

THE ALLURE OF CONSEQUENTIAL FIT

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I. INTRODUCTION

The Supreme Court's highly fractured decision in *Eastern Enterprises v. Apfel*,¹ while of little precedential value,² provides an invaluable lens through which to examine two critical issues in the Court's developing jurisprudence on the constitutionality of economic legislation. First, given the collapse of definitional limitations on property, what is the reach of the takings protections? The plurality opinion in *Eastern Enterprises* comes close to holding that taxes can violate the takings protections,³ a position that the Supreme Court unapologetically adopted at the turn of the Twentieth Century but more recently has seemed to reject.⁴ Second, to what degree should courts use the takings protections or due process clauses to scrutinize the way in which the government allocates the costs of its actions?

This Article focuses principally on the second, allocative question. In 1978, the Supreme Court announced that it found it impossible to agree on any set tests for determining when property regulations violate the takings protections.⁵ Takings law

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1. 524 U.S. 498 (1998).

2. Most lower courts have concluded that, given the failure of five Justices to agree on an approach, *Eastern Enterprises* provides no precedential value. See, e.g., *United States v. Alcan Aluminum Corp.*, 49 F. Supp. 2d 96, 99 (1999).

3. *Eastern Enters.*, 524 U.S. at 522-23.

4. See, e.g., *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211 (1986); *Concrete Pipe & Prods. of Cal., Inc. v. Construction Laborers Pension Trust for S. Cal.*, 508 U.S. 602 (1993).

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

was at its nadir, and the Court seemed ready to validate virtually any governmental action short of a full and outright confiscation of land. In the last two decades, however, the Court has embarked on two courses that have breathed new life into the takings protections. First, the Court has examined regulations to see whether they are structurally similar to the exercise of eminent domain, the Court's core conception of a taking.⁶ Under this structural approach, the Court has looked to see whether regulations lead to "physical occupations" of property or destroy all of the economically viable use of property.⁷ Commentators have had a field day lambasting this approach, correctly noting that the approach is divorced from any substantive theory of what motivates the takings protections and engages in unjustified conceptual severance.⁸

In a second line of cases, however, the Supreme Court has scrutinized the relationship between the actions or status of a property owner and the burden imposed on the property owner by the challenged regulation—a relationship that I will call "consequential fit"—to determine whether the actions or status justify the burden.⁹ Where the government has conditioned the development of land on the public dedication of some interest in the land, for example, the Court has asked whether the required dedication is responsive to legitimate governmental concerns with the development and whether it is "roughly proportional" to those concerns.¹⁰ Compared to the Supreme Court's structural approach, inquiries into consequential fit enjoy a substantive allure. Rather than abstractly deciding what looks like a taking, courts can sink their teeth into the meaty and meaningful question of whether particular property owners, rather than society more broadly, should bear the cost of public goods and services. But in biting into allocational issues, the Court invites allusions to *Lochner v. New York*¹¹ and raises a host of new questions:

6. See, e.g., *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426-35 (1982); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1014-19 (1992).

7. See *Loretto*, 458 U.S. at 426-35; *Lucas*, 505 U.S. at 1014-19.

8. See, e.g., Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1674-78 (1988).

9. See *infra* Part III.

10. See *infra* notes 83-93 and accompanying text.

11. 198 U.S. 45 (1905).

Will the Court's interest in consequential fit draw it into a roving review of all governmental allocative decisions? Assuming that a legislative allocation is minimally "rational," should courts ever second guess the legislative judgment underlying the allocation? What is the justification for a "consequential fit" test compared to a variety of other allocational tests that the Court might adopt?

Part II of this Article argues that efforts to shelter "taxes" as an abstract category from takings analysis will inevitably fail because property confiscations and regulations are themselves implicit taxes. Because all takings cases concern the allocation of costs through implicit and explicit taxes, moreover, takings cases inevitably require courts to review allocative decisions and limit legislative discretion over the allocation of public burdens. Part III summarizes the Supreme Court's special interest in the consequential fit of legislative or regulatory burdens, with a particular emphasis on the Court's decision in *Eastern Enterprises*. Part IV explores what normative rationales, if any, might justify a constitutional inquiry into consequential fit. Although no Justice has yet tried to set out a detailed rationale, the Court's opinions suggest three possible bases: basic concepts of fairness, the risk of political discrimination against some property owners, and the protection of legitimate expectations. Of these potential rationales, only the risk of political discrimination provides a justification that is historically rooted, institutionally appropriate, and readily circumscribed. Part V uses two environmental statutes—Superfund and the Endangered Species Act—to examine further the differences among the various rationales for inquiring into consequential fit and the problems that each presents. Part VI provides a brief conclusion.

II. TAKINGS AND TAXES

In *Eastern Enterprises*, the Supreme Court came close to extending constitutional takings analysis to taxes.¹² *Eastern Enterprises* involved a challenge, under both the takings and due process clauses of the Fifth Amendment, to the Coal Industry

12. *Eastern Enters.*, 524 U.S. at 522-23.

Retiree Health Benefit Act (the "Coal Act").¹³ The Coal Act establishes a Combined Benefit Fund to cover the health costs of retired coal miners and their spouses and require former employers to pay into the fund.¹⁴ Justice O'Connor and three other members of the Court concluded that Eastern Enterprises' required payments under the Coal Act were an unconstitutional taking of its property;¹⁵ Justice Kennedy disagreed but decided that the payments violated substantive due process.¹⁶ Four dissenters, led by Justice Breyer, would have upheld the Coal Act.¹⁷ Only four members of the Court thus found the takings clause relevant to the Coal Act. Although the superficial disagreement between the plurality and the other five members of the Court was whether the takings protections extend to purely monetary obligations, this dispute camouflaged a more fundamental issue: Are taxes open to takings challenges? Reflecting the issue's sensitivity, no member of the Court chose to characterize payments under the Coal Act as a tax. Yet, the Coal Act requires former employers to make payments that are used to provide health benefits to the employers' former employees and their spouses,¹⁸ payments which on their face appear to be a tax. In other contexts, lower courts have unhesitatingly recognized that payments under the Coal Act are "taxes."¹⁹

Justice O'Connor's plurality opinion studiously avoided the tax issue.²⁰ The concurring and dissenting opinions, however, acknowledged the consequences that would have attended extending the takings protections to payments under the Coal Act.²¹ Justice Kennedy complained that the plurality's unwillingness to require a showing that some "specific property interest" is affected "would expand an already difficult and un-

13. *Id.* at 503-04.

14. *Id.* at 514-15.

15. *Id.* at 522-37.

16. *Id.* at 539-50 (Kennedy, J., concurring in the judgment and dissenting in part).

17. *Eastern Enters.*, 524 U.S. at 554-68 (Breyer, J., dissenting).

18. *Id.* at 514-15.

19. See, e.g., *LTV Steel Co. v. Shalala*, 53 F.3d 478, 498 (2d Cir. 1995); *UMWA 1992 Benefit Plan v. Leckie Smokeless Coal Co.*, 99 F.3d 573, 583 (4th Cir. 1996).

20. See *Eastern Enters.*, 524 U.S. at 522-23.

21. *Id.* at 541-47 (Kennedy, J., concurring in the judgment and dissenting in part); *id.* at 554-58 (Breyer, J., dissenting).

certain rule to a vast category of cases not deemed, in our law, to implicate the Takings Clause."²² According to Justice Kennedy, prior Court opinions had been "careful not to lose sight of the importance of identifying the property allegedly taken, lest all governmental action be subjected to examination under the constitutional prohibition against taking without just compensation."²³ Justice Breyer was more direct in his concerns: "[A]pplication of the Takings Clause here bristles with conceptual difficulties. If the Clause applies when the government simply orders A to pay B, why does it not apply when the government simply orders A to pay the government, i.e., when it assesses a tax?"²⁴

Although the Court is understandably troubled with opening up taxes to takings challenges, is there any principled basis for excluding taxes? All forms of property regulations and confiscations can be viewed as taxes. Where a governmental regulation reduces the value of property, the government is imposing an implicit tax on the property owner. Confiscations are in-kind taxes, the oldest form of taxation used by governments. Takings cases thus involve the constitutional scrutiny of a legislative choice to finance a particular governmental goal through an implicit or in-kind tax on property owners—and, where a court decides that a particular action is unconstitutional, the constitutional imposition of an "optimal" tax policy. The question in takings cases is always whether Congress can impose an implicit tax on the property owner, in the form of the challenged regulation or confiscation, or whether Congress must instead impose a tax on other citizens in order to compensate the property owner for the owner's loss in wealth. Who must bear the burden of the economic cost of the governmental action: the property owner or other taxpayers?²⁵

The parallel among confiscations, regulations, and taxes has not been lost on academics and commentators. Early legal treatises frequently meshed issues of inverse condemnation and

22. *Id.* at 542 (Kennedy, J., concurring in the judgment and dissenting in part).

23. *Id.* at 543.

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

25. For more on takings as a choice between different forms of taxation, see Barton H. Thompson, Jr., *The Endangered Species Act: A Case Study in Takings & Incentives*, 49 *STAN. L. REV.* 305, 354-67 (1997).

taxation, viewing both issues as focused on the fair allocation of the cost of public goods.²⁶ The economist A.G. Pigou first elaborated his theory of tax equity in the context of governmental takings of property.²⁷ Professor Richard Epstein, among others, has harbored no concerns about using the takings clause to directly attack traditional governmental taxes.²⁸

At the turn of the twentieth century, the Supreme Court itself willingly applied the takings protections to a subset of taxes.²⁹ In *Village of Norwood v. Baker*,³⁰ the Court held that property assessments imposed to pay for the opening of a street violated the takings protections because, in words similar to modern consequential fit inquiries, the assessments were in "substantial excess of the special benefits accruing"³¹ to the property owner by virtue of the new street.³² The Court conceded that the assessment "was an exercise of the power of taxation."³³

But the Court concluded that the power to tax property is not unlimited. "There is a point beyond which the legislative department, even when exerting the power of taxation, may not go consistently with the citizen's right of property."³⁴ State courts continue to scrutinize assessments and other taxes imposed on landowners and other subsets of the population for potential takings violations.³⁵

In recent decades, however, the United States Supreme Court has tried valiantly to separate traditional confiscations

26. See Jeb Rubenfeld, *Taxing, Taking, and Using* (1998) (U.S. Court of Federal Claims 1999 Spring Symposium, on file with the *Alabama Law Review*).

27. See A. PIGOU, *A STUDY IN PUBLIC FINANCE* 5-12 (3d rev. ed. 1949).

28. See RICHARD EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 99-104 (1985).

29. See *Village of Norwood v. Baker*, 172 U.S. 269 (1898).

30. 172 U.S. 269 (1898).

31. *Norwood*, 172 U.S. at 279.

32. *Id.*

33. *Id.* at 277.

34. *Id.* at 278.

35. See, e.g., *Furey v. City of Sacramento*, 598 P.2d 844, 847-48 (Cal. 1979) (sewer assessment); *Dixon Road Group v. City of Novi*, 395 N.W.2d 211, 216-17 (Mich. 1986) (special assessment); *Johnson v. City of Eagan*, 584 N.W.2d 770, 771-72 (Minn. 1998) (special assessment); *Westling v. County of Mille Lacs*, 581 N.W.2d 815 (Minn. 1998) (contamination tax); *City of Reno v. Folsom*, 464 P.2d 454, 455-56 (Nev. 1970) (special assessment); *Haynes v. City of Abilene*, 659 S.W.2d 638, 641 (Tex. 1983) (special assessment).

from "property regulations" from "taxation." According to even the most conservative members of the Court, the takings protections of the Constitution do not deal with the taking of money through taxes.³⁶ But with the disintegration of property,³⁷ the distinction between confiscations, property regulations, and taxes has proven harder and harder to draw. In 1980, the Supreme Court concluded that the interest on court-administered interpleader funds is constitutionally protected property.³⁸ By a narrow 5-4 margin, the Court concluded a year before *Eastern Enterprises* that interest earned on client funds placed in Texas' Interest on Lawyers Trust Account program is the property of the client for the purpose of takings protections.³⁹ Having extended the takings protections to interest on monetary funds, it is not surprising that four justices found it impossible to avoid the temptation to extend the takings protection to money itself in *Eastern Enterprises*. And once a justice takes this step, it is hard to see why taxes are not fodder for a takings analysis.

With that last step, of course, things get constitutionally dicey. In the post-*Lochner* era, courts are justifiably concerned that if they extend the takings protections to taxes, they will be drawn into a broad and dangerous constitutional review of governmental tax policy. But the answer does not lie in trying to define a category of governmental actions labeled "taxes" and then declaring that all taxes are off-limits to takings scrutiny. For the reasons already discussed, confiscations, property regulations, and taxes are not substantively differentiable.⁴⁰ The concerns motivating the takings protections, moreover, may well speak to many governmental requirements traditionally considered taxes.⁴¹ A better approach to limiting the reach of the tak-

36. See, e.g., *Pennell v. City of San Jose*, 485 U.S. 1, 23 (1988) (Scalia, J., concurring in part and dissenting in part). A few state courts have been more willing to apply takings analysis to explicit taxes. See, e.g., *Westling*, 581 N.W.2d at 817; *City of Reno*, 464 P.2d at 456-57.

37. See Tom Grey, *The Disintegration of Property*, 22 NOMOS 69 (1980).

38. See *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164-65 (1980).

39. See *Phillips v. Washington Legal Found.*, 524 U.S. 156, 160 (1998).

40. See *supra* notes 25-28 and accompanying text.

41. In his insightful contribution to the Spring 1999 Symposium of the Court of Federal Claims, *When Does Retroactivity Cross the Line*: Winstar, *Eastern Enterprises*

ings protections is to focus on the motivations of the protections and to restrict application of the protections to those governmental impositions, whether regulations or taxes, that trigger those motivations. Part IV, which examines the possible motivations for a consequential fit test, will return to this issue.

III. JUDICIAL INQUIRIES INTO CONSEQUENTIAL FIT

In the last several decades, justices on the Supreme Court have shown a growing interest in scrutinizing the consequential fit of various governmental regulations and liabilities. The appropriateness of imposing the liability for particular public goods and services on select citizens has historically been the fodder of substantive due process and equal protection challenges. Under the minimum rationality standard, such challenges have provided only weak oversight of legislative judgments. As Part II highlights, however, the appropriateness of particular allocations is also the intrinsic substance of takings challenges. Takings cases ask whether the government can impose the cost of specific goods and services on individual property owners or must spread the cost to a broader set of citizens.

All three constitutional provisions—the due process clause, equal protection clause, and takings protections—could provide a platform for inquiries into consequential fit. Prior to *Eastern Enterprises*, a majority of the Supreme Court had held that individualized conditions imposed on the development of land must be both related and roughly proportionate to the potential harms of developing the land. Justice O'Connor, moreover, had suggested that *retroactive* impositions of liability must reflect a consequential fit with the prior actions of the plaintiff, but the Court as a whole had never adopted this position.⁴² A major

es and Beyond, Professor Rubinfeld argues that "taxation does not conscript. It does not dictate the use either of persons or property. Taxation leaves individual[s] free to choose for themselves what occupation to pursue, what to do with their property, and so on." Rubinfeld, *supra* note 26, at 8. But taxation does conscript; it tells you how you can utilize your money as definitively as a property regulation dictates use of your property. Nor is it clear that taxes, as traditionally conceived, are less intrusive into overall "freedom" (however freedom might be measured) than many property regulations and confiscations.

42. See *American Trucking Ass'n v. Smith*, 496 U.S. 167, 177-79 (1990).

question in *Eastern Enterprises* and subsequent Supreme Court cases has been the degree to which the Court is willing to engage in a hard scrutiny of consequential fit outside the context of conditioned property development.

A. Takings Cases

The Supreme Court has found it difficult to agree on a shared, coherent, and meaningful rationale for the takings protections. This difficulty, moreover, has influenced the Court's takings jurisprudence. In its 1978 decision in *Penn Central Transportation Co. v. City of New York*,⁴³ the Supreme Court seemed to admit defeat in developing either a shared rationale or any "set formula" for identifying when governmental actions unconstitutionally take property.⁴⁴ Lacking an overarching rationale, the Court announced that it would engage in an ad hoc, tripartite balancing of factors.⁴⁵ This tripartite standard focused on a case-by-case consideration of (1) the economic impact of the governmental regulation, (2) the reasonable investment-backed expectations of the property owner, and (3) the nature of the governmental action.⁴⁶ Lacking an underlying rationale for invoking the takings protections and haunted by the specter of *Lochner*, however, this tripartite approach has provided virtually no significant restrictions on property regulations.

In the last two decades, a conservative majority of the Court has therefore embarked on a structural approach to regulatory takings. Since it is generally accepted that total confiscations of property require compensation, the Court has scrutinized property regulations to determine how much they resemble confiscations. If a regulation quacks like a duck, the Court has seemed to suggest, it must be a duck. This structural approach has yielded two categorical tests for regulatory takings: Regulations that interfere with a "core property interest" by physically invading property require compensation,⁴⁷ and regulations that de-

43. 438 U.S. 104 (1978).

44. *Penn Central*, 438 U.S. at 123-24.

45. *Id.* at 124-28.

46. *Id.* at 124.

47. See, e.g., *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 438-42 (1982).

stroy all the economically viable use of a parcel of property also are takings.⁴⁸ By using structural analogies, the Court has attempted to avoid the need to agree on an underlying rationale. But without a rationale, the Court has been unable to defend its particular structural foci. In looking to see whether a regulation resembles a confiscation, why does the Court look at physical invasion and loss of economic value, rather than at the government's and property owner's respective authority to use the property? As Professor Margaret Jane Radin has observed, the Court's structural approach engages in a conceptual severance of property rights, arbitrarily giving some elements of a property right conclusive significance in takings cases.⁴⁹ The Court's categorical tests, moreover, have proven too formulaic and insufficiently encompassing and nuanced to serve as a robust decisionmaking guide, relegating courts over and over again back to the muddy tripartite standard of *Penn Central*.

Against the backdrop of the tripartite standard and a structural approach, consequential fit offers the allure of a cohesive, substantive standard. Both recently and at the turn of the twentieth century, the Court has suggested that at least some forms of governmental impositions violate the takings protections if they levy burdens that are unrelated or disproportionate to the actions or status of property owners—i.e., if they lack consequential fit. In scrutinizing the consequential fit of governmental impositions, the Court finally seems to be focusing on what the takings protections are all about: controlling the government's ability to impose the cost of public goods and services on a select set of property owners. The allure of substance, however, has camouflaged once again the lack of any agreed underlying rationale. And the lack of rationale, in turn, has left ambiguous the exact terms and scope of the inquiry into consequential fit.

1. *Early Inquiries Into Consequential Fit*.—The first Justice Harlan originally suggested the need for consequential fit in *Village of Norwood v. Baker*.⁵⁰ In *Norwood*, an Ohio town condemned a strip of land to build a road and then assessed the

48. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

49. Radin, *supra* note 8, at 1674-78.

50. 172 U.S. 269 (1898).

landowner for the cost of the condemnation, as well as of the condemnation proceeding.⁵¹ By a six to three vote, the Supreme Court, led by Justice Harlan, held that the assessment was an unconstitutional taking of the landowner's property.⁵² Although the Court might have argued that the condemnation and assessment were one action that effectively took the strip of land without compensation, the Court instead analyzed each action separately.⁵³ It held that the town properly paid compensation for its exercise of eminent domain,⁵⁴ but that the town could not impose an assessment on a property owner that was "in substantial excess of the special benefits accruing to him."⁵⁵ According to Harlan, confiscations are unconstitutional because they impose an undue burden on the affected property owners, and other disproportionate burdens also must fall for the same reason.⁵⁶

It is true that the power of taxing is one of the high and indispensable prerogatives of the government, and it can be only in cases free from all doubt that its exercise can be declared by the courts to be illegal. But such a case, if it can ever arise, is certainly presented when a property is specified, out of which a public improvement is to be paid for in excess of the value specially imparted to it by such improvement. As to such excess I cannot distinguish an act exacting its payment from the exercise of the power of eminent domain. In case of taxation the citizen pays his quota of the common burthen; when his land is sequestered for the public use he contributes more than such quota, and this is the distinction between the effect of the exercise of the taxing power and that of eminent domain. When, then, the overplus beyond benefits from these local improvements is laid upon a few landowners, such citizens, with respect to such overplus, are required to defray more than their share of the public outlay, and the coercive act is not within the proper scope of the power to tax.⁵⁷

At least two factors appeared to motivate the Court's inter-

51. *Norwood*, 172 U.S. at 274-76.

52. *Id.* at 279.

53. *Id.* at 276-96.

54. *Id.* at 274-77.

55. *Id.* at 279.

56. *Norwood*, 172 U.S. at 279-84.

57. *Id.* at 284.

est in the consequential fit of the assessment. The first factor was the Court's normative conception of fairness. According to Harlan, the takings protections are rooted "in those elementary principles of equity and justice which lie at the root of the social compact."⁵⁸ To the extent that the cost of a governmental action exceeds the benefits to particular property owners, "the burden should be borne by the community for whose benefit the improvement is made."⁵⁹ A second fear was political discrimination. As Justice Harlan argued in a related opinion, when the government relies on general taxation such as the income tax, "all [citizens] are equally affected"—providing everyone with protection against "unjust taxation."⁶⁰ Special assessments that are laid on a few landowners, however, invite abuse. "The majority are never backward in consenting to, or even demanding, improvements which they may enjoy without expense to themselves."⁶¹

The Supreme Court's initial interest in consequential fit, however, was short-lived. Within two years, the Court announced that it would generally leave to the legislature the determination of whether a special assessment is justified by the benefits conferred on the landowner.⁶² *Norwood* was distinguished as an extreme case in which the imposition of the entire cost of opening a street on "a single person" was clearly "an abuse of the law, an act of confiscation, and not a valid exercise of the taxing power."⁶³

State courts, however, have continued to invalidate special assessments when the burden is disproportionate to the benefit.⁶⁴ Courts have differed on the exact degree of consequential fit required. Some have employed the *Norwood* standard that assessments cannot be "in substantial excess of the special benefits";⁶⁵ some have required that there be "reasonable propor-

58. *Id.* at 280.

59. *French v. Barber Asphalt Paving Co.*, 181 U.S. 324, 368 (1901) (Harlan, J., dissenting).

60. *French*, 181 U.S. at 369 (Harlan, J., dissenting).

61. *Id.*

62. *Id.* at 343-44.

63. *Id.* at 344.

64. See, e.g., *Furey v. City of Sacramento*, 598 P.2d 844 (Cal. 1979); *Dixon Road Group v. City of Novi*, 395 N.W.2d 211 (Mich. 1986); *Haynes v. City of Abilene*, 659 S.W.2d 638 (Tex. 1983).

65. See, e.g., *Furey*, 598 P.2d at 851 (quoting *Norwood v. Baker*, 172 U.S. 269,

tionality between the amount of the assessment and the value of the benefits,⁶⁶ yet others have proscribed assessments that are "materially greater than the benefits."⁶⁷ State courts, however, almost uniformly require that special assessments provide some degree of consequential fit under the constitutional takings protections.⁶⁸

2. *Modern Interest in Consequential Fit.*—Although many lawyers trace the Supreme Court's modern interest in consequential fit to Justice Scalia's opinions in *Nollan v. California Coastal Commission*⁶⁹ and *Pennell v. City of San Jose*,⁷⁰ Justice O'Connor first suggested that the takings protections require consequential fit in her concurring opinion in *Connolly v. Pension Benefit Guaranty Corp.*⁷¹ Like *Eastern Enterprises*, *Connolly* involved a takings challenge to retroactive legislation, which required employers withdrawing from pension plans to pay a share of unfunded vested benefits.⁷² Quoting *Armstrong v. United States*,⁷³ the Court formulated the issue as whether "fairness and justice"⁷⁴ permitted Congress to decide that the "responsibility for rescuing [pension] plans that are in financial trouble"⁷⁵ should be "shoulder[ed]" by withdrawing employers.⁷⁶ The Court concluded that the employer's prior relationship with its plan justified imposing the burden on it;⁷⁷ there was no evidence, moreover, that the liability would "always be out of proportion to [an employer's] experience with the plan."⁷⁸ In her concurring opinion, Justice O'Connor explicitly proposed a

279 (1898)).

66. See, e.g., *Dixon Road Group*, 395 N.W.2d at 216.

67. See, e.g., *Haynes*, 659 S.W.2d at 641.

68. See, e.g., *Furey*, 598 P.2d at 844; *Dixon Road Group*, 395 N.W.2d at 211; *Haynes*, 659 S.W.2d at 638.

69. 483 U.S. 825 (1987).

70. 485 U.S. 1 (1988).

71. 475 U.S. 211 (1986).

72. *Connolly*, 475 U.S. at 214.

73. 364 U.S. 40 (1960).

74. *Connolly*, 475 U.S. at 227.

75. *Id.*

76. *Id.*

77. *Id.* at 225-28.

78. *Id.* at 226.

consequential fit test.⁷⁹ Retroactive liability for legislation benefiting an employee raises a constitutional issue, Justice O'Connor wrote, "in the absence of any connection between the employer's conduct and some detriment to the employee."⁸⁰ In addition, Justice O'Connor implied that the fit must justify both the liability and the size of the liability.⁸¹

Justice O'Connor gained an ally for her approach when Justice Scalia was confirmed to the Court several months later. Just as Justice O'Connor had insisted in *Connolly* that there be a "connection" between an employer's actions and retroactive liability imposed by Congress,⁸² Justice Scalia, writing for the Court in *Nollan v. California Coastal Commission*,⁸³ insisted that there be an "essential nexus" between the potential adverse impacts of a proposed land use and any governmental conditions imposed upon that use.⁸⁴ A year later in *Pennell v. City of San Jose*,⁸⁵ Justices Scalia and O'Connor tried unsuccessfully to get the Court to apply a consequential fit test to rent control ordinances. According to their concurring opinion penned by Justice Scalia, most property regulations are constitutional "because there is a cause-and-effect relationship between the property use restricted by the regulation and the social evil that the regulation seeks to remedy."⁸⁶ However, Justice Scalia noted, the government cannot make "one citizen pay, in some fashion other than taxes, to remedy a social problem that is none of his creation."⁸⁷

*Dolan v. City of Tigard*⁸⁸ added a proportionality element to the inquiry into consequential fit. According to the Court, the "degree" of conditions imposed upon a real estate development must be "roughly proportional" to the development's "projected impact."⁸⁹ *Dolan* unfortunately left the nature of the propor-

79. *Connolly*, 475 U.S. at 229 (O'Connor, J., concurring).

80. *Id.*

81. *Id.* at 232.

82. *Id.* at 229.

83. 483 U.S. 825 (1987).

84. *Nollan*, 483 U.S. at 825.

85. *Pennell*, 485 U.S. 1.

86. *Id.* at 20 (Scalia, J., concurring).

87. *Id.* at 23.

88. 512 U.S. 374 (1994).

89. *Dolan*, 512 U.S. at 386, 391.

tionality requirement ill-defined. The most direct interpretation of *Dolan's* "rough proportionality" requirement is that the conditions imposed on property development must be of the same rough magnitude as the impacts sought to be avoided. As Justice Souter noted in his dissent, however, the Court's application of the requirement to the facts of *Dolan* seemed to focus on the tightness of the nexus, rather than whether the extent of the conditions exceeded the extent of the potential impact.⁹⁰ In invalidating a condition that Mrs. Dolan donate land for a bike path to offset traffic generated by her business, for example, the Court emphasized that the city had not proven that the path would actually reduce traffic;⁹¹ the Court did not suggest that the dedication of the bike path went *beyond* the actions needed to offset any added traffic. Justice Souter has not been the only one confused regarding what the Court meant by proportionality. Others have read *Dolan* as requiring that the benefits from any condition justify its cost. According to Professor David Dana, for example, *Dolan* requires courts to ask "whether the amount of mitigation achieved by a development condition is sufficiently great to justify the developer's expenditure."⁹² Most lower courts, however, have read *Dolan* to require that the extent of conditions be roughly proportional to the extent of the potential impact.⁹³

Nollan, *Dolan*, and Justice Scalia's opinion in *Pennell* raise a number of central questions. First, why should the Court inquire into consequential fit? *Dolan* and, to a more ambiguous degree, *Nollan* suggest that the doctrine of "unconstitutional conditions" justifies an inquiry into consequential fit where land use conditions are involved.⁹⁴ *Pennell*, where the doctrine of unconstitutional conditions was irrelevant, invokes the two rationales underlying the Supreme Court's earlier *Norwood* decision. The first rationale is fairness. The "essence" of the takings

90. *Id.* at 411-12 (Souter, J., dissenting).

91. *Id.* at 412-14.

92. David A. Dana, *Land Use Regulation in an Age of Heightened Scrutiny*, 75 N.C. L. REV. 1243, 1275 (1997).

93. See, e.g., *Ehrlich v. City of Culver City*, 911 P.2d 429 (Cal. 1996) (explaining that the question is whether the condition "is more or less proportional, in both nature and scope, to the public impact of the proposed development").

94. See *Dolan*, 512 U.S. at 391; *Nollan*, 483 U.S. at 831-41.

protections, according to Scalia, is "simply the unfairness of making one citizen pay, in some fashion other than taxes, to remedy a social problem that is none of his creation."⁹⁵ "Unless we are to abandon the guiding principle of the Takings Clause that 'public burdens . . . should be borne by the public as a whole,'"⁹⁶ the cost of providing for the poor cannot be imposed constitutionally on a subset of property owners. A second rationale is the fear of political discrimination. In Justice Scalia's view, financing a public good through regulation poses a greater risk to the democratic process than if the financing is accomplished through general taxation:

The politically attractive feature of regulation is not that it permits wealth transfers to be achieved that could not be achieved otherwise; but rather than it permits them to be achieved "off budget," with relative invisibility and thus relative immunity from normal democratic processes. . . . Once the door is opened it is not unreasonable to expect price regulations requiring private businesses to give special discounts to senior citizens (no matter how affluent), or to students, the handicapped, or war veterans. Subsidies for these groups may well be a good idea, but because of the operation of the takings Clause our governmental system has required them to be applied, in general, through the process of taxing and spending, where both economic effects and competing priorities are more evident.⁹⁷

A second question, to which the Court has provided even less guidance, is the type of governmental regulations and impositions subject to a consequential fit standard. *Nollan* and *Dolan* clearly hold that consequential fit is relevant to at least some forms of land use conditions.⁹⁸ But is consequential fit relevant to other takings challenges? Lower courts have haggled over the applicability of *Nollan* and *Dolan* even in the context of land use conditions.⁹⁹ Because *Nollan* and *Dolan* both involved situations where the government had required landowners, on a case-by-case basis, to dedicate an interest in their land in return

95. *Pennell*, 485 U.S. at 23 (Scalia, J., concurring).

96. *Id.* at 21-22 (Scalia, J., concurring) (quoting *Armstrong*, 364 U.S. at 49).

97. *Id.* at 22-23.

98. *Nollan*, 483 U.S. at 831-41; *Dolan*, 512 U.S. at 386, 391.

99. See, e.g., *Home Builders Ass'n v. City of Scottsdale*, 902 P.2d 1347 (Ariz. Ct. App. 1995); *Ehrlich*, 911 P.2d at 429.

for permission to develop, lower courts have disagreed whether both nexus and rough proportionality are required where the legislature imposes a general condition on all development or where a developer must pay a fee rather than dedicate an interest in his or her land.¹⁰⁰

Justice Scalia's opinion in *Pennell* suggests that consequential fit is relevant to property regulations generally, but not to taxes—thus his assertion that the government cannot make “one citizen pay, in some fashion other than taxes, to remedy a social problem that is none of his creation.”¹⁰¹ But why should taxes be excluded? Perhaps Justice Scalia simply wished to avoid any concern that a consequential fit test would involve the Court in a roving review of the fairness of all governmental tax schemes. Alternatively, Justice Scalia, like Justice Harlan a century earlier, might have been suggesting that constitutional review is unnecessary where general taxes are involved; there the political process is sufficiently trustworthy. The problem, as the passage above from *Pennell* suggests, is when the government turns to implicit taxation through regulation.

B. Due Process Reviews of Retroactivity

The Court also has frequently relied on consequential fit to justify retroactive legislation challenged under the Due Process Clause. In *Usery v. Turner Elkhorn Mining Co.*,¹⁰² for example, the Court upheld the Black Lung Benefits Act of 1972 on the ground that mining companies had “created . . . the dangerous conditions”¹⁰³ which had led to the need for benefits.¹⁰⁴ These decisions, however, employ consequential fit merely as one means of showing a rational basis, rather than as a unique affirmative requirement. According to the Court in *Usery*, the Black Lung Benefits Act was constitutional not only because the mining companies had caused the problem, but also because the mining companies had “profited from the fruits” of the miner's

100. See, e.g., *Home Builders Ass'n*, 902 P.2d at 1350-52 (holding *Dolan* inapplicable to legislative fee systems).

101. *Pennell*, 485 U.S. at 23 (Scalia, J., concurring).

102. 428 U.S. 1 (1976).

103. *Usery*, 428 U.S. at 19.

104. *Id.* at 19-20.

labor.¹⁰⁵

Until *Eastern Enterprises*, only Justice O'Connor had suggested that the Due Process Clause affirmatively requires some degree of consequential fit. In *Connolly*, Justice O'Connor ventured that "imposition of retroactive liability on employers for the benefit of employees may be arbitrary and irrational in the absence of any connection between the employer's conduct and some detriment to the employee."¹⁰⁶ She repeated and applied this framework in *Concrete Pipe & Products v. Construction Laborers Pension Trust*.¹⁰⁷

C. *Eastern Enterprises v. Apfel*

Courts, practicing lawyers, and commentators all looked to *Eastern Enterprises* to help clarify some of the issues left open in the Court's earlier discussions of consequential fit. The applicability of *Nollan* and *Dolan* outside the context of land use conditions, in particular, was a fiercely briefed issue in *Eastern Enterprises*. Both the plaintiffs and conservative interest groups urged the Court to adopt the nexus and rough proportionality tests of *Nollan* and *Dolan* as general takings requirements, while governmental agencies urged the Court to strictly confine *Nollan* and *Dolan* to their facts.¹⁰⁸ Those hoping for greater clarity, however, were sorely disappointed.

Not surprisingly, consequential fit plays a key role in Justice O'Connor's plurality opinion in *Eastern Enterprises*. According to Justice O'Connor, Congress enjoys the constitutional authority to develop a mechanism for funding retired coal miners' health benefits:

When, however, that solution singles out certain employers to bear a burden that is substantial in amount, based on the employers' conduct far in the past, *and unrelated to any commit-*

105. *Id.* at 18.

106. *Connolly*, 475 U.S. at 229 (O'Connor, J., concurring).

107. 508 U.S. 602 (1993).

108. Compare, e.g., Brief Amicus Curiae of California Cities and Counties, *Eastern Enters. v. Apfel*, 524 U.S. 498 (1998) (No. 97-42), with Brief for Petitioner, *Eastern Enters. v. Apfel*, 524 U.S. 498 (1998) (No. 97-42), and Brief Amicus Curiae for the Washington Legal Foundation, *Eastern Enters. v. Apfel*, 524 U.S. 498 (1998) (No. 97-42).

ment that the employers made or to any injury they caused, the governmental action implicates fundamental principles of fairness underlying the Takings Clause. Eastern cannot be forced to bear the expense of lifetime health benefits for miners based on its activities decades before those benefits were promised.¹⁰⁹

Congress might constitutionally hold a company "responsible for employment-related health problems of all former employees whether or not the cost was foreseen at the time of employment,"¹¹⁰ but the Coal Act would have held Eastern liable for all health benefits of former employees and their dependents.¹¹¹

Unfortunately, Justice O'Connor's opinion provides only the vaguest of road maps for how a consequential fit test might apply in future cases. Justice O'Connor clearly is not applying *Nollan* or *Dolan*. Her opinion cites neither case and avoids using the terminology of "essential nexus" and "rough proportionality."¹¹² Contrary to *Dolan*, Justice O'Connor also imposes the burden of proof on *Eastern Enterprises* (although *Dolan*'s imposition of the burden on the government may be limited to only adjudicative settings).¹¹³

Rather than building on *Nollan* and *Dolan*, Justice O'Connor embeds her analysis in the tripartite analysis of *Penn Central*—requiring significant contortions to say the least. In Justice O'Connor's view, a lack of consequential fit triggers concern under each of the three *Penn Central* factors¹¹⁴—economic impact, investment-backed expectation, and the nature of the governmental action. The economic impact of the Coal Act is troubling because, even though the Coal Act did not involve a

109. *Eastern Enters.*, 524 U.S. at 537 (emphasis added).

110. *Id.* at 536.

111. *Id.*

112. *See id.* at 522-37.

113. *Id.* *Dolan* adds two separate twists to *Nollan*, each arguably triggered by different facts. In any setting, whether legislative or adjudicative, where the government conditions land use on giving up a right that otherwise would require compensation, *Dolan* suggests that both an "essential nexus" and "rough proportionality" are required. *Dolan*, 512 U.S. at 386, 391. *Dolan* also suggests that the government has the burden of proving this necessary fit, but only where there has been an "adjudicative decision." *Id.* at 391 n.8.

114. *Eastern Enters.*, 524 U.S. at 529-37.

"permanent physical occupation,"¹¹⁵ the impact was significant and had no relationship "to responsibilities that Eastern accepted under any benefit plan the company itself adopted."¹¹⁶ The Coal Act "substantially interfere[d] with Eastern's reasonable investment-backed expectations"¹¹⁷ for "similar reasons": The Coal Act was "not calibrated either to Eastern's past actions or to any agreement [implicit or otherwise] by the company."¹¹⁸ Finally, the nature of the governmental action was "quite unusual" and "implicate[d] fundamental principles of fairness"¹¹⁹ because of the lack of consequential fit.

Justice O'Connor's opinion provides us with little guidance on exactly how much fit is required in different takings contexts, including in *Eastern Enterprises* itself. Like the majority in *Nollan*, Justice O'Connor concludes that the challenged governmental liability had no fit whatsoever, eliminating any need to refine the requirement further in this case.¹²⁰ Nonetheless, Justice O'Connor's opinion suggests that, in most cases, the necessary fit would be an "ad hoc and fact intensive" inquiry that "does not lend itself to any set formula."¹²¹ When the government conditions a land use on the forfeiting of a right that otherwise would mandate just compensation, *Dolan* holds that the "well-settled doctrine of 'unconstitutional conditions'"¹²² requires both "essential nexus" and "rough proportion[ality]."¹²³ At least in adjudicative settings, the government carries the burden of establishing these requirements.¹²⁴ Outside the "unconstitutional conditions" context,¹²⁵ however, the strict tests for consequential fit required by *Nollan* and *Dolan* are not relevant.¹²⁶ Instead, consequential fit becomes an integral part of

115. *Id.* at 530.

116. *Id.* at 531.

117. *Id.* at 532.

118. *Id.* at 536.

119. *Eastern Enters.*, 524 U.S. at 537.

120. *Id.* at 529-37.

121. *Id.* at 523.

122. *Dolan*, 512 U.S. at 385.

123. *Id.* at 385-91.

124. See *supra* note 113 and accompanying text.

125. *Dolan*, 512 U.S. at 385.

126. The Supreme Court has more recently confirmed this view of the applicability of the *Nollan* and *Dolan* tests in *City of Monterey v. Del Monte Dunes*, 526 U.S. 687 (1999).

the ad hoc *Penn Central* inquiry. Justice O'Connor's plurality opinion suggests that the nature, extent, and degree of required fit will vary from case to case.¹²⁷ As discussed in Parts IV and V of this Article, fleshing out a structure for this inquiry will be the lower courts' most important job.

Although Justice O'Connor provides little guidance on how much fit is required in any specific case, her opinion intimates that proportionality is part of the analysis. In discussing the economic impact of the Coal Act in *Eastern Enterprises*, for example, Justice O'Connor suggests that "an employer's statutory liability for multiemployer plan benefits should reflect some 'proportionality to its experience with the plan'"¹²⁸ and complains that "the amount assessed against Eastern [by the Coal Act] resembles a calculation 'made in a vacuum.'"¹²⁹ In her conclusion, moreover, Justice O'Connor objects not that the Coal Act imposed an unrelated burden on Eastern, but that it imposed a "severe, *disproportionate*, and extremely retroactive burden on Eastern."¹³⁰ By themselves, these few quotations add up to no more than a weak hint that proportionality is a relevant inquiry. But as these snippets suggest, it is difficult to separate out at least a loose concept of proportionality from any question of consequential fit.

Consequential fit is also central to Justice Kennedy's concurring opinion. According to Justice Kennedy, the Coal Act violated due process standards because Eastern was not "responsible" for either the miners' "expectation[s] of lifetime health benefits or for the perilous financial condition of the 1950 and 1974 Plans which put the benefits in jeopardy."¹³¹ Retroactive liability, Justice Kennedy explains, is particularly suspect because legislatures can impose such liability "with an exact knowledge of who will benefit from it."¹³² As a consequence,

127. See *Eastern Enters.*, 524 U.S. at 523.

128. *Id.* at 530 (quoting *Concrete Pipe & Prods. v. Construction Laborers Pension Trust*, 508 U.S. 602, 645 (1993)).

129. *Id.* at 531.

130. *Id.* at 538 (emphasis added); see also *id.* at 536 ("[T]he Constitution does not permit a solution to the problem of funding miners' benefits that imposes such a disproportionate and severely retroactive burden upon Eastern.").

131. *Eastern Enters.*, 524 U.S. at 550 (Kennedy, J., concurring).

132. *Id.* at 548 (quoting Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 HARV. L. REV. 692, 693 (1960)).

legislatures may be tempted "to use retroactive legislation as a means of retribution against unpopular groups or individuals."¹³³ If there is consequential fit, retroactive liabilities are both fair and less suspect.¹³⁴ But when consequential fit is absent and retroactivity is particularly strong, courts can intervene under the Due Process Clause. Justice Kennedy is more forthcoming than Justice O'Connor in the nature and degree of the required fit, but only slightly. The standard is permissive and likely to be violated "only under the most egregious of circumstances;" "mathematical precision" is unnecessary.¹³⁵

The four dissenters in *Eastern Enterprises* adopt an even more lenient approach to consequential fit. To Justice Breyer, consequential fit is important in the due process context only in determining the reasonableness of a person's expectation that she will not be subject to retroactive liability.¹³⁶ Eastern's prior actions undercut any "reasonable expectation that it would remain free of future health care cost liability for the workers whom it employed."¹³⁷ Eastern benefitted from the labor of its prior employees.¹³⁸ "Insofar as working conditions created a risk of future health problems for those miners, Eastern created those conditions."¹³⁹ Eastern contributed to the worker's expectation that they would receive life-time health benefits. And Eastern "continued to obtain profits from the coal mining indus-

133. *Id.* at 548 (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 266 (1994)).

134. *Id.* at 549 (suggesting that retroactive liability that is "remedial, designed to impose an 'actual, measurable cost of [the employer's] business' which the employer had been able to avoid in the past" is "just and reasonable.").

135. *Id.* at 550.

136. According to Justice Breyer, the only due process issue is whether the Coal Act's "reachback" provision "is fundamentally unfair and unjust, in terms of Eastern's reasonable reliance and settled expectations." *Eastern Enters.*, 524 U.S. at 559.

[T]he relationship between Eastern and the payments demanded by the Coal Act is special enough to pass the Constitution's fundamental fairness test. That is, even though Eastern left the coal industry in 1965, the historical circumstances, taken together, prevent Eastern from showing that the Coal Act's "reachback" liability provision so frustrates Eastern's reasonable settled expectations as to impose an unconstitutional liability.

Id.

137. *Id.* at 567.

138. *Id.* at 560.

139. *Id.*

try long after 1965."¹⁴⁰

D. City of Monterey v. Del Monte Dunes

The Supreme Court had another opportunity to explain the relevance of consequential fit a year after *Eastern Enterprises*. In *City of Monterey v. Del Monte Dunes*,¹⁴¹ the City of Monterey denied a building permit to a planned coastal development. The trial court allowed a jury to determine whether the denial significantly advanced a legitimate state interest. In affirming, the federal court of appeals stated that, even if the denial advanced a legitimate state interest, the denial "must be 'roughly proportional' to furthering that interest. That is, the City's denial must be related 'both in nature and extent to the impact of the proposed development.'"¹⁴²

Although the Supreme Court granted certiorari to decide whether nexus to a legitimate state interest is an appropriate jury question, the Court also addressed the need for proportionality. All members of the Court agreed that the *Dolan* rough proportionality test is inapplicable outside the

special context of exactions—land-use decisions conditioning approval of development on the dedication of property to public use. The rule applied in *Dolan* considers whether dedications demanded as conditions of development are proportional to the development's anticipated impacts. It was not designed to address, and is not readily applicable to, the much different questions arising where, as here, the landowner's challenge is based not on excessive exactions but on denial of development.¹⁴³

The Court prefaced this passage, however, by observing that "in a general sense concerns for proportionality animate the Takings Clause" and that the "Fifth Amendment's guarantee . . . was designed to bar the Government from forcing some people alone to bear public burdens which, in all fairness and justice, should

140. *Eastern Enters.*, 524 U.S. at 565.

141. 526 U.S. 687 (1999).

142. *Del Monte Dunes v. City of Monterey*, 95 F.3d 1422, 1430 (9th Cir. 1996) (quoting *Dolan*, 512 U.S. at 391) (internal citations omitted).

143. *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 702-03 (internal citations omitted).

be borne by the public as a whole."¹⁴⁴ Thus even if the *Dolan* "rough proportionality" is a standard only in cases of exactions, some degree of proportionality might still be required in other takings cases.

IV. WHY SHOULD THE CONSTITUTION CARE ABOUT CONSEQUENTIAL FIT?

Under a narrow reading of the Supreme Court's current case law, consequential fit could be largely written off as a highly exceptional rule applicable only in exaction cases (where the avoidance of unconstitutional conditions requires some policing of exactions that otherwise would be takings) and in challenges to strongly retroactive legislation. To some Justices, however, consequential fit seems to have a broader allure. The plurality opinion in *Eastern Enterprises*, moreover, would make consequential fit an integral part of the *Penn Central* tripartite standard.

Are courts justified in scrutinizing other economic legislation under the Fifth Amendment for consequential fit? Any general justification must satisfy at least four criteria. First, the justification must be rooted in an accepted purpose of the Fifth Amendment, as animated by the history of its provisions. Second, the justification must explain and animate the Court's specific interest in consequential fit versus an alternative allocation rule. Third, the justification must limit the use of a consequential fit test to a reasonably small and readily definable subset of Congressional legislation. By cutting loose the consequential fit test from the land use context, both Justices O'Connor and Kennedy in *Eastern Enterprises* threaten to enmesh federal courts in the review of a wide variety of economic legislation, including taxes. Although some political skeptics may think that wide-ranging judicial oversight of Congressional initiatives would be a good thing, it would be a surprising and institutionally dangerous reading of the Constitution. A viable justification therefore must explain why consequential fit is an important inquiry in some cases but not in most. Finally, the

144. *Id.* at 702 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

justification must outweigh the considerable intrusion into Congressional discretion that even a reasonably constrained use of a consequential fit test would pose.

The judicial opinions discussed in Part III suggest at least three potential rationales for constitutional inquiries into consequential fit. One possible rationale, suggested in virtually every opinion, is fairness. Under this rationale, the takings protections embody a constitutional conception that governmental impositions that lack consequential fit are unfair. A second potential rationale, suggested by the Court's decision in *Norwood*, Justice Scalia's opinion in *Pennell*, and Justice Kennedy's opinion in *Eastern Enterprises*, is political discrimination. Under this rationale, the potential for political discrimination in some settings justifies a requirement of consequential fit. A final possible rationale is the protection of expectations. Justices O'Connor's and Breyer's opinions in *Eastern Enterprises* submit that the need to protect reasonable and legitimate expectations justifies at least some inquiry into consequential fit: Legislation that lacks fit will violate "reasonable investment-backed expectations" (from Justice O'Connor's takings perspective) or a "reasonable expectation that [one] would remain free of future . . . liability"¹⁴⁵ (from Justice Breyer's general due process perspective).

A. Fairness

A constitutional concept of fairness initially may seem a particularly strong justification for inquiring into consequential fit. The most quoted takings opinion of all time is Justice Hugo Black's majority opinion in *Armstrong v. United States*.¹⁴⁶ The opinion is almost entirely devoid of normative reasoning, but Justice Black said one thing that justice after justice has found irresistibly repeatable: The Fifth Amendment is "designed to bar Government from forcing some people alone to bear public bur-

145. *Eastern Enters.*, 524 U.S. at 567 (Breyer, J., dissenting).

146. 364 U.S. 40 (1960). At the federal level, published takings cases have quoted Justice Black's opinion 121 times. By comparison, only 29 published cases have quoted Justice Holmes' famous and older bon mot in *Mahon* that we "are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922).

dens which, in all fairness and justice, should be borne by the public as a whole."¹⁴⁷ The parroting of this sentence by judges, both sympathetic and hostile to property owners' claims, has become almost a joke.¹⁴⁸ By not specifying the line beyond which "fairness and justice" bar the government from going, Justice Black obviously left it easy for people to agree with him. Who would advocate imposing unfair and unjust burdens? But Justice Black's précis is meaningful in its argument that the takings protections are about the fairness and justice of allocative decisions. To justice after justice, this has seemed the essence of the takings protections.

The problem, of course, is translating fairness into a set rule that is binding on the legislature. The Constitution sets out no rule of fairness other than that compensation must be paid for the taking of property which, for many years, was understood to refer only to direct confiscations. A requirement of consequential fit is consistent with a requirement that compensation be paid for confiscations because uncompensated confiscations almost inevitably load onto the shoulder of a property owner the cost of a governmental good benefitting society more generally. But such consistency does not mean that the Constitution requires consequential fit in other settings as a matter of fairness. The constitutional debates do not speak to the issue.

Professor Jan Laitos has tried to build a fairness argument for consequential fit based on principles of "justice as fairness" and "equal liberty" first explicated in John Rawls' *A Theory of Justice*.¹⁴⁹ According to Professor Laitos, "justice as fairness" requires horizontal equity, a requirement that "similarly situated people (and property owners) should be treated similarly under the law."¹⁵⁰ "Equal liberty," in turn, forbids society from imposing upon some citizens "lower prospects of life for the sake of the higher expectations of others,"¹⁵¹ which Laitos argues includes

147. *Armstrong*, 364 U.S. at 49.

148. Bill Fischel has suggested that lawyers should inscribe the quotation "on an inspirational poster" and keep it hung in their offices. WILLIAM A. FISCHEL, *REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS* 141 (1995).

149. See Jan G. Laitos, *The New Retroactivity Causation Standard*, 51 ALA. L. REV. 1123 (2000) [hereinafter Laitos, *The New Retroactivity*]; Jan G. Laitos, *Takings and Causation*, 5 WM. & MARY BILL OF RTS. J. 359 (1997).

150. Laitos, *The New Retroactivity*, *supra* note 149, at 1136-37.

151. JOHN RAWLS, *A THEORY OF JUSTICE* 180 (1971).

requiring property owners to pay through regulations for goods or services enjoyed by the public as a whole.¹⁵²

Although he makes an intriguing attempt to support the Court's interest in consequential fit, Professor Laitos fails to justify consequential fit as a constitutional takings norm. Even assuming that the Constitution embodies some notion of horizontal equity (although the Equal Protection Clause would seem a more logical basis than the takings protections for enforcing it), consequential fit is a far more rigorous standard than horizontal equity. The Coal Act levy at issue in *Eastern Enterprises* certainly provided horizontal equity (all former employers were treated alike), even if it did not provide consequential fit. Professor Laitos' broad reading of "equal liberty" seems more contiguous with consequential fit, but the Constitution surely does not embody a norm that the government cannot redistribute wealth in the form of property. Laitos' arguments implicitly assume that the initial distribution of property rights is fair and conducive to "equal liberty." But this will not always, or even frequently, be the case.

Given the absence of any fairness criterion inherent in the takings protections themselves, a fairness rationale also raises the question of why the courts are a more appropriate institution than Congress to determine the fairest means of allocating the cost of particular public goods or services. A fairness rationale requires a court to second guess Congress' own fairness determinations, placing a court in the worst institutional posture. The problem is compounded by the potential reach of a fairness justification. If consequential fit is required as a matter of constitutional fairness, all governmental intrusions into property rights would seem to be legitimate objects of a takings challenge. And given the lack of effective definitional limits on property, the scope of the consequential fit inquiry would become dangerously broad.

B. Political Discrimination

The historically strongest justification for scrutinizing eco-

152. Laitos, *The New Retroactivity*, *supra* note 149 at 1137-38.

conomic legislation and regulation under the Fifth Amendment is the fear of political discrimination. As Professor William Treanor has explored, the takings protections originated in the framers' concern with failures in the political process.¹⁵³ Madison, in particular, believed that landed interests were peculiarly vulnerable to majoritarian decision-making and needed constitutional protection. The potential for current breakdowns in the governmental process still provides one of the most coherent and powerful bases for judicial regulation of economic legislation and regulation.¹⁵⁴

Courts could address the potential for political failures in several ways. Courts could scrutinize the decision-making process in each instance for indicia of political breakdowns, but this would place courts in the uncomfortable role of directly judging and policing the legislative process. If there are well-accepted or commonly used norms for when individuals should be expected to bear unique economic burdens, courts instead might use these norms both to identify governmental actions that are politically suspect and to determine the remedy. On the surface, consequential fit would seem to fit the bill, at least as one potential norm. Although a requirement of consequential fit is not embodied in the Constitution, the principle that people should not be singled out to bear burdens that are unrelated to their actions or status has strong ethical appeal and is a commonly employed political norm.

A political discrimination justification could also help restrict the domain of inquiry into consequential fit. Most forms of economic legislation and regulation do not raise a sufficient enough risk of injurious political failure to justify appreciable constitutional review. Consider standard tax legislation. If the

153. See William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782 (1995).

154. See Barton H. Thompson, Jr., *Judicial Takings*, 76 VA. L. REV. 1449, 1482-89, 1492-95 (1990) [hereinafter Thompson, *Judicial Takings*]. For a handful of the articles elaborating theories of takings based on political discrimination, see Daniel A. Farber, *Economic Analysis and Just Compensation*, 12 INT'L REV. L. & ECON. 125 (1992); Glynn S. Lunney, Jr., *A Critical Reexamination of the Takings Jurisprudence*, 90 MICH. L. REV. 1892 (1992); Treanor, *supra* note 153; see also Barton H. Thompson, Jr., *A Comment on Economic Analysis and Just Compensation*, 12 INT'L REV. L. & ECON. 141 (1992) (discussing both the strengths and problems of a political discrimination theory).

tax is broadly applicable, potential taxpayers should be able to bind together in a powerful enough coalition to avoid being politically steamrolled. The exact longterm losers under any tax legislation are also often difficult to predict, expanding the range of interests that might combine against proposed excesses. Potential taxpayers, moreover, typically enjoy multiple degrees of freedom. Although various prior actions may limit their current options, potential taxpayers can try to plan their affairs to minimize tax liability. In some cases, potential taxpayers can take advantage of intergovernmental competition by moving themselves or their economic affairs to a more favorable jurisdiction. These degrees of freedom provide two checks on political discrimination. They permit many potential taxpayers to escape any discrimination, at least in part. They also discipline governmental options because authorities must worry about the possible consequences of their actions; pushing too far can backfire.

Specific categories of economic legislation or regulation, by contrast, might lack enough of these normal protections to cause constitutional antennae to quiver. As others have elaborated, heavily retroactive legislation is one such category.¹⁵⁵ Legislatures can single out a particular class of individuals or entities for a unique economic burden without having to worry as much about others being accidentally ensnared.¹⁵⁶ The targets of the legislation, moreover, have no degrees of freedom. They must bear the burden, and the government therefore can impose the burden with less worry that efforts to avoid the burden will prove counterproductive to the government's goals. This is not to say that the targets of retroactive legislation are without any practical safeguards. If the target class is sufficiently large, members of the class may well be able to form an effective political coalition. The government must also worry that heavily retroactive legislation will undercut the trust that is crucial in the

155. Because retroactivity is a spectrum, see Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 HARV. L. REV. 1055 (1997), I find it more useful to speak of retroactivity in comparative terms rather than in distinct classes such as "retroactive" and "retrospective" or "primary" and "secondary" retroactivity.

156. See *Eastern Enters.*, 524 U.S. at 548-49 (Kennedy, J., concurring); *Landgraf v. USI Film Prods.*, 511 U.S. 244, 266 (1994); DANIEL E. TROY, *RETROACTIVE LEGISLATION* 19 (1998); Charles B. Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 HARV. L. REV. 692, 693 (1960).

government's current dealings with others.¹⁵⁷ But the remaining protections will often be sufficiently weak to justify greater constitutional scrutiny than normal.

Individual development exactions such as those at issue in *Dolan* are another suspect category.¹⁵⁸ The government again can single out particular targets, perhaps based on their lack of political pull. The property owner may have little chance of forming an effective coalition because only he or she will be directly affected. Because land cannot be moved to another jurisdiction, the target cannot totally escape any unfair burden. On the other hand, the target can choose not to develop his or her property, which provides some discipline on governmental excesses. Special assessments, like that involved in *Norwood*, share the same dangers as individual development exactions, with the added concern that the property owner has no means of avoiding the assessment.

In these and other settings, courts might conclude that an inquiry into consequential fit is justified and necessary. When grounded on fears of political discrimination, however, a consequential fit test raises potential concern that the judiciary is inappropriately intervening in the legislative realm. Not only are courts scrutinizing governmental actions for possible political dysfunction, but they may be accused again of substituting their own views of justice and fairness for those of the legislature. These concerns may explain why no majority opinion for the Supreme Court, and only a small handful of concurring or dissenting opinions, has ever expressly justified a consequential fit inquiry on fears of political discrimination.¹⁵⁹ Courts understandably feel on far safer constitutional grounds basing the

157. See Barton H. Thompson, Jr., *The History of the Judicial Impairment "Doctrine" and Its Lessons for the Contract Clause*, 44 STAN. L. REV. 1373 (1992).

158. *Nollan*, by contrast, involved a more generalized exaction scheme and thus raised fewer political concerns. See Thompson, *A Comment on Economic Analysis and Just Compensation*, *supra* note 154, at 143 (emphasizing that California law generally required public access as a condition for new beachfront development).

159. Justice Scalia's partial dissent in *Pennell* provides the strongest political argument. Justice Kennedy's concurrence in *Eastern Enterprises* merely quotes *Landgraf* for the proposition that retroactive lawmaking "is a particular concern for the courts because of the legislative 'tempt[ation] to use retroactive legislation as a means of retribution against unpopular groups or individuals.'" *Eastern Enters.*, 524 U.S. at 548 (quoting *Landgraf v. USI Film Products*, 511 U.S. 244, 266 (1960)).

inquiry on politically more neutral rationales, such as the protection of reasonable expectations.

Yet a discrimination-based inquiry into consequential fit need not raise significant constitutional concerns. Courts obviously would not want to engage in a roving review of every challenged governmental action for signs of political imperfection. But courts should not be troubled by the identification of a limited number of carefully restricted categories of governmental action that will be subject to heightened review because of generalized risks that require public reassurance. Courts engage in similar constitutional categorization in a variety of settings, including under the First and Fourteenth Amendments.

Courts can also reduce concerns that they are substituting their judgment for legislatures by justifying and delineating the consequential fit test in terms of standard governmental norms rather than independent evaluations of justice and fairness. Courts should try to ferret out and emulate how legislatures would normally view the fairness or justice of particular impositions. They should engage in political interpretation, a task much akin to the common law process, rather than in an independent assessment of fairness or justice. Courts, in short, should engage in a process of political, rather than constitutional, interpretation. If consequential fit is required in only a small subset of all governmental actions, moreover, legislatures will remain free to achieve the same ends in politically less suspect situations.

C. Reasonable Expectations

The historical basis for protecting reasonable expectations through the Constitution is relatively weak. The Supreme Court's current preoccupation in the takings arena with "investment-backed expectations" (which appears yet again in Justice O'Connor's *Eastern Enterprises* opinion) actually stems from a misreading of Frank Michelman's landmark 1967 article.¹⁶⁰

160. Michelman coined the term to explain why the taking of a mere subset of property might require compensation, not as a general explanation for when a governmental regulation should be found to be a taking. Frank Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation"*

Modern jurists and academic commentators, nonetheless, have argued that both the takings protections and general constitutional protections against retroactive legislation are justified by the goal of protecting reasonable economic expectations.¹⁶¹ These arguments take two forms: a moral version (elementary considerations of fairness require honoring expectations) and an economic one (market economies depend on stable expectations). The moral argument finds some reflection in writings contemporaneous with the constitutional debate (although the argument is frequently mixed inseparably with political process concerns) and is the stronger of the two. The economic version of the argument has a decidedly modern air to it and finds no reflection in the constitutional debates. The economic version of the argument, moreover, rests on an arguably false assumption (that markets will collapse without constitutional protection) and ignores other potential means by which people can protect their economic interests from political uncertainty.¹⁶²

Both versions of the expectations argument also have the potential to sweep quite broadly. All legislation, whether strongly retroactive or highly prospective, can upset economic expectations. If courts are concerned with protecting expectations, can they limit significant scrutiny to a limited number of categories of laws and regulations? The answer, if there is one, might be found in people's ability to avoid the consequences of change. Where legislation is strongly retroactive, as in *Eastern Enterprises*, shocks to settled expectations come particularly hard because there is no opportunity to escape. Prospective changes in tax laws are generally less traumatic because, to varying degrees, one can adjust one's activities in response. A focus on avoidance ability would call for heightened scrutiny of many of the same categories of governmental action as political discrimination would highlight, but there would be differences. Real property regulations as a whole, for example, would be of signifi-

Law, 80 HARV. L. REV. 1165, 1213, 1229-34 (1967).

161. See, e.g., J. Gregory Sidak & Daniel F. Spulber, *Deregulatory Takings and Breach of the Regulatory Contract*, 71 N.Y.U. L. REV. 851, 865 (1996) (takings); TROY, *supra* note 156, at 20-21 (retroactivity).

162. For critiques of economic-based expectation arguments, see Farber, *supra* note 154; Lewis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 509 (1986).

cant concern under an expectations justification because of the difficulty of avoiding new restrictions on land; a concern with political discrimination is likely to be more selective in focus.

The questionable convergence of expectations and consequential fit in any particular case is perhaps the most troubling aspect of trying to justify a consequential fit test as protective of reasonable expectations. Consider, for example, retroactive legislation such as that involved in *Eastern Enterprises* or *Connolly*.¹⁶³ In some cases, members of an industry may reasonably expect that they will not be held liable even for specific prior actions. In others, regulatory tradition and practice may have undermined any expectation that future burdens will necessarily be correlated with past or current actions. Blanket employment of a consequential fit test thus must rest on two premises: First, expectations of more than consequential fit are unreasonable or not important enough to protect, and second, an expectation of consequential fit is sufficiently important to fairness or stable markets that governments should not be permitted to prospectively undermine the expectations. Neither conclusion seems intuitively correct. If economic expectations are of any value, certainly the government should not be permitted to abrogate constitutional protections of those expectations by the mere expediency of destroying all expectations. But why the base line expectation should be consequential fit, and why the Constitution should not be protective of greater expectations than the government may have harbored, are not readily answerable questions.

V. POTENTIAL APPLICATIONS

The issues raised by *Eastern Enterprises* and a consequential fit test can be highlighted by examining two environmental laws that raise potential constitutional concerns—the Comprehensive Environmental, Response, Compensation, and Liability Act (“Superfund”)¹⁶⁴ and the Endangered Species Act.¹⁶⁵ A number of “potentially responsible parties” under

163. *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 222 (1986).

164. 42 U.S.C. §§ 9601-9675 (1994 & Supp. III 1997).

165. 16 U.S.C. §§ 1531-1540 (1994 & Supp. IV 1998).

Superfund have begun to urge that the constitutionality of Superfund's liability scheme, which most people believed had long ago been decided,¹⁶⁶ should be reopened in light of *Eastern Enterprises*. Although no constitutional challenge to the land regulations of the Endangered Species Act has yet been decided, a number of lawsuits are working their way up through the Court of Federal Claims, including several that raise consequential fit issues.

A. Superfund¹⁶⁷

Where a hazardous waste site requires an expensive clean-up, Superfund imposes responsibility for the clean-up costs on four categories of potentially responsible parties ("PRPs"): generators of the waste, transporters of the waste (if they controlled where the waste went), owners or operators of the facility at the time that the waste was disposed of on the land, and current owners and operators.¹⁶⁸ Liability is strict (with few effective defenses) and joint and several.¹⁶⁹ Federal circuit courts have repeatedly held that liability is also retroactive and does not depend on the legality of the waste disposal at the time that it occurred.¹⁷⁰

The broad analysis of *Eastern Enterprises* invites constitutional challenges to Superfund liability. An initial question, however, is whether Superfund calls for the same degree of inquiry into consequential fit as the Coal Act received. While the Coal Act was purely retroactive, Superfund applies both retroactively and prospectively. Someone who, prior to the passage of Superfund, purchased a hazardous waste site without contributing to the waste problem is likely to feel aggrieved when held

166. See, e.g., *United States v. Monsanto Co.*, 858 F.2d 160, 173-74 (4th Cir. 1988); *United States v. Northeastern Pharm. & Chem. Co.*, 810 F.2d 726, 733-34 (8th Cir. 1986).

167. Analyses of constitutional issues raised by Superfund are found in TROY, *supra* note 156, at 88-90; Bruce Howard, *A New Justification for Retroactive Liability in CERCLA: An Appreciation of the Synergy Between Common and Statutory Law*, 42 ST. LOUIS L.J. 847 (1998).

168. See 42 U.S.C. § 9607(a).

169. See *id.* § 9607.

170. See, e.g., *United States v. Olin*, 107 F.3d 1506 (11th Cir. 1997).

liable for clean-up costs. However, the landowner shares this ignominious status with unoffending landowners who purchased after the Act's passage. Should this make a difference? The opinions of Justice O'Connor (embedded in the *Penn Central* tripartite analysis) and Justice Kennedy (emphasizing the unique character of the Coal Act) raise the possibility of a different standard where a liability is both retroactive and prospective but the opinions are ultimately unhelpful. The answer may depend on the justification for inquiring into consequential fit. Superfund's prospective applicability seems irrelevant under either a fairness or reasonable expectation rationale, but it may justify a less stringent standard under a political discrimination justification. Superfund's prospective impact makes it more difficult for Congress to discriminate and thus reduces the need for judicial review. Initially, for example, Superfund could have been read to hold liable even landowners who had no reason to expect that they were purchasing contaminated property. However, the resulting uproar, along with fears of such a reading's impact on the real estate market, led Congress to add a clearer "innocent landowner" defense¹⁷¹ in the Superfund Amendments and Reauthorization Act of 1986.¹⁷² Because the Superfund legislation was not purely retroactive, in short, the political process was self-correcting.

Assuming that a full inquiry into consequential fit is justified, most PRPs will find it difficult to argue that their liability is totally unrelated to a prior action (albeit an action that was sometimes perfectly legal at the time). Most PRPs actually disposed of the hazardous waste that must be cleaned up and therefore directly contributed to the problem that the government is addressing.¹⁷³ The major exception will be owners of contaminated land who were not involved in the disposal of hazardous waste. Under the "innocent landowner" defense, cur-

171. See Pub. L. 99-499, 100 Stat. 1613 (1986).

172. 42 U.S.C. § 9601(35).

173. Largely for this reason, several recent district court decisions have rejected *Eastern Enterprises* challenges against Superfund brought by PRPs that actually disposed of the hazardous waste. See, e.g., *Franklin County Convention Facilities Auth. v. American Premier Underwriters, Inc.*, 61 F. Supp. 2d 740 (S.D. Ohio 1999); *Combined Properties/Greenbrier Ltd. Partnership v. Morrow*, 58 F. Supp. 2d 675 (E.D. Va. 1999).

rent owners are still liable under Superfund if they knew or should have known that hazardous waste was present on the property.¹⁷⁴ Those who owned the land at the time that waste was disposed of on the land are liable even if they were unaware of the disposal. Is the ownership of contaminated property sufficient to establish consequential fit if either a current landowner fails unreasonably to discover hazardous waste on his or her property or a former landowner fails, even *reasonably*, to prevent hazardous substances from being disposed of on his or her property? Under the opinions of both Justices O'Connor and Kennedy, consequential fit must incorporate some concept of responsibility for the problem being remedied. Eastern's actions were certainly a "but for" cause of their former employees' current plight because Eastern could have but did not provide a vested lifetime benefit plan. Yet a majority of the Court did not believe that Eastern was "responsible" for the plight and thus could constitutionally be held liable for it.¹⁷⁵

Unfortunately, neither Justices O'Connor nor Kennedy provide much help in determining what notions of responsibility to build into a consequential fit requirement. What would the various rationales suggest? The fairness rationale would leave it up to courts, guided perhaps by their dog-eared copy of Rawls, to decide the question on moral terms—highlighting the awkwardness of a fairness rationale. There is little reason, absent fears of political discrimination, to believe that courts are better equipped than legislatures to determine the fairness of such allocations.

By contrast, both the political discrimination justification and the reasonable expectation rationale suggest that courts should look to governmental norms in similar settings that are not politically suspect. Although legislative norms are important in this inquiry, courts may find it easier to turn to those common law and interpretive norms with which they work on a

174. See 42 U.S.C. § 9601(35).

175. Both Justices O'Connor and Kennedy speak explicitly in terms of "responsibility." See, e.g., *Eastern Enters.*, 524 U.S. at 536 (O'Connor, J., concurring) (asserting that the takings problem arises when liability arises "without regard to the extent of a particular employer's actual responsibility"); *id.* at 550 (Kennedy, J., concurring in judgment and dissenting in part) ("Eastern was not responsible for the resulting chaos in the funding mechanism. . . .").

normal basis; in most cases, the legislative and judicial norms will be closely aligned. The two rationales suggest slightly different temporal focuses in identifying relevant norms: The political discrimination rationale would focus on contemporary norms, while the expectations rationale would focus on those norms applicable at the time that the triggering actions (e.g., purchasing contaminated property or owning property that becomes contaminated) took place. Although temporal difference is not likely to be important in most cases, it could be in some. Generators of hazardous waste, for example, might argue that they are not "responsible" for the hazardous waste problem, if examined from the perspective of the governmental norms generally accepted at the time that they disposed of their waste.¹⁷⁶

Normative "responsibility," however, may not always be necessary to establish consequential fit. The Supreme Court's decision in *Usery v. Turner Elkhorn Mining Co.*,¹⁷⁷ for example, indicates that a relationship between current liability and prior profits can also establish sufficient consequential fit to meet constitutional requirements. According to a unanimous Court in that case, mining companies could be held liable for death or disability payments to former miners because, at least in part, the companies had "profited" from the fruits of the miners' labor.¹⁷⁸ Whether or not a company could be considered "responsible" for the health problems, the challenged law merely "allocate[d] to the mine operator an actual, measurable cost of his business."¹⁷⁹ Justice Breyer picked up on this line of argument in *Eastern Enterprises*, urging that Eastern could constitutionally be required to pay for benefits to former employees because it obtained profits from the coal mining industry for many years.¹⁸⁰ The concept that profits can bring with them addi-

176. See, e.g., Howard, *supra* note 167 (arguing that Superfund liability is quite different from traditional notions of product liability and strict liability for ultrahazardous activities).

177. 428 U.S. 1 (1976).

178. *Usery*, 428 U.S. at 18.

179. *Id.* at 19.

180. *Eastern Enters.*, 524 U.S. at 565 (Breyer, J., dissenting); see also *United States v. Monsanto Co.*, 858 F.2d 160, 173-74 (4th Cir. 1988) (rejecting PRPs' constitutional challenge to Superfund on the ground that the PRPs had "played a role in creating the hazardous conditions" and also had "profited from inexpensive waste disposal methods"); *United States v. Northeastern Pharm. & Chem. Co.*, 810

tional public responsibilities is broadly enough found in the nation's laws that both the political and expectations rationales for consequential fit would seem to support an *Usery* approach. Under this approach, holding current and prior owners of Superfund property liable for at least part of the clean-up costs would seem justifiable. Current owners will presumably benefit from the clean-up of their properties; prior owners may have profited from whatever use of their property led to the disposal of hazardous waste.

In the case of most PRPs, therefore, the interesting question will be whether their liability is sufficiently "proportional" to their prior actions (or profits) to satisfy a consequential fit test. Although Superfund provides for contribution actions, the disappearance or bankruptcy of many companies can require PRPs to pick up often sizable "orphan shares" of the cost of cleaning up a site. From a purely numerical standpoint, PRPs' liability therefore can sometimes be disproportionate to their "share" of contamination. But does the Constitution require the government to load such costs onto the backs of current taxpayers (which is the government's most likely alternative)? Given the historical use of joint and several liability in other settings, none of the rationales for inquiring into consequential fit would seem to preclude Congress from using such a liability system in dealing with those who actually contributed to the hazardous waste problem. The issue, however, is closer if the PRP is a current or prior landowner.

Since the Supreme Court's decision in *Eastern Enterprises*, generators of hazardous waste have tried to use the decision to get courts to reconsider the constitutionality of Superfund in several cases. Not surprisingly, all the courts have held that Superfund's retroactive imposition of liability on generators of hazardous waste is constitutional.¹⁸¹ As the courts have explained, generators are liable under Superfund because of their past actions. "Just as it was reasonable in *Turner Elkhorn* to

F.2d 726, 733-34 (8th Cir. 1986) (same).

181. See, e.g., *United States v. Alcan Aluminum Corp.*, 49 F. Supp. 2d 96 (N.D.N.Y. 1999); *Franklin County Convention Facilities Auth. v. American Premier Underwriters, Inc.*, 61 F. Supp. 2d 740 (S.D. Ohio 1999); *Combined Properties/Greenbrier Ltd. Partnership v. Morrow*, 58 F. Supp. 2d 675 (E.D. Va. 1999); *United States v. Vertac Chem. Corp.*, 33 F. Supp. 2d 769 (W.D. Ark. 1998).

impose retroactive liability for unforeseen diseases relating to mining, it is reasonable here to impose retroactive liability for possibly unforeseen costs of responding to environmental harms resulting from a party's disposal of waste."¹⁸² Courts have yet to deal with the tougher situations where a landowner with no connection to or knowledge of the disposal is held liable.

B. *Endangered Species Act*¹⁸³

Section 9 of the ESA prohibits anyone from harming a species listed as endangered or threatened (of which there were 1200 at last count). Under the Interior Department's regulations, a "significant habitat modification or degradation" that "actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering"¹⁸⁴ constitutes unlawful "harm."¹⁸⁵ A property owner who wishes to develop or use his or her land in a way that may violate section 9, however, can apply to the federal government for an "incidental take permit" under section 10 of the ESA. Central to the issuance of a permit is the property owner's development of a habitat conservation plan ("HCP") that, among other things, "will, to the maximum extent practicable, minimize and mitigate the impacts" of the actions.¹⁸⁶

Individual property owners can apply for an incidental take permit by developing an HCP for their specific parcels of land; the HCP may provide for on-site or off-site habitat preservation, special habitat management measures, or the payment of a

182. *Alcan Aluminum*, 49 F. Supp. 2d at 100.

183. Takings challenges to the Endangered Species Act are discussed in Blaine I. Green, *The Endangered Species Act and Fifth Amendment Takings: Constitutional Limits of Species Protection*, 15 YALE J. REG. 329 (1998); Robert Meltz, *ESA & Private Property: Where the Wild Things Are: The Endangered Species Act and Private Property*, 24 ENVTL. L. 369 (1994); Barton H. Thompson, Jr., *The Endangered Species Act: A Case Study in Takings & Incentives*, 49 STAN. L. REV. 305 (1997) [hereinafter Thompson, *The Endangered Species Act*].

184. 50 C.F.R. § 17.3 (1994).

185. The Supreme Court upheld this regulation in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995), but it did not address the regulation's constitutional takings implications.

186. 16 U.S.C. § 1539(a)(2)(B)(ii) (1994 & Supp. IV 1998).

mitigation fee. A growing trend, however, is the development of regional HCPs where an entire region, generally through consensus discussions, develops an area-wide HCP, leading to the issuance of a regional incidental take permit that authorizes development in pre-specified situations and with pre-specified conditions. Most regional HCPs provide for the purchase of habitat preserves and impose some form of development fee to pay for these and other conservation measures (although local, state, and federal taxpayers also pick up sizable portions of the bill).

Constitutional challenges to the ESA, which only recently have begun to be lodged, are likely to incorporate a variety of Fifth Amendment claims. *Nollan*, *Dolan* and *Eastern Enterprises*, in particular, provide the potential basis for challenges to development or use conditions contained in HCPs. An initial question will again be the applicability of a consequential fit test. At first glance, an HCP-case might look very much like *Nollan* and *Dolan*—a landowner challenging the nexus and proportionality of conditions imposed on his or her development or use of land. In most cases, however, the challenged conditions will not themselves be takings (as the Supreme Court assumed the conditions in *Nollan* and *Dolan* would have been). The government typically does not require landowners under the ESA to dedicate a portion of their land to the government (as in *Dolan*) or to open portions of their land to the public (as in *Nollan*). Instead, as noted, the government generally requires landowners to preserve part of their land as habitat (which courts to date have consistently held is not a taking¹⁸⁷), take conservation measures, or pay a conservation fee.

As noted earlier, lower courts have split on the issue of whether *Nollan* and *Dolan* are applicable where the condition is not a taking. Given *Dolan*'s unconstitutional condition rationale, some courts have read the two cases as resting on the government's attempt to force property owners to give up rights that the government could not otherwise constitutionally obtain for free.¹⁸⁸ The Court's decision in *City of Monterey v. Del Mon-*

187. See, e.g., *Southview Assocs. v. Bongartz*, 980 F.2d 84 (2d Cir. 1992); *Florida Game & Fresh Water Fish Comm'n v. Flotilla, Inc.*, 636 So. 2d 761 (Fla. Dist. Ct. App. 1994).

188. See, e.g., *Clajon Prod. Corp. v. Petera*, 70 F.3d 1566 (10th Cir. 1995).

*te Dunes*¹⁸⁹ can be read as supportive of this view. Other lower courts, however, have concluded that the risks of political overreaching are equally great where the condition is not itself a taking and that the nexus/rough proportionality standards of *Nollan* and *Dolan* do apply.¹⁹⁰ *Eastern Enterprises*, moreover, suggests that the applicability of *Nollan* and *Dolan* is only part of the issue. Even if *Nollan* and *Dolan* are confined to a narrow setting, consequential fit may remain a significant issue under the *Penn Central* tripartite approach. All three of the rationales for a consequential fit inquiry, moreover, argue for significant scrutiny.

In most cases, there will be a direct relationship between a property owner's proposed action (destruction or adverse modification of habitat) and the challenged condition (habitat preservation or a conservation fee). As with Superfund, the constitutionality of the condition therefore typically will hinge on the type and degree of proportionality required. The concept of proportionality can take courts down many different roads, some of them quite radical in their constitutional implications. For example, could current landowners complain that they are being forced to bear the entire burden of protecting endangered species when the principal cause of the species' decline and peril was the loss of previous habitat to the development of existing homes and businesses in the region?¹⁹¹ Less radically, could landowners complain that HCPs impose more onerous conditions on them than on other owners of undeveloped land? Or could they complain that a standard fee or condition imposed in a regional HCP is not contoured, even roughly, to the particular value of each parcel of land as habitat for the endangered species?

The answer to these questions rests in part on whether proportionality is viewed only at the level of the individual landowner (in which case there would seem to be no difficulty unless the HCP requires the property owner to do more than protect the species from the potential consequence of his development or

189. 526 U.S. 687 (1999).

190. See, e.g., *Ehrlich v. City of Culver City*, 911 P.2d 429 (Cal. 1996).

191. By the time most species are listed as endangered, they have already lost a sustainable quantum of habitat. See Barton H. Thompson, Jr., *People or Prairie Chickens: The Uncertain Search for Optimal Biodiversity*, 51 STAN. L. REV. 1127 (1999).

at a societal or problem level (in which case a landowner's comparative complaints are better taken). All three of the rationales for investigating consequential fit militate for the broader inquiry. The questions raised in the last paragraph all pose difficult issues of horizontal equity and thus fairness. If a series of individualized HCPs or a regional HCP were to require half of the landowners in an area to preserve large swaths of habitat but leave the other half untouched without any biological justification, moreover, most people would suspect political discrimination.¹⁹² And landowners' expectations of what burdens the government may place on them depend on how the government has treated other landowners in similar situations.

Under either the political discrimination or expectations rationales, however, courts must keep in mind that the goal of a consequential fit test is not to substitute the court's judgment of fairness and justice for those of legislatures or administrative agencies. As discussed in Part IV, the test for consequential fit should reflect well established, outlying norms. The court's goal should be to ferret-out these norms through a careful interpretation of the political terrain and then to compare the outlying norms, which frame the limits of conventional political action, with the actions that are challenged in the case before them. Mere temporal distinctions in the burdens imposed on landowners by the ESA seem unlikely to violate such norms. Similarly, the use of a uniform condition or fee in a regional HCP, where greater contouring would be administratively difficult or costly, seems unlikely to violate such norms. Although many may complain about the "unfairness" of loading the costs of environmental preservation on the backs of those property owners who waited too long to develop their properties, and although it would be nice from the standpoint of both fairness and efficiency to better contour conditions or fees, standard land use practice witnesses both phenomena, even in settings where there seems little fear of political discrimination against particular property owners. Under the more restrained versions of consequential fit elaborat-

192. Some regional HCPs have raised exactly such concerns. See Thompson, *The Endangered Species Act*, *supra* note 183, at 320-21 (noting that large property owners are sometimes able to shift at least some of the burden of regional HCPs onto smaller, less politically organized landowners).

ed here, the power of the Fifth Amendment should be retained for those instances where a landowner is singled out for a disproportionate burden that lies outside the boundaries of normal land use regulation.

VI. CONCLUSION

Eastern Enterprises can be read as an extension of the Supreme Court's previous interest in consequential fit. A majority of the Court freed the consequential fit inquiry from its previous linkage with land use exactions that themselves would be takings of private property. Justice O'Connor read it into the tripartite analysis of *Penn Central*. Justice Kennedy read it into substantive due process. This is not surprising given the significant allure of the concept of consequential fit. But the Court has opened the federal judiciary up to new constitutional challenges to a variety of environmental and other legislation. The potential breadth of *Eastern Enterprises* is illustrated in the fact that far more published opinions have had to address *Eastern Enterprises* in the first two years since its issuance than had to address *Nollan*, *Dolan*, or *Lucas* in a similar time span after their issuance. By tackling monetary liability and announcing a broad concern with consequential fit, *Eastern Enterprises* theoretically speaks to a wide set of economic legislation.

How much *Eastern Enterprises* actually ends up changing the constitutional divide between legislative and judicial decisions will largely fall to lower courts. As Part V illustrates, applying the concept of consequential fit to concrete cases raises novel and often difficult questions. In answering them, courts must keep in mind the risks of excessive intrusion into the legislative and administrative realm and thus the limited nature of the inquiry in which they should be engaged. Of the potential rationales for an inquiry into consequential fit, protection against political discrimination provides both the strongest and safest basis, while fairness is the weakest and most dangerous. If the concept of consequential fit is applied carefully, it can provide valuable protection against political excesses while not intruding unnecessarily into the legislative and administrative domains.

