INTRODUCTION

In 1992, Congress passed the Coal Industry Retiree Health Benefit Act (Coal Act)\(^1\) to counteract the lack of retirement and health benefits for coal workers who had retired prior to 1978 and whose prior employers no longer operated in the coal business (orphan retirees).\(^2\) The Act merged several earlier benefit plans won by the United Mine Workers of America to create the "United Mine Workers of America Combined Benefit Fund" (Combined Fund),\(^3\) an aggregate fund that provided substantially the same benefits as its predecessors.\(^4\) Coal operators that had signed any agreement requiring contribution to any of the earlier funds were assessed premiums for the Combined Fund.\(^5\) The Commissioner of Social Security assigned individual retirees to operators according to a tripartite scheme. The Commissioner first assigned retirees to any available employer for which they had worked for more than two years and which had signed any post-1978 coal wage agreement, then to any employer that had employed them for any length of time and had signed a post-1978 agreement. If no employer who had signed a post-1978 agreement was available, the Commissioner

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4. See id. § 9703(b)(1), (f).
5. See id. § 9701(b)(1), (3), (c)(1).
assigned retirees to the operator for whom they had worked the longest prior to the 1978 agreement. 6

Eastern Enterprises (Eastern), a company that operated in the coal industry from 1929 to 1965, 7 was a signatory to each benefits plan created through collective bargaining prior to its departure from the industry. 8 Between 1963 and 1965, Eastern transferred its coal operations to a subsidiary, Eastern Associated Coal Corporation (EACC). 9 Eastern retained its interest in EACC and received dividends totaling more than $100 million by 1987, when it sold its interest to Peabody Holding Co., Inc. 10 Under the Coal Act, the Commissioner of Social Security assigned Eastern the obligation to provide premiums to the Combined Fund for over 1,000 retired coal workers who had been employed by Eastern prior to 1966. 11 Eastern’s liability for the first year exceeded $5 million; 12 the company’s total liability was estimated at between $50 million and $100 million. 13 Eastern sued the Commissioner of Social Security, the

6. See id. § 9706(a). The relevant language is:
   For purposes of this chapter, the Commissioner of Social Security shall . . . assign each coal industry retiree who is an eligible beneficiary to a signatory operator which (or any related person with respect to which) remains in business in the following order:
   (1) First, to the signatory operator which—
   (A) was a signatory to the 1978 coal wage agreement or any subsequent coal wage agreement, and
   (B) was the most recent signatory operator to employ the coal industry retiree in the coal industry for at least 2 years.
   (2) Second, if the retiree is not assigned under paragraph (1), to the signatory operator which—
   (A) was a signatory to the 1978 coal wage agreement or any subsequent coal wage agreement, and
   (B) was the most recent signatory operator to employ the coal industry retiree in the coal industry.
   (3) Third, if the retiree is not assigned under paragraph (1) or (2), to the signatory operator which employed the coal industry retiree in the coal industry for a longer period of time than any other signatory operator prior to the effective date of the 1978 coal wage agreement.

Id.

7. See Eastern Enterprises, 118 S. Ct. at 2142-43.
8. See id. at 2143.
9. See id.
10. See id.
11. See id. Under the third prong of the assignment test, the Commissioner found that Eastern was the operator for whom the miners had worked for the longest time. See id.
12. See id.
13. See id. at 2149.
Combined Fund, and its trustees, seeking injunctive relief and a
declaratory judgment that the Coal Act violated substantive due
process and constituted a regulatory taking in violation of the
Fifth Amendment. The district court granted summary
judgment to the defendants on all claims. The Court of Appeals
for the First Circuit affirmed. Noting that to succeed, a
substantive due process claim "must show that the legislature
acted in an arbitrary and irrational way," the court held that
Eastern's obligations under the Coal Act were rationally related
to Congress' purposes in passing the legislation and thus did not
violate due process standards. In analyzing Eastern's takings
claim, the court found that the Coal Act did not result in a
permanent appropriation of Eastern's property but instead
"adjust[ed] the benefits and burdens of economic life to promote
the common good."

The Supreme Court reversed in what can best be described
as a 4-4-1 split. Justice O'Connor, writing for a plurality that
included Chief Justice Rehnquist, and Justices Scalia and
Thomas, found that the statute as applied to Eastern did effect
an unconstitutional taking. Justice O'Connor indicated a
reluctance to subject economic regulation to a due process
analysis, but eventually declared the issue moot in the face of
the takings holding. Justice Kennedy, while concurring in the
judgment, vigorously objected to analyzing the case under
takings doctrine. He argued instead that the Coal Act was a
rare instance of an economic regulation that violated due
process, primarily because of its retroactive nature. Justice

14. The implicated portions of the Fifth Amendment states in relevant part: "No
person shall . . . be deprived of life, liberty, or property, without due process of law;
nor shall private property be taken for public use, without just compensation." U.S.
Constr. amend. V. Eastern also challenged the Commissioner's interpretation of the
aff'd sub nom. Eastern Enterprises v. Chater, 110 F.3d 150 (1st Cir. 1997), rev'd sub
15. See id.
16. See Eastern Enterprises v. Chater, 110 F.3d 150 (1st Cir. 1997), rev'd sub
17. Id. at 156 (quoting Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15
(1976)). The Court of Appeals also rejected Eastern's challenge to the
Commissioner's interpretation of the Coal Act. See id. at 157-58.
18. Id. at 161 (quoting Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211,
225 (1986)) (internal quotation marks omitted).
19. See Eastern Enterprises, 118 S. Ct. at 2153 (plurality opinion).
20. See id.
21. See id. at 2154-58 (Kennedy, J., concurring in judgment and dissenting in
part).
22. See id. at 2159.
Breyer, joined by Justices Stevens, Souter, and Ginsburg dissented. Justice Breyer agreed with Justice Kennedy that the plurality "view[ed] this case through the wrong legal lens," and that the correct analysis was due process rather than takings. Justice Breyer argued that imposing liability on Eastern rather than on the present industry, taxpayers, or coal consumers was not unfair and thus did not violate due process principles. Thus, five of the nine justices believed the appropriate analysis was due process and not takings, but split over the application of that analysis to the Eastern case.

I

PLURALITY: TAKINGS TO AVOID DUE PROCESS

Justice O'Connor's plurality opinion began by noting that, while the inquiry is undeniably ad hoc and fact intensive, three factors have traditionally informed regulatory taking analysis: "the economic impact of the regulation, its interference with reasonable investment-backed expectations, and the character of the governmental action." Ultimately, the inquiry is to be guided by examining whether the government acted with "justice and fairness."

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23. See id. at 2161 (Breyer, J., dissenting).
24. See id. at 2167.
25. Justice Thomas signed on to the plurality and wrote a separate concurrence in which he offered the opinion that the main constitutional issue was the ex post facto nature of the act. In so doing he invited reconsideration of the Court's holding in Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798), that the ex post facto clause, U.S. CONST. art. I, § 9, cl. 3, applies only in the criminal context. See Eastern Enterprises, 118 S. Ct. at 2154 (Thomas, J., concurring). Justice Stevens also dissented, and was joined by Justices Breyer, Ginsburg, and Souter. Justice Stevens' dissent focused on the historical record in arguing that prior to Eastern's departure from the coal industry, operators and miners had an implicit understanding that the operators would provide lifetime health benefits, and therefore Eastern's reasonable expectations could not have been unfairly infringed. Thus, whether the case was analyzed under either the Takings Clause or the Due Process Clause, Eastern failed to overcome the presumption of constitutionality afforded to an act of Congress. See id. at 2160-61 (Stevens, J., dissenting).
26. Id. at 2146 (plurality opinion) (quoting Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979)) (internal quotation marks omitted). The opinion first dispensed with a jurisdictional matter, deciding that the request for equitable relief need not wait upon exhaustion of just compensation claims pursued through the Court of Federal Claims under the Tucker Act. The plurality noted that given the nature of the taking here— a payment of funds—"it cannot be said that monetary relief against the Government is an available remedy." Id. at 2145. Thus, "the presumption of Tucker Act availability must be reversed where the challenged statute . . . requires a direct transfer of funds." Id. (quoting In re Chateaugay Corp., 53 F.3d 478, 493 (1995)) (internal quotation marks omitted).
27. Id. at 2146 (citing Andrus v. Allard, 444 U.S. 51, 65 (1979)).
Justice O'Connor relied heavily on decisions of the Court upholding similar legislative schemes, such as the Black Lung Benefits Act of 1972\(^\text{28}\) and the Multiemployer Pension Plan Amendments Act of 1980.\(^\text{29}\) While conceding that these statutory regimes had survived both due process and takings challenges in the past, and that Congress enjoyed considerable leeway to fashion economic legislation, Justice O'Connor nevertheless found that "our decisions ... have left open the possibility that legislation might be unconstitutional if it 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."\(^\text{30}\) The application of the Coal Act to Eastern, Justice O'Connor argued, was such a case.

According to Justice O'Connor, each of the traditional three factors in the takings inquiry was satisfied. Given Eastern's early exit from the industry, prior to the adoption of plans that guaranteed lifetime health benefits, its liability of $50 to $100 million seemed disproportionate to Eastern's experience with earlier benefits plans.\(^\text{31}\) While the amount of the liability did not itself imply a taking, previous decisions had suggested that "an employer's statutory liability for multiemployer plan benefits should reflect some 'proportionality' to its experience with the plan."\(^\text{32}\) Thus, Justice O'Connor argued that the Coal Act had "forced a considerable financial burden on Eastern,"\(^\text{33}\) satisfying the first factor of the regulatory takings analysis. Turning to the second factor, Justice O'Connor held that because the Coal Act "attaches new legal consequences to [an employment relationship] completed before its enactment,"\(^\text{34}\) it "substantially interferes with Eastern's reasonable investment-backed


\(^{30}\) Eastern Enterprises, 118 S. Ct. at 2149 (plurality opinion).

\(^{31}\) See id. at 2149-50.

\(^{32}\) Id. at 2149 (quoting Concrete Pipe & Prods., 508 U.S. at 645).

\(^{33}\) Id.

\(^{34}\) Id. at 2151 (quoting Landgraf v. USI Film Prods., 511 U.S. 244, 270 (1994)) (internal quotation marks omitted).
Indeed, the legislation "reaches back 30 to 50 years to impose liability against Eastern based on the company's activities between 1946 and 1965." This was especially disturbing to the plurality given the general disfavor with which retroactivity is viewed. While respondents had argued that retroactive liability was justified given the implicit industry-wide agreement that the earlier pension plans would fund lifetime health benefits, Justice O'Connor found that this contention was not supported by the earlier agreements. Turning to the third and final factor in the takings analysis, Justice O'Connor recognized that complex problems like those addressed by the Coal Act often call for legislative solutions, but those solutions are always constrained by the fundamental fairness concerns underlying the Takings Clause. Allowing the government to offer a solution that burdens a few employers based on actions far in the past, unrelated to any commitment made by those employers or to any injury they caused, would license government action of a most unusual character. Thus, in the judgment of the plurality, the governmental action deprived Eastern of substantial property interests and interfered with reasonable investment-backed expectations, doing both in a most suspect way—an improper taking under the Fifth Amendment.

Justice O'Connor only briefly discussed the issue of due process. She noted both the difficult standard required of a private litigant to challenge a government regulation under due process and the Court's reluctance to invalidate economic regulation using due process analysis. Justice O'Connor conceded that the severe retroactive nature of the Coal Act raised

35. Id.
36. Id.
37. See id.; see also, e.g., Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827, 855 (1990); Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988); Dash v. Van Kleeck, 7 Johns. 477, 503 (N.Y. 1811) ("It is a principle in the English common law, as ancient as the law itself, that a statute, even of the omnipotent parliament, is not to have a retrospective effect.").
39. See Eastern Enterprises, 118 S. Ct. at 2152 (plurality opinion).
40. See id. at 2153.
41. See id.
42. See id. ("To succeed, Eastern would be required to establish that its liability under the Act is 'arbitrary and irrational.'") (quoting Usery v. Turner Elkhorn, 428 U.S. 1, 15 (1976)).
43. See id.
legitimate due process questions, and that the takings and due process analyses have become somewhat correlated. Nevertheless, she concluded that any due process analysis was unnecessary given the finding that a taking had occurred.

II

CONCURRENCE: A RARE DUE PROCESS VIOLATION

Justice Kennedy praised the plurality's conclusion that the Coal Act is "arbitrary and beyond the legitimate authority of the Government to enact." His reason for this conclusion, however, differed sharply from that of the plurality. He rejected the plurality's Takings Clause analysis for the fundamental reason that takings, even regulatory takings, must involve deprivation of a specific property right, and such a deprivation was not at stake in the Coal Act. "The Coal Act neither targets a specific property interest nor depends upon any particular property for the operation of its statutory mechanisms." He questioned the wisdom of extending an already complex and uncertain doctrine to a whole new class of cases and took the plurality to task for overlooking the importance of this threshold inquiry. Justice Kennedy also pointed out that the takings analysis is inapplicable because the Takings Clause assumes that the governmental action in question is otherwise constitutional, not barring government action but merely ensuring that the government "pays the charge" to do what it wants. Thus, any other constitutional challenge to a government action should logically precede a takings claim. Accordingly, he argued that an inquiry into due process, which ascertains whether the government action is legitimate, should precede any takings analysis, which ascertains only whether the government must

44. See id.
45. See id.
46. Id. at 2154 (Kennedy, J., concurring in judgment and dissenting in part).
47. See id. at 2154-58.
48. Id. at 2156.
49. See id. at 2155.
50. See id. at 2157 ("As its language indicates, and as the Court has frequently noted, [the Takings Clause] does not prohibit the taking of private property, but instead places a condition on the exercise of that power. This basic understanding of the Amendment makes clear that it is designed not to limit the governmental interference with property rights per se, but rather to secure compensation in the event of otherwise proper interference amounting to a taking.") (quoting First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 314-15 (1987) (emphasis and citation omitted)); see also Ronald J. Krotoszynski, Jr., Fundamental Property Rights, 85 GEO. L.J. 555, 572 (1997) (observing that Takings Clause "speaks directly to occasions of presumptively rational government behavior").
pay for its action. Finally, Justice Kennedy used the plurality's jurisdictional holding against it, pointing out that, if the question before the Court is not one of compensation, then the takings analysis would be contraindicated: "Given that the constitutionality of the Coal Act appears to turn on the legitimacy of Congress' judgment rather than on the availability of compensation, the more appropriate constitutional analysis arises under general due process principles rather than under the Takings Clause."  

Turning to the due process analysis, Justice Kennedy conceded that there exists a presumption that economic legislation is constitutional but pointed out that the Court has paid careful, well-deserved attention to retroactive legislation. He concluded that, given Eastern's early exit from the industry, its limited obligations prior to its withdrawal, and the extremely retroactive nature of the solution imposed by Congress, the "[application of the Coal Act to Eastern would violate the proper bounds of settled due process principles."

III

DISSENT: DUE PROCESS LENS, BUT NO VIOLATION

Justice Breyer's dissent agreed with Justice Kennedy's concurring opinion to the extent that it found the Due Process Clause, rather than the Takings Clause, the appropriate framework for analysis. Thus a majority of the Court actually favored applying Due Process principles rather than the Takings Clause to Eastern. Justice Breyer and his colleagues, however, reached a different outcome after applying the due process test.

Turning to the takings question, Justice Breyer pointed out...
that no interest in physical or intellectual property was at stake in *Eastern*, but only "an ordinary liability to pay money." 58 He noted that the Court had only applied takings analysis in two cases of general liability, *Connolly* and *Concrete Pipe & Products*, rejecting the claims in both. 59 He confronted the plurality with the doctrinal difficulties that would flow from such a finding. A Takings Clause unmoored from the limitation to specific property interests and from the requirement of just compensation could apply to tax provisions 60 and to economic regulation in general. 61 Ultimately Justice Breyer declared that it required "torture" to fit the Takings Clause to the case at hand. 62 Fortunately the Court had no need to go through such contortions "as the potential unfairness of retroactive liability finds a natural home in the Due Process Clause, a Fifth Amendment neighbor." 63

According to the dissent's reasoning, the basic purpose of the Due Process clause is to ensure "the fair application of law." 64 If the Coal Act were an unfair retroactive assessment of liability it thereby "undermines a basic objective of law itself." 65 On the substantive question of whether Eastern was unfairly required to make payments to the Combined Fund based on its past employment of the miners, Justice Breyer concluded that "the historical circumstances, taken together, prevent Eastern from showing that the Act's 'reachback' liability provision so frustrates Eastern's reasonable settled expectations as to impose an unconstitutional liability." 66 These historical circumstances included Eastern's employment of the miners under conditions that may have contributed to their future health problems; Eastern's contribution prior to 1966 to the creation of an implicit promise of continued benefits; Eastern's understanding of the government's interest in seeing that the miner's future benefits were assured; and finally, Eastern's continuing to share in the profits of the coal industry after 1966 through a wholly owned

58. Id. at 2162.
59. See id.
60. See id. ("If the [Takings] Clause applies when the government simply orders A to pay B, why does it not apply when the government simply orders A to pay the government . . .?").
61. See id. ("Would that Clause apply to some or to all statutes and rules that 'routinely creat[e] burdens for some that directly benefit others'?") (quoting *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 223 (1986)).
62. Id. at 2163.
63. Id.
64. Id. at 2164.
65. Id. at 2163.
66. Id. at 2164.
Justice Kennedy’s concurring opinion and Justice Breyer’s dissenting opinion cogently critiqued the plurality’s application of the Takings Clause to Eastern. While it may fall short of “torture” to apply the Takings Clause to a general economic liability, little, if anything, recommends this reading. The plurality seems to have embraced the strained analysis solely to avoid the substantive due process question. Upon reaching the precipice of economic due process analysis, the plurality shuddered and then retreated; such analysis thankfully did not need to be pursued because takings had disposed of the problem. Indeed, those Justices who applied due process analysis to Eastern took pains to distance themselves from the discredited past of substantive due process typified by Lochner v. New York despite the fact that four of the five found that the Coal Act met due process requirements. Simply engaging in the substantive due process inquiry was suspect. Thus, even those Justices who applied the due process analysis reacted strongly to the long shadow of Lochner. Yet if Eastern’s confused takings analysis represents the alternative, it is time for a reconsideration and rehabilitation of substantive due process.

67. See id. at 2164-67.
68. 198 U.S. 45 (1905).
69. Thus Justice Breyer wrote: “Insofar as the plurality avoids reliance upon the Due Process Clause for fear of resurrecting Lochner v. New York and related doctrines of ‘substantive due process’ that fear is misplaced.” Eastern Enterprises, 118 S. Ct. at 2163 (Breyer, J., dissenting) (citation omitted). “To find that the Due Process Clause protects against this kind of fundamental unfairness . . . is not to resurrect long-discredited substantive notions of ‘freedom of contract.’” Id. at 2164. Justice Kennedy made no mention of Lochner, but continually pointed out that Eastern was one of those “rare” cases that would run afoul of the due process analysis. See supra note 55 and accompanying text.
70. In this attempt to distance themselves from the discredited past, both Justice Kennedy’s concurrence and Justice Breyer’s dissent relied heavily on the retroactive nature of the Coal Act to distinguish the application of due process analysis in Eastern from a more widespread application to general economic regulation. See id. at 2158 (Kennedy, J., concurring in judgment and dissenting in part) and at 2163 (Breyer, J., dissenting). Given the Court’s previous position on this issue that “the strong deference accorded legislation in the field of national economic policy is no less applicable when that legislation is applied retroactively,” Pension Benefit Guar. Corp. v. R.A. Gray & Co., 467 U.S. 717, 729 (1984), the Justices’ attempts to use this to distinguish Eastern from other applications of due process review fail to convince.
A. The Evils of the Lochner Era

While it is a veritable chant of the modern judiciary to reject the "evils of the *Lochner* era,"\(^7\) ascertaining precisely the nature of those evils is more difficult. In the approximately thirty years between *Lochner* and *Nebbia v. New York*,\(^2\) the Supreme Court subjected state regulation of the economy to searching review and struck down such legislation with some frequency.\(^7\) It did so by importing "substance" into the Due Process Clause of the Fifth and Fourteenth Amendments.\(^4\) Substantive due process, particularly as applied by the *Lochner* Court, inspired resistance from the beginning both from within the judiciary\(^7\) and from the wider polity.\(^7\) Critics charged that the judiciary was reading values into the Constitution that could not be found there, and that those values unfairly restricted the legislature's ability to regulate the growing industrial economy.\(^7\) Such criticisms did not go unheeded, and beginning with *Nebbia* in 1934, the Court began a retreat from due process review of economic regulation, a retreat that accelerated through to the 1937 "switch in time" in

\(^{71}\) See, e.g., Ferguson v. Skupra, 372 U.S. 726, 731 (1963) ("[O]ur abandonment of the use of . . . the Due Process Clause to nullify laws which a majority of the Court believed to be economically unwise . . . ."); Williamson v. Lee Optical, Inc., 348 U.S. 483, 488 (1955) ("The day is gone when this Court uses the Due Process Clause . . . to strike down . . . laws, regulatory of business and industrial conditions . . . .").

\(^{72}\) 291 U.S. 502 (1934) (upholding government regulation fixing the price of milk).

\(^{73}\) Slightly fewer than 200 laws were struck down by the Court in the *Lochner* era. See GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 466 (13th ed. 1997).

\(^{74}\) The *Lochner* case itself typifies the holdings many now find so objectionable. In *Lochner*, the Court struck down a New York law regulating the baking industry, including a provision of a maximum ten hour work day for bakers, on the theory that such a law interfered with the liberty of contract and thus violated due process. See *Lochner* v. New York, 198 U.S. 45, 64 (1905). Justice Holmes dissented vigorously and accused the majority of undue interference with legislative prerogative. See id. at 75 (Holmes, J., dissenting). This charge is echoed by many modern critics. See, e.g., Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689 (1984).

\(^{75}\) Justice Holmes' dissent is noted supra note 74. Later Justices Brandeis, Stone, and Cardozo typically dissented from the Court's substantive due process holdings. Learned Hand was one of many critics not on the Supreme Court. See generally Learned Hand, *Due Process of Law and the Eight-Hour Day*, 21 HARV. L. REV. 495 (1908). 76. The Roosevelt campaign of 1912 and the LaFollette campaign of 1924 both heavily criticized the Court's *Lochner* era holdings. See GUNTHER, supra note 73, at 466 n.2.

\(^{77}\) See generally BERNARD H. SIEGAN, ECONOMIC LIBERTIES AND THE CONSTITUTION (1980); Charles Warren, *The New "Liberty" Under the Fourteenth Amendment*, 39 HARV. L. REV. 431 (1926) (attacking the Court's reading of liberty as extending well beyond the common law and the intent of the due process clause).
No economic regulation has been found in violation of the Due Process Clause by the Supreme Court since 1937; indeed, the doctrine is so discredited that argument on the issue before the Court is rare.79

Despite the reputation of the _Lochner_ Court, it upheld the majority of economic regulation it reviewed,80 including regulation of exactly the type that its critics felt it obstructed.81 Even during the _Lochner_ era, the scrutiny given to economic legislation under due process analysis was, in theory at least, minimal.82 Thus, the Court employed the same standard it uses currently: whether the regulation is rationally related to advancing a legitimate legislative end.83

**B. Reasons for Reconsideration**

While the due process standard may have been applied with too much rigor by the _Lochner_ Court, such extremism has bred an equal extremism in the modern abdication of any meaningful review of economic legislation in the Court's "hands off" approach.84 Neither extreme is warranted. Periodically, some

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78. 300 U.S. 379 (1937) (upholding a minimum wage for women).
79. Ordinarily such argument is only taken up when a lower court has found a statute unconstitutional. See SIEGAN, supra note 77, at xiv.
80. See id. at 45.
81. See, e.g., Bunting v. Oregon, 243 U.S. 426 (1917) (upholding a ten-hour workday for all factory workers); Muller v. Oregon, 208 U.S. 412 (1908) (sustaining a ten-hour workday for women laundry workers). The Court was, however, derailing the emerging New Deal with its Commerce Clause jurisprudence.
82. See _Lochner_ v. New York, 198 U.S. 45, 56 (1905) ("Is this a fair, reasonable, and appropriate exercise of the police power of the state, or is it an unreasonable, unnecessary, and arbitrary interference with the right of the individual to his personal liberty?"). The _Lochner_ Court also noted that, "The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate . . . ." _Id._ at 57.
83. In practice, the standard may have been somewhat higher, particularly in regard to the Court's evaluation of the legitimacy of legislative ends. See Gerald Gunther, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 HARV. L. REV. 1, 42 (1972) ("The primary evil of the discredited [Lochner] doctrine was the dogmatic judicial intervention regarding ends, not means."). On the "ends" aspect of the _Lochner_ test, see generally LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW (2d ed. 1988); Cass R. Sunstein, _Lochner's Legacy_, 87 COLUM. L. REV. 873 (1987); and Sunstein, supra note 74. Nevertheless, the Court's eventual withdrawal from the area was not accompanied by any visible change in the standard of review applied. See _West Coast Hotel Co._, 300 U.S. at 391 ("[R]egulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process."); _Nebbia_, 291 U.S. at 525 ("[T]he guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained.").
84. See, e.g., Williamson, 348 U.S. at 488 ("It is enough that there is an evil at
commentators have suggested a middle way, in which the mere rationality standard could be given "teeth" without reviving the judicial usurpation of the *Lochner* era. Thus, a more searching review of economic legislation under the Due Process Clause would not require the Court to overturn doctrine in this area; rather, it would require the Court only to apply the test it has articulated both during the *Lochner* era and after.

There are additional reasons to suspect that the modern distrust of due process analysis is misplaced or at least exaggerated. While many criticize the *Lochner* Court's protection of contract and property rights, the Court simultaneously extended substantive due process protection to non-economic rights. Nor has the utility of due process for protecting such rights been limited to the heyday of the doctrine in the first third of this century. Beginning with *Griswold v. Connecticut*, the Court revived its dormant substantive due process jurisprudence and applied it to extra-constitutional "fundamental" non-
economic liberties. The Court not only resurrected the doctrine, but reinvigorated it by adopting a much stricter scrutiny.

The privacy and autonomy interests at stake in Griswold are no more (or less) found in the Constitution than are the contract and property interests so ardently defended in Lochner. At best, the sharp distinction between the hands-off review afforded economic rights and the heightened scrutiny given to personal rights under the same standard creates a confused jurisprudence. At worst, it subjects the Court to suspicions of hypocrisy and the judicial equivalent of multiple personality disorder. The application of substantive due process in the modern cases sparks a great deal of controversy—within the judiciary, from legal scholars, and from the wider polity. While initially some challenged the very legitimacy of the Court's review in the area of "fundamental rights," more recent critiques focus on the Court's choice of fundamental values and the heightened scrutiny they receive. More important than the debate in the academic literature, the Court's own decisions

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89. See, e.g., Cruzan v. Missouri Dep't of Health, 497 U.S. 261 (1990) (implicitly recognizing a right to die under certain circumstances); Moore v. East Cleveland, 431 U.S. 494 (1977) (striking down, as a violation of substantive due process, a zoning law that limited occupancy of a dwelling to members of a single family narrowly defined); Roe v. Wade, 410 U.S. 113 (1973) (recognizing privacy interests in the area of abortion).

90. "The law must be shown necessary, and not merely rationally related to, the accomplishment of a permissible state policy." Griswold, 381 U.S. at 497 (Goldberg, J., concurring) (internal quotation marks and citation omitted).

91. See, e.g., id. at 508 (Black, J., dissenting).


94. Included here are some early critics who have modified—somewhat—their opinions. See ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1990); JOHN HART ELY, DEMOCRACY AND DISTRUST (1980). For an entertaining summary of Bork's work, see Richard A. Posner, Bork and Beethoven, 42 STAN. L. REV. 1365, 1378 (1990) ("Originalism's bark [at least this originalist's bark], it appears, is worse than its bite . . . Originalism—[at least Bork's originalism]—is not an analytic, but a rhetoric that can be used to support any result the judge wants to reach.").
post-Roe make clear its commitment to some "fundamental rights" jurisprudence. The presence of such a healthy, if controversial, jurisprudence in the area of non-economic rights certainly suggests that the repudiation of due process analysis in the area of economic regulation is a decision of pragmatic judicial policy, not a principle that the doctrine itself is untenable. A resumed rational examination of economic regulation, then, has some potential to lend consistency to the Court's jurisprudence and to silence those critics who complain about the incoherence of the Court's application of the due process doctrine.

Further, the courts of several states, in interpreting similar state constitutional provisions, have never followed the Supreme Court's complete abdication in the area of substantive due process. These state courts have continued to review economic legislation with more care and to invalidate it more frequently than have the federal courts.\(^{95}\) The experiences of such states, though not without problems of their own,\(^{96}\) belie the theory that modern economy and democracy are incompatible with judicial oversight of economic regulation,\(^{97}\) and suggest that there is a practicable, if difficult, middle ground between the Court's earlier rigidity and its modern permissiveness.\(^{98}\)

This current Supreme Court has shown itself to be open to reconsideration in some areas of jurisprudence, particularly as they have an impact upon economic regulation. The United States v. Lopez\(^ {99}\) decision provides an interesting parallel in the

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96. See Strnad, supra note 95, for a survey of the problems in the states' application of due process review.

97. See Struve, supra note 95, at 1464 (discussing the states of Illinois, Massachusetts, New York, and Pennsylvania, and concluding that "[i]n some state courts, notably those of several great industrial states, [economic due process] has survived.").

98. See Strnad, supra note 95, at 1488 n.5 ("One bold state court relied solely on the federal due process clause to invalidate a statute regulating cosmeticians."); see also Christiaan's, Inc. v. Chobanian, 373 A.2d 160 (R.I. 1977).

area of Commerce Clause analysis. *Lopez* was the first and only restriction on federal power under the Commerce Clause since 1937, yet it hardly presaged a deluge of cases in which the federal courts struck down legislation passed pursuant to the Commerce Clause.¹⁰⁰ Nor is *Lopez* likely to be a threat to the generally plenary powers of Congress under the Commerce Clause. Nevertheless, the decision is not without impact. *Lopez* has, at the very least, stirred a great deal of commentary,¹⁰¹ and most commentators feel it has affected and will continue to affect future congressional action—particularly in regards to how Congress drafts and documents its legislative efforts.¹⁰²

Two lessons from *Lopez* seem particularly applicable to the revival of an economic substantive due process analysis by the Supreme Court. First, the fact that no economic legislation has been struck down by the Court since 1937 should be no bar, and a reversal of this trend need not open the floodgates to judicial usurpation in the area of economic regulation. Second, a revival of the doctrine may be useful in prompting an academic and public debate over the increasingly pervasive nature of legislative regulation of the economy and in encouraging legislatures to pay more careful attention to document the purported ends of legislation and the means chosen to achieve those ends.

**CONCLUSION**

Perhaps the best argument for a reconsideration of economic substantive due process is *Eastern* itself. A takings analysis, unconstrained by requirements that a specific property interest

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100. The Supreme Court has struck down no law as exceeding the Commerce Clause since its decision in *Lopez*. The decision has been cited over 400 times by the Courts of Appeal, but arguably in only three cases has government action been struck down as violative of the Commerce Clause. *See* United States v. Wilson, 133 F.3d 251 (4th Cir. 1997); United States v. Denalli, 73 F.3d 328 (11th Cir. 1996); United States v. Pappadopoulos, 64 F.3d 522 (9th Cir. 1996). Each of these were criminal cases, two were cases under the same arson statute. *Lopez* seems to have little future to affect federal regulatory activity. For a summary, see William Funk, *The Lopez Report*, ADMIN. & REG. L. NEWS, Summer 1998, at 1.

101. The *Lopez* decision has been the topic of some 300 journal articles and has been cited in over 1200 more.

102. *See, e.g.*, Julian Epstein, *Evolving Spheres of Federalism After U.S. v. Lopez and Other Cases*, 34 HARV. J. ON LEGIS. 525, 555 (1997) ("At the very least, these evolving doctrines will force Congress to exercise greater care in drafting laws.... It is possible that as a result Congress will draft statutes better insulated from constitutional attack. Such strategems may include utilizing different and overlapping authorities.... Thus, while the *Lopez* decision is unlikely to result in any watershed change in congressional authority, it may enhance congressional care and creativity in the evolving areas of federalism as the debate regarding the proper scope of federal powers continues both in and out of the courts.").
be impaired and that redress be limited to "just compensation," has the potential to serve as a review of economic regulation both more strict and more widespread than that being avoided by those who abhor a revival of substantive due process. The growth of takings litigation over the past twenty years demonstrates the Court's inability to turn its back completely on local economic regulation. Prior to *Eastern*, the takings revival had been concentrated on land use regulation, but with the *Eastern* decision this may no longer be the case. The Court's application of takings analysis to a pure economic liability indicates its willingness to use the Takings Clause to review a much broader array of governmental action. Justice Breyer indicates as much in dissent, as he criticized the plurality for broadening takings so much that it might be used to review taxes and social regulations. This role is more naturally filled by a due process review. Not only is the Takings Clause in *Eastern* forced to fill the role of its Fifth Amendment neighbor, but the Court has also shown that it is willing to apply a more rigorous standard of review in the context of takings than it would in due process. Consequently, those who prefer minimal scrutiny in the area of economic regulation may be better served by a limited revival of substantive due process than by more rigorous review under the Takings Clause. Even in the land use context, the Court has often reviewed regulations with an eye toward the appropriateness of the governmental action, rather than whether compensation is warranted, an inquiry more typical of due process analysis than takings. Thus, the Court is engaged in just the task it has turned its back on in its rejection of due process analysis for economic regulation. Far better to bring it into the light and apply the appropriate standard than to force the Takings Clause to serve in a capacity for which it is ill-suited.


104. See *Eastern Enterprises*, 118 S. Ct. at 2162 (Breyer, J., dissenting).

105. See the recent discussion of the evolution of the higher standard for takings in Anderson, supra note 103, at 504-06 (discussing the evolution of the tight nexus/rough proportionality standard in takings cases as it has progressed through *Agins v. City of Tiburon*, 447 U.S. 255 (1980), *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994)).

106. See Anderson, supra note 103, at 477.