemeral foundation.

Pennsylvania styled the Kohler Act a police power regulation and, at least superficially, that description was apt. On the other hand, the effect of the Kohler Act was to vest 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

---

[96] 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).

simply invoked its eminent domain powers, seized certain mineral rights, and then redistributed the mineral rights to those with 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.[97]

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."[98] In his view, the Kohler Act was "merely the prohibition of a noxious use."[99] This approach ignores, of course, 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.

If a person wishing to construct a homestead wished to ensure against such an eventuality, she would have been entirely free to acquire both the surface and mineral rights before

---

[97] 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").

[98] Mahon, 260 U.S. at 417 (Brandeis, J., dissenting).

[99] Id.

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.[100]

Applying a theory of expropriatory intent would not affect the outcome in *Nollan* v. *California Coastal Commission*,[101] another major regulatory takings case, either. As in *Mahon*, such an

---

[100] 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.

[101] 483 U.S. 835 (1987).

approach would provide needed doctrinal clarity while vindicating the Supreme Court's core fairness concerns.

In *Nollan*, the owners of a beach front lot wished to obtain a permit to demolish a dilapidated beach front bungalow and erect a new house.[102] The California Coastal Commission, which possessed jurisdiction over the Nollans' permit application, agreed to grant the permit only on the condition that the Nollans' cede, in perpetuity, an easement across the property that would connect two public beaches.[103] 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 landowners' premises does not constitute the 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.[104]

---

[102] Id. at 827-28.

[103] Id. at 828.

[104] Id. at 831 (citation omitted).

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."[105] 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.'"[106] 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.[107]

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

---

[105] Id. at 837.

[106] Id.

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

the stated effect on the roadside view had no discernable relationship to connecting two public parks 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 for it. 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 more hard pressed to infer expropriatory intent.[108] 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.

---

[108] See generally Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981).

Lucas v. *South Carolina Coastal Commission*[109] presents a somewhat harder case. 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 Commission's denial of a building permit for a house to be located on a very expensive beach front lot on the Isle of Palms.[110] Concerned about the potential for erosion on the delicate barrier island, the Commission decided to prohibit Mr. Lucas from developing his lot. The Commission did not require Lucas to condition the development of his lot on some neighboring landowner's consent[111] or to convey an interest in the land to the government.[112] Instead, because of safety and environmental concerns, the agency simply refused to allow any development.

On these facts, the Commission 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.

---

[109] 505 U.S. 1003 (1992).

[110] Id. at 1006-07.

[111] Cf. Mahon, 260 U.S. at 413-16.

[112] Cf. Nollan, 483 U.S. at 827-31.

To be sure, the effect of the agency's decision had a profound impact on the value of Lucas's property. Obviously, a beach front parcel with a house has a much higher market value than a beach front 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 the 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 (i.e., 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 now have stranded capital that probably cannot be recovered 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.

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.[113] 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."[114]

---

[113] See Rose-Ackerman & Rossi, supra note ___, at 1481-86, 1493-95.

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

The South Carolina Beach Front Management Act was, in principal, 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.[115] 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.[116] Its effects, although perhaps unexpected, unfair, and costly to Mr. Lucas do not constitute a "taking" of the affected properties.[117]

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,

---

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

[116] 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.

[117] 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.

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 prevail on such a claim. 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.

Finally, *Dolan* v. *City of Tigard*[118] 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.[119] She also planned to develop a second building and still more parking spaces. In order to make these improvements, Dolan needed the approval of the City Planning Commission.

The 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. The greenway would feature a pedestrian/bicycle pathway open to the public.[120] In addition, the Commission required Dolan to refrain

---

[118] 512 U.S. 374 (1994).

[119] See id. at 379-80.

[120] See id.

from developing a portion of her land to permit improvements to a storm drainage system associated with Fanno Creek, a stream running across her parcel.

Ms. Dolan objected to the conditions. 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. Additional paving would increase the run off 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.

Ms. Dolan sued in state court, alleging that the Commission's conditions were not reasonably related to legitimate state interests, and therefore transgressed the Takings Clause. 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.[121] The United States Supreme Court granted a writ of certiorari to review the decision of the Supreme Court of Oregon sustaining the Commission's conditional approval of Ms. Dolan's permit applications.

---

[121] See id. at 382-83.

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."[122] 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."[123] Chief Justice Rehnquist further observed that an additional condition applies in cases involving conditional approvals of land use: an "essential nexus" must exist between the government's conditions and the legitimate state interest.[124]

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. Accordingly, a nexus existed between the Commission's conditions and the city's objectives set forth in the master zoning plan.[125] For the majority, however, this was not the end of inquiry. Rather,

---

[122] Id. at 384.

[123] Id. at 385 (quoting Agins v. City of Tiburon, 447 U.S. 255, 260 (1980)).

[124] See id. at 386-87.

[125] See id. at 387-88.

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 and/or flooding associated with the improvements.[126]

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."[127] 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."[128] 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.[129]

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

---

[126] See id. at 388-96; see also Monterey v. Del Monte Dunes, 526 U.S. 687, 702-03 (1999) (holding that the "rough proportionality" test elaborated in *Dolan* applies only to "the special context of exactions" rather than to outright denials of proposed development plans requiring zoning waivers or permits).

[127] Dolan, 512 U.S. at 391.

[128] Id.

[129] See id. at 394-95.

deference.[130] 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."[131] 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."[132]

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

---

[130] See id. at 396-97, 405, 409-11 (Stevens, J., dissenting).

[131] Id. at 411.

[132] Id. 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 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. 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.

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 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 their 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 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 land owner 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 the easement could be justified as a flood control measure, transferring title to the city and requiring public access did not advance, at all, 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 run off 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 Justice Rehnquist's approach and the approach proposed in this Article. 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.[133] 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, if viewed through the lens of maximizing wealth or utility; laws that significantly and irrationally reduce the value of real property within the jurisdiction.[134]

Open-ended inquiries into the "legitimacy" of local land use decisions, coupled with an "essential nexus" and "rough

---

[133] See id. at 406-07 (Stevens, J., dissenting) ("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.").

[134] For example, imagine a law requiring that all residential construction undertaken after a date certain 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.

proportionality" requirement for conditional waivers of court-approved policies, simply invites federal judges to serve as the ultimate local zoning board.[135] Moreover, such judicial efforts will surely 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.

The OSH Act, the Endangered Species Act, the Clean Air Act, 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 local, state, and national 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.

---

[135] Cf. Ackerman & Rossi, supra note ___, at 1493 ("When the government is best characterized as a policymaker, compensation should not be the general rule.").

In the context of the Contracts Clause,[136] the Supreme Court has wisely rejected the idea that capital investment precludes the subsequent exercise of the police powers to change basic social policies.[137] 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).[138]

In this sense, then, requiring a showing of expropriatory intent as a necessary element of a takings claim would bring needed doctrinal order to an otherwise muddled field of constitutional law. Moreover, it would avoid the undesirable

---

[136] 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. . .").

[137] See Home Building & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934); see also Exxon Corp. v. Eagerton, 462 U.S. 176 (1983); Energy Reserves Group v. Kansas Power & Light Co., 459 U.S. 400 (1983); but cf. Allied Structural Steel v. Spanneus, 438 U.S. 234 (1978).

[138] See Rose-Ackerman & Rossi, supra note ___, 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).

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*.

IV. 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.[139]

A critic might argue that, under the proposed theory, judges intent on finding a taking would declare "expropriatory intent" to be present, 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

---

[139] See generally Hugo L. Black, "The Bill of Rights," 35 N.Y.U. L. Rev. 865 (1960); Harry Kalven, Jr., "Upon Rereading Mr. Justice Black on the First Amendment," 14 UCLA L. Rev. 428 (1967); Charles A. Reich, "Mr. Justice Black and the Living Constitution," 76 Harv. L. Rev. 673 (1963); 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.").

that the test could be deployed in support of a results-oriented jurisprudence. This objection, however, proves too much.

Many tests in constitutional law presuppose good faith application by judges.[140] 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 (e.g., the constitutionality of a federal law depending on a showing of a "substantial relationship to a significant government interest"[141]). Among these factors, of course, is intent. In *Washington* v. *Davis*,[142] the Supreme Court held that proof of discriminatory intent constitutes an essential element of an equal protection claim.[143]

In order to establish an Equal Protection Clause violation, a plaintiff must prove that the government harbored discriminatory intent.[144] When a law facially discriminates on an

---

[140] But cf. Bush v. Gore, 121 S. Ct. 525 (2000); 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).

[141] See Mississippi University for Women v. Hogan, 458 U.S. 718, 723-26 (1982).

[142] 426 U.S. 229 (1976).

[143] See id. at 239-45.

[144] See Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 264-65 (1977); see also Michelle Adams, "Causation and Responsibility in Tort," 79 Tex. L. Rev. 643 (2000) (discussing the related, but distinct, requirement that a governmental entity prove intentional past discrimination, that causes continuing contemporary effects, as a

invidious basis, showing discriminatory intent presents little difficulty.[145] Conversely, when a facially neutral law has a disparate impact on a vector triggering strict scrutiny (e.g., race), the plaintiff cannot prevail unless she establishes that this impact is something more than merely coincidental.[146] 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.[147]

Plainly, the requirement of showing discriminatory intent requires judges to engage in a bit of guesswork regarding the

---

predicate for any current affirmative action efforts using race or gender classifications).

[145] See, e.g., Loving v. Virginia, 388 U.S. 1 (1967); United States v. Virginia, 518 U.S. 515 (1996).

[146] See, e.g., McCleskey v. Kemp, 481 U.S. 279 (1987); Yick Wo v. Hopkins, 118 U.S. 356 (1886).

[147] Compare Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977) (rejecting race-based equal protection claim because plaintiffs failed to establish discriminatory intent notwithstanding discriminatory effect of zoning decision); Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256 (1979) (rejecting gender-based equal protection claim because plaintiff failed to establish discriminatory intent notwithstanding disparate impact of hiring preference for veterans) with Hunter v. Underwood, 471 U.S. 222 (1985) (finding facially neutral provision of Alabama constitution to violate Equal Protection Clause because framers of provision harbored discriminatory intent when including it); Castaneda v. Partida, 430 U.S. 482 (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).

actual motives of a governmental body.[148] To some extent, of course, it would be quite impossible to discern with certainty the actual motive of a majority of those legislators supporting or opposing a particular piece of legislation.[149] 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

---

[148] See, e.g., Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (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, "Text, History, and Structure in Statutory Interpretation," 17 Harv. J. L. Pub. Pol'y 61 (1994) (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, "The Role of Original Intent in Statutory Construction," 11 Harv. J. L. Pub. Pol'y 59 (1988) (same).

[149] Cf. Hunter v. Underwood, 471 at 228-33 (examining history of Alabama constitutional convention and concluding that, based on statements by some participants and overall attitude of delegates, state constitutional provision denying convicted felons right to vote reflected both discriminatory purpose and effect and, therefore, was invalid on equal protection grounds).

demonstrate the inefficacy of the test across the broad generality of cases.[150] And, as with discriminatory intent in equal protection cases, judges could infer expropriatory intent from circumstantial evidence.[151] 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.[152] Because the essence of the art of judging is giving

---

[150] 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.").

[151] 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 circumstances.

[152] 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

reasons in support of results,[153] 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, "[t]he 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."[154]

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, then, every government action carries with it a kind of "expropriatory

---

Due Process Clause, the Supreme Court is better able to distill directly from those cases the principles that speak to the definition of liberty.").

[153] See Frederick Schauer, "Giving Reasons," 47 Stanford L. Rev. 633 (1995); see also Ronald J. Krotoszynski, Jr., "Back to the Briarpatch: An Argument in Favor Constitutional Meta-Analysis in State Action Determinations," 94 Mich. L. Rev. 302, 333-34 (1995).

[154] Universal Camera Corp. v. NLRB, 340 U.S. 474, 489 (1951); 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.").

intent."[155] Obviously, I do not intend to connote such a meaning for purposes of developing a theory of the Takings Clause premised on expropriatory intent.

I would argue 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.[156] 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 modelled as uncompensated eminent domain actions would not satisfy either definition.

In this sense, then, expropriatory intent does not exist in every case where the government demands labor or wealth. If one

---

[155] See generally John Locke, Two Treatise of Government (1693) (explaining the labor theory of property and the government's ability to both secure stable property rights but also exact property rights from citizens incident to the social contract); 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).

[156] See Hart, "Land Use Law in the Early Republic," supra note ___; Hart, "Colonial Land Use Law," supra note ___.

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 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 reject the idea that any obligation to surrender labor or money to the government constitutes an uncompensated taking.

All scholarly and judicial commentators agree that some government actions should constitute takings, whereas others should not. 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 single property owner to shoulder too much of what should be a more widely shared community obligation. 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,[157] the

---

[157] See, e.g., Morey v. Dowd, 354 U.S. 457 (1957) (invalidating, as irrational, law that singled out American Express for negative treatment); Heimgaertner v. Benjamin Elec. Mfg. Co., 128 N.E. 2d 691 (Ill. 1955) (striking down state statute as irrational under state constitution substantive due process review); Paulson, "The Persistence of Economic Due Process in the States," 34 Minn. L. Rev. 91 (1950) (describing survival of meaningful substantive due process review of economic

Supreme Court should give the Takings Clause a limited reading -- a reading supported by its historical roots.

The Supreme Court remains free, of course, to disregard history in favor 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.[158] Once one abandons the historical 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. 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.[159]

---

legislation in some state supreme courts); see also United States v. Carolene Products Co., 304 U.S. 144, 152-54 (1938) (providing rational basis test as proper standard for evaluating economic and social legislation that does not rely upon a suspect classification or adversely affect a fundamental right); Laurence H. Tribe, American Constitutional Law, § 8-7, at 582-86 (2d ed. 1988) (describing decline, but not abolition, of substantive due process review of economic legislation in the federal courts).

[158] See William L. Church, "The *Eastern Enterprises Case*: New Vigor for Judicial Review?," 2000 Wis. L. Rev. 547, 552-56.

[159] See generally Poe v. Ullman, 367 U.S. 497, 541-44 (1961) (Harlan, J., dissenting) (arguing that history and tradition provide the best and more reliable means of cabining the scope of judicial discretion when interpreting otherwise vague constitutional text); Griswold v. Connecticut, 381 U.S.

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. This would not deny citizens the proper protection 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.

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. Virtually all of the powers elaborated in Article I, Section 8 could not be exercised without access to revenue or in the absence of an

---

479, 500-02 (1965) (Harlan, J., concurring) (finding right to marital privacy implicit in concept of ordered liberty given a history/tradition of special recognition of 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 the teachings of history" and "solid recognition of the basic values that underlie our society").

ability to compel behavior.[160] 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.

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,[161] not every government action can give rise to an obligation to pay compensation if the business of government is to go on. This Article proposes a line of demarcation derived from the core concern of the Takings Clause: uncompensated exercises of the power of eminent domain.

---

[160] 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 science 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.

[161] 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 developing an alternative account 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.

V. Conclusion

At the moment, the Supreme Court's 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).[162]

---

[162] See supra text and accompanying notes ___ to ___.

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.