SUPREME COURT OF THE UNITED STATES

No. 97–42

EASTERN ENTERPRISES, PETITIONER *v.* KENNETH S. APFEL, COMMISSIONER OF SOCIAL SECURITY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

[June 25, 1998]

JUSTICE BREYER, with whom JUSTICE STEVENS, JUSTICE SOUTER, and JUSTICE GINSBURG join, dissenting.

We must decide whether it is fundamentally unfair for Congress to require Eastern Enterprises to pay the health care costs of retired miners who worked for Eastern before 1965, when Eastern stopped mining coal. For many years Eastern benefited from the labor of those miners. Eastern helped to create conditions that led the miners to expect continued health care benefits for themselves and their families after they retired. And Eastern, until 1987, continued to draw sizable profits from the coal industry though a wholly owned subsidiary. For these reasons, I believe that Congress did not act unreasonably or otherwise unjustly in imposing these health care costs upon Eastern. Consequently, in my view, the statute before us is constitutional.

I

As a preliminary matter, I agree with JUSTICE KENNEDY, *ante*, at 2–9, that the plurality views this case through the wrong legal lens. The Constitution's Takings Clause does not apply. That Clause refers to the taking of "private property . . . for public use without just compensa-

tion." U. S. Const., Amdt. 5. As this language suggests, at the heart of the Clause lies a concern, not with preventing arbitrary or unfair government action, but with providing *compensation* for legitimate government action that takes "private property" to serve the "public" good.

The "private property" upon which the Clause traditionally has focused is a specific interest in physical or intellectual property. See, *e.g.*, *Penn Central Transp. Co.* v. *New York City*, 438 U. S. 104, 124 (1978); *Ruckelshaus* v. *Monsanto Co.*, 467 U. S. 986 (1984). It requires compensation when the government takes that property for a public purpose. See *Dolan* v. *City of Tigard*, 512 U. S. 374, 384 (1994) (Clause requires payment so that government cannot "'forc[e] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole'" (quoting *Armstrong* v. *United States*, 364 U. S. 40, 49 (1960))). This case involves, not an interest in physical or intellectual property, but an ordinary liability to pay money, and not to the Government, but to third parties.

This Court has not directly held that the Takings Clause applies to the creation of this kind of liability. The Court has made clear that, not only seizures through eminent domain, but also certain "takings" through regulation can require "compensation" under the Clause. See, *e.g.*, *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393, 415 (1922) ("[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking"); *Lucas* v. *South Carolina Coastal Council*, 505 U. S. 1003 (1992) (land use regulation that deprives owner of all economically beneficial use of property constitutes taking); *Nollan* v. *California Coastal Comm'n*, 483 U. S. 825 (1987) (public easement across property may constitute taking). But these precedents concern the taking of interests in *physical* property.

The Court has also made clear that the Clause can apply to monetary interest generated from a fund into which

a private individual has paid money. *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U. S. 155 (1980). But the monetary interest at issue there arose out of the operation of a specific, separately identifiable fund of money. And the government took that interest for itself. Here there is no specific fund of money; there is only a general liability; and that liability runs, not to the Government, but to third parties. Cf., *e.g.*, *Armstrong*, *supra*, at 48 (Government destroyed liens "for its own advantage"); *Connolly* v. *Pension Benefit Guaranty Corporation*, 475 U. S. 211, 225 (1986) (no taking where "the Government does not physically invade or permanently appropriate any . . . assets *for its own use*") (emphasis added).

The Court in two cases has arguably acted *as if* the Takings Clause might apply to the creation of a general liability. *Connolly*, *supra; Concrete Pipe & Products of Cal., Inc.* v. *Construction Laborers Pension Trust for Southern Cal.*, 508 U. S. 602 (1993). But in the first of those cases, the Court said that the Takings Clause had *not* been violated, in part because "the Government does not physically invade or permanently appropriate any . . . assets for its own use." *Connolly*, 475 U. S., at 225. It also rejected the position that a taking occurs "whenever legislation requires one person to use his or her assets for the benefit of another." *Id.*, at 223. The second case basically followed the analysis of the first case. *Concrete Pipe*, 508 U. S., at 641–647. And both cases *rejected* the claim of a Takings Clause violation. *Id.*, at 646–647; *Connolly*, *supra*, at 227–228.

The dearth of Takings Clause authority is not surprising, for application 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? Cf. *In re Leckie Smokeless Coal Co.*, 99 F. 3d 573, 583 (CA4 1996) (charac-

terizing "reachback" liability payments as a "tax"), cert. denied, 520 U. S. ___ (1997); *In re Chateaugay Corp.*, 53 F. 3d 478, 498 (CA2 1995) (same), cert. denied, *sub nom. LTV Steel Co., Inc.* v. *Shalala*, 516 U. S. 913 (1995). Would that Clause apply to some or to all statutes and rules that "routinely creat[e] burdens for some that directly benefit others"? *Connolly*, *supra*, at 223. Regardless, could a court apply the same kind of Takings Clause analysis when violation means the law's invalidation, rather than simply the payment of "compensation?" See *First English Evangelical Lutheran Church of Glendale* v. *County of Los Angeles*, 482 U. S. 304, 315 (1987) ("[The Takings Clause] is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking").

We need not face these difficulties, however, for there is no need to torture the Takings Clause to fit this case. The question involved– the potential unfairness of retroactive liability– finds a natural home in the Due Process Clause, a Fifth Amendment neighbor. That Clause says that no person shall be "deprive[d] . . . of life, liberty, or property, without due process of law." U. S. Const., Amdt. 14, §1. It safeguards citizens from arbitrary or irrational legislation. And the Due Process Clause can offer protection against legislation that is unfairly retroactive at least as readily as the Takings Clause might, for as courts have sometimes suggested, a law that is fundamentally unfair because of its retroactivity is a law which is basically arbitrary. See, *e.g.*, *Pension Benefit Guaranty Corporation* v. *R. A. Gray & Co.*, 467 U. S. 717, 728–730 (1984); *id.*, at 730 ("[R]etroactive aspects of legislation [imposing withdrawal liability on employers participating in pension plan] . . . must meet the test of due process"); *id.*, at 733 ("[R]etrospective civil legislation may offend due process if it is particularly harsh and oppressive") (internal quotation marks omit-

ted); *Usery* v. *Turner Elkhorn Mining Co.*, 428 U. S. 1, 17 (1976). Cf. *United States* v. *Carlton*, 512 U. S. 26, 30 (1994) (retroactive tax provision); *Welch* v. *Henry*, 305 U. S. 134, 147 (1938) (same); *National Labor Relations Board* v. *Guy F. Atkinson Co.*, 195 F. 2d 141, 149, 151 (CA9 1952) (invalidating administrative order as "arbitrary, capricious, an abuse of discretion," see 5 U. S. C. §706(2)(A), because "[t]he inequity of . . . retroactive policy making . . . is the sort of thing our system of law abhors").

Nor does application of the Due Process Clause automatically trigger the Takings Clause, just because the word "property" appears in both. That word appears in the midst of different phrases with somewhat different objectives, thereby permitting differences in the way in which the term is interpreted. Compare, *e.g.*, *United States* v. *Martin Linen Supply Co.*, 430 U. S. 564 (1977) ("person" includes corporations for purposes of Fifth Amendment Double Jeopardy Clause) with *Doe* v. *United States*, 487 U. S. 201, 206 (1988) ("person" does not include a corporation for purposes of Fifth Amendment Self-Incrimination Clause).

Insofar as the plurality avoids reliance upon the Due Process Clause for fear of resurrecting *Lochner* v. *New York*, 198 U. S. 45 (1905), and related doctrines of "substantive due process," that fear is misplaced. Cf. *id.*, at 75–76 (Holmes, J., dissenting); *Lincoln Fed. Union* v. *Northwestern Iron & Metal Co.*, 335 U. S. 525, 535 (1949) (repudiating the "*Allgeyer-Lochner-Adair-Coppage* constitutional doctrine"). As the plurality points out, *ante*, at 32, an unfair retroactive assessment of liability upsets settled expectations, and it thereby undermines a basic objective of law itself. See, *e.g.*, 2 J. Story, Commentaries on the Constitution §1398 (5th ed. 1891) (criticizing retrospective laws as failing to "accord with . . . the fundamental principles of the social compact"); *ibid.* (retroactive legislation invalid "upon principles derived from the general nature of

free governments, and the necessary limitations created thereby"); *General Motors Corp.* v. *Romein,* 503 U. S. 181, 191 (1992) ("[R]etroactive legislation . . . can deprive citizens of legitimate expectations"); *Fletcher* v. *Peck,* 6 Cranch 87, 143 (1810) (Johnson, J., concurring) (suggesting that retroactive legislation is invalid because it offends principles of natural law).

To find that the Due Process Clause protects against this kind of fundamental unfairness— that it protects against an unfair allocation of public burdens through this kind of specially arbitrary retroactive means— is to read the Clause in light of a basic purpose: the *fair application of law,* which purpose hearkens back to the Magna Carta. It is not to resurrect long-discredited substantive notions of "freedom of contract." See, *e.g.*, *Ferguson* v. *Skrupa,* 372 U. S. 726, 729–732 (1963).

Thus, like the plurality I would inquire if the law before us is fundamentally unfair or unjust. *Ante,* at 33–35. But I would ask this question because like JUSTICE KENNEDY, I believe that, *if so,* the Coal Act would "deprive" Eastern of "property, without due process of law." U. S. Const., Amdt. 14, §1.

II

The substantive question before us is whether or not it is fundamentally unfair to require Eastern to make *future* payments for health care costs of retired miners and their families, on the basis of Eastern's *past* association with these miners. Congress might have assessed all those who now use coal, or the taxpayer, in order to pay for those retired coal miners' health benefits. But Congress, instead, imposed this liability on Eastern. Coal Industry Retiree Health Benefit Act of 1992 (Coal Act), 26 U. S. C. §§9701–9722 (1994 ed. and Supp. II). The "fairness" question is, why Eastern?

The answer cannot lie in a contractual promise to pay,

for Eastern made no such contractual promise. Nor did Eastern participate in any benefit plan that made such a contractual promise, prior to its departure from the coal industry in 1965. But, as JUSTICE STEVENS points out, this case is not a civil law suit for breach of contract. It is a constitutional challenge to Congress' decision to assess a new future liability on the basis of an old employment relationship. *Ante*, at 2–3, n. 3 (STEVENS, J., dissenting). Unless it is fundamentally unfair and unjust, in terms of Eastern's reasonable reliance and settled expectations, to impose that liability, the Coal Act's "reachback" provision meets that challenge. See *Connolly*, 475 U. S., at 227; *Concrete Pipe*, 508 U. S., at 645–646.

I believe several features of this case demonstrate that the relationship between Eastern and the payments demanded by the 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 Act's "reachback" liability provision so frustrates Eastern's reasonable settled expectations as to impose an unconstitutional liability. Cf. *Penn Central*, 438 U. S., at 127–128.

For one thing, the liability that the statute imposes upon Eastern extends only to miners whom Eastern itself employed. See 26 U. S. C. §9706(a) (imposing "reach-back" liability only where no presently operating coal firm which ratified 1978 or subsequent bargaining agreement ever employed the retiree, and Eastern employed the retiree longer than any other "reachback" firm). They are miners whose labor benefited Eastern when they were younger and healthier. Insofar as working conditions created a risk of future health problems for those miners, Eastern created those conditions. And these factors help to distinguish Eastern from others with respect to a later obligation to pay the health care costs that inevitably arise in

old age. See, *e.g.*, 138 Cong. Rec. 34001 (1992) (Conference Report on Coal Act) (Coal Act assigns liability to "those companies which employed the retirees . . . and thereby benefitted from their services"); Hearings on Provisions Relating to the Health Benefits of Retired Coal Miners before the House Committee on Ways and Means, 103d Cong., 1st Sess., 8–9, 32 (1993) (hereinafter Hearings on Health Benefits); House Committee on Ways and Means, Financing UMWA Coal Miner "Orphan Retiree" Health Benefits, 103d Cong., 1st Sess., 50–51 (Comm. Print 1993) (hereinafter House Report).

Congress has sometimes imposed liability, even "retroactive" liability, designed to prevent degradation of a natural resource, upon those who have used and benefited from it. See, *e.g.*, Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U. S. C. §9601 *et seq.* (1994 ed. and Supp. I). That analogy, while imperfect, calls attention to the special tie between a firm and its former employee, a human resource, that helps to explain the special retroactive liability. That connection, while not by itself justifying retroactive liability here, helps to distinguish a firm like Eastern, which employed a miner but no longer makes coal, from other funding sources, say current coal producers or coal consumers, who now make or use coal but who have never employed that miner or benefited from his work.

More importantly, the record demonstrates that Eastern, before 1965, contributed to the making of an important "promise" to the miners. That "promise," even if not contractually enforceable, led the miners to "develo[p]" a reasonable "expectation" that they would continue to receive "[retiree] medical benefits." *Ante*, at 34. The relevant history, outlined below, shows that industry action (including action by Eastern), combined with Federal Government action and the miners' own forbearance, produced

circumstances that made it natural for the miners to believe that either industry or government (or both) would make every effort to see that they received health benefits after they retired– regardless of what terms were explicitly included in previously signed bargaining agreements.

(1) Before the 1940's, health care for miners, insofar as it existed, was provided by "company doctors" in company towns. See, *e.g.*, U. S. Dept. of Interior, Report of the Coal Mines Administration, A Medical Survey of the Bituminous-Coal Industry 121, 144 (1947) (Boone Report); *id.*, at 131, 191, 193 (describing care as substandard and criticizing the "noticeable deficiency" in the number of doctors); Secretary of Labor's Advisory Commission on United Mine Workers of America Retiree Health Benefits, Coal Commission Report 19 (1990) (Coal Comm'n Report), App. in No. 96–1947 (CA1), p. 1350 (hereinafter App. (CA1)). By the late 1940's, health care and pension rights had become *the* issue for miners, a central demand in collective bargaining, and a rallying cry for those who urged a nationwide coal strike. M. Fox, United We Stand 404, 416 (1990); I. Krajcinovic, From Company Doctors to Managed Care 17, 43 (1997); C. Seltzer, Fire in the Hole 57 (1985); R. Zieger, John L. Lewis: Labor Leader 151 (1988); see also *ante*, at 2. John L. Lewis, head of the UMWA, urged the mine owners to "'remove that fear'" of sudden death from "'their minds so that they will know if that occurs . . . their families will be provided with proper insurance.'" Zieger, *supra*, at 153. In 1946, the workers struck. The Government seized the mines. And the Government, together with the Union, effectively imposed a managed health care agreement on the coal operators. Seltzer, *supra*, at 58.

(2) The resulting 1946 "Krug-Lewis Agreement" created a Medical and Hospital Fund designed to "provide, or to arrange for the availability of, medical, hospital, and related services for the miners and their dependents." Krug-

Lewis Agreement §4(b), App. (CA1) 612–613. One year later, this fund was consolidated with a "Welfare and Retirement Fund" also established in 1946 (W&R Fund). 1947 National Bituminous Coal Wage Agreement (NBCWA) 150, App. (CA1) 621. Under the 1947 and successive agreements, the Fund's three trustees (union, management, and "neutral") determined the specific benefits provided under the plan. 1947 NBCWA 144, App. (CA1) 618.

(3) Between 1947 and 1965, the benefits that the W&R Fund provided included retiree benefits quite similar to those at issue here. The bargaining agreements between the coal operators and miners (NBCWA's) and the Fund's Annual Reports make clear that the W&R Fund provided benefits to all "employees . . . , their families and dependents for medical or hospital care." 1947 NBCWA 146, App. (CA1) 619; 1950 NBCWA 60–61, App. (CA1) 639 (continuing coverage); 1951 NBCWA 50–51, App. (CA1) 648 (same); 1952 NBCWA 40–42, App. (CA1) 650–651 (same); 1955 NBCWA 34–35, App. (CA1) 655 (same); 1956 NBCWA 28–29, App. (CA1) 658 (same); 1958 NBCWA 16–17, App. (CA1) 661 (same); 1964 NBCWA 4–5, App. (CA1) 668–669 (same); 1966 NBCWA 4–5, App. (CA1) 688–689 (same). The Fund's Annual Reports specified that eligible family members included miners' spouses, children, dependent parents, (and, at least after 1955) *retired miners and their dependents*, and widows and orphans (for a 12-month period). 1955 W&R Fund Annual Report 15, 28, App. (CA1) 881, 894; 1956 W&R Fund Annual Report 13–14, App. (CA1) 912–913 (also noting the "unprecedented magnitude and liberality of the Fund's Hospital and Medical Care Program"); 1958 W&R Fund Annual Report 7, App. (CA1) 943; 1959 W&R Fund Annual Report 7–8, App. (CA1) 975–976; 1960 W&R Fund Annual Report 9, App. (CA1) 1,018; 1961 W&R Fund Annual Report 16–17, App. (CA1) 1,058–1,059; 1962 W&R Fund Annual Report 15–16, App. (CA1) 1,090–1,091; 1963 W&R Fund Annual

Report 15–16, App. (CA1) 1,123–1,124; 1964 W&R Fund Annual Report 22–23, App. (CA1) 1,160–1,161; 1965 W&R Fund Annual Report 14, App. (CA1) 1,187. See also Hearings on Health Benefits, at 36 (suggesting retirees eligible "'from the inception of bargained benefits.'")

The only significant difference between the coverage provided before 1974 and after 1974 consists of greater generosity after 1974 with respect to widows, for the earlier 12-month limitation was repealed and health benefits extended to widows' remarriage or death. See 1974 NBCWA 105, App. (CA1) 758.

(4) In return for what the miners thought was an assurance (though not a contractual obligation) from management of continued pension and health care benefits, the Union agreed to accept mechanization of mining, a concession that meant significant layoffs and a smaller future workforce. Coal Comm'n Report 11–14, App. (CA1) 1,342–1,345 (75% decline in employment from 1950 to 1969); Krajcinovic, *supra*, at 4, 43–44; Seltzer, *supra*, at 36; see also C. Perry, Collective Bargaining and the Decline of the United Mine Workers 43 (1984) (detailing benefits of mechanization for coal operators). The President of the Southern Coal Operators' Association said in 1953 that the miners "have been promised and grown accustomed to" health benefits. App. (CA1) 2,000. Those benefits, the management's W&R Fund trustee said in 1951, covered "mine worker[s], including pensioners, and dependents . . . without limit as to duration." *Id.*, at 1,972. This Court, too, has said that the UMWA "agreed not to oppose the rapid mechanization of the mines" in exchange for "increased wages" and "payments into the welfare fund." *Mine Workers* v. *Pennington*, 381 U. S. 657, 660 (1965); see also *id.*, at 698 (Goldberg, J., concurring in judgment) (improved wages, benefits, and working conditions were a "*quid pro quo*" for automation).

Others have reached similar conclusions. The Coal Commission more recently said:

> "Retired coal miners have legitimate expectations of health care benefits for life; that was the promise they received during their working lives and that is how they planned their retirement years. That commitment should be honored." Coal Comm'n Report 1, App. (CA1) 1,332.

And numerous supporters of the present law read the history as showing, for example, that the "miners went to work each day under the assumption that their health benefits would be there when they retired." 138 Cong. Rec. 20121 (1992) (Sen. Wofford); see also *id.*, at 20118 (Sen. Rockefeller) (Act "will see to it that the promise of health care is kept to tens of thousands of retired coal miners and their families"); *id.*, at 20119 (Sen. Byrd) (Coal Act will "assure . . . retired coal miners . . . that promises made to them during their working years are not now . . . reneged upon"); *id.*, at 20120 (Sen. Ford) (Coal Act assures that "promise made to [retirees] can be kept"); *id.*, at 34001 (Conference Report on Coal Act) ("Under [NBCWA's], retirees and their dependents have been promised lifetime health care benefits").

Further, the Federal Government played a significant role in developing the expectations that these "promises" created. In 1946, as mentioned above, during a strike related to health and pension benefits, the Government seized the mines and imposed the "Krug-Lewis Agreement," which established the basic health benefits framework. *Supra*, at 9; see also 11 Fed. Reg. 5593 (1946) (President Truman's seizure order). In 1948, during a strike related to pension benefits, the Government again intervened to ensure continued availability of these benefits. 13 Fed. Reg. 1579 (1948) (Executive Order creating board to inquire into strike); Krajcinovic, *supra*, at 37–38.

In later years, but before 1965, Congress provided the W&R Fund with special tax benefits, helped the Fund to build hospitals, and established health and safety standards. Brief for Respondents the UMWA Combined Benefit Fund et al. 11–12 (citing relevant statutes and record materials). This kind of government intervention explains why the President of the Southern Coal Producers' Association said, in the 1950's, that if benefits were reduced, it was

> "entirely conceivable that Congress . . . [would] step in and take over the mines, assuming responsibility for the welfare collections and payment." App. (CA1) 2,000.

I repeat that the Federal Government's words and deeds, along with those of the pre-1965 industry, did not necessarily create contractually binding promises (which, had they existed, might have eliminated the need for this legislation). But in labor relations, as in human relations, one can create promises and understandings which, even in the absence of a legally enforceable contract, others reasonably expect will be honored. Indeed, in labor relations such industry-wide understandings may spell the difference between labor war and labor peace, for the parties may look to a strike, not to a court, for enforcement. It is that kind of important, mutual understanding that is at issue here. For the record shows that pre-1965 statements and other conduct led management to understand, and labor legitimately to expect, that health care benefits for retirees and their dependents would continue to be provided.

Finally, Eastern continued to obtain profits from the coal mining industry long after 1965, for it operated a wholly owned coal-mining subsidiary, Eastern Associated Coal Corp. (EACC), until the late 1980's. Between 1966 and 1987, Eastern effectively ran EACC, sharing officers,

supervising management, and receiving 100% of EACC's approximately $100 million in dividends. Brief for Petitioner 6, n. 13; App. (CA1) 2,172 (affidavit of T. Gallagher, EACC General Counsel); *id.*, at 2,182 (Eastern Corporate Cash Manual); see also *id.*, at 2,170–2,173 (noting Eastern's profits from, and control over, EACC); *id.*, at 2,178–2,181; *id.*, at 2,192–2,205. Eastern officials, in their role as EACC directors, ratified the post-1965 bargaining agreements, Brief for Bituminous Coal Operators' Association, Inc., as *Amicus Curiae* 28, and n. 20; Brief for Respondent Peabody Holding Co., Inc., et al. 14–15, and must have remained aware of the W&R Fund's deepening financial crisis.

Taken together, these circumstances explain why it is not fundamentally unfair for Congress to impose upon Eastern liability for the future health care costs of miners whom it long ago employed— rather than imposing that liability, for example, upon the present industry, coal consumers, or taxpayers. Each diminishes the reasonableness of Eastern's expectation that, by leaving the industry, it could fall within the Constitution's protection against unfairly retroactive liability.

These circumstances, as elaborated by the record, mean that Eastern knew of the potential funding problems that arise in any multiemployer benefit plan, see *Concrete Pipe*, 508 U. S., at 637–639, before it left the industry. Eastern knew or should have known that, in light of the structure of the benefit plan and the frequency with which coal operators went out of business, a "last man out" problem could exacerbate the health plan's funding difficulties. See, *e.g.*, Boone Report xvi; House Report 34; Coal Commission Report on Health Benefits of Retired Coal Miners: Hearing before the Subcommittee on Medicare and Long-Term Care of the Senate Committee on Finance, 102d Cong., 1st Sess., 15, 21 (1991) (statement of Coal Commission Vice Chairman Henry Perritt, Jr.). Eastern also

knew or should have known that because of prior federal involvement, future federal intervention to solve any such problem was a serious possibility. *Supra*, at 12–13; see also *Concrete Pipe*, *supra*, at 645–646; *Connolly*, 475 U. S., at 226–227; *Usery*, 428 U. S., at 15–16. Eastern knew, by the very nature of the problem, that any legislative effort to solve such a problem could well occur many years into the future. And, most importantly, Eastern played a significant role in creating the miners' expectations that led to this legislation. Add to these circumstances the two others I have mentioned– that Eastern had benefited from the labor of the miners for whose future health care it must provide, and that Eastern remained in the industry, drawing from it substantial profits (though doing business through a subsidiary, which usually, *but not always*, insulates an owner from liability).

The upshot, if I follow the form of analysis this Court used in *Connolly*, is that I cannot say the Government's regulation has unfairly interfered with Eastern's "distinct investment-backed expectations." See *Connolly*, *supra*, at 225–227 (analyzing "taking" in terms of three factors: (1) "economic impact"; (2) interference "'with distinct investment-backed expectations'"; and (3) "'character of the governmental action'" (citations omitted)). Within that framework, I could find additional support for the constitutionality of the "reachback" liability provision by adding that the "character of the governmental action" here amounts to the creation of a liability to a third party, and not a direct "taking" of an interest in physical property. And the fact that the statute here narrows Eastern's liability to those whom it employed, while explicitly preserving Eastern's rights to indemnification from others (thereby helping Eastern spread the risk of this liability), 26 U. S. C. §9706(f)(6), helps to diminish the Act's "economic impact" upon Eastern as well.

I would put the matter more directly, however. The law

imposes upon Eastern the burden of showing that the statute, because of its retroactive effect, is fundamentally unfair or unjust. The circumstances I have mentioned convince me that Eastern cannot show a sufficiently reasonable expectation that it would remain free of future health care cost liability for the workers whom it employed. Eastern has therefore failed to show that the law unfairly upset its legitimately settled expectations. Because, in my view, Eastern has not met its burden, I would uphold the "reachback" provision of the Coal Act as constitutional.