

RETROACTIVITY, THE RULE OF LAW, AND THE CONSTITUTION

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I. INTRODUCTION

Two recent Supreme Court decisions provide a context for reconsidering the state of retroactivity law. In *Eastern Enterprises v. Apfel*,¹ the Court invalidated the retroactive liability for former employee health benefits which the Coal Act of 1992² imposed on the plaintiff coal company.³ While there was no consensus among the five Justices supporting the judgment,⁴ all of the opinions in the case focus explicitly on the problem of retroactivity.⁵ In *United States v. Winstar Corp.*,⁶ the Court found that the government had breached its contract with the plaintiff financial institutions when the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA")⁷ changed previously established accounting principles to the detriment of the plaintiffs.⁸ In that case, the Court dealt with a clearly retro-

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

2. Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. §§ 9701-9722 (1994 & Supp. III 1997).

3. *Eastern Enters.*, 524 U.S. at 538-39.

4. Joined by the Chief Justice, Justice Scalia and Justice Thomas, Justice O'Connor concludes that the retroactive impacts of the Coal Act result in a taking of private property in violation of the Fifth Amendment. *Id.* at 538. Justice Kennedy concludes that the Act's retroactive effects violate the Due Process Clause, but not the Takings Clause, of the Fifth Amendment. *Id.* at 539 (Kennedy, J., concurring in the judgment, dissenting in part). Justice Thomas also suggests that the Coal Act's retroactivity might violate the Ex Post Facto Clause of Article I, § 9, cl. 3, even if it did not constitute a Takings Clause violation. *Id.* at 538-39 (Thomas, J., concurring).

5. *See id.*

6. 518 U.S. 839 (1996).

7. Pub. L. No. 101-73, 103 Stat. 183 (codified as amended in scattered sections of 12 U.S.C.).

8. *Winstar*, 518 U.S. at 843.

active law without explicit discussion of the problem of retroactivity.⁹

Do the *Eastern Enterprises* and *Winstar* decisions offer any promise or guidance for a renaissance of the rule of law as a fundamental principle of American constitutional government?¹⁰ While *Eastern Enterprises* deals explicitly with the issue of retroactivity, all of its opinions suffer from reliance on the jurisprudence of balancing which has come to dominate our constitutional law.¹¹ *Winstar*, although it avoids discussion of the abstract problem of retroactivity and thus offers no insights on the general problem of retroactive legislation,¹² is a good example of rule of law jurisprudence. Both may be helpful to the restoration of a rule of law principle in our constitutional jurisprudence.

The problem with balancing tests is that they require the courts to choose among the competing values which might be enshrined as American constitutional principles, as opposed to relying upon the principles which are actually enshrined in the Constitution.¹³ Balancing tests do not invite judicial activism;

9. See *id.*

10. In describing the Framers' methods of controlling the power of government, Herman Belz listed two approaches: "The first is the theory and practice of arranging the internal structure of government so that power is distributed and balanced. A second method of constitutionalism has been to subject government to legal limitations, or the rule of law." Herman Belz, *Constitutionalism and the American Founding*, in *ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION* 480, 481 (Leonard W. Levy et al. ed., 1986) (emphasis omitted).

11. See *Eastern Enters.*, 524 U.S. at 529; *id.* at 539 (Thomas, J., concurring); *id.* at 546 (Kennedy, J., concurring in the judgment and dissenting in part).

12. *Winstar*, 518 U.S. at 860.

13. The judicial task of constitutional interpretation must be committed to the principle that constitutional language has meaning intended by someone other than the judges or other officials of the moment, or we lose any claim to having a constitutional system based upon the rule of law. Constitutional government is limited government. The limitations are those set forth in the language of the Constitution. See, e.g., *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991) (noting that the Constitution creates a government of limited powers). If government officials—whether executives, bureaucrats, legislators or judges—are free to adjust constitutional meaning to their perceptions of current needs, the rule of law and constitutional government are lost to benevolent discretion at best and tyranny at worst. Framer intent—whether of the men who convened in Philadelphia more than 200 years ago, of the state conventions that ratified their work, or of some subsequent interpreter of their language—must provide meaning to the Constitution, or we have abandoned constitutional government and the rule of law.

they require it. Decisions are to be made on the basis of a choice between, say, liberty or state sovereignty,¹⁴ on the one hand, and federal or state power,¹⁵ on the other. In the application of a balancing test, judges do not have reference to the Constitution as the arbiter of competing values.¹⁶ Rather, the Constitution is a receptacle, from which the judge is free to choose among the values contained therein. The levels of scrutiny analysis,¹⁷ which has grown up in conjunction with the juris-

Few will contend that the Constitution has the meaning today that the original Framers or those who have amended it by constitutional process intended. It has been subjected to two centuries of judicial interpretation, sometimes with little regard for original Framer intent. *See, e.g.,* *New Jersey v. T.L.O.*, 469 U.S. 325, 335 (1985) (stating that the protections of the Fourth Amendment against searches and seizures have never been limited to the antiquated use of general warrants at which the Fourth Amendment was directed). This reality poses a dilemma for judges committed to constitutional government and the rule of law. Do they accept the interpretations of their predecessors who have ignored the intent of the original Framers and thus avoid upsetting settled expectations, or do they overrule those interpretations as violations of the fundamental principles of constitutional government? In the face of the Roosevelt and Warren Courts' broad scale rewriting of the Constitution, *see, e.g.,* *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), the conservatives on today's Court have often deferred to longstanding, if incorrect, judicial interpretations. *See, e.g.,* *Almendarez-Torres v. United States*, 523 U.S. 224, 248 (1998) (Scalia, J., dissenting). But Justice Thomas' *Eastern Enterprises* opinion on the subject of the Ex Post Facto Clause urges a different view. 524 U.S. at 539 (Thomas, J., concurring).

14. *See, e.g.,* *United States v. Robel*, 389 U.S. 258, 261 (1967), in which the Court invalidated a statute forbidding every member of the Communist Party from working in defense facilities. According to Laurence Tribe, the Court's analysis in *Robel* "implicitly 'balances' against government wherever the latter's interest seems dubious or marginal, but reserves the possibility of balancing for government whenever its interest is clearly compelling." LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-33, at 1039 (2d ed. 1988).

15. *See, e.g.,* *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) wherein the Court stated:

Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clear excessive in relation to the putative local benefits.

If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

Pike, 397 U.S. at 142 (citations omitted).

16. *See, e.g.,* TRIBE, *supra* note 14, § 12-33, at 1037-39.

17. Over the course of many years and in the context of a wide array of constitutional provisions, the Supreme Court has developed an approach to interpretation which requires the courts to pay closer attention to some constitutional claims than

prudence of balancing, does favor some values over others (as well as some people over others),¹⁸ but it remains for the courts to resolve the most basic issues of constitutional government.

This jurisprudence of balancing runs counter to the principle of the rule of law.¹⁹ While the Legal Realists were surely

to others. The level of scrutiny to be applied ranges from strict, meaning the government must demonstrate a compelling interest, *see, e.g., id.* § 16-6, at 1451-54 (discussing strict scrutiny as applied in equal protection situations), to deferential, meaning the government need only demonstrate a rational basis for its actions. *See, e.g., id.* § 16-2, at 1439-43 (discussing the basic requirement of minimum rationality in equal protection situations). The level of scrutiny to be applied depends upon various factors, including the particular right asserted, the status of the individual asserting the right, and the nature of the governmental interest sought to be promoted by the challenged regulation or statute. *See, e.g., id.* § 16-9 to -14, at 1458-74.

18. *See, e.g., United States v. Virginia*, 518 U.S. 515, 533 (1996) (requiring an "exceedingly persuasive" justification for classifications that deny opportunities based on gender); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 222 (1995) (noting that all racial classifications are reviewed under the strict scrutiny standard). Levels of scrutiny analysis has the effect of prejudging the balance in any particular case. The application of strict scrutiny to cases involving fundamental interests or suspect classes means that the government has to demonstrate a lot of public benefit to justify any intrusion on the preferred rights or impacts on the preferred individuals. *See* TRIBE, *supra* note 14, § 16-7, at 1454. Where the right asserted is not fundamental or the individual challenging the government action is not preferred, the government need only demonstrate that some public benefit could be expected to result from its challenged action. *See id.* § 16-2, at 1439-43. While this prejudging has the effect of constraining prospective judicial balancing and thus providing a level of certainty, it is nonetheless without foundation in the Constitution.

19. Balancing tests have long been integral to the common law, *see, e.g., Water-Lot Co. v. Bucks*, 5 Ga. 315, 327 (Ga. 1848) (applying a balancing test to a land use dispute in the nineteenth century), but the balancing of the common law judge is a qualitatively different matter from the constitutional balancing of modern constitutional law.

Much of the balancing of the common law is rooted in equity, or at least in the principle that judicial intervention in private affairs ought to preserve or restore the reasonable expectations of private parties in conflict. *See, e.g., Bucks*, 5 Ga. at 327. For example, neighboring property owners understand that their rights are correlative to the extent that use of one property impacts other property. While neighbors might endeavor to define their relative rights in anticipation of every possible future conflict, it is efficient, as well as unavoidable, that some matters be effectively delegated to the courts for future definition consistent with the general principles of private property law. An independent adjudicator's balancing of conflicting private interests that conforms to the spirit of property law is probably what most individuals will prefer as a rule for the resolution of unanticipated future disputes, and in any event, it is what they will understand to be the law of private nuisance which the courts will apply to such disputes.

Property owners will also understand that the law of public nuisance limits property rights in relation to the public and that courts will balance private against

correct in observing that judges and others who interpret and enforce the law are unavoidably influenced by who they are,²⁰ this recognition of human frailty, if not self-interest, should not lead us to embrace a jurisprudence which substitutes ad hoc judgment for an earnest and honest effort to interpret and apply the Constitution as a fundamental rule of law.²¹ In the context of retroactive legislation, we should aspire to a rule of interpretation which will serve the values of the rule of law while limiting the discretion of the judiciary to make constitutional choices. *Eastern Enterprises* and *Winstar* can be helpful because both the "average reciprocity of advantage"²² concept of takings doctrine

public interests when there is a conflict, but like the law of private nuisance, this balancing is an established part of the law of property, *see id.*, and thus not contrary to the expectations of property owners. As circumstances change, the balance may change, but that too is part of the expectation established by the common law.

The expectations of constitutional law are a different matter altogether. The Constitution is the most important legal manifestation of the American Revolution. Among other things, the Constitution defines and limits the roles of the three branches of government. *See* U.S. CONST. arts. I-III. The rights protected by the Constitution are limits on government power, including the power of the judiciary. *See id.* The English common law persists, Wambdi Awanwicake Wastewin, *Federal Courts-Indians: The Eleventh Amendment and Seminole Tribe: Reinventing the Doctrine of State Sovereign Immunity*, 73 N.D. L. REV. 517 (1997) (noting that the vestiges of the English common law were carried over in the creation of the United States), but only to the extent that it is consistent with the Constitution. *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981) (noting that it is basic to the Supremacy Clause that all provisions in conflict with the Constitution are without effect). The individual rights protections of the Constitution operate as limits on the courts in the application of the common law.

While we might debate the merits of particular uses of balancing in the common law, reliance on balancing to resolve disputes over the extent of private claims of right is not inherently inconsistent with the rule of law. However, reliance on judicially created balancing tests in constitutional interpretation, absent express constitutional authorization, is by definition an abuse of the constitutionally prescribed and limited powers of the judiciary.

20. *See, e.g.*, Jerome Frank, *What Courts Do In Fact*, 26 ILL. L. REV. 645, 655 (1932).

21. Critical legal theorists have argued that ad hoc, self-interested decision making is inherent to the law, *see* MARK KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* 3 (1987), but in their own inability to separate politics from law, they underestimate the capacity of humans to exercise self-restraint where it will serve the long term interests of both the individual and the community.

22. The language was first used by Justice Holmes in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). The central idea is that some regulations provide widespread benefits to the same people burdened by those regulations. *Mahon*, 260 U.S. at 415, 417 (Brandeis, J., dissenting). The principle has generally been interpreted to mean that there is no taking where such reciprocal advantages exist, *see*,

and the "public and general acts"²³ criterion of government contract law provide an opportunity to move in this direction.

II. *EASTERN ENTERPRISES V. APFEL & UNITED STATES V. WINSTAR*

Eastern Enterprises and *Winstar* both deal with legislative retroactivity,²⁴ but in very different ways. Particularly the former case offers hope for a renewed analysis of retroactivity,²⁵ although both cases disappoint by failing to provide clear guidance on the constitutionality of retroactive legislation.²⁶ As is often the case in modern constitutional law, it remains for the lower courts to piece together a coherent doctrine.²⁷

In *Eastern Enterprises*, no member of the Court doubts that the 1992 Coal Act has retroactive consequences for the plaintiff.²⁸ However, the five Justices who find the law unconstitu-

e.g., *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1017 (1992), although the better analysis is reflected in Richard Epstein's conclusion that while there has been a taking, the reciprocal advantages constitute implicit compensation. RICHARD EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 195 (1985). For a defense and explication of the Epstein thesis, see James L. Huffman, *A Coherent Takings Theory at Last: Comments on Richard Epstein's Takings: Private Property and the Power of Eminent Domain*, 17 ENVTL. L. 153 (1986).

23. *Horowitz v. United States*, 267 U.S. 458, 461 (1925) (quoting *Jones v. United States*, 1 Ct. Cl. 383, 384 (1865)).

24. See *supra* notes 1-5, 6-8.

25. See *Eastern Enters.*, 524 U.S. at 532.

26. See *id.*; *Winstar*, 518 U.S. at 580.

27. It is commonplace for lower courts to claim that their adherence to the principle of stare decisis leaves them no involvement in the development of the law, see, *e.g.*, *Addison v. Commercial Bank*, 165 F.2d 937, 938-40 (5th Cir. 1998), but the reality is that they have persistent and significant impacts. The Supreme Court has the last word on questions of federal law, see, *e.g.*, *Williams v. United States*, 401 U.S. 667, 680 (1971) ("[I]t is necessary for the proper functioning of the federal system that [the Supreme Court] have the last word on issues of federal . . . law.") (Harlan, J., concurring in the judgment and dissenting in part), but it does not have the only word. Even without the discretion inherent in reliance on balancing tests, the lower courts cannot avoid exercising discretion in the interpretation of the law and the application of Supreme Court precedents. More importantly, they are duty bound to exercise their best judgment and to uphold the Constitution. As the Supreme Court acknowledges from time to time, it sometimes gets things wrong. *E.g.*, *Monell v. Department of Soc. Servs.*, 436 U.S. 658, 663 (1978) (overruling prior decision). Unless the lower courts question Supreme Court precedent where they believe it is incorrect, the High Court will have less occasion to reconsider past decisions and correct its mistakes.

28. See 524 U.S. at 534; *id.* at 538-39 (Thomas, J., concurring); *id.* at 547 (Ken-

tional do not agree on the reason for that finding,²⁹ and the four dissenters who all agree that the Coal Act is constitutional also agree that there are circumstances under which a retroactive civil statute would not pass constitutional muster.³⁰ So it seems that every member of the Court is of the opinion that retroactivity in civil legislation can pose a constitutional problem,³¹ but they disagree in this particular case and, presumably, in many other cases.

Again, in *Winstar*, no member of the Court doubts that FIRREA has retroactive consequences for the plaintiff,³² although breach of contract, not retroactivity, is the language of the Court's discussion.³³ Like *Eastern Enterprises*, the judgment is announced in a plurality opinion to be understood in the context of two concurrences and a dissent.³⁴ While the plurality

nedy, J., concurring in the judgment and dissenting in part); *id.* at 557 (Breyer, J., dissenting).

29. See *supra* note 4 and accompanying text.

30. *Eastern Enters.*, 524 U.S. at 556 (Breyer, J., dissenting). "To find that the Due Process Clause protects against . . . 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 harkens back to the Magna Carta." *Id.* at 558 (Breyer, J., dissenting). Breyer goes on to conclude that the law in question is not "fundamentally unfair or unjust," *id.* at 558, 567-68, but clearly he is of the view that some laws will be sufficiently unfair and unjust to offend the Due Process Clause.

31. *Id.* at 534; *id.* at 538-39 (Thomas, J., concurring); *Eastern Enters.*, 524 U.S. at 547 (Kennedy, J., concurring in the judgment and dissenting in part); *id.* at 557 (Breyer, J., dissenting).

32. *Winstar*, 518 U.S. at 900-03; *id.* at 910-11 (Breyer, J., concurring); *id.* at 919 (Scalia, J., concurring); *id.* at 931-33 (Rehnquist, C.J., dissenting).

33. *Id.* at 860; *Winstar*, 518 U.S. at 910 (Breyer, J., concurring); *id.* at 919 (Scalia, J., concurring); *id.* at 924 (Rehnquist, C.J., dissenting).

34. See *id.* at 839-924. Justice Souter, joined by Justices Stevens, O'Connor and Breyer, concludes that FIRREA's alteration of capital reserve requirements does constitute a breach of contract and is not subject to the unmistakability defense because it does not entail an exercise of sovereign power. *Id.* at 910. Justice Breyer concurs in an opinion urging that the unmistakability doctrine has more limited application than the government contends. *Winstar*, 518 U.S. at 911 (Breyer, J., concurring). Justice Scalia, joined by Justices Kennedy and Thomas, concurs in the judgment, but he insists that the challenged provisions of FIRREA are clear exercises of sovereign power which were unmistakably limited by the earlier contractual agreements of the government. *Id.* at 920 (Scalia, J., concurring). The Chief Justice's dissent, in an opinion joined by Justice Ginsburg, agrees with Justice Scalia on the applicability of the unmistakability doctrine, but he concludes that pursuant to that doctrine the government cannot, in this case, be held liable for breach of contract. *Id.* at 934-37. (Rehnquist, C.J., dissenting).

refers to what dissenting Chief Justice Rehnquist calls "lofty jurisprudential principles,"³⁵ all of the opinions are mired ultimately in the law of government contracts.³⁶ The resolution of a government contracts case certainly requires reference to the law of government contracts, but that law cannot be understood without reference to constitutional principles, particularly those relating to legislative retroactivity.³⁷

So, after *Eastern Enterprises*, it remains for the lower courts to advance the analysis beyond a mere balancing if the constitutional responsibilities of the judiciary are to be met.³⁸ And, after *Winstar*, it falls to the lower courts to articulate the relationship between government contracts doctrine and the undergirding constitutional principles which constrain reliance on retroactive legislation in pursuit of the public welfare.³⁹ Central among the responsibilities of the judiciary at any level is surely the pursuit of the principle of the rule of law.⁴⁰ It is a challenging pursuit when the Supreme Court, whose rulings are the law of the land, constructs a constitutional house of cards in the form of a wide array of balancing tests.

In the modern world of constitutional balancing tests, divided opinions like *Eastern Enterprises* are inevitable, even if every member of the Court agrees on what constitutional provision or

35. *Id.* at 932 (Rehnquist, C.J., dissenting).

36. *See id.* at 860-910; *Winstar*, 518 U.S. at 910-18 (Breyer, J., concurring); *id.* at 919-24 (Scalia, J., concurring); *id.* at 924-37 (Rehnquist, C.J., dissenting).

37. *See, e.g., Lynch v. United States*, 292 U.S. 571, 579 (1934) (noting that Congressionally-issued insurance remains subject to the law applicable to private individuals and the Due Process Clause). The point is that government contract law is not exempt from any of the constitutional limitations on government power. *See Lynch*, 293 U.S. at 579. To the extent that retroactivity poses a constitutional problem under the Takings, Contract, Ex Post Facto and Due Process Clauses, those provisions of the Constitution must be addressed in a government contract case in the same way that they would be addressed in any other case. *See id.*

38. *See supra* notes 11, 12-21 and accompanying text.

39. *See supra* notes 6-9, 25, 35 and accompanying text.

40. Fidelity to the rule of law does not mean unthinking deference to every prior judicial decision or even every prior decision of a higher court. *Stare decisis* serves the rule of law. It is not a value unto itself. Adherence to prior decisions which have ignored the rule of law may be contrary to the values served by the rule of law. It is a difficult problem to resolve, as suggested in note 26, *supra*, but surely slavish deference to prior legal error cannot always be justified in the name of adherence to the rule of law. The prospect of being labeled a judicial activist no doubt deters many judges from questioning precedent, but it is not judicial activism to do that which the Constitution requires.

provisions constrain retroactivity. Reliance on balancing tests assures that judicial determinations of constitutionality are ad hoc. Courts are required to undertake fact intensive inquiries for the purpose of determining the weight of the relevant variables which tip the retroactivity balance.⁴¹ Such inquiries are not the traditional judicial activity of applying the law to the facts of the case. Rather they are more like the traditional legislative function of determining which among competing values will carry the day. As with the lawmakers in a legislature, it will be surprising if every member of the Court agrees on the best outcome in a particular case. And so we get Supreme Court opinions which require a score card to know what has been decided. Lower courts, legal advisors and ordinary citizens find themselves in the position of deciphering Supreme Court opinions as an exercise in something resembling the determination of legislative intent.

In *Eastern Enterprises* there is the disagreement we have come to expect. Four members of the Court, represented by Justice O'Connor's opinion,⁴² conclude that the retroactive impacts of the Coal Act result in an unconstitutional taking of property.⁴³ Justice Kennedy concludes that the Act's retroactivity violates the Due Process Clause of the Fifth Amendment.⁴⁴ Justice Breyer, with the concurrence of the other three dissenters,⁴⁵ concludes that, while retroactivity might offend the Due Process Clause, the retroactivity of the Coal Act is not sufficiently unfair and arbitrary to do so in this case.⁴⁶

In *Winstar*, there is disagreement of a very different sort. While there is divergence of opinion about the significance and import of the unmistakability and sovereign acts doctrines of

41. *Eastern Enters.*, 524 U.S. at 523 ("[T]he process for evaluating a regulation's constitutionality involves an examination of the 'justice and fairness' of the governmental action. That inquiry, by its nature, does not lend itself to any set formula, and the determination . . . is essentially ad hoc and fact intensive.") (quoting *Andrus v. Allard*, 444 U.S. 51, 65 (1979)).

42. *Id.* at 503 (Chief Justice Rehnquist, Justice Scalia and Justice Thomas join in Justice O'Connor's plurality opinion).

43. *Id.* at 538.

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

45. Justices Stevens, Souter and Ginsburg join in Justice Breyer's dissenting opinion. *Id.* at 556.

46. *Eastern Enters.*, 524 U.S. at 556, 567-68 (Breyer, J., dissenting).

government contract law,⁴⁷ the core disagreement is in the application of law to the facts. Justice Souter, writing for a plurality of four (except as to parts IV-A and IV-B),⁴⁸ concludes that the unmistakability doctrine does not apply because a finding of breach under FIRREA imposes no limitations on sovereign power, and that the sovereign acts doctrine defense is not available because FIRREA is not a "public and general" Act.⁴⁹ According to Souter, "[t]he sovereign acts doctrine . . . balances the Government's need for freedom to legislate with its obligation to honor its contracts. . . ."⁵⁰ Justice Scalia dismisses the "so-called 'sovereign acts' doctrine [as] add[ing] little, if anything at all, to the unmistakability doctrine,"⁵¹ which he applies as a common sense requirement that the constraint on sovereignty implicit in every government contract be expressed clearly in those contracts.⁵² In dissent, Justice Rehnquist agrees that the unmistakability and sovereign acts doctrines "are not entirely separate principles,"⁵³ but he concludes that both reflect the requirement articulated many years ago by Justice Holmes that "[m]en must turn square corners when they deal with the Government,"⁵⁴ a principle which Justice Rehnquist says "arises, not from any ancient privileges of the sovereign, but from the necessity of protecting the federal fisc. . . ."⁵⁵

47. See *Winstar*, 518 U.S. at 910-24. The unmistakability doctrine was explained concisely in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148 (1982): "[S]overeign power, even when unexercised, is an enduring presence that governs all contracts subject to the sovereign's jurisdiction, and will remain intact unless surrendered in unmistakable terms." The classic statement of the sovereign acts doctrine is from *Horowitz v. United States*, 267 U.S. 458, 461 (1925): "It has long been held by the Court of Claims that the United States when sued as a contractor cannot be held liable for an obstruction to the performance of the particular contract resulting from its public and general acts as a sovereign" (citations omitted).

48. *Winstar*, 518 U.S. at 843. Justice Souter was joined by Justice Stevens and Justice Breyer and by Justice O'Connor except for Parts IV-A and IV-B which deal with the nature and extent of the concept of public and general acts for purposes of the sovereign acts defense. See *id.* at 843, 896, 900.

49. *Id.* at 903.

50. *Id.* at 896.

51. *Id.*

52. *Winstar*, 518 U.S. at 923-24.

53. *Id.* at 937.

54. *Id.* (quoting *Rock Island, Ark. & La. R.R. Co. v. United States*, 254 U.S. 141, 143 (1920)).

55. *Id.* According to the Chief Justice, this necessity to protect the federal fisc rises, in turn, "from possible improvidence on the part of the countless Government

Although the abstract issue of retroactivity is never discussed in *Winstar*, all of the opinions are truer to the rule of law than are the opinions in *Eastern Enterprises*.⁵⁶ Justice Souter observes that the sovereign acts doctrine reflects a balancing,⁵⁷ but in all four *Winstar* opinions, the central issue is: What did the government promise?⁵⁸ The unmistakability and sovereign acts doctrines are merely interpretive principles for answering that question. The differing answers to the question may reflect differences of opinion about the balance between protection of private expectations, on the one hand, and flexibility of the government to change its policies on the other. But on the face of the several opinions, the debate is about whether the government has breached a promise.⁵⁹ If so, all agree that the government must pay damages.⁶⁰

officials who must be authorized to enter into contracts for the Government." *Id.* But is not the point of the Bill of Rights and the many other rights guarantees of the Constitution to protect individuals from the improvidence as well as the ill-intent of government officials? Will we accept constraints on free speech or due process if they result from mere improvidence as opposed to a conscious effort to constrain liberties? It would be a peculiar Constitution, indeed, that protects the government from the incompetence and inattention of its officials rather than protecting the citizens from those very same eventualities. The central point of waiving sovereign immunity in contract disputes is to position the government similarly to those private parties with which it engages.

56. See *supra* notes 12, 22-23 and accompanying text.

57. See *Winstar*, 518 U.S. at 895-99 (Souter, J., dissenting). "The sovereign acts doctrine thus balances the Government's need for freedom to legislate with its obligation to honor its contracts by asking whether the sovereign act is properly attributable to the Government as contractor." *Id.* at 896. But the balancing which Souter describes is implicit in the doctrine, not a task for courts to perform on an ad hoc basis. The task for the courts is not to do the balancing but to apply the balance which the doctrine reflects.

58. *Id.* at 868-69 (noting that the Court must be "clear about what these contracts did and did not require of the government"); *id.* at 918 (noting that the contract made specific promises concerning regulatory treatment) (Breyer, J., concurring); *id.* at 921 (discussing whether the government promised to regulate in a particular fashion) (Scalia, J., concurring); *Winstar*, 518 U.S. at 929-30 (discussing the promises made by the government in the contract) (Rehnquist, C.J., dissenting).

59. *Id.* at 870; *id.* at 918 (Breyer, J., concurring); *id.* at 919 (Scalia, J., concurring); *id.* at 935 (Rehnquist, C.J., dissenting). Implicit in whatever promises the government is determined to have made is the sovereign acts doctrine, and thus the balance which has been achieved between the government's freedom to legislate and the obligation to honor its contracts.

60. *Winstar*, 518 U.S. at 910; *id.* at 918 (Breyer, J., concurring); *id.* at 919 (Scalia, J., concurring).

III. THE LAW OF RETROACTIVITY

In *Winstar*, the Court limits itself to government contract law which, for the purposes of this discussion, I will describe as a subset of the law of retroactivity.⁶¹ In *Eastern Enterprises*, the Court ranges expansively across the landscape of retroactivity law,⁶² although the plaintiffs' complaints in the two cases are not all that different. The *Winstar* plaintiffs (financial institutions in three consolidated cases) sought damages for harm suffered as a result of FIRREA's retroactive changes in special accounting treatment they had been promised when they acquired failing thrifts.⁶³ The *Eastern Enterprises* plaintiff sought an invalidation of the Coal Act or compensation for an unconstitutional taking which resulted from the retroactive imposition of liability for funding of health benefits for former employees.⁶⁴ In the former case, damages are the only available remedy.⁶⁵ In the latter case, the remedy could take the form of compensation or invalidation of the offending legislation.⁶⁶ In both cases, the harm is not to real or personal property, but to the plaintiffs' bottom lines.⁶⁷

The opinions in *Eastern Enterprises* skim the surface of retroactivity law which is explicated in much greater depth and detail in other articles prepared for this symposium. However, it will be useful to examine the opinions in *Eastern Enterprises* to illustrate the shortcomings of what seems to be the prevailing constitutional doctrine on legislative retroactivity.

Justice O'Connor's opinion for the plurality finds an uncon-

61. *Id.* at 860; *supra* note 32 and accompanying text. Of course, there is much more to government contract law than a concern about the validity of unilateral, retroactive changes resulting from government legislation, but it cannot be gainsaid that the central purpose of contract law is to fix future expectations. Unilateral, retroactive changes thus defeat the central purpose of contract law and must overcome a presumption of invalidity.

62. See *Eastern Enters.*, 524 U.S. at 532-33 (discussing the historical dimensions of retroactivity); *id.* at 533 (discussing the constitutional concerns implicated by retroactive laws); *id.* at 534 (discussing that even where retroactivity is tolerated, it is tolerated only within limits).

63. 518 U.S. at 858.

64. 524 U.S. at 517.

65. *Winstar*, 518 U.S. at 858.

66. *Eastern Enters.*, 524 U.S. at 520-22.

67. See *Winstar* at 858; *Eastern Enters.*, 524 U.S. at 517.

stitutional taking of private property in *Eastern Enterprises*, but also establishes that an unconstitutional taking should not be declared without an explicit focus on the retroactive nature of every taking.⁶⁸ While acknowledging that all of the precedent in related cases finds no taking;⁶⁹ O'Connor concludes that the earlier decisions "left open the possibility that legislation might be unconstitutional if it imposes severe retroactive liability on a limited class of parties that could not have anticipated the liability, and the extent of that liability is substantially disproportionate to the parties' experience."⁷⁰ The opinion goes on to recount the three factor test to be employed in this ad hoc inquiry,⁷¹ but at the heart of the analysis is the retroactive nature of the Coal Act.⁷² Citing the suggestion in *Calder v. Bull*⁷³ that the Takings Clause is a parallel restraint on retroactivity to the Ex Post Facto Clause's prohibition of retroactivity in penal statutes,⁷⁴ O'Connor describes the Coal Act's retroactive impacts on Eastern as "substantial and particularly far reaching."⁷⁵

The concurring and dissenting opinions, including Justice

68. *Eastern Enters.*, 524 U.S. at 525, 528-29, 532-38. Every legislative or regulatory taking is by definition retroactive. See, e.g., *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798). The successful plaintiff's claim is based upon a determination that a property right vested prior to the enactment of the offending law. See *Calder*, 3 U.S. at 394. Thus, where a statute or regulation limits a preexisting property right but no taking is found to have occurred, we must conclude that that amount of retroactivity does not offend the Constitution, even though it offends the principle of the rule of law. The only way to avoid this conclusion is to insist that the property right was held subject to the right of the government to limit it, which is to say that it is no right at all, but only a license. To the extent that property rights are understood to be thus limited, we move away from the purpose, if not the form, of the rule of law principle.

69. *Eastern Enters.*, 524 U.S. at 528.

70. *Id.* at 528-29.

71. *Id.* at 529. The three factors are: the economic impact of the regulation, which the plurality finds to be substantial, *id.*, its interference with reasonable investment-backed expectations, which it finds to be severe, *id.* at 532, and the character of the governmental action, which it finds to be "quite unusual." *Eastern Enters.*, 524 U.S. at 537.

72. See *id.* at 532.

73. 3 U.S. (3 Dall.) 386 (1798).

74. *Eastern Enters.*, 524 U.S. at 533-34. In *Calder*, the point of drawing this parallel was to justify the Court's narrow application of the Ex Post Facto Clause. 3 U.S. (3 Dall.) at 394. The Court suggested that the existence of the Takings Clause and other effective limits on retroactive civil laws supported the conclusion that the Ex Post Facto Clause was intended only to apply to penal laws. *Id.*

75. *Eastern Enters.*, 524 U.S. at 534.

Kennedy's, which concurs in the judgment, take the position that retroactive legislation like the Coal Act cannot offend the Takings Clause because there is no specific property right or interest at stake.⁷⁶ According to Justice Kennedy, "it is incongruous to call the Coal Act a taking, even as that concept has been expanded by the regulatory takings principle."⁷⁷ Justice Breyer agrees that there is no property interest at stake⁷⁸ but, along with Justice Kennedy, thinks that the Coal Act has "an adverse economic effect" on some individuals.⁷⁹

Justice Kennedy's concurrence in the judgment is based on his conclusion that the case "represents one of the rare instances where the Legislature has exceeded the limits imposed by due process."⁸⁰ Justice Breyer agrees that "a law that is fundamentally unfair because of its retroactivity is a law that is basically arbitrary,"⁸¹ but he disagrees with Kennedy that the Coal Act is such a law.⁸² Neither Kennedy nor Breyer explain how it is that there is no property interest at stake for takings clause purposes but that there is a property interest at stake sufficient to implicate the Due Process Clause.⁸³

So all agree that retroactivity can be a constitutional problem, but they disagree as to the relevant constitutional provision and the acceptability of the retroactive effects of the Coal Act on Eastern Enterprises.⁸⁴ As suggested above,⁸⁵ such disagreement will seldom be avoided if the test for unconstitutional retroactivity relies on balancing. In the balance seem to be the economic impact on the plaintiff, the extent of interference with

76. *Id.* at 541 (Kennedy, J., concurring in the judgment and dissenting in part); *id.* at 553 (Stevens, J., dissenting); *id.* at 554 (Breyer, J., dissenting).

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

78. *Eastern Enters.*, 524 U.S. at 554 (Breyer, J., dissenting).

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

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

81. *Id.* at 557 (Breyer, J., dissenting).

82. *Id.* at 559.

83. *Eastern Enters.*, 524 U.S. at 539 (Kennedy, J., concurring in the judgment and dissenting in part); *id.* at 553 (Breyer, J., dissenting). Justice Breyer states that he "would inquire if the law before us is fundamentally unfair or unjust. 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.'" *Id.* at 558 (citing U.S. CONST., amend. XIV, § 1).

84. *Supra* notes 27-30 and accompanying text.

85. *See supra* pp. 1096-97.

investment backed expectations, and the nature of the governmental action.⁸⁶ Each requires ad hoc investigation and, finally, a clearly nonjudicial choice between the plaintiff's and the government's interests.

The contrast between *Eastern Enterprises* and *Winstar* is significant. In the former, the Court is particularly concerned with the severity of the retroactivity, as it seeks to balance the impact on the plaintiff against the interests of the government.⁸⁷ More severe retroactivity apparently translates into greater impacts on the plaintiffs which in this case tips the scales in favor of a finding of unconstitutionality.⁸⁸ The Court does the balancing.⁸⁹ In *Winstar*, the Court is concerned with whether there are retroactive consequences.⁹⁰ Both the majority and the dissent seem to agree that if the government has breached its contract, it is liable for damages.⁹¹ The disagreement is about what the government promised.⁹² By way of informing their understanding of the law, the plurality opinion notes the unmistakability and sovereign acts doctrines reflect a balancing of "the Government's need for freedom to legislate with its obligation to honor its contracts,"⁹³ but the Court does not balance the interests to decide the case.⁹⁴

In his concurrence in *Eastern Enterprises*, Justice Thomas states that he "would be willing to reconsider *Calder* [v. Bull] and its progeny to determine whether a retroactive civil law . . . is . . . unconstitutional under the Ex Post Facto Clause."⁹⁵ This is a radical idea, but not one which should be dismissed out of hand. The case law since *Calder* has not adhered consistently to the view that the Ex Post Facto Clause has application only to penal laws,⁹⁶ although that is the accepted understanding

86. *Supra* note 69 and accompanying text.

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

88. *Id.* at 537.

89. *Id.* at 529-37.

90. *Winstar*, 518 U.S. at 889-91.

91. *Id.* at 881-83; *id.* at 933 (Rehnquist, C.J., dissenting).

92. *Id.* at 879-80; *id.* at 926 (Rehnquist, C.J., dissenting).

93. *Winstar*, 518 U.S. at 896.

94. *See id.*

95. *Eastern Enters.*, 524 U.S. at 539 (Thomas, J., concurring).

96. *See* TRIBE, *supra* note 14, at 635-36. Tribe notes that although the Supreme Court had wavered on the question of whether the Ex Post Facto Clause applies to

among virtually all constitutional lawyers today.⁹⁷ But more persuasive than a handful of nineteenth century cases invalidating civil legislation as *ex post facto* is that the logic of *Calder* is not entirely convincing. Central to that Court's conclusion that the Clause has application only to retrospective penal laws is that the Constitution also prohibits making anything but gold and silver coins as tender in payment of debts and impairing obligations of contract—limits on retrospective civil legislation which would be redundant if the *Ex Post Facto* Clause is understood to also limit such laws.⁹⁸ But why should we conclude that the Constitution does not take extra measures—even redundant measures—to protect liberty? Only two sentences before urging that redundancy argues for limiting the *ex post facto* prohibition to penal laws, Justice Chase describes the Clause as “an additional bulwark in favor of the personal security of the subject.”⁹⁹ Indeed, the Constitution is replete with redundant protections of liberty, both in the structural limitations on federal and state power and in the specific guarantees of individual rights.¹⁰⁰ As originally submitted to the states for ratification, the Constitution included no enumeration of rights,¹⁰¹ not to avoid redundancy with the natural rights understood to exist, but for fear that an incomplete enumeration of all rights would be understood to exclude those inadvertently not included.¹⁰² If the Ninth Amendment means what it says, every provision of the Bill of Rights is a redundant articulation of the rights that

civil proceedings,

[b]y the 1950s the limited view of the scope of the constitutional ban was so well established that the Court seemed reluctant to upset the pattern of statutes and decisions based on the belief that the retrospective imposition of civil disabilities was beyond the scope of the *Ex Post Facto* clauses.

Id.

97. See, e.g., Brian E. Raftery, *Taxpayers of America Unite! You have Everything to Lose—A Constitutional Analysis of Retroactive Taxation*, 6 SETON HALL CONST. L.J. 803, 818-19 (1996) (concluding that American taxpayers are precluded from arguing against retroactive tax increases by way of the *Ex Post Facto* Clause).

98. *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798).

99. *Calder*, 3 U.S. (3 Dall.) at 390.

100. See, e.g., U.S. CONST. art. I (confining Congress' power to limited spheres); U.S. CONST. amend. XIV (extending the protections of liberty contained in the Bill of Rights to the citizens of states).

101. WILLIAM COHEN & DAVID DANIELSKI, *CONSTITUTIONAL LAW: CIVIL LIBERTY AND INDIVIDUAL RIGHTS* 3 (4th ed. 1997).

102. *Id.* at 3-7.

people have with or without constitutional articulation. On more than one occasion, Justice John Marshall made an abstract case for a constitutional principle before pointing out, much as an afterthought, that the framers had made specific provisions for the principle in question, just in case.¹⁰³ Almost the entirety of the Bill of Rights has been made to apply to the states by incorporation in the Due Process Clause of the Fourteenth Amendment,¹⁰⁴ surely not an interpretive approach which demands precision, without redundancy, in constitutional drafting. Additionally, the Fifth Amendment Due Process Clause has been interpreted to require that the federal government guarantee equal protection of the laws.¹⁰⁵ When it comes to protecting liberty, redundancy and liberality of interpretation are good things.¹⁰⁶

But it seems unlikely that the Supreme Court will soon accept Justice Thomas' invitation to reconsider *Calder*¹⁰⁷ and expand the application of the Ex Post Facto Clause beyond penal legislation. It is therefore likely that the constitutional law of legislative retroactivity will continue to be made in the context of the Takings, Contract and Due Process Clauses. The essence of all three is that retroactivity is contrary to both individual liberty and the public good, although the latter point is often lost

103. See, e.g., *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316, 411 (1819), wherein Chief Justice Marshall makes a logical argument for the power of Congress to employ unenumerated means to achieve enumerated ends and then observes that the constitution of the United States has not left the right of congress to employ the necessary means, for the execution of the powers conferred on the government, to general reasoning. To its enumeration of powers is added, that of making 'all laws which shall be necessary and proper, for carryinig [sic] into execution the foregoing powers. . . .

Id. at 411-12.

104. *TRIBE*, *supra* note 14, at 772-74.

105. See, e.g., *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

106. The balancing tests which have been critiqued in this Article, *supra* notes 19-22 and accompanying text, like Chief Justice Rehnquist's concern for the public fisc, *supra* note 51, represent a deferential posture in relation to the legislative and executive branches of the government and thus a threat to liberty. It is a position encouraged by a generation of conservative resistance to judicial activism, perhaps most vociferously asserted by Judge Robert Bork. See ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 1-11 (1990). Regrettably, it is a point of view which has the effect of being unfriendly to many claims of individual liberty and is dangerously susceptible to the tyranny of the majority, against which Madison cautioned. *THE FEDERALIST* No. 10 (James Madison).

107. See *supra* notes 92-94 and accompanying text.

on those who would limit so-called economic liberties in the name of the public good.¹⁰⁸ Unfortunately, the Supreme Court's approach to each of these constitutional protections has been through the jurisprudence of balancing.¹⁰⁹

IV. THE MAHON DILEMMA: SOME HINDRANCE AND HELP FROM HOLMES (AND STONE IN *CAROLINE PRODUCTS*)

Our late twentieth century constitutional jurisprudence of balancing has many roots, but central among them are Justice Holmes' opinion in *Pennsylvania Coal v. Mahon*¹¹⁰ and Justice Stone's opinion in *United States v. Carolene Products*.¹¹¹

In *Mahon*, Holmes succinctly described the challenge of protecting rights in a democracy. "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."¹¹² The dilemma Holmes describes is not limited to property rights, but rather applies to all guarantees of rights which, by definition, operate to limit the power of government.¹¹³ In ruling for the property owner in *Mahon*, Holmes sought to provide guidance so "that further suits should not be brought in vain."¹¹⁴ After acknowledging a presumption of legislative validity,¹¹⁵ Holmes stated "[t]he general rule at least is, that

108. The relationship between the protection of individual rights and the promotion of the public good has often been recognized in the context of the First Amendment. "A public interest is not wanting in granting freedom to speak their minds even to those who advocate the overthrow of the Government by force. For, as the evidence in this case abundantly illustrates, coupled with such advocacy is criticism of defects in our society." *Dennis v. United States*, 341 U.S. 494, 549 (1951) (Frankfurter, J., concurring). The same is surely true of individual economic liberties. The immense wealth which has been created by entrepreneurs working in a free market is inextricably linked to the property and contract liberties protected by the Constitution. See James L. Huffman, *The Public Interest in Private Property*, 50 OKLA. L. REV. 377, 380-82 (1997) (describing the modern American tension between the private and public good).

109. Huffman, *The Public Interest in Private Property*, *supra* note 108, at 381-82; see *supra* notes 10-19 and accompanying text.

110. 260 U.S. 393 (1922).

111. 304 U.S. 144 (1937).

112. *Mahon*, 260 U.S. at 413.

113. See *id.*

114. *Id.* at 414.

115. *Id.* at 413. The presumption of validity is well founded in terms of the val-

while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."¹¹⁶

Far from providing guidance, Holmes' "general rule" made it clear, as he said earlier in his opinion, that in each case "the question depends upon the particular facts."¹¹⁷ But what is a court to do with those facts? When should the presumption of legislative validity be abandoned? How far is too far?

In a footnote in *Carolene Products*, Justice Stone invited us down the perhaps inevitable path which would lead to judicial ranking of governmental purposes, rights and even the rights of claimants:

There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution . . . [or when] legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation . . . [or when] statutes [are] directed at particular religious, . . . or national, . . . or racial minorities, . . . [or when] prejudice against discrete and insular minorities may be a special condition, which tends to seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities. . . .¹¹⁸

These situations, concluded Stone, might "call for a correspondingly more searching judicial inquiry."¹¹⁹ But what questions will the Court ask? And how will the Court know what answers to give? What are the limits of legislative power in the face of constitutionally protected individual liberties?

Though Justice Holmes may have helped to send us down this path, he also suggested a way to avoid the quagmire of ad hocery at the end of the path—and ironically, in the very same *Mahon* case. Holmes distinguished another Pennsylvania coal

ue of the separation of powers, see *id.*, but it is not clear why it should be applied in the context of individual rights claims. Where the question is whether the legislature has chosen the best means to pursue its constitutional ends, the principle of separation of powers requires judicial deference. But where the question is whether the legislature has violated individual rights, the presumption should favor the individual who, without the courts, is powerless against the awesome power of the state.

116. *Mahon*, 260 U.S. at 415.

117. *Id.* at 413.

118. *United States v. Carolene Products*, 304 U.S. 144, 152 n.4 (1938) (citations omitted).

119. *Carolene Products*, 304 U.S. at 152 n.4.

case in which no taking had been found on the basis of what he called "an average reciprocity of advantage"¹²⁰ experienced by every property owner affected by the challenged legislation. It is a powerful concept, worthy of consideration in the search for a constitutional principle to be applied to retroactive legislation.

Stone, too, provided us with the kernel of an idea helpful to retroactivity analysis in his otherwise troublesome *Carolene Products* footnote. Stone did not have in mind coal companies and other property owners and commercial entities when he suggested that discrete and insular minorities might be discriminated against,¹²¹ but that is the point of the Takings and Contract Clauses. The temptations to transfer wealth by retroactive legislation are substantial, and in a well functioning democracy, the minority of wealthy individuals is every bit as much or more at risk as the political minorities which Stone no doubt had in mind.¹²²

Taken together, the principle of reciprocity of advantage and the concern for discrete and insular minorities can help to define a coherent basis for assessing the validity of retroactive legislation. Indeed, the two ideas are rooted in the same concern for fair and just treatment under the rule of law.

120. *Mahon*, 260 U.S. at 415.

121. See *Carolene Products*, 304 U.S. at 152 n.4. Justice Stone mentions religious, national and racial minorities in the context of his discrete and insular minorities language, *id.* at 153 n.4, which suggests that he did not have in mind just any political minority, but the logic of his argument applies as much to any minority, the circumstances of which limit its ability to influence the democratic process. Although it is not irrelevant that minority status based on race is permanent absent relative growth in the size of the group, all individuals are members of multiple interest groups for political purposes, so they can never be said to be completely foreclosed from the democratic process. But if Stone's argument is persuasive with respect to religion, national and racial minorities, it is also persuasive with respect to other political minorities.

122. No doubt many civil libertarians will take offense at the suggestion that the wealthy are a discrete and insular minority in the same sense as racial and ethnic groups, but by what principle do we distinguish one political minority from another? We might limit Justice Stone's notion to minorities identified by unalterable traits, but that suggests that we are prepared to live with majoritarian impositions on minorities as long as those imposed upon have the possibility of joining the tyrannous majority. And even if we are prepared to accept that compromise with tyranny, experience demonstrates, as the environmental justice movement has urged, that the majority is as willing to redistribute wealth from the poor as it is from the rich. See Bunyan Bryant, *Pollution Prevention & Participatory Research as a Methodology for Environmental Justice*, 14 VA. ENVTL. L.J. 589, 599 (1995).

V. A RULE OF LAW OF RETROACTIVE LEGISLATION

It is often urged in response to concerns about the impacts of retroactive legislation that life is filled with uncertainties and constantly changing circumstances.¹²³ Why, it is asked or implied, should the economic consequences of changes in the law be any different from the economic consequences of changes in the weather or fluctuations in the stock market?¹²⁴ The answer is simple. We have some reasonable hope of using law to reduce the uncertainties of human interaction, while we have much less hope of controlling the uncertainties of weather and the stock market. Indeed, a central purpose of law is to lessen the uncertainties of social existence. We would do the same with weather and the stock market if we could.

The framers of the Constitution were fond of biological and mechanical metaphors in their thinking about the Constitution. It was, in a phrase used by Michael Kammen as the title of a book, "a machine that would go of itself."¹²⁵ And what is a machine that would go of itself, but a machine which is predictable, a machine which does what we expect it to do? Viewed in this way, law, including the law of the Constitution, is the technology of human societies. Like the engineering which assures that our buildings will withstand the forces of nature and the satellites which permit us to adjust our behavior in anticipation of changes in the weather, the law provides certainty where we would otherwise have to resort to predictions about the actions of others and defensive measures when we anticipate that those actions will be harmful. The law, though not perfect, has proven to be an excellent social mechanism for the control of the future behavior of our fellows in society. We enter into contracts to control the future behavior of others, and we adopt constitutions to control the future behavior of our governments.

123. See generally Matthew A. Schwartz, *A Critical Analysis of Retroactive Economic Legislation: A Proposal for Due Process Revitalization in the Economic Arena*, 9 SETON HALL CONST. L.J. 935, 975 (1999) (stating that some "defenders of economic retroactivity [believe] that there is no fundamental difference between market risk and legislative uncertainty").

124. *Id.*

125. MICHAEL G. KAMMEN, *A MACHINE THAT WOULD GO OF ITSELF: THE CONSTITUTION IN AMERICAN CULTURE* (1986).

As Holmes points out in *Mahon*, we do not want to tie the hands of government, or there would be no point in having a government.¹²⁶ So our Constitution enumerates both what government is to do and what it is not to do. It is to provide for the general welfare, but only by legally authorized means and not without respecting our rights as individuals. It is a fine line to walk, but our government can stay on the reasonably straight and narrow by respecting the principle of the rule of law.

The rule of law requires that the government and its agents, like its citizens, be bound by the law, including the making of new law. Citizens who make new law by contracting with one another must adhere to existing law. The same is true of legislatures. This does not mean that the law cannot change, but rather, that it must change in conformance with the rules which govern changes in the law. It is the central function of the courts to assure that the government, as the enforcer of private law and formulator and implementer of public law, acts in accordance with the law rather than according to the predilections of those who happen to govern, including the judges themselves. This is the essence of the rule of law.

Because legislative enactments cannot help but have retroactive consequences, both intended and unintended, the issue of retroactivity is particularly difficult. If every change in the law with a negative impact for someone were invalid because retroactive, government would indeed cease to function. But the measure of unconstitutional retroactivity cannot be the mere coincidence of detriment. A more sophisticated and discerning standard is required.

One aspect of that standard is suggested by the "average reciprocity of advantage" concept of takings law¹²⁷ and the "public and general" concept of government contract law.¹²⁸ Both concepts reflect the recognition that legislation imposes costs but also provides benefits.¹²⁹ If there is an average reciprocity of advantage, which is to say if the benefits and costs are

126. *Mahon*, 260 U.S. at 413 ("Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.").

127. *Supra* text accompanying note 117.

128. *Supra* notes 23, 43-45 and accompanying text.

129. *Supra* notes 22-23 and accompanying text.

public and general, the consequences of retroactivity will be shared across the population. While we might conclude, in the case of impacted private property, that the individual costs are a taking, we should also conclude that the constitutional requirement is satisfied by implicit compensation in the form of shared benefits.

The same principle will apply where no traditional property rights are at stake but where legislation still has both positive and negative consequences. If the legislation is public and general, then there will be average reciprocity of advantage for those affected. While specific expectations may be frustrated, the general expectation of stability and predictability will be satisfied.

But when legislation discriminates in its imposition of costs and delivery of benefits, the rule of law is thwarted. When the benefits accrue to a few or even to the general public and the costs are borne by a "discrete and insular minority" contrary to their reasonable expectations under the pre-existing law, the Constitution should be understood to forbid the legislation or to require compensation. The oft-quoted principle, repeated by Justice O'Connor in *Eastern Enterprises*, that "economic injuries caused by public action [must] be compensated by the government, rather than remain disproportionately concentrated on a few persons,"¹³⁰ is a sound articulation of the foregoing principle. The objection of Justices Kennedy and Breyer in *Eastern Enterprises* that the Takings Clause is not implicated because no property rights are at issue¹³¹ is not only contradicted by their subsequent analysis of the due process claim, but it is also ill-conceived from the perspective of allowing government to pursue its legitimate ends without sacrificing individual rights. The genius of the Takings Clause is its recognition that rights can be respected through compensation, without standing in the way of the government's pursuit of its constitutional objectives. A broadened definition of property, like that urged by the plurality in *Eastern Enterprises*,¹³² will permit governments to rely on the significant power of eminent domain which assures that the

130. *Eastern Enters.*, 524 U.S. at 523 (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979)).

131. *Supra* notes 74-76 and accompanying text.

132. *Eastern Enters.*, 524 U.S. at 530, 542.

rule of law is not sacrificed to the pursuit of the public good, nor vice versa.¹³³

In addition to insisting upon the average reciprocity of advantage which results from general and public legislation in our assessment of the constitutionality of retroactive legislation, we might usefully distinguish the direct and indirect affects, with the former being a basis for a finding of unconstitutional retroactivity. Direct effects are those which are intended or reasonably foreseeable. Indirect effects are those which are analogous to the consequences of changes in the weather or fluctuations in the stock market. Like most distinctions, it does not produce a clear line, but it does invite an inquiry which is far more appropriate to the judiciary than is a balancing of the public benefits and private costs.

Where consequences are intended or reasonably foreseeable, it is fair to assume that they are thought by the legislature to be in the public interest. As Chief Justice Rehnquist argues in his dissent in *Winstar*,¹³⁴ intent is not easily proven and is often readily concealed by the experienced legislator, but it is not a concept foreign to the judiciary.¹³⁵ Nor will the concept of rea-

133. The dominant view among proponents of regulation is that the Takings Clause is something of an unfortunate obstacle to the pursuit of the public good. Huffman, *The Public Interest in Private Property Rights*, *supra* note 108, at 381. Regulatory agencies have generally taken the same view, *see id.*, notwithstanding that the costs of compensation for takings normally come from a general judgment fund and thus seldom affect an agency's budget. *See Government Operations: Quayle Council OKs Making Agencies Pay for Takings*, Washington Insider (BNA), (May 7, 1991), available in WL 5/17/1991 BWI (discussing past proposed legislation that would require agencies to pay for takings from their own operating budgets, rather than from an established fund). This is a shortsighted perspective since the effect of not compensating is to shift rather than to avoid costs. If the government does not pay for the costs to property owners which result from regulation, the property owners will bear those costs with direct consequences in terms of future resource allocations and wealth generation. Notwithstanding the impact on the public fisc of compensation, the public interest will be served by a generous respect for the rights of property owners.

134. *Winstar*, 518 U.S. at 924 (Rehnquist, C.J., dissenting). With reference to the plurality's reliance on the comments of individual legislators on the question of whether the statute was free of government self-interest, the Chief Justice states: "It is difficult to imagine a more unsettling doctrine to insert into the law of Government contracts." *Id.* at 932. He goes on to conclude that it is "preferable, rather than either importing great natural-law principles or probing legislators' intent to modify the sovereign acts doctrine, to leave that law where it is." *Id.*

135. *Id.* at 933, 936.

sonable foreseeability pose difficult challenges for the courts.

Because a central purpose of law is to reduce uncertainty, intentional and foreseeable disruptions of expectations reasonably based on existing law should not go uncompensated. The purpose of the a new law will always be, in some sense, the elimination of uncertainty. It would be incongruous to unnecessarily disrupt expectations in pursuit of certainty.

Together, the suggested standards can protect individuals from the effects of retroactive legislation without unduly constraining the legislature. Where the consequences of retroactive change in the law are relatively insignificant to the individual, they are almost certainly widely distributed because the law is public and general, or they are unintended or unforeseeable. Where the consequences are substantial to the individual, those consequences were probably intended or reasonably foreseeable, and it is highly unlikely that there is an average reciprocity of advantage.

Not only should we be concerned about the unfairness of imposing the costs of providing a public benefit on a few individuals, but we should also want our legislature to consider those costs as a part of the calculus of public benefit. By requiring compensation for the consequences of retroactive legislation, those costs will be internalized,¹³⁶ thus assuring better public decisions. The costs are, after all, factors in the net social welfare, whether borne by individuals or by the state. If the costs are not internalized by making the state responsible for them, the legislative incentive will always be to externalize costs rather than appropriate funds, even where the former is a less efficient method for dealing with a perceived public welfare concern.

136. A recognition of the importance of cost and benefit internalization to efficient resource allocation is standard to a contemporary analysis of the public policy effects of private action, *see, e.g.*, Bernard W. Bell, *In Defense of Retroactive Laws*, 78 TEX. L. REV. 235, 249-50 (1999) (reviewing DANIEL E. TROY, *RETROACTIVE LEGISLATION* (1998)), and thus to the design and justification of regulatory initiatives. An accounting for the external costs and benefits of government actions is of similar importance to the evaluation of those actions. From this perspective, compensation for taken property can be viewed as the internalization of some of the external costs of government regulation. The easy inclination of regulators is to account for perceived benefits while ignoring the external costs.

VI. CONCLUSION

In the pursuit of judicial standards for the assessment of the constitutionality of retroactive legislation, we should seek to further the rule of law principles of constitutional government. A central purpose of a constitution is to define the relationship between government and its citizenry—to set the boundaries of appropriate government and individual action and to guarantee both the certainty and predictability which is essential to productive and satisfying human activity.

Legislation is enacted with particular ends in mind. Invariably, those ends will be met only if people, both inside and outside of government, behave in certain ways. In recognition of this reality, legislation and associated regulations are drafted with the explicit objective of commanding or encouraging human conduct productive of the ends sought. Sometimes lawmakers will be seeking particular results, but often they will have only abstract objectives in mind, for example encouraging private innovation in technology or expanded commercial activity. If the legislators and regulators have gotten it right, individuals will adjust their conduct in response to the laws with the expectation that they will be able to rely on the continuation of those laws. That is what the lawmakers want them to do.

It would be ironic in the extreme if legislation and other laws which exist to provide certainty in an otherwise uncertain world could be changed willy nilly in pursuit of the current public agenda. If we believe, as all empirical evidence suggests that we should, that a rule of law regime is the best for the protection of rights and the promotion of the public welfare, then the legislature of the moment must itself be constrained by the rule of law. It is tempting for every legislature, like every individual, to seek benefits and burden others with the costs. Because of its immense powers, the legislature, more than the individual, must be denied that temptation by courts sworn to uphold the rule of law.

The judgment in *Eastern Enterprises* is a step in the right direction. The Court's opinions are burdened by the weight of several decades of the jurisprudence of balancing, but the core idea that a few individuals must not be made to bear the costs of general public benefits reflects a recognition that fairness is

fundamental to the rule of law.¹³⁷ The judgment in *Winstar* reflects a more principled commitment to the rule of law, but its opinions are focused on the law of government contracts and thus are not burdened with constitutional balancing tests.¹³⁸ Both decisions seem to reflect a recognition that adherence to the rule of law is more important to the welfare of society than is a particular legislature's or agency's current conception of the public interest.

In his dissent in *Eastern Enterprises*, Justice Breyer suggests that an imperfect analogy might be drawn between the Coal Act and another statute imposing retroactive liability,¹³⁹ the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA").¹⁴⁰ In light of the Court's conclusion in *Eastern Enterprises*,¹⁴¹ however, it must be asked whether CERCLA and other laws resulting in retroactive liability are constitutional under the Takings and Due Process Clauses.¹⁴²

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

138. See *supra* notes 88-91 and accompanying text.

139. *Eastern Enters.*, 524 U.S. at 560 (Breyer, J., dissenting).

140. 42 U.S.C. §§ 9601-9675 (1994).

141. See *supra* notes 79-84 and accompanying text.

142. Prior to *Eastern Enterprises*, takings and due process challenges to CERCLA had been rejected by numerous federal courts, e.g., *United States v. Monsanto*, 858 F.2d 160 (4th Cir. 1988); *United States v. Northeastern Pharm. & Chem. Co.*, 810 F.2d 726 (8th Cir. 1986), but the Supreme Court had never addressed the issue. Since *Eastern Enterprises*, at least three federal district courts have rejected similar challenges to CERCLA. See, e.g., *United States v. Alcan Aluminum Corp.*, 49 F. Supp. 2d 96 (N.D.N.Y. 1999); *United States v. Vertac Chem. Corp.*, 33 F. Supp. 2d 769 (E.D. Ark. 1999); *Franklin County v. American Premier Underwriters, Inc.*, 61 F. Supp. 2d 740 (E.D. Ohio 1999).

