

April 1991

Proposals for Funding United Mine Workers of America Retiree Health Benefits: The Constitutional Dimensions

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PROPOSALS FOR FUNDING UNITED MINE WORKERS OF AMERICA RETIREE HEALTH BENEFITS: THE CONSTITUTIONAL DIMENSIONS

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I. INTRODUCTION

The United Mine Workers of America 1950 and 1974 Benefit Plans (UMWA Plans)¹ provide health benefits to 124,191 retired and disabled coal miners, surviving spouses and dependents.² Beginning in 1988 the Plans began to encounter funding short-falls. This has required mid-term increases in the contribution rate specified in the 1988 National Bituminous Coal Wage Agreement (1988 Agreement) and, ultimately, resulted in litigation between the Plan Trustees and the Bituminous Coal Operators' Association (BCOA).³ During 1990 the Plans were the subject of a six-month study by an Advisory Commission appointed by Secretary of Labor Elizabeth Dole.⁴ The Commission was a source of controversy⁵ and did not reach a con-

1. The UMWA Plans are collectively bargained Taft-Hartley trusts established under the National Bituminous Coal Wage Agreement (NBCWA). The NBCWA is the predominate labor contract in the unionized sector of the coal industry. It is negotiated between the United Mine Workers of America (UMWA) and the Bituminous Coal Operators' Association (BCOA). The BCOA is an association which represents member companies in multi-employer bargaining with the UMWA. BCOA member companies account for approximately half of all UMWA-represented coal production. The overwhelming majority of non-BCOA members also sign the NBCWA and, therefore, also participate in the UMWA Benefit Plans.

2. As of June 30, 1990, the 1950 Plan had 110,667 beneficiaries, the 1974 Plan had 13,524. UMWA HEALTH & RETIREMENT FUNDS, 1990 ANNUAL REPORT 3 (1990).

3. See *infra* notes 47-51 and accompanying text.

4. Advisory Commission on United Mine Workers of America Retiree Health Benefits ("Dole Commission"). See *infra* notes 52-66 and accompanying text.

5. See, e.g., Comments of Commission Chairman W.J. Usery, Jr., stating that "[o]f all the things I've been . . . involved with, I can't remember when we have stirred up as much controversy within an industry." *Advisory Group's Work Was Task Fraught With Controversy Usery Says, Daily*

sensus on the crucial question of who should pay for the UMWA retiree health benefits. Nevertheless, a likely outgrowth of the Commission's activities is that the UMWA and the BCOA will seek legislative action to broaden the Plans' contribution base.⁶

Some of the legislative solutions suggested for resolving the UMWA retiree health care quandary have constitutional implications.⁷ In order to assess the constitutional dimensions it is necessary to trace the evolution of the UMWA Benefit Plans, assess their current situation, and examine the key details of the suggested legislative solutions. It may be of assistance, however, to first place the retiree health care issue in a broader perspective.

II. THE NATIONAL PERSPECTIVE

Prior to the mid-1960's few employers provided health benefits to their retirees.⁸ Such coverage has now become commonplace. In 1988 employers provided health benefits to about 7 million retirees and their dependents at an annual cost of about \$9 billion.⁹ One recent study reported that almost 80% of large and mid-sized companies offer such benefits to retirees under 65, and almost 70% extend coverage to Medicare-eligible retirees.¹⁰ There are many pos-

Labor Report (BNA) No. 230, at A-11 (November 29, 1990). A group of over one hundred fifty non-UMWA coal companies challenged, among other things, the make-up of the Commission and whether the UMWA Benefit Plans actually face a funding crisis. See *The Private Benefits Alliance, Presentation of the Private Benefits Alliance to the Advisory Commission on United Mine Workers of America Retiree Health Care* (October 10, 1990).

6. *Quenon Promises Further Action on 'Orphans'*, 14 *Coal Outlook* (Pasha Publications, Inc.) 1 (Nov. 12, 1990):

If the secretary of labor [sic] refuses to act on an industry-wide tax to help save the 1950 and 1974 UMW pension funds [sic], signatories to those Funds will go for a Capitol Hill showdown on the issue.

That's the promise of Robert Quenon, Chairman of Peabody Holding and a member of the commission appointed by Labor Secretary Elizabeth Dole to examine the health of the Funds.

7. See *infra* text at pages 649-70.

8. EDUCATION AND PUBLIC WELFARE DIVISION, CONGRESSIONAL RESEARCH SERVICE, PUB. NO. IB88004, *HEALTH BENEFITS FOR RETIREES: AN UNCERTAIN FUTURE 2* (1990).

9. U.S. GENERAL ACCOUNTING OFFICE, PUB. NO. GAO/HRD-89-51, *EMPLOYEE BENEFITS, COMPANIES' RETIREE HEALTH LIABILITIES LARGE, ADVANCE FUNDING COSTLY 1* (1989) [hereinafter GOA REPORT].

10. A. Foster Higgins & Co., Inc., *Health Care Benefits Survey 1989, Report 4: Retiree Health Care 5* (1990); see also Chollet, *Retiree Health Insurance Benefits: Trends and Issues*, in *RETIREE HEALTH BENEFITS: WHAT IS THE PROMISE?* 20 (Employee Benefits Research Institute, 1989).

sible explanations for this trend but the introduction of Medicare is likely the primary catalyst. Except for retirees under the age of 65, employer coverage is supplemental to Medicare and has constituted a relatively small cost component of an employer's total benefit package.¹¹

In 1988, a report by the Government Accounting Office (GAO) put the cost of providing postretirement health benefits in a very different perspective. The GAO study concluded:

The nation's private employers have accumulated significant obligations to their current and retired employees for retiree health benefits. We estimate \$227 billion or about one-fourteenth of the value of all companies' stocks in 1988 is owed. In addition, companies can anticipate \$175 billion in future accruals for their active workers, for a total retiree health benefit liability of \$402 billion.¹²

The GAO announcement had the impact of a tornado sighting on a calm summer day. Most employers had never even attempted to calculate what the ultimate economic burden of providing lifetime retiree health benefits might be. If the GAO report was a shot across the bow, the Financial Accounting Standards Board's (FASB) February 14, 1989, draft accounting standard¹³ was a direct hit. This draft provides that employers who offer post-retirement health benefits must treat them as deferred compensation and reflect their present value on the corporate balance sheet. Although the final FASB standard is not expected to become effective before 1993, the reality that all companies will soon have to reflect the long term cost of retiree health benefit promises on their bottom line has sparked widespread awareness and debate about the issue.

11. Despite the frequency of this benefit, the GAO has estimated that only forty percent of all private sector workers work for employers that offer post-retirement health benefits. U.S. GENERAL ACCOUNTING OFFICE, PUB. NO. GOA/HRD-90-92, *EMPLOYEE BENEFITS: EXTENT OF COMPANIES' RETIREE HEALTH COVERAGE* 1 (1990).

12. GAO REPORT, *supra* note 9, at 3. Although these numbers are mind numbing, they pale in comparison to estimates of the total retiree health care bill. One commentator has estimated the present value of the cost of providing post age sixty-five health care to everyone who is now forty years of age or older at \$6.7 trillion dollars. Enthoven, *Retiree Health Benefits as a Public Policy Issue*, in *RETIREE HEALTH BENEFITS: WHAT IS THE PROMISE?* 3-4, 7 (Employee Benefits Research Institute, 1989).

13. Relevant sections of this FASB draft have been reprinted in *RETIREE HEALTH BENEFITS: WHAT IS THE PROMISE?* 147-207 app. (Employee Benefits Research Institute, 1989). Employers will not be required to recognize future obligations to a multi-employer plan under this standard. *Id.* at

The rapidly changing financial implications associated with providing retiree health care virtually insures that many companies will seek to alter benefits for future retirees, and possibly curtail benefits to current retirees as well. In the view of one commentator,

[I]t seems unlikely that future retirees will enjoy the kind of health benefits that we see among today's retirees. Confronting huge financial liabilities for retiree benefits, many employers are likely either to terminate their health plans or substantially alter the benefit promise to reduce projected corporate cost. The budget and philosophical constraints on legislation that would assist employers in funding benefit obligations suggest that the legislative debate will be a long one, and that the ultimate legislation may be less favorable to employers than comparable pension legislation has been.¹⁴

It is, of course, far more difficult to reduce or discontinue a benefit than to introduce it in the first instance. An employer's right to curtail benefits for current retirees or for active employees who have already satisfied the employer's eligibility requirements has been the subject of much litigation.¹⁵ Moreover, even in situations where an employer has clearly reserved an adequate legal basis for curtailing or discontinuing such benefits, it can be expected that retirees, current employees and labor unions will resist changes.¹⁶

It is against this backdrop that issues involving the continued funding of benefits for retirees who receive health care from the UMWA Plans must be examined. Although unique in certain respects, the situation facing the UMWA Plans can be viewed as a microcosm of the broader retiree health care dilemma. With respect to the national situation, one observer has framed the issue as follows:

Someone has to pay and no one wants to. Pressures are building. Spiraling health care costs are driving all health care issues today, and we must deal with this factor sooner or later.¹⁷

14. Chollet, *supra* note 10, at 36.

15. There is no statutory entitlement to or regulation of postretirement health care. Most courts have relied on a contract analysis to adjudicate disputes, focusing principally on the intent of the parties with respect to questions of entitlement, amount and duration. Schmidt, *Retiree Health Benefits: An Illusory Promise?*, in RETIREE HEALTH BENEFITS: WHAT IS THE PROMISE? 53-64 (Employee Benefits Research Institute, 1989).

16. Indeed, the cost of health care has become the main issue in 87% of all labor disputes. THE SECRETARY OF LABOR'S ADVISORY COMMISSION ON UNITED MINE WORKERS OF AMERICA RETIREE HEALTH BENEFITS, U.S. DEP'T OF LABOR, COAL COMMISSION REPORT (1990) [hereinafter REPORT].

17. Kahn, *A Congressional Perspective*, in RETIREE HEALTH BENEFITS: WHAT IS THE PROMISE? 125 (Employee Benefits Research Institute, 1989).

Due to a confluence of events, it seems likely that Congress will be called upon to examine the retiree health benefits issue in the coal industry sooner rather than later.

III. THE UMWA RETIREE HEALTH PLANS

Commenting on how the high cost of collectively bargained retiree health benefits could have been ignored for so long, one commenter has observed, “[r]etiree health benefits were a bargaining prize that apparently could be won or granted with no present sacrifice in wages or profits. Now the long-run consequences are becoming apparent.”¹⁸ In order to evaluate the proposals that have been put forth to pay this “bargaining prize” in the coal industry, it is necessary to understand how the entitlement of UMWA members to post-retirement health benefits arose.

Although there are many multi-employer health plans¹⁹ it is doubtful that any can compare to the UMWA Plans for their richness of history and their role in dominating labor relations in an industry. The UMWA Benefit Plans trace their lineage to the first collectively bargained multi-employer welfare plan, which was created in 1946 at a time when the mines were under the control of the federal government.

A. Creation of the UMWA Welfare and Retirement Fund: 1940-1950

Prior to the 1940's, there was no provision in UMWA collective bargaining agreements concerning the provision of pension or medical benefits. In the period 1940 through 1950 UMWA President John L. Lewis set as goals for negotiations obtaining health and

18. Enthoven, *supra* note 12, at 12-13.

19. There are over 915 multi-employer health plans, 66% of which provide some level of benefits to retirees. Six percent of all retirees eligible for employer-sponsored health benefits receive them from multi-employer plans. U.S. GENERAL ACCOUNTING OFFICE, PUB. NO. GAO/HRD-90-132, *EMPLOYEE BENEFITS, EXTENT OF MULTI-EMPLOYER PLAN RETIREE HEALTH COVERAGE 1* (1990).

pension benefits for his members and gaining control over their delivery.²⁰

In negotiations for a successor to the 1945 Agreement, creation of a health and retirement fund was the cornerstone of the Union's contract demands. Indeed, Lewis refused to talk of other provisions until the operators agreed "in principle" to a health and retirement fund. When the operators refused, a strike ensued.²¹ The impact of the miners strike had its intended effect, and the government sought to mediate.²² On May 10, 1946, a White House source announced that the operators had agreed "in principle" to a health and welfare fund, but the operators apparently reneged and the negotiations collapsed.²³ On May 21, 1946, President Truman ordered Secretary of the Interior Julius A. Krug to seize the mines under the War Labor Disputes Act and to negotiate an agreement with the UMWA for the one year period covered by government operations of the mines.²⁴

On May 29, 1946, Secretary Krug and Lewis executed the National Coal Wage Agreement (Krug-Lewis Agreement) which addressed, at least temporarily, the Union's demand for a welfare fund. Actually, the Krug-Lewis Agreement established two separate funds. The first was a "Welfare and Retirement Fund" to be managed by three trustees, one appointed by Krug, one by the President of the UMWA, and the third by the other two trustees. This fund was to be financed by contributions of 5 cents per ton and was to be used primarily to compensate miners, their dependents and their survivors for lost wages resulting from temporary or permanent disability,

20. In 1941 negotiations for the Appalachian Joint Wage Agreement, Lewis proposed to give the UMWA the right to participate in selecting physicians and supervising medical services financed through deductions. M. DUBOFSKY & W. VAN TINE, JOHN L. LEWIS: A BIOGRAPHY 459 (1947). The employers rejected that proposal. *Id.* Lewis next raised this issue in negotiations for the 1945 Agreement. *Id.* The employers rejected Lewis' proposal for imposition of a 10 cent per ton royalty to create a welfare trust. *Id.* at 455. In the compromise that led to the 1945 Agreement, Lewis backed away from his welfare program demand. *Id.*

21. *Id.* at 459.

22. During the 1940's coal was the lifeblood of the country's industrial base and a strike impacted on the economy quickly. It was indispensable for steel making, generation of electric power, rail transportation, home heating, and other fundamental economic activity.

23. M. DUBOFSKY & W. VAN TINE, *supra* note 20, at 461.

24. *Id.*

the operators committed to cooperate with the Union in its administration.²⁹ The Agreement also specified that Lewis' faithful friend Josephine Roche would be the neutral Trustee, effectively yielding control of the 1950 Fund to the Union.³⁰ Although the structure and stated purpose of the 1950 Fund differed little from the trust established by the 1947 Agreement, it was the operators good faith commitment to cease their obstreperous tactics in 1950 that enabled the 1950 Fund to begin functioning as envisioned by Lewis.

B. *Union Domination: 1950-1974*

The 1950's began with an employer-funded welfare program secure at last and under the firm control of the Union. The Fund was the exclusive source of health, pension and other welfare benefits for all UMWA miners and retirees and their dependents. As a practical matter the trustees were the sole arbiters of benefits, eligibility criteria, and all other matters affecting the health and welfare of UMWA members.³¹

The administrative structure of the 1950 Fund changed little from 1950 through 1974. A signatory's obligation through this period was to pay the tonnage rate specified in the contract, and the Fund operated on a pay-as-you-go basis. Eligibility criteria and benefit levels fluctuated depending on the economic condition of the in-

29. The 1950 Agreement provided:

It is the intent and purpose of the contracting parties hereto that full cooperation shall by each of them be given to each other, the Trustees named under this Section and to all affected Mine Workers to the eventual coordination and development of policies and working agreements necessary or advisable for the effective operation of this Fund.

National Bituminous Coal Wage Agreement of 1950, Various Coal Operators and Associations — United Mine Workers of America, Welfare and Retirement Fund of 1950, para. D [hereinafter 1950 Agreement]. It also provided that the 1950 Fund would succeed to the unencumbered assets of the 1947 trust. *Id.* at B(3).

30. DUBOFSKY & VAN TINE, *supra* note 20, at 489.

31. FINLEY, *supra* note 28, at 189:

The three trustees of the Fund had enormous authority. While the labor contract with the industry created the supply of money, it provided only a broad statement of purpose. The trustees had the power to say who got the money, how it was to be spent, how it was to be invested, what benefits were to be paid. They would meet and make their own rules.

dustry.³² Benefits were adjusted to comport with available funds and, on occasion, entire categories of beneficiaries lost their eligibility.³³

The era of the 1950 Fund ended on a tragic note. The UMWA's largely unsupervised domination of the Fund led to abuses and, ultimately to beneficiary-initiated legal actions. Ensuing court orders resulted in major changes in the way the 1950 Fund conducted its business.³⁴

C. Restructuring in Collective Bargaining: 1974-1978

The 1974 bargaining began shortly after the court ordered reforms to the 1950 Fund. It also occurred at a time of great promise for the coal industry and signatory operators agreed to the most generous labor contract ever. With respect to pension and health benefits the National Bituminous Coal Wage Agreement of 1974 (1974 Agreement) provided for:

substantially increased benefits under both the 1950 and 1974 Pension Plans, and liberalized eligibility requirements for health benefits as well as for pensions. The contracts also introduced several entirely new benefits for the industry . . . [including] lifetime health benefits for disabled mine workers, mine workers' surviving spouses, and disabled or mentally retarded children.³⁵

In response to the newly enacted Employee Retirement Income and Security Act of 1974 (ERISA)³⁶ which required that pension plans be fully funded on an actuarial basis, it was necessary to separate pensions from the other benefits provided by the 1950 Fund. The 1974 Agreement therefore established four separate trusts: The

32. From the outset Lewis chose to maximize current wages at the expense of building a sound financial basis for the Fund. [H]e insisted on a liberal benefit program and expected to wrest from the operators the money needed to cover the costs through his collective bargaining skills. As a result of these decisions, the welfare and retirement fund was a noble venture fated for financial troubles." DUBOFSKY & VAN TINE, *supra* note 20, at 510-511.

33. In 1954, for example, benefits to some 30,000 disabled miners and 24,000 widows and children were stopped. FINLEY, *supra* note 28, at 190.

34. Lamb v. Carey, 498 F.2d 789 (D.C. Cir.), *cert. denied*, 419 U.S. 689 (1974); Boyle v. Blankenship, 329 F. Supp. 1089 (D.D.C. 1971), *aff'd* 511 F.2d 447 (D.C. Cir. 1975). Blankenship v. UMWA Welfare and Retirement Fund of 1950, 82 L.R.R.M. (BNA) 3071; See also FINLEY, *supra* note 28, at 198-202.

35. United Mine Workers of America Health and Retirement Funds, Employee Handbook, *reprinted in* Education and Public Welfare Division, *supra* note 28 at 14.

36. Employee Retirement Income Security Act, 29 U.S.C. §§ 1001-1461 (1988).

1950 Pension Trust and 1950 Benefit Trust to provide pension and health benefits to mine workers retiring prior to January 1, 1976, and the 1974 Pension Trust and 1974 Benefit Trust to provide pension and health benefits for active miners and those retiring after January 1, 1976.³⁷ Significantly, the 1974 Agreement specified that 1950 and 1974 Plan retirees, surviving spouses and certain dependents would receive a health card for life.³⁸

The 1974 Agreement was a watershed event with respect to pension and health benefits for UMWA miners and retirees. First, the signatories agreed to create significant new benefits and increase existing ones, at a substantial cost.³⁹ Second, the UMWA and the BCOA assumed responsibility for establishing eligibility criteria and benefit levels in collective bargaining, and the trustees ceased to have unilateral authority to make decisions concerning the Plans. Third, the settlors reduced the results of their collective bargaining into written plan documents which governed the trustees' administration of the Plans during the term of the Agreement.

The restructuring of the 1950 Fund as a result of 1974 bargaining did not affect the comprehensive nature of the pension and benefit program for UMWA members. Indeed, as a consequence of the optimistic economic forecasts, the parties' efforts to correct abuses of the past, and the need to satisfy ERISA's pension funding requirements, UMWA miners and retirees emerged with more generous and better secured benefits than ever. Pay-as-you-go pensions were a thing of the past, and setting forth benefit levels and eligibility criteria in written plan documents enabled the settlors to project needed contribution rates for the term of the contract, thereby stabilizing the delivery of benefits.

Negotiations in 1978 brought the final restructuring. Signatory operators demanded and, after a 111 day strike, achieved the contractual right to provide health benefits to both their active miners

37. See 1974 Agreement, Article XX §§ (a)-(c) and Summary of Principal Provisions (I)-(11).

38. *Id.* at 99-106.

39. Signatories contributed 80 cents per ton to the 1950 Fund immediately prior to the effective date of the 1974 Agreement. Total contributions to the four new trusts started at 74 cents per ton and 98 cents per hour worked.

and their retirees directly rather than through the 1974 Benefit Plan. Retirees covered by the 1950 Benefit Plan were not affected by this change. The dismantling of the 1974 Benefit Plan was, perhaps, the most important change in the system for providing health care to UMWA members since the creation of the 1950 Fund.

As part of the compromise which resulted in this historic change, the 1978 Agreement also provided that (i) the 1974 Benefit Plan would continue for the limited purpose of providing health benefits to UMWA retirees whose last employer ceased business⁴⁰ and (ii) signatory employers would guarantee all health and pension benefits during the term of the contract.⁴¹

D. Recent History: 1978-1990

The basic structure of the UMWA Pension and Benefit Plans has remained unchanged since 1978. A judicial declaration that the 1974 Benefit Plan must assume benefit coverage whenever an employer ceased to be contractually obligated to do so has led to the rapid increase in the number of beneficiaries in the 1974 Plan.⁴² Total contributions to the four UMWA Plans decreased by approximately 50%⁴³ under the National Bituminous Coal Wage Agreement of 1988 (1988 Agreement), largely because the 1950 Pension Plan became fully funded during 1987. The 1988 Agreement also changed the contribution method from a system weighted towards tons produced to one based exclusively on hours worked.

40. 1978 Agreement, Article XX(c)(3)(iii). Several court decisions have affirmed that the 1974 Plan is also obligated to provide health benefits to retirees whose last employer ceases to be signatory to a UMWA Wage Agreement. See *United Mine Workers of Am. Int'l Union v. Nobel*, 720 F. Supp. 1169 (W.D. Pa. 1989), *aff'd*, 902 F.2d 1558 (3d Cir.), *cert. denied* 111 S. Ct. 383 (1990); *cf.* District 29, *United Mine Workers of Am. v. Royal Coal Co.*, 768 F.2d 588 (4th Cir. 1985) (holding coal company not responsible for retiree health benefits following expiration of coal wage agreement), *cert. denied*, 485 U.S. 935 (1988).

41. 1978 Agreement, Article XX(h), quoted *infra* note 48. This guarantee appears in the Agreements of 1981, 1984, and 1988 as well.

42. *Cf. Nobel*, 720 F. Supp. at 1171 (requiring health plan to provide benefits where employer is no longer a signatory to wage agreement). The trial court's opinion in the *Nobel* case contains an extensive history of the bargaining pertaining to the UMWA Plans covering the period 1974-1988. *Id.* at 1173.

43. Compare Article XX(d) of the NBCWA of 1984 with Article XX(d) of the 1988 Agreement. 2

Thus, at this time, the 1988 Agreement provides that any miner who retired prior to 1976 and receives a pension from the UMWA 1950 Pension Plan will receive health benefits from the 1950 Benefit Plan.⁴⁴ Any retiree who receives a pension from the UMWA 1974 Pension Plan is eligible for employer-provided health benefits so long as his employer is signatory to a UMWA contract which provided for such coverage. All other 1974 Plan pensioners receive health benefits from the 1974 Benefit Plan.⁴⁵

IV. THE EMERGING PROBLEM

A. Background

The 1988 Agreement became effective February 1, 1988. It soon became apparent that the contract rate specified for the 1950 Benefit Plan was not sufficient to cover the Plan's actual costs.⁴⁶ Effective July 1, 1988, the BCOA increased the rate for all signatories from \$1.83 per hour to \$2.00 per hour and, effective May 1, 1989, to \$2.17 per hour. Subsequently, the Trustees informed BCOA that the \$2.17 rate was not enough to prevent the Plan from accruing a deficit. The BCOA refused to authorize additional increases and, on July 19, 1989, the Trustees filed suit⁴⁷ seeking to compel the

44. 1988 Agreement, Article XX, at 158. The 1950 Plan also covers certain disabled miners, surviving spouses and eligible dependents. Retirees must have at least 20 years of credited service to qualify for health care benefits. *Id.* at 160.

45. The 1974 Plan also covers certain disabled miners, surviving spouses and eligible dependents. A deferred vested pensioner with less than 20 years of service is ineligible for health benefits. *Id.* at 160. It should be noted that there is still a dispute with respect to whether the 1974 Plan is obligated to provide benefits to certain categories of pensioners. *See, e.g., Nobel*, 720 F. Supp. at 1169.

46. Apparently, the BCOA was aware that the initial rates set in the 1988 Agreement would not be adequate. *See Nobel*, 720 F. Supp. at 1177-78:

[In 1988 bargaining] [t]he Union negotiators had projected that contributions in the range of 18 to 22 cents per hour would be necessary to provide benefits to the potential beneficiaries and maintain the corpus of the trust at the end of the contract. They expressed skepticism that eight cents would be sufficient to provide benefits to the potential beneficiaries over the term of the agreement. The BCOA responded that, since they were guaranteeing the benefits, the UMWA should not be concerned about the contribution rate, and that additional money would be forthcoming if necessary.

47. *Connors v. BCOA*, No. 89-1744 (D.D.C. filed). This case is still pending. On August 14, 1990 Judge Jackson entered a preliminary injunction which resulted in the BCOA setting a \$2.92 per hour rate for the period September 1 through December 31, 1990. *Id.* The parties entered into agreed orders covering subsequent months.

BCOA to honor the guarantee clause at Article XX(h) of the 1988 Agreement.⁴⁸

The 1988 Agreement set the contribution rate to the 1974 Benefit Plan at eight cents per hour. This rate also proved to be inadequate, and the 1974 Plan developed funding deficiencies. On March 23, 1990, the Trustees again filed suit⁴⁹ against the BCOA seeking to enforce the guarantee clause with respect to the 1974 Plan.

A separate event during this period also focused attention on the Benefit Plans. When the 1984 Agreement expired, the Pittston Coal Group, Inc. (Pittston) a substantial coal industry employer and long-time participant in the UMWA Plans refused to sign the 1988 Agreement negotiated between the UMWA and the BCOA. Instead, Pittston terminated its labor agreement, ceased making contributions to the UMWA Pension and Benefit Plans, and notified its retirees that it would no longer provide them with health benefits. In lieu of continued participation in the UMWA Plans, Pittston proposed a single employer pension plan and a health plan for its employees and pensioners with deductibles and other cost containment features not provided for under the 1988 UMWA-BCOA Agreement.⁵⁰

48. Article XX(h) provides:

Notwithstanding any other provisions in this Agreement the Employers hereby agree to fully guarantee the pension and health benefits provided by the 1950 Pension Fund, the 1950 Benefit Fund, the 1974 Pension Fund, the 1974 Benefit Fund and all other benefit plans described in Section (c) of this Article XX during the term of this Agreement.

In order to fully fund these guaranteed benefits, the BCOA may increase, not decrease the rate of contributions to be made to the 1950 Pension Fund, the 1950 Benefit Fund, the 1974 Pension Fund, the 1974 Benefit Fund and all other benefit plans described in Section (c) of this Article XX during the term of this Agreement. These contributions, which may be adjusted from time to time, shall be made by all Employers signatory hereto during the term of this Agreement.

49. *Connors v. BCOA*, No. 90-0674 (D.D.C. filed). This case is still pending. On June 29, 1990, Judge Gesell entered a preliminary injunction which resulted in the BCOA setting a 33 cents per hour rate for the period August 1 through November 30, 1990. *Id.* The parties entered into agreed orders covering subsequent months.

50. Pittston was adamant that, among other things, the cost and potential future liabilities of continued participation in the UMWA Plans were prohibitive. The Union was equally adamant that a major employer's withdrawal might cause other signatories to seek to terminate their participation. The UMWA Plans are governed by legal trust documents negotiated between the UMWA and the BCOA in national bargaining, which cannot be altered except with the joint agreement of the settlors. Thus, it was difficult, if not impossible, for the Union to respond to specific issues raised by Pittston

B. The Advisory Commission on UMWA Retiree Health Benefits

The Pittston dispute lasted 24 months and was eventually settled with the assistance of a high level mediator⁵¹ appointed by U.S. Secretary of Labor Elizabeth Dole. However, the fact the strike had been greatly prolonged by difficulties encountered in bargaining about the UMWA Plans led Secretary Dole to form an Advisory Commission "to make recommendations to the Secretary of Labor on health care issues arising from [the] 1950 and 1974 UMWA Benefit Plans and the effects of resolving these issues on the coal industry as a whole."⁵² This Commission was charged with advising the Secretary concerning (i) the financial status and prospects of the UMWA Benefit Plans, (ii) the means of delivery of health benefits to UMWA retirees and their dependents and (iii) arrangements for assuring the long-term financial viability of the UMWA Benefit Plans.⁵³

The Commission estimated the combined deficit of both Plans is estimated to be \$114.7 million as of October, 1990.⁵⁴ The Report noted that more than half of the Plans' beneficiaries last worked for companies which had either gone out of business or ceased to be signatory to a UMWA labor agreement requiring them to participate in the Plans. The Commission concluded that "[h]ow to continue to provide health benefits to 'orphans' is the essence of the problem."⁵⁵

51. W. J. Usery, Jr., a former Secretary of Labor. Mr. Usery was subsequently appointed as Chairman of the Commission Secretary Dole established to study UMWA retiree benefits.

52. REPORT, *supra* note 16, at 147, "The payment of health care benefits to retired and disabled miners and their families was a major issue in the [Pittston] strike and was responsible in large measure for the subsequent formation of this Commission." *Id.* at 4.

53. *Id.* at 6, 145.

54. *Id.* at 4. UMWA Funds Executive Director, Jerry Clark estimated the combined deficits to be in excess of \$90 million as of December 31, 1990. See March 29, 1991, Declaration of Jerry N. Clark, para. 5, submitted as an affidavit in the case of United Mine Workers of America 1974 Pension Trust, et al. v. The Pittston Company, et al., No. 88-0969 (D.D.C. 1991). Although the Commission projected a deficit of more than \$300 million by 1993, Report at 4, it apparently did not factor in the effect of the court ordered incidents. This projection also ignores the "guarantee clause" litigation discussed above. See *supra* notes 48 & 50 and accompanying text. Assuming the courts enforce the guarantee clause, it would be incumbent on current signatories to insure that the Plans have no deficit at the time the current Agreement expires.

55. *Id.* at iv (Executive Summary).

C. Some Proposals for a Solution

The Commissioners reached a consensus with respect to a number of points⁵⁶ but not with respect to the question of who should be asked to pay for the health care of a Plan beneficiary whose last employer no longer contributes. Three choices appear possible (1) all coal industry employers should pay irrespective of whether they were ever signatory to a UMWA labor agreement, (2) current signatories plus any employer who was previously signatory should pay,⁵⁷ or (3) current signatories should continue to pay in accordance with historical precedent and present contract obligations.⁵⁸

Although the Commission did not make recommendations with respect to who should pay for "orphan" retirees health benefits in the future, the Report referred two funding proposals to the Secretary of Labor for consideration.⁵⁹ The two proposals are similar in certain respects.⁶⁰

56. These include: (i) retired miners are entitled to the health care benefits that were promised and guaranteed them; (ii) a statutory obligation to contribute should be imposed on employers currently participating in the Plan *and* employers who formerly participated but do not now do so; (iii) mechanisms should be enacted to prevent employers from "dumping" retiree health care obligations on the Plans; (iv) legislation should be enacted which would permit the transfer of assets from the overfunded 1950 Pension Plan to the Benefit Plans; and (v) implement managed care and cost containment activities designed to reduce costs without loss of benefits. *Id.* at 81-105.

57. *Id.* at 84 ("Many Commissioners believe that the orphans represent an industry-wide problem that should be resolved on an industry-wide basis. Others believe that only current and past signatories should be required to finance orphan health care.").

58. This is the position advocated by most coal industry employers who have never been signatory to a UMWA labor agreement, as well as current or former signatories who have withdrawn from the Plans. These companies argue that the Plans were created in collective bargaining, that there is no financial crisis, and that any problems which the Plans may face can be resolved in collective bargaining between the UMWA and the BCOA. *See supra* note 5. *See also* Letter from Scott Kiscaden for the Private Benefits Alliance to Roderick A. DeArment, Acting Secretary of Labor 7 (November 30, 1990) ("By failing to acknowledge that the parties *intended* to create, fund and perpetuate Plans which would provide benefits for all UMWA members, including orphans . . . the Report invites a sympathetic response to suggestions that the bargaining parties should now be relieved from their contractual promises — even if this means forcing non-signatories to pay.").

59. "Because of the lack of consensus on the question of who should pay for orphans, the Commission has reviewed an industry-wide funding proposal and an alternative funding proposal. The Commission believes that both proposals, modified as may be appropriate, should be considered, along with any other funding arrangements that may be developed, to resolve the crisis in retiree health care in the coal industry." REPORT, *supra* note 16, at 84.

60. The "industry-wide" plan was proposed by Commissioners Richard L. Trumka, President of the UMWA and Robert H. Quenon, Chairman of the BCOA and President of the Peabody Coal Company. *Financing For Orphans Retirees Most Divisive Issue, Coal Report Says*, Daily Labor Report (BNA) No. 217 at A-14 (Nov. 8, 1990). The "alternative" plan was proposed by Commissioners Carl J. Schramm, President of the Health Insurance Association of America and Michael Mahoney, managing pension partner, Milliman and Robertson, Inc. *Id.*

The "industry-wide proposal" envisions a restructuring of the existing UMWA Plans into two new plans which would be funded without regard to whether the contributors are party to a labor contract with the UMWA. The first new plan would provide benefits to all existing UMWA retirees whose last employer (including all companies with common ownership) is out of business.⁶¹ It would be financed by a tax on all coal industry employers.⁶² The second new plan would provide health care to any 1950 or 1974 Plan beneficiary whose employer or any company affiliated with the beneficiary's last employer remains in business, irrespective of whether such company currently contributes to the UMWA Plans. A current or former signatory (including affiliates) last employing any beneficiary in this plan would be required to pay a fair share of the plan's costs.⁶³ Thus, under the industry-wide proposal, roughly half of the current 124,191 beneficiaries would become an industry responsibility, the remainder would be placed in a plan to be funded only by companies with some connection to the beneficiaries, either a direct employment relationship or a corporate affiliation to a company which had such an employment relationship.

The "alternative proposal" does not envision the creation of new plans or the imposition of an industry-wide tax. Rather, it places a greater emphasis on collective bargaining solutions, cost containment, an asset transfer from the overfunded 1950 Pension Plan, and so forth. However, it too envisions a "reachback" provision which would impose a statutory requirement to resume contributions on past UMWA signatories who have no present contractual obligation to the UMWA Plans to resume contributions.⁶⁴

V. THE CONSTITUTIONAL DIMENSION

A. Introduction

There are two basic solutions to the UMWA retiree health care dilemma: a private-party solution which relies heavily on collective

61. This new plan would also provide coverage to future retirees who lose health benefits because their last employer goes out of business, irrespective of whether their employer was a UMWA signatory.

62. REPORT, *supra* note 16, at 85.

63. *Id.* at 86.

64. *Id.* at 95-96.

bargaining and a governmentally imposed solution. A hybrid of the two is also possible. A government solution, in the form of legislative enactments such as those discussed by the Dole Commission, might lead to constitutional challenges. As one commentator has noted, "[w]henever new regulations make the conduct of an economic activity more difficult, there are those who assert that the regulations violate one or more of their constitutionally protected rights."⁶⁵ This is not to suggest, of course, that such challenges are without merit simply by virtue of their regularity. Despite the difficulty of mounting a constitutional attack on economic regulation,⁶⁶ the Supreme Court will not hesitate to entertain such challenges, and sustain them when constitutional infirmities can be demonstrated.⁶⁷ In the instant case, challenges might be brought under several theories.

B. The Source of Congressional Authority to Legislate

The primary source for Congressional authority to regulate private economic conduct in order to protect the health, safety, morals or general well being of the populace is the Commerce Clause.⁶⁸ The Clause has been interpreted as a grant of plenary authority to Congress,⁶⁹ "complete in itself, [which] may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution."⁷⁰ Moreover, the Supreme Court has consistently

65. Fox, *Federal Constitutional Limitations on the Regulation of Coal Mining Activities*, 3 J. MIN. L. & POL'Y 3 (1987).

66. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976) (citations omitted):

It is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way.

67. See, e.g., *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) (invalidating a California Coastal Comm'n land use regulation as an impermissible taking of property without compensation); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (holding that state law requiring landowner to permit installation of cable television facilities on rental property was invalid as uncompensated taking); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) (invalidating imposition of federal navigable servitude on private property as an uncompensated taking).

68. U.S. CONST. art. I, § 8.

69. *National League of Cities v. Usery*, 426 U.S. 833, 840 (1976); *Cleveland v. United States*, 329 U.S. 14, 19 (1946); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937).

70. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 196 (1824).

upheld legislative enactments under the Commerce Clause designed to regulate conduct not strictly commercial in nature.⁷¹

The Commerce Clause has provided the authority for Congressional regulation in areas as diverse as lotteries⁷² and civil rights.⁷³ So long as the regulated activity affects interstate commerce in the view of Congress, the Court must defer if there is any rational basis for that finding.⁷⁴ Given the Court's extremely broad reading of the Commerce Clause, it has rarely been a source of serious constitutional challenge to Congressional action.⁷⁵

C. *Limitations on Congressional Authority: Overview of the Fifth Amendment*

The broad grant of authority to Congress under the Commerce Clause is not without limitation. The due process and just compensation clauses of the Fifth Amendment⁷⁶ provide a check on Congress' authority by protecting private citizens from unreasonable government action.⁷⁷ Under the due process clause, the government

71. See, e.g., *United States v. Darby*, 312 U.S. 100, 114 (1941):

Congress, following its own conception of public policy concerning the restrictions which may appropriately be imposed on interstate commerce, is free to exclude from . . . [such] commerce articles whose use in the states for which are destined it may conceive to be injurious to the public health, morals, or welfare, even though the state has not sought to regulate their use.

72. *Champion v. Ames*, 188 U.S. 321 (1903).

73. *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964).

74. In many respects, the authority of Congress to regulate non-commercial activity under the Commerce Clause is similar to the authority traditionally exercised by the states under their inherent police power. Both enjoy similar presumptions of validity, and are often discussed interchangeably when considering the appropriate standards to be applied in testing the constitutionality of regulations. See, e.g., *Fox*, *supra* note 65, at 5; see also *Lynch v. United States*, 292 U.S. 571, 579 (1934) (discussing the "federal police power").

75. See, e.g., *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 276 (1981); *Heart of Atlanta Motel*, 379 U.S. at 258; *Katzenbach*, 379 U.S. at 303-04.

76. "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

77. The Equal Protection Clause of the Fourteenth Amendment applies only to the actions of state governments. However, the Fifth Amendment Due Process Clause imposes on the federal government an obligation to treat all citizens equally as an aspect of the Fifth Amendment's fundamental fairness requirement. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

[T]he Fifth Amendment 'prevents the public from loading upon one individual more than

must act reasonably. That is, legislation must have an identifiable public purpose and must be reasonably related to accomplishing that purpose by not being arbitrary, capricious, or unduly burdensome. Under the just compensation clause, the government must compensate property owners whenever the government acquires private property for its own use.

The due process and just compensation clauses overlap. As Justice Holmes observed in the now famous case, *Pennsylvania Coal Co. v. Mahon*,⁷⁸ "[t]he general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."⁷⁹ Justice Holmes' observation set the stage for what has since become the jurisprudence of regulatory takings,⁸⁰ a hybrid between purely permissible regulation which simply "adjust[s] the burdens and benefits of economic life,"⁸¹ and compensable takings which entirely deprive an owner of property.

Since the Court's decision in *Mahon*, the regulatory takings analysis has been applied to an increasingly wide variety of cases.⁸² The problem, however, is that because regulatory takings cases inevitably involve a balancing of interests in determining who should bear the burden of financial loss, the property owner or the public,⁸³ no clear tests have been developed by the Court to determine when regulation becomes an impermissible taking. Indeed, as one commentator has

his just share of the burdens of government, and says that when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him.'

Pruneyard Shopping Center v. Robins, 447 U.S. 74, 83 n.7 (1980) (quoting *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 323 (1893)).

78. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

79. *Id.* at 415.

80. *See, e.g., Williamson Comm'n v. Hamilton Bank*, 473 U.S. 172, 197-98 (1985).

81. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976).

82. *See, e.g., Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987) (upholding state mining subsidence regulation); *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211 (1986) (upholding Multi-employer Pension Plan Amendments Act of 1980, imposing liability on employers withdrawing from multi-employer pension plans); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984) (upholding Environmental Protection Agency health and safety disclosure regulations); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981) (upholding provisions of Surface Mining Control and Reclamation Act); *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978) (upholding zoning regulations restricting commercial development of space above private property).

83. *Agins v. City of Tiburon*, 447 U.S. 255, 260-61 (1980).

observed, “[i]n truth, the collected decisions of the Supreme Court, and all other courts, leave the subject as disheveled as a ragpicker’s coat.”⁸⁴ The Supreme Court itself has observed that “[t]he attempt to determine when regulation goes so far that it becomes, literally or figuratively, a ‘taking’ has been called the ‘lawyer’s equivalent of the physicist’s hunt for the quark.’”⁸⁵ Another commentator has identified no fewer than four separate tests employed by the Court in recent cases to determine when a regulatory taking has occurred.⁸⁶ At best, the Court describes its approach as “ad hoc, factual inquiries.”⁸⁷

A further complicating factor is the remedial aspect of the takings clause and the fundamental fairness line of analysis. Takings clause cases traditionally involve, as a remedy, just compensation to the injured party.⁸⁸ On the other hand, fundamental fairness cases usually require invalidation of the challenged statute, and if appropriate, actual damages.⁸⁹ Nevertheless, the Court has applied the takings clause analysis to regulatory cases challenging the imposition of a tax or scheme of compensation, where a just compensation remedy would be meaningless.⁹⁰

It is against this analytic framework that the governmental solution model to the problem of paying for retiree health care in the coal industry must be examined.

D. Due Process and Fundamental Fairness

1. Is There An Identifiable Public Purpose?

The first prong of the due process fairness test, the existence of an identifiable public interest, is normally a question left entirely to

84. Stoebuck, *Police Power, Takings, and Due Process*, 37 WASH. & LEE L. REV. 1057, 1059 n.11 (1980).

85. *Hamilton Bank*, 473 U.S. at 199 n.17 (1985) (quoting C. HAAR, *LAND-USE PLANNING* 766 (1976)).

86. Peterson, *The Takings Clause: In Search of Underlying Principles Part I-A Critique of Current Takings Clause Doctrine*, 77 CALIF. L. REV. 1301, 1316 (1989).

87. *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979), cited with approval in *Connolly*, 475 U.S. at 224; *Ruckelshaus*, 467 U.S. at 1005.

88. See, e.g., *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 441 (1982).

89. *Hamilton Bank*, 473 U.S. at 197 & n.15.

90. *Connolly*, 475 U.S. at 224-28; *Republic Industries, Inc. v. Teamsters Joint Council*, 718 U.S. 628, 642-43 (1989), cert. denied, 467 U.S. 1259 (1984).

the legislature. Accordingly, minimal scrutiny is applied. Judicial deference will be shown unless the legislature's determination of public purpose involves an impossibility,⁹¹ or is "palpably without reasonable foundation."⁹²

The existence of such a strict burden does not automatically lead to the conclusion, however, that a public purpose always exists when the legislature acts. In *Pennsylvania Coal v. Mahon*,⁹³ for example, the Supreme Court held that the Kohler Act, a Pennsylvania statute designed to remedy the harmful effects of surface subsidence in the coal mining industry, was unconstitutional because the statute did not "disclose a public interest sufficient to warrant so extensive a destruction of . . . constitutionally protected rights"⁹⁴ of the coal companies whose interests were adversely affected. Although *Pennsylvania Coal* has since come to stand for the proposition that regulation can become a taking,⁹⁵ and thereby invoke a just compensation analysis under the due process clause, the case is fundamentally one evaluating the public purpose espoused by the state legislature upon passage of the Kohler Act.

The Kohler Act prohibited the removal by underground mining of coal located beneath homes and other surface structures, in order to avoid the surface subsidence which sometimes resulted. Justice Holmes' opinion set forth the public interest question which is an integral component of the due process analysis:

This is the case of a single private house. No doubt there is a public interest even in this, as there is in every purchase and sale and in all that happens within the commonwealth. Some existing rights may be modified even in such a case. But usually in ordinary private affairs the public interest does not warrant much of this kind of interference. A source of damage to such a house is not a public nuisance even if similar damage is inflicted on others in different places. The damage is not common or public. The extent of the public interest [in preventing subsidence] is shown by the statute to be limited, since the statute ordinarily does not apply to land when the surface is owned by the owner of the coal. Furthermore, it is not justified as a protection of personal safety. That could be

91. See e.g., *Old Dominion Land Co. v. United States*, 269 U.S. 55, 66 (1925).

92. *United States v. Gettysburg Elec. Ry. Co.*, 160 U.S. 668, 680 (1896).

93. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

94. *Id.* at 414.

95. *Id.* at 415.

provided for by notice. Indeed the very foundation of this bill is that the defendant gave timely notice of its intent to mine under the house If we were called upon to deal with the plaintiff's position alone, we should think it clear that the statute does not disclose a public interest sufficient to warrant so extensive a destruction of the defendant's constitutionally protected rights [to realize its property interest in the coal].⁹⁶

The Supreme Court revisited almost the identical issue as that decided in *Pennsylvania Coal* sixty-five years later in *Keystone Bituminous Coal Ass'n v. DeBenedictis*.⁹⁷ *Keystone* involved a challenge to the Pennsylvania Bituminous Mine Subsidence and Land Conservation Act, designed to minimize subsidence caused by underground mining of coal and to regulate its consequences. Because of the apparent facial similarities between the Subsidence Act and the Kohler Act, the coal industry challenged the new law on the basis of the Court's earlier decision in *Pennsylvania Coal*. The Court declined to overrule the Subsidence Act however, noting that while the Kohler Act "merely involve[d] a balancing of the private economic interests of coal companies against the private economic interests of surface owners,"⁹⁸ the Subsidence Act set forth identifiable public purposes which were "genuine, substantial, and legitimate."⁹⁹ "None of the indicia of a statute enacted solely for the benefit of private parties identified in Justice Holmes' opinion are present here."¹⁰⁰ The Court specifically took note of Section 2 of the Subsidence Act, which set forth that the Act sought to protect the "health, safety and general welfare" of the citizenry by enhancing the value of surface land for taxation, preserving the land and adjacent water supplies, and improving the general use and enjoyment of the surface lands.¹⁰¹

What is significant about the Court's *Keystone* decision is that it distinguishes *Pennsylvania Coal* on the existence of an identifiable public purpose, rather than simply overruling it. Hence the Court appears to be confirming that some investigation into this due proc-

96. *Id.* at 413-14 (citations omitted).

97. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987).

98. *Keystone*, 480 U.S. at 485.

99. *Id.* at 486.

100. *Id.*

ess requirement is in order and that the question whether an identifiable public interest exists in legislation is not merely a matter of judicial lip-service.¹⁰²

As a threshold matter, then, the Dole Commission's legislative solutions to the problem of paying for UMWA retiree health care embody a fundamental question of whether a true public purpose behind the recommendations exists, or whether, as the *Keystone* majority suggests, paraphrasing *Pennsylvania Coal*, the proposed legislation "merely involve[s] a balancing of private economic interests of coal companies." It is not self-evident that there is a sufficient public interest to support a legislative action which, in effect, would transfer private-party contract obligations to entities not party to the contract. Doubtless there exists a public interest in providing adequate health care to the elderly sufficient to satisfy due process. Indeed, Medicare already provides a minimum level of benefits to all retirees age 65 or older. It might be difficult, however, to articulate a sufficient public interest to justify federal intervention guaranteeing supplemental health benefits to UMWA retirees when sixty percent of all private sector workers are not employed by companies which provide post-retirement health care¹⁰³ and when 37 million Americans have no health insurance whatsoever.¹⁰⁴ Perhaps it could be argued that, because of the health hazards of their occupation, there exists a special public interest in the health of coal miners. Accepting this as true, it cannot be said that legislation such as that envisioned by the Dole Commission would be reflective of

102. The significance of the dissenting opinion in *Keystone* must not be discounted, however. With the concurrence of Justices Powell, O'Connor, and Scalia, Chief Justice Rehnquist pointed out that the majority's public purpose analysis constituted an insufficient basis upon which to distinguish the cases, finding instead that the Kohler Act invalidated in *Pennsylvania Coal v. Mahon* had much of the same public purpose aims as the Subsidence Act. According to the dissent, "[t]here can be no doubt that the Kohler Act was intended to serve public interests . . . The public purposes in this case are not sufficient to distinguish it from *Pennsylvania Coal*." *Keystone*, 480 U.S. at 511 (footnote omitted). To the extent that the *Keystone* dissenters may now constitute a new Court majority, it remains to be seen whether the public purpose test will maintain its viability. In any event, the existence of a legitimate public purpose does not end all further inquiry. In *Keystone* the Court went on to analyze the impact of the regulation to determine if the due process requirements were otherwise satisfied. *Keystone*, 480 U.S. at 493-99. *Accord* *Whitney Benefits, Inc. v. United States*, 926 F.2d 1169, 1177 (Fed. Cir. 1989).

103. See *supra* note 11.

104. See *Kuhn, supra* note 17, at 126-5.

a general public interest in providing supplemental health benefits to elderly mine workers and their families, because, unlike such remedial legislation as the Mine Safety Act and the Black Lung Benefits Program, this legislation would benefit only a sub-group which had been receiving such benefits pursuant to a contractual agreement between private parties — not all retired mineworkers.¹⁰⁵

The clearest explanation of why a governmental solution to UMWA retiree health care is warranted, that is, why there exists identifiable public purpose sufficient to justify legislative intervention to adjust private economic interests among coal companies, seems to be the emphasis on federal involvement in the area of mineworker health benefits—historically, as set forth—in a UMWA-BCOA joint presentation to the Commission.¹⁰⁶ This involvement took the form of federal participation in the creation of the Plans' predecessor in 1946,¹⁰⁷ a federally sponsored survey in 1946 of health care and housing conditions in coal mining areas,¹⁰⁸ the provision of federal funds by the U.S. Department of Commerce to the Presbyterian Church in 1963 which enabled the Church to purchase hospitals owned by the 1950 Fund,¹⁰⁹ passage of the Black Lung Amendments to the Federal Coal Mine Health and Safety Act of 1969,¹¹⁰ appointment of the Presidential Coal Commission by President Carter in 1978 and subsequent passage of the Multi-employer Pension Plan Act of 1980 (MPPAA),¹¹¹ and numerous court deci-

105. In this regard, Justice Holmes' observation in *Pennsylvania Coal v. Mahon* that, on its face, the Kohler Act seemed to lack a public interest because it did not seek to prevent subsidence where the mineral and surface owner were the same is particularly apropos. Since the coal tax would benefit only coal industry retirees in the UMWA Plans, and not all coal industry retirees, it seems facially evident that the intent of such legislation would be to underwrite a commitment contained in a private contract, not to assure a certain level of health care to all coal industry retirees. *Pennsylvania Coal*, 260 U.S. at 413-14.

106. REPORT, *supra* note 16, at 19-42. "The challenge to find ways to cope with the present crisis in the medical care delivery system started by a collective bargaining agreement negotiated between the UMWA and the coal operators, with help from the Federal government, four and one-half decades ago." *Id.* at 40.

107. *Id.* at 24.

108. *Id.* at 25-26.

109. *Id.* at 31.

110. Black Lung Benefits Act, 30 U.S.C. § 901-956 (1972).

111. Multi-employer Pension Plan Amendments Act, 29 U.S.C. § 1381- 1453 (1988) (Employee

Retirement Income Security Act (ERISA), 29 U.S.C. § 1001-1461 (1988)).

sions which have had significant impact on the operation of the UMWA Plans.¹¹²

These events do not necessarily compel a conclusion that there has been sufficient federal involvement in mineworker health benefits to require a governmentally imposed solution. The federal government has clearly never promised to provide health care to UMWA retirees, nor has it coerced anyone else into doing so. Although such benefits may have been provided by the UMWA 1950 Fund prior to 1974, it would not appear that UMWA retirees had any basis to claim a legal entitlement to such benefits prior to the 1974 Agreement. Moreover, Commission members themselves were not in agreement on this point.¹¹³ In the view of one Commissioner, Richard M. Holsten:

[t]he basic cause of the Funds' problems today has really nothing to do with the federal government as some would profess It is the cumulative result of the collective bargaining process over the years, as far back as 1950, in which the BCOA has progressively made health care commitments to the UMWA, commitments that may have been entirely rational at the time but have now become economically unbearable.¹¹⁴

In contrast, Commission Vice-Chairman Henry H. Perritt emphasized the role of federal judicial involvement in undermining the key features of the present private arrangements.¹¹⁵ "The judicial decisions taken together say that the health benefits must be paid; while depriving the private sector of the means to pay for them [T]he equitable realities are that the law has frustrated realization of a private arrangement to provide a safety net for people who have a vested right to retiree health care benefits."¹¹⁶ He went on to observe that "[a] variety of other governmental policies reflected in labor law and interpretation of labor law have made it difficult for the United Mine Workers of America to maintain a

112. REPORT, *supra* note 16, at 32-33.

113. "Some Commission members do not believe that the government is responsible for the Funds' present financial crisis or that it is necessary for the government to be involved in resolving the present crisis." *Id.* at 19 n.1.

114. *Id.* at 120-21.

115. *Id.* at 107.

116. *Id.* at 108.

sufficient organization base and contractual uniformity to secure an adequate financing base When the present system falls apart there will be instability, not only in the organized part of the industry but in the coal industry generally.”¹¹⁷

It is entirely possible that concerns such as those voiced by Commissioner Perritt would, in the view of the Court, satisfy the public interest prong of the due process test. Yet the question still remains whether such concerns, as real and significant as they may be, provide an identifiable public interest sufficiently related to the health, safety, morality, and general welfare of the populace to warrant legislative balancing of interests. More attention will undoubtedly need to be paid to this threshold aspect of due process analysis of the Commission’s legislative options.

2. Are the Commission’s Recommendations Reasonably Related to the Perceived Problem: The Ends-Means Analysis

The relationship between the perceived public purpose behind legislative solutions and the means employed to accomplish the purpose is perhaps the more significant due process inquiry. Fundamentally, the means chosen by Congress to accomplish a legislative end must not be arbitrary or irrational.¹¹⁸ Aspects of the Commission’s proffered solutions are especially vulnerable to an arbitrariness inquiry because of their apparent retroactive effect. Also, some of the funding proposals would make employers who never participated in the UMWA Plans liable for benefits they never promised. This might raise issues under the ends-means analysis because such a solution could affect the competitive structure in the industry by requiring some employers to pay for a contractual promise made by their competitors.

For example, the Commission recommends imposing by statute contribution obligations on past signatories, consistent with an ER-ISA “control group” test, possibly reaching as far back as 1978

117. *Id.*

118. Pension Benefit Guarantee Corporation v. R.A. Gray & Co., 467 U.S. 717, 729 (1984);

Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15 (1976); Ferguson v. Skrupa, 372 U.S. 726 (1963).
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(the "reachback" proposal).¹¹⁹ The effect of such a statute would be to retroactively impose funding obligations on past signatories who may have lawfully withdrawn from the UMWA Plans, fulfilling their contribution obligations consistent with the clear terms of their collective bargaining agreements.

Retroactive legislation of this type is normally subject to special scrutiny because "it does not follow that what Congress can legislate prospectively it can legislate retroactively. The retroactive aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former."¹²⁰ Is it fundamentally fair, therefore, to impose retroactively such a burden on former signatories, or may those operators successfully argue that their conduct was in justifiable reliance on the current state of their contractual obligations and the law, and that unsettling those reliance interests is arbitrary or irrational?

While it is settled that Congress has the authority to legislate retroactively in order to adjust the burdens and benefits of economic life,¹²¹ the Court will examine retroactivity with particular attention to such factors as (a) whether reliance interests are unfairly disrupted;¹²² (b) if there is a rational basis for applying a statute retroactively;¹²³ and (c) whether the parties had sufficient notice or could reasonably have anticipated possible changes in the law in order to adjust their conduct in anticipation.¹²⁴

a. The Reliance Interest

The Commission's recommendation to impose a contribution obligation as far back as 1978 would have the effect of invalidating a course of conduct going back twelve years or longer for certain operators. Entirely new obligations would be created for those com-

119. REPORT, *supra* note 16, at 81.

120. *Usery*, 428 U.S. at 16-17.

121. *Id.* at 16.

122. *Connolly v Pension Benefits Guaranty Corp.*, 475 U.S. 211, 227 (1986).

123. *Nachman Corp v. Pension Benefit Guaranty Corp.*, 592 F.2d 947, 960 (7th Cir. 1979) (citations omitted), *aff'd on stat. grounds*, 446 U.S. 359 (1980).

124. *Pension Benefit Guaranty Corp. v. Gray*, 467 U.S. 717, 730-32 (1984).

panies. They would undoubtedly argue the importance of their reliance on both contractual and legal authority for their withdrawal, as well as the costs and benefits of their decided course of conduct. However, in addressing this aspect of the reliance equation, the Court must also consider the reliance interests of the retirees.¹²⁵ The inquiry may well turn on whether retroactivity is a critical requirement for guaranteeing retiree benefits. If other means are available, retroactivity may create too great an interference with employer expectations dating back as much as twelve years. In this regard, the question of whether current signatories can afford to maintain the existing funding mechanism, or whether it would be financially prohibitive for them to do so, may be material.

One factor the Court may weigh in evaluating competing reliance interests is the question of notice. In *Republic Industries, Inc. v. Teamsters Joint Council*,¹²⁶ an employer who had withdrawn from a multi-employer pension plan prior to the effective date of the Multi-employer Pension Plan Amendments Act of 1980 (MPPAA)¹²⁷ challenged the retroactive imposition of pension plan withdrawal liability. The court of appeals observed that the employer had fair notice of its potential multi-employer pension plan withdrawal liability because of extended Congressional deliberations over the MPPAA legislation. The court concluded that these pre-enactment events diminished the company's reliance interest in its asserted right to withdraw from a multi-employer plan in favor of employee expectations.¹²⁸

Another factor may be the source of competing reliance interests. In *Nachman Corp. v. Pension Benefit Guaranty Corp.*, the circuit court took note of the vested nature of employee pension rights, the existing ERISA statutory scheme establishing vesting schedules,

125. See, e.g., *Nachman*, 592 F.2d at 961-62.

126. 718 F.2d 628 (4th Cir. 1983), cert. denied, 467 U.S. 1259 (1984).

127. MPPAA amended ERISA, and provided that an employer who ceased to contribute to an underfunded multi-employer pension plan must pay withdrawal liability. See 29 U.S.C. §§ 1381-1453 (1988). The problem which Congress sought to be addressed with MPPAA, stabilizing underfunded multi-employer pension plans, has important parallels to the instant situation, stabilizing underfunded multi-employer benefit plans. Thus, the case law analyzing the constitutional boundaries of MPPAA may be of particular relevance.

128. *Republic*, 718 F.2d at 638.

and prior federal regulation in the area of pension plan terminations, to conclude that a stronger case existed for favoring employee reliance interests over the employer's.¹²⁹

Bearing these factors in mind when evaluating the possible legislative solutions for funding UMWA retiree benefits, attention necessarily must be paid to such things as the absence of any concept of "vesting" in the health benefits area, the absence of a federal statutory scheme concerning postretirement health benefits, or other factors which could arguably create an employee reliance interest originating in anything other than a contractual promise.

b. The Rational Basis for Retroactive Application

The rationality aspect of retroactivity amounts to a determination of the reasonableness of spreading risks by reaching back to prior conduct. In *Nachman*, the issue was retroactive imposition of liability under ERISA for payment of unfunded, vested benefits upon individual employers who terminated single employer pension plans. Retroactivity was held constitutional because it was thought reasonable to hold an employer, who had received the full benefit of services from his employees, liable for his promise to fund their pensions.¹³⁰ Similarly, in *Pension Benefit Guaranty Corp. v. Gray*,¹³¹ retroactive withdrawal liability provisions under the MPPAA amendments to ERISA were upheld under a due process challenge. The Court noted Congress' concern that multi-employer pension plans encouraged employer withdrawal as a means of avoiding contribution obligations.¹³² Thus, Congress provided that MPPAA withdrawal liability would be applied retroactively, but only with respect to the period of Congressional consideration and debate of the proposed amendments. In that situation, the retroactivity was applied for the "short and limited period[] required by the practicalities of

129. *Nachman*, 592 F.2d at 961-62. The Court's statutory affirmation of the *Nachman* decision has been considered by many courts as a *sub silentio* affirmation of the constitutional issues in the case as well. See *Republic*, 718 F.2d at 636 n.9.

130. *Nachman*, 592 F.2d at 963.

131. 467 U.S. 717 (1984).

132. *Id.* at 731 (citing 126 CONG. REC. 20179 (1980) (statement of Sen. Javits); 126 CONG. REC. 20244 (1980) at 20244 (remarks of Sen. Matsunaga)).

producing national legislation . . . a customary congressional practice.”¹³³ Finally, in *Usery v. Turner Elkhorn Mining Co.*,¹³⁴ the Court approved the retroactive application of liability for the effects of past disabilities under the Black Lung Act as a “rational measure to spread the costs of the employees’ disabilities to those who have profited from the fruits of their labor—the operators and the coal consumers.”¹³⁵

Applying these three different rationality criteria — responsibility for unfulfilled past promises; maintaining the benefits of the statutory scheme during its pendency; and payment for the natural costs of doing business — to the Commission’s proposals still leaves considerable questions about the reasonableness of the Commission’s retroactive contribution recommendation. Coal industry employers who have never been party to a contract with the UMWA would appear to have a particularly strong argument that they have never had notice that they might be required to pay for the health benefits of UMWA pensioners. Moreover, such employers can also point out that they have made costly benefit commitments to their own employees and retirees in reliance on the long established coal industry practice that only signatories to UMWA contracts were obligated to pay for UMWA retiree health benefits.

Unlike the concern voiced by the Court in *Nachman*, it remains to be seen whether the promise of retiree health care may yet be fulfilled without reaching back to employers who withdrew from the UMWA Plans as long as twelve years ago. In *Nachman*, which involved a single employer pension plan, no mechanism existed to provide promised benefits where the employer failed or refused to do so. Of course, the UMWA Benefit Plans exist for the very purpose of providing benefits in this situation. Moreover, the 1988 Agreement contains provisions which deter current contributors from withdrawing, by requiring payment of withdrawal liability if they do.¹³⁶ Thus, it is far from clear that retirees will lose their promised

133. *Gray*, 467 U.S. at 731 (quoting *United States v. Darusmont*, 449 U.S. 292, 296-97 (1981) (*per curiam*)).

134. 428 U.S. at 18.

135. *Id.*

136. See 1988 Agreement, Articles XX(i), XX(j).

health benefits unless a "reach back" is imposed, a question which may distinguish the issue addressed by the Commission from that facing the Court in *Nachman*. It may be the case that a prospective remedy will suffice. And if a prospective remedy, in conjunction with other less controversial aspects of the Commission's recommendations, will solve the problem, there may be little reason to legislate retroactively at all, even for the sake of protecting the integrity of the legislative process, as was the case in *Gray*.

Finally, concerning the question of unjust enrichment, that is, retiree health care obligations which former employers are seen as avoiding but which are thought to be rightly theirs, Justice O'Connor's concurrence in *Connolly v. Pension Benefit Guaranty Corp.*¹³⁷ is especially informative. In *Connolly*, the Court upheld the 1980 MPPAA amendments to ERISA against a due process takings challenge.¹³⁸ Justice O'Connor, joined by Justice Powell, wrote specifically to explain that the Court declined to decide, either in *Connolly* or *Gray*, whether the withdrawal liability provisions of MPPAA may in some circumstances be so arbitrary and irrational as to violate the Due Process clause. "Our recent cases leave open the possibility that the imposition of retroactive liability on employers for the benefit of employees may be arbitrary and irrational in the absence of any connection between the employer's conduct and some detriment to the employee."¹³⁹ According to Justice O'Connor, retroactive liability, to be constitutional, "must rest on some basis in the employer's conduct that would make it rational to treat the employees' expectations of benefits under the plan as the employer's responsibility."¹⁴⁰

Because MPPAA withdrawal liability is intended to ensure that a withdrawing employer will contribute a fair share of unfunded liabilities, there is a presumption that employers are liable for those shortfalls in the first place. To cite one example raised in the con-

137. 475 U.S. 211, 228 (1986).

138. MPPAA's retroactivity aspects were previously upheld in *Pension Benefit Guaranty Corp. v. Gray*, 467 U.S. 717 (1984).

139. *Connolly*, 475 U.S. at 229 (citations omitted).

140. *Id.*

currence, there may well be a degree of arbitrariness involved in imposing retroactive contribution obligations on employers who may have long since severed their obligations as signatories, having had no say whatever in benefit levels, contribution rates, or other conditions which may have led to the present deficits.¹⁴¹ Indeed, it could be argued that the remaining signatories' obligation to fund the negotiated benefits is precisely what the parties bargained for. In Justice O'Connor's view at least, it may be irrational to impose retroactive contribution obligations on parties who may have no demonstrable connection to the UMWA Plans. Justice O'Connor concludes by suggesting that such "as applied" challenges to retroactive legislation are still viable under MPPAA, and by analogy, such challenges may exist should Congress enact legislation similar to the Commission's proposals.

c. The Notice Requirement

Finally, on the question of adequate notice of retroactive enactments, the Court has traditionally interpreted this requirement broadly, noting that any pre-enactment events which give a party fair notice of proposed regulation will suffice.¹⁴² In *Connolly*, for example, the Court noted that Congressional concern with pension plans long before the passage of ERISA in 1974 and its continuing concern with pension regulation provided ample notice to employers that they were involved in a highly regulated field. As the Court noted in *Connolly*, "those who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end."¹⁴³

But is this really the case with respect to health benefits? No corollary statutory scheme exists to regulate health care as with pensions. On the contrary, a long-standing private arrangement, collective bargaining, has been the exclusive means by which health benefits have been determined in the coal and other industries. It

141. *Id.*

142. *United States v. Darusmont*, 449 U.S. 292, 299 (1981) (per curiam); *United States v. Hudson*, 299 U.S. 498, 501 (1937).

143. *Connolly*, 475 U.S. at 227 (quoting *FHA v. The Darlington, Inc.*, 358 U.S. 84, 91, (1958)).

may not be reasonable to conclude, therefore, that the employers who withdrew from the Funds during the past twelve years were doing business in the "regulated field" as that term was used by the Court in its *Connolly* decision. In light of the total absence of regulation, it may not suffice to simply point to the existence of the Commission as an example of adequate notice, especially in light of as much as twelve years of reliance interests by employers who may be subject to a reach back provision. It is, of course, possible that the Court could find adequate notice in the language that has been in the wage agreements since 1974 which provides that retirees and surviving spouses are entitled to a health card for life. Whether contractual language might suffice as adequate notice of possible legislative initiatives is certainly open to question.

E. Due Process and Compensatory Takings

The other limitation on legislative authority contained in the Fifth Amendment is the just compensation clause. Traditionally, the just compensation clause is invoked whenever the government, by operation of eminent domain, takes private property for public use. In such circumstances, the Fifth Amendment requires that compensation be paid, in order to "bar government from forcing some people alone to bear public burden which, in all fairness and justice, should be borne by the public as a whole."¹⁴⁴ Increasingly, however, the takings clause has been applied to a wide variety of cases involving not condemnation of property for public use, but economic regulation which operates to deny an owner of property some or all of its economic use.

As already noted,¹⁴⁵ the Court's takings analysis has provided considerable confusion. Nevertheless, certain consistent criteria emerge. Using the Court's decision in *Connolly* as a model because of the similarity between the statutory scheme challenged in that case and the industry-wide tax proposal, the Court will most likely rely on three factors of "particular significance": "(1) 'the economic

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

145. See *supra* notes 82-90 and accompanying text.

impact of the regulation on the claimant'; (2) 'the extent to which the regulation has interfered with distinct investment-backed expectations'; and (3) 'the character of the governmental action.'"¹⁴⁶ All three criteria, in some form or another, have been cited by the Court in most of its recent regulatory takings cases.¹⁴⁷

1. The Economic Impact of the Proposed Legislation

The first of these criteria, the economic impact of the regulation, tends to vary considerably in importance depending upon the Court's view of the facts. At times the Court has looked at the degree of diminution of the claimant's property as a result of the challenged regulation. Such appeared to be the case in the Court's original regulatory takings case, *Pennsylvania Coal Co. v. Mahon*. There the Court stated that, "[o]ne fact for consideration in determining [limits on regulation] is the extent of the diminution [in value]. When it reaches a certain magnitude, in most if not all cases there must be an exercise of eminent domain and compensation to sustain the act."¹⁴⁸ In *Pennsylvania Coal*, the Court found that the challenged subsidence regulation so significantly diminished the value of the coal companies' estate in land that it constituted a taking, especially in view of the absence of an identifiable public interest behind the statute under review.

Another way the Court considers the economic impact of a regulation is whether the challenged law still permits an economically viable use of the owner's property, despite the impact of the regulation on the owner's preferred use.¹⁴⁹ Under this formulation, a challenge to the regulation will be rejected unless the claimant can show there is *no* economically viable use left in its property. The

146. *Connolly*, 475 U.S. at 225 (quoting *Penn Central v. New York City*, 438 U.S. 104, at 124).

147. See *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984); *Pruneyard Shopping Center v. Robbins*, 447 U.S. 74, 82-83 (1980); *Williamson Co. v. Reg. Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 191 (1985); *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979).

148. *Pennsylvania Coal v. Mahon*, 260 U.S. 393, 413 (1922).

149. *Penn Central*, 438 U.S. at 131, 138 n.36; *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *Andrus v. Allard*, 444 U.S. 51 (1979); *Hodel v. Virginia Surface Mining Reclamation Ass'n*, 452 U.S. 264 (1981).

economically viable use sufficient to satisfy the Court, however, may be a far cry from the claimant's conception.¹⁵⁰

In *Connolly*, the Court approached the issue of economic impact from an entirely different perspective. While acknowledging that the impact of MPPAA was to completely deprive an employer of whatever money it must pay to satisfy its statutory obligation, and thus constituted a complete "taking" of those assets, the Court noted that the withdrawal assessments were not made in a "vacuum," but "directly depend[ed] on the relationship between the employer and the plan to which it had made contributions."¹⁵¹ Moreover, the Court noted certain provisions of MPPAA which moderated the economic impact of the assessments on any particular employer. "There is nothing to show that the withdrawal liability actually imposed on an employer will always be out of proportion to its experience with the plan" ¹⁵²

Applying these tests to the Commission's recommended industry-wide tax helps to focus the problem. Certainly as in *Connolly*, a coal tonnage tax would completely deprive an operator of whatever monies it was thereby obligated to pay, constituting a "taking." But unlike the situation in *Connolly*, there would appear to be a real question concerning whether the tax existed in a "vacuum." It is conceivable that for numerous employers, there may be no direct connection between the assessment and the Benefit Plan being funded.¹⁵³ For many companies it may be impossible to show a direct relationship between the tax assessed and a retiree health care obligation. Thus, numerous "as applied" challenges could conceivably exist.

150. For example, in *Andrus*, 444 U.S. 51, claimants were forbidden by statute to sell artifacts containing eagle feathers. Nevertheless, the Court found that claimants retained the right to exclude others from seeing the artifacts, something the Court deemed a valuable property right, leading to the conclusion that claimants could charge for viewings, thereby retaining a viable economic use of the artifacts. *Id.* at 58.

151. *Connolly*, 475 U.S. at 225.

152. *Id.* at 226.

153. Employers currently contributing to the UMWA Plans point out that they have no connection to the roughly 50% of the Plan beneficiaries who are "orphans" either, which is the reason this group should be considered an industry obligation. Of course, the current signatories who are party to the labor contract which promises such benefits presumably factor the cost of providing this benefit into the total economic reflected in the labor agreement.

Finally, attention would certainly have to be paid to whatever moderating or mitigating provisions might be included in any legislation adopting portions of the Commission's proposals, as such factors seem to have played a significant role in the Court's decision in *Connolly*.¹⁵⁴

2. Interference with Investment-Backed Expectations

The second takings criterion, interference with direct investment-backed expectations, has also been the subject of varying treatment by the Court. In most cases, the inquiry seems to turn on whether the challenged regulation was foreseeable, almost in the same way that foreseeability is a factor in the Court's retroactivity analysis set out above.¹⁵⁵

In the takings context, however, foreseeability is clearest when the government action is actually known to the challenging party. In *Ruckelshaus v. Monsanto Co.*,¹⁵⁶ for example, the Court denied the company's takings challenge to the government's disclosure of health and safety data since the challenged regulations specifically permitted the disclosure at issue. Hence the company had no basis to complain of interference with reasonable expectations.

In *Connolly*, the Court analyzed the foreseeability factor in terms of historic regulation of pension benefits. The Court noted that given the history of pension regulation and Congressional concern with the matter, "[p]rudent employers had more than sufficient notice not only that pension plans were currently regulated, but also that withdrawal itself might trigger additional financial obligations."¹⁵⁷ In this respect, of course, an industry-wide tax presents a significant difficulty, much akin to the retroactivity issue previously noted. As no history of government regulation exists in the area of retiree health benefits, in contrast with the pension field, can it reasonably be said that an industry-wide tax to finance retiree health care for a discrete portion of the coal industry was ever foreseeable? If not,

154. *Connolly*, 475 U.S. at 225-226.

155. See *supra* notes 142 and 143 and accompanying text.

156. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984).

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

reasonable investment-backed expectations would appear to be stronger. This is especially so for those in the industry who have addressed their own retiree health care responsibilities by private arrangements, whether unilaterally or through collective bargaining.

3. The Nature of the Government Action

Finally, the nature of the government action being contemplated deserves some attention. Traditionally, this inquiry centers on the question of whether a physical invasion or other form of "condemnation" has occurred, in order to determine whether an eminent domain situation exists.¹⁵⁸ Beyond that initial inquiry, the question then focuses on whether the government action is for the purpose of accomplishing a legitimate end or whether there is justification for the action.¹⁵⁹

In *Connolly*, the Court focused its governmental action inquiry on whether the withdrawal liability requirements at issue in that case constituted a taking or whether they were simply part of a "public program that adjusts the burdens and benefits economic life to promote the common good"¹⁶⁰ Finding in favor of the latter, the Court concluded that no taking had occurred, but that a regulatory scheme had been enacted which was not sufficient to rise to the level of constitutional infirmity. Nevertheless, the Court again emphasized the identifiable public purpose aspect of the MPPAA amendments, an issue already shown to raise concerns when applied to the Commission's proffered solutions generally.

VI. CONCLUSION

Employers are under no statutory obligation to provide post-retirement health benefits, but a great many do. To date Congress has not considered legislation which would require employers to pre-

158. See, e.g., *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

159. In *Keystone*, for example, the Court focused, among other things, on the nuisance like quality of the surface subsidence activity regulated by the challenged state statute. The Court found the nature of the government action permissible because it was an attempt "to arrest what it perceive[d] to be a significant threat to the common welfare." 480 U.S. at 485.

160. *Connolly*, 475 U.S. at 225.

fund retiree medical benefits or any other scheme which would insure that employees who have been promised such benefits will in fact receive them during their retirement.

Since 1950, UMWA retirees have looked to the multi-employer plans created in bargaining between the UMWA and the BCOA for health care benefits. Funding for the UMWA Plans has always been provided by current signatories without regard to whether beneficiaries had an employment connection with a currently contributing employer. Presently, about half of the beneficiaries in the UMWA Plans have no employment connection with a current contributor. At this time the Plans are experiencing funding problems, and the cost of providing benefits is projected to increase in the future.

The UMWA and the BCOA are likely to petition Congress for legislation which would, among other things, spread among all coal industry employers the burden of paying for the health benefits of this particular group of UMWA retirees. Should Congress enact legislation which contains a reach back provision or which imposes an industry-wide tax to pay for the health benefits of some UMWA retirees, the Supreme Court may be presented an opportunity to flesh out the constitutional parameters of possible solutions for paying for retiree health care in this and other industries where a funding problem exists.

